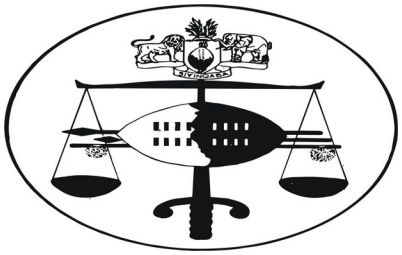

SWAZILAND HIGH COURT

CIVIL CASE NO. 4116/08

BETWEEN

PETZETAKIS AFRICA (PTY) LTD … **FIRST APPLICANT**

SEKUNJALO PIPING
SYSTEMS (PTY) LTD… **SECOND APPLICANT**

AND

SEKUNJALO PIPING SYSTEMS
SWAZILAND (PTY) LTD
REG. NO. R7/23735… **FIRST RESPONDENT**

FIRST NATIONAL BANK SWAZILAND… **SECOND RESPONDENT**

CORAM:
AGYEMANG J

FOR THE APPLICANT:
D.A. SMITH (ESQ.)

FOR THE 1ST RESPONDENT:
J.M. VAN DER VALT (MS)
FOR THE 2ND RESPONDENT:
NO APPEARANCE

JUDGMENT- 12TH JULY 2010

In this application, the applicants herein are asking the court to extend the operation of orders of made by the court on 23/10/08 on an ex parte application.

These are the matters that have given rise hereto: the first respondent is a company registered under the laws of Swaziland. The members thereof are one Mr. Tum Henry du Pont and a Mr. Christopher Brown. The shares were held in this fashion: fifty percent to Mr. DuPont and fifty percent to Mr. Brown. The company was formed in 2005 AD to carry out the business of conducting trading activities in Swaziland. From its inception until September 2008, it did carry out the said business.

Yet although the company appeared to be as aforedescribed, there were other interests therein which were not apparent to anyone save the discerning or the initiated.

These were the matters: the company was said to be a local company which was incorporated to fulfil the wish of a foreign company, a South African Company: the first applicant, to expand its business activities into Swaziland.

The first applicant owns the second applicant and through it, carries out a trade in inter alia, pipes manufactured by the first applicant. The first applicant is alleged to have registered trademarks for a number of products/activities under the name “Sekunjalo”. The first applicant has a number of branches in South Africa all trading under the name of “Sekunjalo Piping Systems” among which was one at Nelspruit. The said branch being close to Swaziland was accessed by the Swaziland market. It will not be presumptuous to surmise that business from Swaziland must have been considerable, for it was a matter that informed the decision of the applicants to open a branch in Swaziland.

But the applicants did not in fact open a branch or subsidiary, they simply tasked two gentlemen to form a company with a name that sounded like a subsidiary of the second applicant: Sekunjalo Systems Swaziland (Pty) Ltd.

According to the applicants, the shares of the new company, was by an oral agreement, to be held jointly by the second applicant and the said gentlemen in this manner: 49.9% by the second applicant, 50.1% by Mr. DuPont and Mr. Brown (referred to hereafter alternately as the ‘two gentlemen”).

It is not in controversy that when the company was formed and its shares were distributed between the said two gentlemen on a 50%-50% basis, the applicants who were apprised of this (either before or after the fact it is not clear), raised no objection and continued to deal with the company thus formed. They however, in line with the said oral agreement, pursued the matter of the shareholding to

include the applicants. Somehow, that shareholding agreement was never concluded, and the company (hereafter referred to as the first respondent), remained a 50-50 shareholding of the said two gentlemen.

In spite of this, and in line with the original plan of expanding the business of the second applicant into Swaziland, the applicants dealt with the first respondent in this manner: the first applicant inter alia, engaged employees and paid their salaries, opened a bank account for the company, rented premises for the company's business, installed a computer and accounting system, monitored creditors and supplied the stock of the company.

The income from the business of the first respondent was placed in the bank account and transferred to the first applicant in South Africa. Although there were members of the Swaziland Company, they were not paid any dividends and to date there are outstanding liabilities such as the payment of various taxes, running costs such as utility bills, among others.

