DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

17/09/24
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 560/22

In the matter between:

VICTOR SIMON MABASO	**First Applicant**
and	
SIGN BY SIGN CC	**First Respondent**
AMIDEX (PTY) LTD	**Second Respondent**
BADENHORST DELTA (PTY) LTD	**Third Respondent**
HENK BADENHORST	**Fourth Respondent**

Heard: 10 September 2024

Delivered: 17 September 2024

This order was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be

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JUDGMENT

BECKENSTRATER, AJ

Introduction

[1] The Applicant was previously employed by the First Respondent. The Applicant alleges that he was assaulted by the Fourth Respondent, a member of the First Respondent on 19 July 2017. He then resigned and lodged a constructive dismissal case at the CCMA. At the subsequent CCMA arbitration pertaining to this dispute, both parties were legally represented. Pursuant to the arbitration, the Presiding Commissioner found that the Applicant had been constructively dismissed and ordered the First Respondent to pay compensation in an amount equivalent to 12 months' remuneration. There has not subsequently been any challenge to that Award.

[2] The Award was thereafter certified in terms of Section 143 of the Labour Relations Act[1] (LRA) and the Applicant attempted to execute thereon through the office of the Sheriff of the Court in February 2019. That attempted execution was met by an interpleader claim in which the Fourth Respondent, as a Director of the Second and Third Respondents, deposed to an affidavit alleging that there were no assets at the relevant premises belonging to the First Respondent but rather that all the assets attached by the Sheriff were the property of either the Second or Third Respondent. It appears that faced with that affidavit, the Applicant did not pursue interpleader proceedings.

[3] The Applicant thereupon had the Award made an Order of this Court on 9 May 2019. Subsequently, the Applicant attempted to call the First Respondent before the Magistrate's Court for a financial enquiry in terms of Section 65 of the Magistrate's Court Act[2]. This was in late 2021/ early 2022. The Fourth Respondent, as a member of the First Respondent, filed an opposing affidavit in those proceedings contending that "*on or about 2017 the staff compliment of Sign by Sign CC, including the [Applicant] was transferred to Amidex (Pty) Ltd t/a Visual*

[1] Act 66 of 1995, as amended (the LRA).
[2] Act 32 of 1944.

Exposure as a going concern in terms of Section 197 of the Labour Relations Act". He further contended that the First Respondent had been dormant since 2017. In support of this he attached confirmations from its auditors that it was in the process of deregistration and from ABSA Bank that its bank account was closed. It appears that thereafter the Applicant did not proceed with any enquiry in terms of Section 65 of the Magistrate's Court Act.

[4] In the same affidavit opposing the Section 65 proceedings, the Fourth Respondent contended that at the CCMA, the Applicant and his legal representative had been advised that they were proceeding against the incorrect Respondent in light of the transfer of the First Respondent's business to the Second Respondent. The CCMA Award contains no mention of this issue having been raised with the Commissioner. The affidavit however provided no further detail of that transfer. It did not explain the *causa* of the transfer, nor what the First Respondent had received for it, nor provide corroborating documentation in relation to such transfer such as a deed of sale or agreement in terms of Section 197(7) of the LRA. It also did not provide a date when that transfer was alleged to have taken place. It did however attach a payslip relating to the Applicant of August 2017 which reflected his employer as being "*Amidex (Pty) Ltd*" and the Applicant's letter of resignation which was addressed to "*Visual Exposure*".

[5] In February 2022, the Applicant's legal representative wrote to the First Respondent's Attorneys requesting bank statements, audited financial statements and proof of deregistration for the First Respondent. No response was received.

The present application

[6] In May 2022, the Applicant then approached this Court seeking to pierce the corporate veil of the First Respondent and, in a variety of broadly stated prayers, seeking, in consequence, to hold the Second, Third and Fourth Respondents, in the alternative, liable for the debt of the First Respondent under the Award.

[7] In support of this claim the Applicant's founding affidavit repeated the history of the matter as set out above, made express reliance upon the provisions of Section 20(9) of the Companies Act[3] and then recorded that: "*the First Respondent's action of citing a dormant company and subsequent deregistration post the arbitration award are deemed to be acts of dishonesty and trying to evade liability in a form of arbitration award*".