It is not clear at what point a cloud passed over the sunny environment of the relationship between the applicants and the first respondent, but suddenly, their honeymoon was threatened. The first respondent refused to transmit monies from its account to the first applicant and in fact instructed the second respondent not to permit the applicants to deal with the company's account. In the negotiations that followed this state of affairs, the first respondent requested financial information including audited accounts from the applicants alleging that same was to enable it fulfil its statutory obligations including tax.

The honeymoon was finally over when the applicants took the decision to halt supplying stock to the first respondent. The first applicant alleged that the said two gentlemen had repudiated their oral shareholding agreement for which reason the applicants wished to end their relationship with the first respondent. Then alleging that although the shareholding of the first respondent did not indicate such, its business was in fact owned by the applicants and was endangered by the first respondent, sought for and obtained on an ex parte application, some interim orders against the first respondent.

The applicants alleged in that application that the stock on the premises of the first respondent was supplied by it and had not been paid for. They thus asserted that the ownership of the stock was vested in the first applicant and furthermore, that any monies in the bank account of the first respondent had to belong to the applicants, alleged to be the first respondent's sole supplier. The applicants alleged further that the said money in the bank account, an amount of over E2,000,000 was in danger of being wasted. What informed their allegation they said, was that Mr. DuPont had withdrawn an amount of E80,000 in questionable circumstances, and further, that the legal fees of the two gentlemen in their dispute with the applicants had been paid out of the first respondent's bank account. The applicants thus sought inter alia, an interdict against the first respondent.

I reproduce in extenso, the interim orders obtained by the applicants against the respondents:

1. That the first respondent is interdicted from alienating, selling, disposing of and/or encumbering and/or dealing in any manner whatsoever with all stock at first respondent's business premises, supplied to it by the first and/or second applicant;
2. That the first respondent is interdicted from withdrawing any monies from the first respondent's banking account with the second respondent being bank account number: 62096056207;
3. The second respondent is hereby interdicted from allowing any withdrawals from account No: 62096056207;
4. That prayers 1,2, and 3 shall operate as an interim interdict with immediate effect pending the return day;
5. The respondents are hereby called upon to show cause before the court on 13/11/08 why the following final orders should not be granted:
    5.1 The first and/or second applicant be permitted forthwith to remove all stock from the premises of the first respondent supplied to the first respondent by the first and/or second applicant;
    5.2 In the alternative to 5.1 (supra) the first and second applicants be permitted to remove all stock on the premises of the first respondent supplied by the first and/or second applicant and to keep same in safe keeping pending the finalization of the action referred to in paragraph 6 (infra);
    5.3 Further and alternative to 5.2 (supra) the first and/or second applicant be permitted to remove all stock on the premises of the

first respondent, supplied by the first and/or second applicant against posting of security in favour of the first respondent equal to the value of the stock so removed such value to be determined by an inspection of the stock and the drawing up of an inventory indicating the value thereof by the applicants pending the finalization of the action…

5.4 Further in the alternative to 5.3 (supra) the Sheriff of the District of Manzini be authorized to remove all stock on the first respondent's premises supplied by the first and/or the second applicant and to keep same in safe keeping pending the finalization of the action…

5.5 The first respondent be interdicted from using the name "Sekunjalo" in connection with its business activities;

5.6 Pending the finalization of the action to be instituted by the first and second applicants against the first respondent, the second respondent be interdicted from permitting any withdrawals of any nature whatsoever from account No: 62096056207;

5.7 The first respondent should not be liable for costs of the application, alternatively why the first and second respondents should not pay the costs jointly or severally in the event of opposition by the second respondent;

6. The first and second applicants are hereby ordered to institute the action against the first respondent within thirty days of the grant of a final order on the return date as per prayer 6 of the notice of motion;

7. The first respondent is ordered to pay the costs of this application;
8. The applicants are hereby ordered to have a copy of this order together with the application served on the respondents by way of the Sheriff or his deputy.

The second respondent did not take part in the present motion proceedings. The first respondent filed an answering affidavit in which it made certain admissions, and remained silent on others. These included the following:

1. That there was indeed an oral agreement for the shareholding of the first respondent before its incorporation, and that it was to be thus: 49% to the second applicant, 41% to Mr. DuPont and 10% to Mr. Brown;
2. That the shareholding, directorships was meant to be finalized after the company was formed;
3. That when the first respondent was formed, the shares were held 50%-50% by Mr. DuPont and Mr. Brown only;
4. That negotiations continued after the incorporation for the shareholding to be brought into being in accordance with the pre-incorporation shareholding agreement;
5. That a draft shareholding agreement was made but was never signed by all the parties;
6. That the first applicant paid the employees of the first respondent, supplied stock, did the financial accounting controlled the bank account from which transfers of money were made to it in South Africa;

7. That the applicant hired premises for the first respondent's business except that rental was paid from the first respondent's bank account;

In spite of these admissions, the first respondent denied that the business of the first respondent belonged to the applicants.

The first respondent contended that it was a company conducting its business and that the ownership in the stock supplied to it passed to it upon delivery by the first applicant. Thus, the applicants' only interest therein was in the price thereof, being a debt owed to it. It contended that an attachment of same would only result in crippling its business unfairly.

Regarding the monies in the bank account, the first respondent asserted that freezing same would work a grave inconvenience to it as it would not be able to meet its responsibilities towards its creditors or fulfil such statutory obligations as the payment of taxes. The first respondent contended that the present application was made in bad faith and that the goal was to permit the applicants to siphon the monies of the company and take its stock to South Africa now that they are no longer interested in the relationship with the first respondent.

The first respondent indicated that it wished to place itself into liquidation so that there would be equitable distribution of assets to its creditors, a deed that would be encumbered by an order freezing its bank account.

In argument, learned counsel for the applicants, without abandoning the other prayers sought, indicated that for reasons of expediency, the applicants

wished to limit themselves to applying for interim orders 1, 2, and 3 made on an ex parte basis, to be made on the present application pending the institution of an action within thirty days of the order. Learned counsel brought to the attention of the court, trite principles of law regarding the matters to be considered in the grant of an interim interdict, and supported them with a plethora of authorities, being: the existence of a prima facie right to be protected, a well-founded apprehension of irreparable harm if the interim relief is not granted, the balance of convenience to the parties and the fact that there should be no other satisfactory remedy.

With regard to the first requirement which is a prima facie right, learned counsel contended that the first respondent by not denying the averments of fact made by the applicants in its answering affidavit,, admitted same and that such should be sufficient for the court, in motion proceedings such as this, to take same as admitted and therefore as facts established without the need to call evidence. Quoting extensively from the case *of Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd 18984 (3) SA 623 (A) at 634H-*635B, learned counsel intimated that the court may grant the order it seeks upon the matters not denied by the first respondent showing the applicants to have a prima facie right for an interdict regarding the stock in the custody of the first respondent. Some of these matters, I have set out before now as having been admitted by the first respondent as indeed it is trite that silence over an allegation in an affidavit amounts to an admission: "…the affidavit is not a pleading and that a statement of lack of knowledge …does not amount

to a denial of the averments… failure to deal at all with an allegation by the applicant amounts to an admission" see: ***Joubert's The Law of South Africa Vol. 3 Civil Procedure and Costs 80 at 146.***

Learned counsel furthermore contended that it was common cause that the main matter underpinning the formation of the first respondent was the expansion of the applicant's business and that when it was thus brought into being, in spite of its shareholding, it was controlled totally by the applicants. He thus contended that by refusing to transmit funds to the applicants, Mr. DuPont and Mr. Brown had "hijacked" the business of the company which was in reality the applicants', thus making out a prima facie right for the grant of an interdict.

Learned counsel contended furthermore, that with the first respondent's admission that the stock the applicants supplied to it had not been paid for, (counsel asserted in any event that it belonged to the applicants), and the fact that the applicants hold no security for their claim against the first respondent, a case of reasonable apprehension of irreparable harm and also of the balance of convenience in their favour had been made.