[8] The Respondents filed an opposing affidavit of the Fourth Respondent in which they did not in any substantial way dispute the background facts set out above but emphasized that the Applicant had elected not to proceed with either the interpleader or Section 65 proceedings. Primarily, the Respondents argued that the Applicant had not made out a case for piercing of the corporate veil whether in terms of the common law requiring the demonstration of fraud, dishonesty or improper conduct[4]) or in terms of Section 20(9) of the Companies Act. The Respondents further pointed out that the First Respondent was a Close Corporation and consequently the Applicant had in any event relied upon the incorrect provision of legislation as it should have attempted to bring a case in terms of section 65 of the Close Corporations Act[5].

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[3] Act 71 of 2008 (the Companies Act). Section 20(9) states: *"If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—*
(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a)".

[4] See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A); [1995] ZASCA 53.

[5] Act 69 of 1984 (the Close Corporations Act). Section 65 states: "*Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration*".

[9] Notably, the Respondents did not provide any further corroboration of the alleged transfer of the business from the First Respondent to the Second Respondent nor any detail about the reasons for or timing thereof. Nor did they explain why full and frank information in this regard had not been provided in the earlier affidavits in the interpleader or Section 65 proceedings, nor why the issue was not raised before the CCMA Commissioner, nor tender any payment to the Applicant by the Second Respondent (if indeed the First Respondent's business had been transferred to it shortly before the Applicant's dismissal - which in all probability rendered it jointly and severally liable with the First Respondent in terms of Section 197 of the LRA).[6]

[10] The Respondents further argued, *in limine*, that the joinder of the Second, Third and Fourth Respondents in these proceedings was incompetent firstly because the joinder was being sought after judgment against the First Respondent and thus, they had no opportunity of being heard in relation to that claim and secondly, as none of them had been a party to the compulsory conciliation required by Section 191 of the LRA.

[11] The Applicant did not file any replying affidavit.

The preliminary objections

[12] The Respondents' first objection of non-joinder is a contention that the Second, Third and Fourth Respondents cannot be held liable for the debts of the First Respondent if they were not joined in the initial proceedings where the debt of the First Respondent was established. This contention conflates the two separate proceedings in issue. The first proceedings were those before the CCMA where the initial liability of the First Respondent was established. Other Respondents would have to have been joined in those proceedings if they had a direct and substantial interest in the subject matter of those proceedings (in other words if

[6] Strangely, paragraph 24 of the Respondents' opposing affidavit alleged that: "*the Applicant was employed with the First Respondent until the date of his transfer on 18 August 2017*", that is a date after the Applicant's resignation/dismissal. I was informed during argument that this must have been a typographical error because the Applicant's payslip at that stage already ostensibly reflected the Second Respondent as the employer.

they had something to say in relation to the merits thereof). In those circumstances they would have to have been joined as a necessity. As noted in *Herbstein & Van Winsen*[7]:

> 'In *Amalgamated Engineering Union v Minister of Labour*[8] the Appellate Division employed two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.'

[13] Subject to issues of the transfer of the business dealt with below, none of the Respondents would have had standing in the dismissal dispute before the CCMA. There is generally no obligation to join every party that has a joint and several liability with a principal debtor in proceedings against the principal debtor. Such parties cannot complain of non-joinder, because that is not the type of interest which attracts a right to be joined.[9]

[14] In the second proceeding, the Applicant's present case is a different claim. He seeks to hold the Second, Third and Fourth Respondents liable for the debts of the First Respondent in terms of a separate cause of action – arising out of the piercing of the corporate veil in relation to an existing debt. The Second, Third and Fourth Respondents are all effectively joined in these proceedings by being cited in this new application from its outset. There thus can be no complaint that they are not being heard in these proceedings.

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[7] The Civil Practice of the High Courts, Juta, 5th edition, p
[8] 1949 (3) SA 637 (A) at 660-661.
[9] *Boshoff v Propinvest Eleven (Pty) Limited* [2007] ZAGPHC 147 at para 27: *"Principal debtors and co-sureties do not fall within the recognised categories of persons with respect to whom joinder is necessary. Moreover, a co-debtor does not have a legal interest in the subject-matter of the action. The interest of the co-debtor is merely financial".*

[15] The Respondents' second objection to non-joinder was that none of them were joined in the conciliation processes required in terms of Section 191 of the LRA and that it is not competent to join such a party in proceedings after judgment.