These, learned counsel maintained, argued for an order permitting the applicants to remove the stock on the premises of the first respondent supplied by them and take them into their custody.

With regard to the funds held in the bank account also, learned counsel asserted that a prima facie right, as well as the fact that a reasonable apprehension of irreparable harm and a case of a balance of convenience in their favour had been made out by the applicants.

The matters that learned counsel relied on in this argument include the following: that the first respondent had admitted that the money in its account was:

- "Earmarked to settle the first respondent's indebtedness towards the first applicant in respect of stock already delivered as well as the other expenses paid by first applicant on behalf of first respondent";
- That the money in the bank account was made up of payment received for the sale of stock supplied by the applicants; that the applicants hold no security for their claim;
- That there was an instance when Mr. DuPont cashed a personal cheque for E80,000 from the first respondent's account as well as the fact of the shareholder's legal fees being paid out of the account; lastly,
- That the first respondent which is incapable of trading without the applicant's supply of stock, has threatened to liquidate itself and allegedly intends to prefer other creditors above them.

Regarding the continued use of the name "Sekunjalo", learned counsel for the applicant alleged that that name was synonymous with the business of the applicants which had built up considerable goodwill. He contended that in

the circumstance, the applicants have a prima facie right to protect same where they no longer have a relationship with the first respondent. He added that the attitude adopted by the first respondent was that the said name was meaningless to it for this reason the balance of convenience lay in its favour for the grant of an interdict of the use of that name by the first respondent.

In reply, learned counsel for the first respondent asserted that the matters of common cause are that the first respondent is a company formed at the instance of the second applicant as a Swazi company under the laws of Swaziland, with two shareholders: Mr. DuPont and Mr. Brown who, even in the pre-incorporation oral shareholding agreement, were always meant to be the majority shareholders. She asserted that from its inception, the applicants were in effective control of the business of the first respondent and its funds which they caused to be transmitted to them after the deduction of local overheads although it is not a branch of either of the applicants. She alleged that the source of disaffection of the applicants with the first respondent is the decision of the shareholders of the first respondent to stop transmitting all its income to the applicants as they had done throughout its lifetime, until the first respondent had complied with its outstanding statutory obligations such as the payment of taxes, and compliance with the labour laws of the land regarding employee PAYE tax, Workman's Compensation and Provident Fund Contributions. This matter, as well as the inability of the parties to sort out the shareholding of the first respondent, is what had resulted in a

deadlock leading to the present proceedings. Denying the allegation of the applicants that the first respondent was formed without their knowledge she asserted that not only were they apprised of it, but they dealt with it after the fact, supplying stock, providing administrative infrastructure, among others. Nor she contended, had the shareholders hijacked their own company. She averred that rather, that it was the applicants who being out of the reach of Swazi law and enforcement procedures, and had from the inception of the company's business taken all its income and now intend to take its stock and funds without permitting it to fulfil its statutory obligations, that have hijacked the company.

Learned counsel maintained that as a company which is not a branch of the applicants, the first respondent owns the stock that was delivered to it in accordance with the trite principle that ownership in the goods passed to it upon delivery. For this reason and also because the funds in the bank account belongs to the first respondent and ought properly be applied to its obligations, she maintained that the present application is misconceived. She contended that this is quite apart from the fact that the ex parte orders that were oppressive to the first respondent were obtained without full disclosure of material facts and with misstatements. These include the fact that the reason for the first respondent's refusal to repatriate funds to the applicants as was its custom was to enable it meet its statutory obligations as a local company was not disclosed to the court, and also, the applicant's assertion that the first respondent was formed behind their backs. With respect to the

order freezing the accounts obtained ex parte and sought to be continued by this application, learned counsel averred that not only had the applicants not demonstrated that the monies in fact belonged to them, but that it ought to be clear to the applicants who had a computer monitoring system of the first respondent's activities/dealings, that the first respondent had done nothing untoward regarding which the applicants could have a well founded apprehension that the monies owed to them would be diverted or wasted. Nor had they shown themselves entitled to the order sought for the removal of stock. She contended that for them to succeed on this which is a vindicatory right, the applicants must establish that the ownership of the stock was vested in them which she maintained was not the so in the instant case. In any case she argued, an interdict in respect of this this would be a final one which would not abide the action to be instituted by the applicants. She thus prayed that the application be dismissed with costs.

Having heard both counsel on this application, it is my view that the application ought to be granted in part: that the first respondent be interdicted from withdrawing monies from its bank account, but not for the reasons canvassed by the applicants or counsel.

I consider it pertinent before I delve into my reasons for so holding, to correct an unfortunate impression or belief held by the applicants and which has been canvassed by their counsel in argument. There is no gainsaying that neither the first respondent nor its members have denied that it was formed

at the instance of the applicants and that it was to further their business interests.

That fact however, and the dealings of the applicants with the first respondent do not admit of the interpretation placed by the applicants on the character of the first respondent. The first respondent is a company duly incorporated under the laws of Swaziland. That agreements/negotiations went on among the major players regarding its share structure before it was formed (including the agreement by which the applicants supplied its stock, administrative and other infrastructure), or that when it came into being, its directors which had the control of its business allowed the applicants to be so involved in its running and business, did not change its character.

The difficulty in this case is that the applicants so totally dealt with the first respondent in the supply of all that it needed to operate as well as with its finances, that they had the erroneous impression that the first respondent was part of their business or that they owned its business. They did not.

The concept of a company being a legal person is so trite that I do not intend to go into it, but it seems to me that this elementary principle has been shunted aside because of the dealings of the applicants with the first respondent (whether carelessly or intentionally, with unfortunate results), that I need to bring same to the fore. Because I have not come across any authorities in our common law, I feel it necessary to cite from English common law authorities for my persuasion on this matter.

Ever since the locus classicus of ***Salomon v. A. Salomon & Co Ltd (1897) AC 22 HL***, the principle of the corporate personality of a company has been adhered to and expatiated in myriad circumstances. One such circumstance is that a company's property belongs to it and not to its shareholders, or its creditors however vast their stake.

In casu, in spite of the agreements/negotiations that went on before and after its formation, the applicants were never shareholders of the first respondent. Doubtless, it was because of those agreements that they were so completely involved in the affairs of the first respondent and even had control of its finances. But their apparent total control of the first respondent was a circumstance that obtained only because it was permitted by the two gentlemen who were the directors of the first respondent.

As a legal person in its own right, the trading stock of the first respondent however acquired belonged to it. This is because ownership of stock supplied to the first respondent, in the absence of an agreement that the supplier would retain ownership of stock it supplied until it was paid for, passed to it upon delivery. The supplier such as the applicants herein, became creditors of the first respondent while the goods were yet unpaid for.

It seems inconceivable that in spite of the principle of a separate corporate personality, a stranger to the first respondent such as the applicants are to it, no matter how well and completely connected it was with it, could own its trading stock just because they supplied goods to it.

Apart from laying claim to stock supplied to the first respondent, the applicants have also laid claim to the business of the first respondent. This cannot be the case. It must be remembered that neither of the applicants is a holding company. Nor is the first respondent a branch of the second applicant.

For the applicants to succeed in laying claim to the first respondent's business, they had to establish a number of things: these included, that the first respondent was a sham and that in reality, it was the applicants, and not the first respondent that carried on the business, or that the first respondent was the agent of the applicants. Yet although overwhelming undisputed evidence has been provided to demonstrate that the applicants provided employees, premises, administrative infrastructure and stock, there is no evidence that the first respondent was a sham. By all accounts it was a proper company that operated a business although it was by the permission/acquiescence of its directors, controlled by the applicants.

That the applicants acknowledged this, is shown in the fact that they intended to hold shares therein and later, even purposed to purchase all its shares in a take-over.