[16] The answer to this contention again lies in the understanding that the Second, Third and Fourth Respondents were not required to be a party to the CCMA proceedings because their alleged liability arises out of a separate cause of action – being that associated with piercing the corporate veil - not relating to their employment or dismissal of the Applicant. Put differently, the interest of the Second, Third and Fourth Respondents in this application does not arise because of any allegation of their employment of the Applicant or as co-employers which could require their having to be joined as Co-Respondents before the CCMA.

[17] Given the Respondents' allegations of the transfer of a business between the First and Second Respondents (something not relied upon by the Applicant in this application) it is worth noting that the spectra of the Second Respondent being the new employer of the Applicant does arise. This is because in terms of Section 197 of the LRA, if there has been a transfer of a business as a going concern: "*all the rights and obligations between the old employer and an employee at the time of transfer continue in force as if they had been rights and obligations between the new employer and the employee*"[10]; "*anything done before the transfer by or in relation to the old employer, including the dismissal of an employee... is considered to have been done by or in relation to the new employer*"[11]; and the new employer is bound by any arbitration award "*that bound the old employer in respect of the employees to be transferred, immediately before the date of the transfer*".[12]

[18] A result of Section 197 is that the new employer effectively steps into the shoes of the old employer. Bearing this in mind the Labour Appeal Court has confirmed that there is no requirement that both the old employer and new employer need to be

[10] Section 197(2)(b)
[11] Section 197(2)(c)
[12] Section 197(5).

cited and/or joined before the CCMA in relation to disputes about unfair dismissals by the old employer. In *Themba Big Save CC v Kunyuza & Others*[13] the Labour Appeal Court held:

> 'In the event of a party invoking the provision of S197 of the LRA, there is no need to refer the old and the new employer to conciliation. Any one of the parties will suffice because, in terms of the Section, the new employer takes the place of the old employer in all material respects, including but not limited to, contracts of employment and any pending litigation. Hence, where the old employer was taken to conciliation, there is no need to also take the new employer because one is not dealing with two employers but only one.'

[19] The Respondents' preliminary objections thus fall to be dismissed.

The Main Issue

[20] The primary issue is thus to determine whether the Applicant has demonstrated, as required by section 20(9) of the Companies Act "*that the incorporation of the company, any use of the company or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity*".

[21] As set out above, the Applicant's papers explain the history of the First Respondent's failure to make payment of the amount due by it in terms of the Award. The dormancy and alleged application for deregistration of the First Respondent are set out. The Applicant further relies upon the conclusion from its earlier attempts at execution that the First Respondent has now divested itself of its assets. This does not appear controversial. However, the conclusion the Applicant wishes to draw from these circumstances is one of dishonest conduct as set out in its founding affidavit as quoted in paragraph 7 above. Advocate Molema, who appeared on behalf of the Applicant, contended that the First Respondent's divesting itself of its assets in these circumstances and deregistering itself in

[13] [2016] 37 ILJ 2633 (LC) at para 31.

circumstances where it was aware of an outstanding liability, constituted dishonesty and a wrongful act.

[22] During argument, Advocate Molema was however constrained to concede that the Applicant did not have any direct evidence of such dishonesty because, she contended, the First Respondent had failed to provide the records requested which could have demonstrated it. In her own words, the dishonesty was a clear "*possibility*" in the circumstances. I think this concession was correctly made. There is not direct evidence of any dishonesty nor other conduct which could be said to be akin to unconscionable abuse.

[23] I have given consideration to whether the background facts together with the vagueness of the allegations put up by the Respondents (as alluded to in paragraphs 4 and 9 above) and what appears to be clear attempts at avoiding payment could allow this Court to draw an inference of dishonesty or such other abusive conduct. This consideration appears akin to the circumstances considered by the Labour Appeal Court in *Wilson v Prinsloo;* in re *Prinsloo v Expidor 163 CC t/a The League of Gentlemen & Another*[14] and *Bargaining Council for the Furniture Manufacturing Industry, Kwazulu-Natal v UKD Marketing CC & Others*[15]. In the UKD Marketing case, the Labour Appeal Court gave extensive consideration to the evidence led about the structuring of various businesses and considered the argument that, as the Respondents' called no witnesses, an adverse inference had to be drawn against them. The Court then made the following concluding remarks:

> 'In summary therefore, when all this evidence is read and analysed as a whole, it did not provide a sufficient basis to enable this Court to conclude that, notwithstanding no direct explanation on the part of the Respondents, Appellant's version was more probable than not. To the contrary, there is no justification, on the probabilities, to have concluded that the various proprietorships and close

[14] [2021] 8 BLLR 805 (LAC) at paragraphs 14 – 21 (the Wilson case).
[15] [2013] 34 ILJ 96 (LAC) (the UKD Marketing case).

corporations did not operate for their own account or that it could be said that the First Respondent had any financial interest therein.'[16]

[24] Similarly, in this matter, the absence of full explanations from the Respondents why there was a transfer of the business from the First Respondent to the Second Respondent, what the First Respondent received in consequence of this transfer, when this took place and why the Second Respondent has not made payment of the debt in those circumstances, does not make it more probable than not that there has been some dishonesty or abuse of corporate personality.

[25] Simply put, the Applicant has not set out sufficient facts to demonstrate such conduct as a probability.

[26] Much like the *Wilson case*, the Applicant's situation is also exacerbated by its failure to have relied upon the provisions of Section 65 of the Close Corporations Act. Rather, its claim is based upon Section 20(9) of the Companies Act as referred to above. As the Respondent however pointed out, the First Respondent is a Close Corporation and Section 20(9) of the Companies Act has not application to it. This is significant because it has been held that the circumstances in which the corporate veil can be lifted under Section 20(9) of the Companies Act are much wider than either under the common law or Section 65 of the Close Corporations Act. Under the common law, piercing of the corporate veil was something not lightly entertained and generally required proof of "*fraud, dishonesty or improper conduct*" or where the company "*has been used as a façade at the time of the relevant transactions*".[17] In *Ex Parte Gore N.O. & Others (in the capacities of the Liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries)*[18] it was stated in this regard:

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[16] Paragraph 20.
[17] Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A) at 803G-804C.
[18] [2013] 2 ALL SA 437 (WCC).

'[32] The language of s 20(9) is cast in very wide terms, indicative of an appreciation by the lawgiver that the provision might find application in widely varying factual circumstances...

[33] If anything, the width of the provision appears to broaden the bases upon which the courts in this country, and certainly those in England, have hitherto been prepared to grant relief that entails disregarding corporate personality...

[34] The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an à priori diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or 'drastic'. This much seems to be underscored by the choice of the words 'unconscionable abuse' in preference to the term 'gross abuse' employed in the equivalent provision of the Close Corporations Act; the latter term having a more extreme connotation than the former. The term 'unconscionable abuse of the juristic personality of a company' postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like 'sham', 'device', 'stratagem' and the like used in that connection in the earlier cases, and - as the current case illustrates - conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.'

[27] The facts set out by the Applicant fall short of demonstrating the circumstances required either at common law or in terms of Section 65 of the Close Corporations Act which would allow this Court to pierce the corporate veil. Even if this Court entertained this application on the generous acceptance that the Applicant had intended to bring the case based on Section 65 of the Close Corporations Act, insufficient evidence has been set out to sustain such claim.

[28] In the circumstances, the application falls to be dismissed.

Costs

[29] Both parties argued that, if they were successful, they should be awarded costs. The Respondents accepted that this Court is generally slow to make cost orders in accordance with principles of fairness but argued that the Applicant had been repetitively warned in the Respondents' answering affidavit and heads of argument that it had not made out a proper case. Notwithstanding this he had failed even to file a replying affidavit and persisted with the application. They thus argued that the costs incurred had been unnecessarily incurred. They further pointed to what was termed the Applicant's abandoned proceedings in relation to the interpleader and Section 65 proceedings as an indication of the Applicant's alleged "*forum shopping*".

[30] I do not however accept the Respondents' arguments pertaining to costs. To my mind, the Respondents conduct in dealing with the interpleader and the Section 65 proceedings as well as in opposing this application has been far from open and frank. It is the Respondents' coy proposition that there was a transfer of the business "*on or about 2017*" together with its failure to have disclosed the dormancy and apparent lack of assets of the First Respondent at the time the Second and Third Respondents lodged an interpleader affidavit that have led the Applicant to turn in desperation to this Court. The Respondents' lack of frankness is a substantial cause of the present litigation.

[31] Consequently, I make the following Order.

Order

1. The application is dismissed.

2. There is no order as to costs.

C Beckenstrater

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate M N Molema

Trust Account Advocate

For the Respondent: Attorney Nikita Schroeder

Instructed by: Higgs Attorneys