The first respondent may very well, (as its antecedents indicate), have been intended to be a branch of either of the applicants, but that was not brought into being when the decision was made to form a local company and not a branch of the foreign company that both applicants are. That the first respondent was separate and distinct from either of the applicants is

demonstrated in the fact that even though it is common cause that the first respondent's shareholding as at the time of its formation was not intended to be the final one, the applicants intending to hold shares therein, it is clear that its membership was intended to be different from that of the applicants with its majority shares being held by Swazi citizens.

There is also no evidence of an agency relationship between the parties. In my judgment, the mere fact of the applicants, beyond providing the infrastructure et al for the first respondent, supplied its stock and took its profits (which I have said could only happen on the say-so of its directors who had control of its business), did not establish a principal/agent relationship that the first respondent would conduct the applicants' business for it. Indeed, even if the applicants held all or substantially all of the first respondent's shares (and they held none), that fact would not without more make the first respondent's business that of the applicants, see: ***Gramophone and Typewriter Co Ltd. V Stanley [1908] 2 KB 89 CA***

From all this it is abundantly clear then that the applicants' sense of entitlement to the stock and funds of the first respondent arising form the notion of ownership of the first respondent's business, a matter that has been relied on in this application, is without basis and is clearly misconceived.

Yet in spite of this finding, it is my view that to permit the first respondent to deal with its bank account in any manner it sees fit may lead to the unfortunate circumstance of it emptying same to the detriment of the

applicants who are acknowledged to be bona fide creditors of the respondent. Although the first respondent has explained that the matter of the E80,000 withdrawn from its account was to enable it meet its tax obligations, the fact that it was upon the personal cheque of one of the shareholders makes it a questionable circumstance that does not leave me with any degree of confidence to assert that the first respondent's funds will not be wasted if it is permitted to deal with it.

It is thus my view from the undisputed evidence, that the applicants have shown themselves to have a clear right to at the very least, a substantial portion of the money in the bank as it has supplied goods to the first respondent yet to be paid for.

Happily, all that the applicants are seeking here are interim orders pending the institution of an action to vindicate their right.

For this reason I make an order interdicting the first respondent from withdrawing monies from its bank account described as: account No: 62096056207.

Regarding the interdict of the first respondent's dealing with its stock, I advert my mind to the fact that the first respondent has been alleged to have no assets beyond its stock, and furthermore that the applicants who are bona fide creditors hold no security for their claim against it, if it were not a going concern, those matters would be sufficient reason for me to grant an interdict restraining it from dealing with its stock. Being however mindful of this, I decline the invitation to freeze its dealings with its stock as that may have the

effect of crippling the company. It is for this reason that I refuse to grant an interdict restraining the first respondent from alienating, selling, disposing of and/or encumbering and/or dealing in any manner whatsoever with the stock on its premises. I however, in refusing this prayer which will thus permit the first respondent to continue in its operations, safeguard any possible activities which may adversely affect the outcome of the action to be instituted by making the following order:

The attorneys for the parties are hereby ordered to open an interest-bearing account as joint signatories to receive the income from the conduct of the first respondent's trade hereof, pending the outcome of the action by the applicants against the first respondent to be instituted thirty days hereof.

I make a further order that the applicants herein lodge with the Registrar of the High Court, an undertaking that it will be responsible for any damage that may be suffered by the first respondent by reason of these orders if they do not succeed in their action.

With regard to the use of the name "Sekunjalo", I do not find that the applicants have in this application and at this point, made out a case sufficient for the first respondent which has been registered under that name, has conducted business in Swaziland for three years under it, and is solely associated with it in Swaziland, to be restrained from using same. I must say that even if the applicants are associated with that name in South Africa (the

second applicant being known by that name), they have not shown that in Swaziland, they suffer an injury or stand to so suffer if the said name is used by the first respondent.

Application succeeds in part and the first respondent is hereby interdicted from withdrawing any mines from its account described as: No. 62096056207.

The second respondent is hereby interdicted from allowing any withdrawals by the first respondent from the account afore-described.

Having regard to all the circumstances of this application and the conduct of counsel on both sides which is apparent on the record, I make no order as to costs.

MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE