IN THE HIGH COURT OF SWAZILAND

Civil case No: 65/2012

In the matter between:

T.T. Global Investments (PTY) Ltd
APPLICANT

AND

Swaziland Revenue Authority **Respondent**

Neutral citation: *T.T. Global Investments (PTY) Ltd v Swaziland Revenue Authority (65/2012) [2012] SZHC137 (9 July 2012)*

Coram: **MAPHALALA M.C.B., J**

Summary

Civil procedure – application seeks a declaratory order that it is a bona fide purchaser of certain motor vehicles – the basis of the application is a Contract of Sale – the said Contract was concluded in *fraudem creditorum* and to pervert respondent's lien – application dismissed with costs – counter–application piercing applicant's corporate veil granted.

JUDGMENT
9th JULY 2012

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[1] An urgent application was instituted by the applicant for an order declaring that it was a *bona fide* purchaser of the motor vehicles which are the subject of these proceedings. It further sought an order interdicting and restraining the respondent from removing the said motor vehicles from the applicant's premises to the State Warehouse pending finalisation of the main prayer; the applicant also prayed that in the event that a removal had been effected, restitution of possession of the motor vehicles should be restored.

[2] The applicant is a company engaged in the business of importing second hand motor vehicles and selling them to members of the public. The applicant was registered and incorporated on the 18th April 2011 and subsequently commenced its business operations.

[3] The applicant concluded a Sale and Cessionary Agreement on the 12th July 2011 with Nagra Motors (PTY) Ltd in terms of which it purchased fifty three motor vehicles for E1 657 500.00 (one million six hundred and fifty seven thousand five hundred emalangeni); however, Nagra Motors (PTY) Ltd only delivered forty motor vehicles. By virtue of the Agreement, the seller further ceded all its rights in terms of the Agreements of Sale with debtors to the applicant in relation to the said motor vehicles at a cost of E1 000 000.00 (one million emalangeni);

the applicant would acquire all the rights of Nagra Motors (PTY) Ltd in relation to the Agreements of Sale with the debtors and outstanding balances. Nagra Motors (PTY) Ltd would also transfer and register twenty nine motor vehicles into the name of the applicant.

[4] On the 18th August 2011 the respondent served the applicant with a Detention Notice for the forty motor vehicles pending further investigation of Contravening Section 87 of the Customs and Excise Act No. 21 of 1971. On the 19th August 2011 the respondent further served the applicant with another Detention Notice in terms of which twenty nine motor vehicles with their registration documents were attached "pending investigations concerning the sale of motor vehicles by Nagra Motors (PTY) Ltd to the applicant without the clearance of Customs". In addition to the Detention Notices, a seal and /or embargo was effected on applicant's premises in terms of which no motor vehicle would be removed and/or brought into the premises.

[5] The applicant alleged that it approached the respondent with a view to resolving the dispute amicably; however, it was advised by the respondent to raise its concerns in writing for consideration. The applicant wrote to the respondent on the 23rd August 2011 and requested that the embargo should be withdrawn since it was affecting its business operations. On the 25th August 2011, the respondent

advised the applicant that it had placed a revolving lien on the balance owed to Customs by Nagra Motors (PTY) Ltd; the respondent further advised that in terms of an Agreement with Nagra Motors (PTY) Ltd concluded on the 18th May 2011, it was understood between the parties that sections 108 and 114 of the Customs and Excise Act provided that the goods could not be removed without the permission of the Commissioner General of the respondent.

[6] Further attempts by the applicant on the 1st September 2011 to withdraw the embargo and bring into the premises a further stock of motor vehicles to continue trading was not successful. The applicant argued that it wanted to continue trading so that it could meet its financial obligations including the payment of rental; however, the respondent refused to withdraw the embargo unless it concluded a firm Agreement with Nagra Motors (PTY) Ltd.

[7] The applicant further alleged that subsequent meetings were held between the parties where it was resolved that they could assist each other in locating the Directors of Nagra Motors (PTY) Ltd who could not be located. In September 2011 the respondent withdrew the embargo on applicant's premises and the applicant that was able to trade in respect of a further stock of motor vehicles; however, it advised the applicant that the forty motor vehicles bought from Nagra

Motors (PTY) Ltd were still held as a revolving lien to secure the debt of E2 002 917.35 (two million and two thousand nine hundred and seventeen emalangeni thirty five cents) owed by Nagra Motors (PTY) Ltd. The said amount comprised the capital debt and penalties.

[8] On the 16th January 2012 the respondent started removing the motor vehicles by towing them to the State Warehouse. A request by the applicant to suspend the removal pending negotiations failed.

[9] The applicant alleged that when concluding the Contract with Nagra Motors (PTY) Ltd, it was not aware of the debt owed to the respondent as well as the alleged lien over the motor vehicles; and, that it only became aware of this fact on the 18th August 2011 when it was served with the Detention Notice. The applicant further argued that it does not owe any monies to the respondent, and, that it was not a party to the Agreement of the 18th May 2011 between the respondent and Nagra Motors (PTY) Ltd in which the respondent had placed a revolving lien on the motor vehicles in respect of the debt owed to the respondent by the company. The applicant further argued that it did not buy the business of Nagra Motors (PTY) Ltd but its motor vehicles, and that it could not be held liable for the debts of Nagra Motors (PTY) Ltd. It also argued that it was a *bona fide* purchaser of the motor vehicles and could not be deprived of their ownership.

[10] The applicant alleged that it is entitled to the interim interdict on the basis that it has established a prima facie right that it bought the motor vehicles from Nagra Motors (PTY) Ltd. It further argued that it would suffer prejudice by the towing of the motor vehicles by the respondent since they are equipped with computer boxes and have to be driven or moved with special care to avoid any damage. It also argued further that a claim for damages would not only prove difficult to quantify but it would take an inordinately long period to complete to its prejudice. On the other hand, it argued that a party whose rights are infringed need not wait for the damage to occur and then sue for damages, but, it is entitled to take steps to prevent the damage occurring. It also argued that goods kept at the State Warehouse are subject to storage fees which it would be expected to pay.

[11] The applicant argued that the matter was urgent on the basis that the respondent was proceeding with the removal and towing of the motor vehicles from its premises to the State Warehouse; and, that if the matter were to take its normal course, it would be greatly prejudiced since the damage it seeks to prevent would long have been occasioned to its detriment. It also argued that the removal of the motor vehicles was done without its consent or a Court Order; and,

that this rendered the matter urgent because spoliation matters are by their very nature urgent.

[12] It is common cause between the parties that on the 17th January 2012, this court issued an interim order in the following terms: firstly, that pending finalization of the matter, the motor vehicles forming the subject – matter of these proceedings should not be removed from the applicant's premises; secondly, that the applicant is ordered not to alienate the motor vehicles concerned pending finalization of the matter.

[13] The application is opposed by the respondent, and it has raised certain points *in limine*. Firstly, that the applicant has failed to meet the requirements for the grant of a declaratory order and that it is not entitled to the order sought. It argued that the lien held by the respondent over the motor vehicles is such that Nagra Motors (PTY) Ltd lost some rights over the motor vehicles including the right to deal in any manner or form, to alienate or dispose of the motor vehicles. It was further argued that Nagra Motors (PTY) Ltd could not pass rights which it did not have itself; and, that the contract of sale is *void ab initio* and of no force or effect.

[14] The second Point of Law is that the matter is not urgent because the applicant was advised of the detention and embargo of the motor

vehicles on the 18th and 19th August 2011 when it was served with a Detention Notice; that on the 25th August 2011, the application was made for the seizure of the fifty three motor vehicles to be detained at the premises of the respondent. It was further argued that the respondent was authorised by section 114 (4) of the Customs and Excise Act to detain goods so seized at its premises.

[15] The third Point of Law is that the applicant has failed to meet the requirements for the grant of the interim interdict with regard to the removal of the motor vehicles.

[16] The fourth Point of Law is that the applicant is "*in fraudem creditorum*" because the promoters, directors and shareholders of the applicant are the same as those of Nagra Motors (PTY) Ltd.

[17] The fifth Point of Law relates to the "doctrine of unclean hands"; it is argued that the applicant is approaching this Court with unclean hands by dealing "*in fraudem creditorum*"; that the motor vehicles were subject to a lien, and, the applicant was formed to evade the effects of the lien. It was further argued that the purported Contract of Sale between Nagra Motors (PTY) Ltd and the applicant was intended to frustrate creditors of Nagra Motors, as well as to circumvent and defeat the respondent's lien.

[18] The sixth Point *in limine* is that the applicant has failed to meet the requirements for the grant of a "*mandament van spolie*" which is sought in respect of the prayer for a restitution of possession of the motor vehicles seized and detained by the respondent.

[19] The Court directed that the Points *in limine* should be argued together with the merits and that Supplementary Heads of Argument should be filed to deal with the merits. I reached this conclusion on the strength of the precedent as laid down by the Court of Appeal of Swaziland, as it then was, in the case of Shell Oil Swaziland (PTY) Ltd v. Motor World (PTY) Ltd t/a Sir Motors Civil Appeal No. 23/2006 at pages 23-24, para. 39 and 40 where Tebbutt JA quoted with approval case of Trans African Insurance v. Maluleka 1956 (2) SA 273 (A) at 278 G where Schreiner JA stated that the current trend in application proceedings which is now well-recognised and firmly established is that technical objections to less than perfect procedural aspects should not be allowed to interfere in the expeditious and if possible, inexpensive decisions of cases on their real merits. He further stated that the Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs. The Court emphasized that rules are not an end in themselves

to be observed for their own sake but they are provided to secure the inexpensive and expeditious completion of cases and that where a party has failed to comply with the Rules to th e prejudice of the other, the Court should remedy the prejudice bearing in mind the objects for which the Rules were designed.

[20] On the merits the respondent argued that the formation of the applicant was based on illegal motives aimed at defeating the creditors of Nagra Motors (PTY) Ltd and, that the applicant was "*a mere facade*" and "*alter ego*" of Nagra Motors (PTY) Ltd. It was further argued that the Agreement between the applicant and Nagra Motors (PTY) Ltd does not mention how the Creditors of Nagra Motors (PTY) Ltd would be paid including the respondent who has a lien over the motor vehicles which Nagra Motors (PTY) Ltd has sold to the applicant. It was also argued that the conduct of Nagra Motors (PTY) Ltd manifested the *mala fides* of the Contract of Sale and the intent to escape and defraud its creditors and its Statutory obligations, in particular liabilities for Customs Sales Tax.

[21] The respondent denies that the applicant is a separate and distinct entity from Nagra Motors (PTY) Ltd and urges this Court to pierce or lift the corporate veil of the applicant; it argues that the promoters, directors and shareholders of Nagra Motors (PTY) Ltd play

the same roles in the applicant's structure, and, that this explains the use of the same premises, dealing in the same business, trading on the same stock by the same personnel, and, being exclusively supplied by T.T. Global (Japan). It was further argued that prior to this Agreement, the applicant existed only on paper.

[22] The respondent referred the Court to clause 3.4 of the Agreement as proof that the intention of the applicant by concluding the Agreement with Nagra Motors (PTY) Ltd was to escape its Contractual and Statutory liabilities. Clause 3.4 of the Agreement provides the following:

> **"The seller indemnifies the purchaser of all liability to any business concern or person accrued prior to the commencement of this Agreement and in the same spirit it is agreed between the parties that the purchaser has not taken any liability of the seller company, Nagra Motors (PTY) Ltd, such as any amounts payable to any business concern or individual or to any Government officers like Customs, Sales Taxes and Income Taxes or any other such liability."**

[23] The respondent further referred to Clause 3.5 of the Agreement and argued that the said clauses seek to illicitly and explicitly oust its

lien and render it inconsequential and further do away with its tax liabilities. Clause 3.5 provides the following:

> **"In relation to the vehicles listed in annexure "A" herein the Seller Company shall sign all such documents and ensure that all such motor vehicles are registered in the name of the purchaser T.T. Global Investments (PTY) Ltd in relation to this Agreement."**

[24] The respondent alleged that Rashid Minhaz, the majority shareholder in the applicant is also the majority shareholder in Nagra Motors (PTY) Ltd; it further alleged that Nagra Motors (PTY) Ltd was solely and exclusively supplied by T.T. Global Inc., a company based in Japan which bears the same name as the applicant. Similarly, it alleged that Rashid Minhaz is the president of T.T. Global (Japan) Inc.

[25] The respondent further referred the court to annexure "SRA 1" and "SRA 2" being Form J of both Nagra Motors (PTY) Ltd and the applicant respectively; and "SRA3" being T.T. Global) (Japan) Inc. as well as annexure "SRA5", an entry permit into Swaziland issued to Rashid Minhaz in August 2007. Annexure "SRA6" is a copy of letters of instructions from Nagra Motors (PTY) Ltd to applicant to pay T.T. Global (Japan) Inc. which is also called Tokyo Trading Company.

[26] The respondent further argued that Nagra Motors (PTY) Ltd had no power to sell the motor vehicles by virtue of sections 11 and 108 of the Customs and Excise Act No. 21 of 1971. Section 11 provides that no goods imported into Swaziland may be disposed or removed from the point of entry without the permission of the respondent. Section 108 of the Act provides the following:

> **"If any officer has reason to believe that the correct duty has not been paid on any goods or that there has been or may be in respect of any goods, plant, vehicle, or thing a contravention of this Act of any law relating to the import or export of goods, he may place an embargo on such goods, plant, vehicle or thing, wheresoever found, and no person shall remove such goods, plant, vehicle or thing from the place indicated by the officer, or in any way deal therewith except with the permission of the officer, until the embargo has been withdrawn."**

[27] The basis of sections 11 and 108 of the Act is that imported goods are subject to the control of the respondent; and, that once the goods arrive at the point of entry, they cannot be removed or disposed without the permission of the respondent. Section 108 of the Act grants power on the respondent to place an embargo upon imported goods where it believes that the proper duty has not been paid.

[28] The respondent argued that by virtue of its powers outlined in section 108, it issued a Detention Notice on the 18th August 2001 in respect of the motor vehicles which rendered them subject to its lien. The respondent conceded that the embargo was subsequently uplifted at the instance of Nagra Motors (PTY) Ltd on the condition that the motor vehicles would not be sold without the written authorisation of the respondent. It further argued that the subsequent transfer and registration post-embargo of the motor vehicles is *void ab initio* since Nagra Motors (PTY) Ltd had no authority to pass ownership without the respondent's authorisation. The respondent reiterated that the Detention Notice was issued on the basis of a reasonable belief that Nagra Motors (PTY) Ltd was undervaluing the motor vehicles in order to pay less duty.

[29] The respondent further argued that the applicant was aware of the embargo on the vehicles since it was informed on the 19th August 2011 in terms of annexure "TT6" which was the Detention Notice addressed and delivered to the applicant. The reason for the detention of the motor vehicles was reflected on the Notice as being "pending investigation concerning sale of motor vehicles by Nagra to TT Global without the former customs clearance". It was also argued that the transfer and registration of the motor vehicles do not vitiate the lien or confer ownership on the applicant.

[30] The respondent denied that the applicant is entitled to the interim interdict on the basis that it had failed to prove a *prima facie* right. It further argued that no harm would be occasioned by the removal of the motor vehicles from the premises of the applicant; and that the majority of the motor vehicles are of Japanese origin, and that they are easy to manouver. The respondent further argued that it has an interest in the towing and safekeeping of the motor vehicles because it holds a lien over them.

[31] The respondent denied that it would be difficult to quantify and prove a claim for damages in the event that there is damage to the motor vehicles being towed. It was argued that it would easily be ascertainable who would be responsible for the damage and that it would be easy to quantify and prove the damages from the contract. Furthermore, the respondent argued that payment of storage costs is not a ground for an interdict and that in any event it has the power to waive storage charges in appropriate cases.

[32] The respondent further denied that the applicant has no alternative remedies at its disposal; and, to that extent, it was argued that if the sale was *bona fide*, the applicant could have sued Nagra Motors (PTY) Ltd on the breach of contract either for specific

performance or cancellation of the contract and damages. The respondent further argued that in order for the applicant to succeed in the alternative remedies, it would have to prove its rights before asserting them.

[33] The respondent further argued that it effected the lien prior to the Agreement of Sale between Nagra Motors (PTY) Ltd and the applicant; and, that the lien supercedes the Agreement. To that extent it was argued that the applicant could not in the circumstances have acquired ownership of the motor vehicles.

[34] The respondent further denied that the applicant was entitled to spoliation on two grounds: firstly, that the seizure and removal of the motor vehicles was authorised by statute; secondly, that the applicant has no right over the motor vehicles. It was argued that the respondent was in the circumstances not obliged to obtain the applicant's consent to remove the motor vehicles from the applicant's premises.

[35] The respondent also filed a counter-application for an order directing that the corporate veil of the three entities be pierced; it further sought an order declaring the sale agreement concluded between the applicant and Nagra Motors (Pty) Ltd to be declared null

and *void ab initio*. The basis of the counter-application is two-fold: first, that when the Agreement for the sale of the fifty three motor vehicles was concluded, the motor vehicles had already been placed under a lien pursuant to certain tax obligations which Nagra Motors (PTY) Ltd had failed to discharge. Secondly, that the Agreement of sale was a sham and concluded solely to pervert the lien on the basis that the majority shareholder of Nagra Motors (PTY) Ltd was also the majority shareholder of the applicants as well as the president of TT Global Inc. (Japan) which is the sole supplier of stock to the applicant and previously the sole supplier of Nagra Motors (PTY) Ltd.

[36] It was further argued that when Nagra Motors (PTY) Ltd realised the enormity of its debts and tax liabilities, it was resolved that the applicant should be established solely for the purpose of evading its creditors, statutory and tax obligations; and that the Sale Agreement was concluded "*in fraudem creditorum*". It was argued that the corporate veil of the three entities should be pierced in order to determine whether they are truly separate and distinct entities as alleged by the applicant.

[37] A Supplementary Affidavit to the Opposing Affidavit was filed by Shahid Jawed, a former director of Nagra Motors (PTY) Ltd who was managing and running the business on a daily basis. He confirmed

that the company imported cars into Swaziland as its core business and undervalued them in order to pay less duty and thus maximize profit. He alleged that the department of Customs and Excise was relaxed; and that with the advent of the respondent, it became difficult to maximise profit by undervaluing the motor vehicles. He argued that as a result Nagra Motors (PTY) Ltd began to experience financial problems.

[38] He further alleged that when the respondent audited and investigated Nagra Motors, it discovered that the company had grossly undervalued the motor vehicles at its premises and others which had already been sold. Pursuant thereto the respondent issued a Detention and Seizure Notice and imposed an embargo on the consignment of vehicles on site.

[39] He also confirmed that Rashid Minhaz is a director in both Nagra Motors and the applicant with a majority shareholding in both companies as well as in T.T. Global (Japan) Inc. which was the sole supplier of the motor vehicles to both Nagra Motors as well as the applicant.

[40] He explained that the effect of the embargo was to bring to a halt the business of Nagra Motors; and, that it was resolved that Nagra

Motors would conclude an Acknowledgement of Debt of E2 002 917.35 (two million and two thousand nine hundred and seventeen emalangeni thirty five cents) in respect of the duty tax and other levies on the motor vehicles; that the debt would be paid monthly; that all motor vehicles on site would be subject to the respondent's lien until the debt was paid; that the embargo would be lifted gradually in commensurance with the amount paid; that Nagra Motors would not dispose of any motor vehicles unless it is freed from the lien by the respondent or the embargo is lifted; and, that the value of the motor vehicles on site would at all material times not be below the debt outstanding at the time.

[41] He disclosed that Rashid Minhaz assigned him on behalf of Nagra Motors to sign the Acknowledgement of Debt. He explained that Nagra Motors failed to make payment of the debt due to financial constraints, and, the Directors decided to establish the applicant in order to take over the operations of Nagra Motors and its assets. He confirmed that Nagra Motors and the applicant are one and the same company.

[42] He alleged that he had previously opposed the move to circumvent the respondent's lien; hence, he was seen as an obstacle to progress. He disclosed that he had paid about E400 000.00 (four hundred thousand emalangeni) to the respondent in an attempt to

liquidate the debt owed by Nagra Motors. Minhaz was upset and saw the repayment made as a waste of his money; and, he arranged a meeting where he was dismissed from work as a managing director of Nagra Motors. He also called for the piercing of the applicant's corporate veil in order to ascertain its promoters, shareholders and directors. He further alleged that some directors of the applicant are directors of Nagra Motors.

[43] He denied that the applicant paid the purchase price of E1 657 500.00 (one million six hundred and fifty seven thousand five hundred emalangeni) to Nagra Motors as alleged; he further denied signing the contract of sale between Nagra Motors and the applicant. He clarified that his signature on the contract was forged and that it differs markedly from his signature appearing on the Acknowledgement of Debt.

[44] He drew the court's attention that the applicant uses the same premises as Nagra Motors, the same business on the same stock. He further disclosed that Nagra Motors was never liquidated and that its creditors have no way to make thier claims.

[45] The applicant has filed a replying affidavit, but it has failed to deal with the averment of facts raised in the Opposing Affidavit and in

particular those raised by Shahid Jawed. It alleged that Shahid Jawed phoned Rashid Minhaz and denied deposing to the supplementary affidavit and further promised to depose to an affidavit distancing himself from the supplementary affidavit; however, no such affidavit was filed.

[46] In as much as the applicant denied that they are the same company with Nagra Motors, annexure "SRA1", "SRA2" and "TT14" show that when the applicant was incorporated and registered on the 18th April 2011, Rashid Minhaz was still a director of Nagra Motors, and that he only resigned on the 13th June 2011.

[47] Contrary to the submissions by the applicant that annexure "SR7", "SR8" and "SR9"are irrelevant as they do not deal with the detention notices relating to the present application, the annexures are relevant because they establish that the motor vehicles alleged to have been sold by Nagra Motors to the applicant on the 12th June 2011 were already under the respondent's lien when the sale agreement was concluded. Annexure "SRA7" was written in April 2011 and "SRA9" and "SRA10" were written in May 2011. The Detention Notices were only issued on the 18th and 19th August 2011 respectively. The relevance of the Annexures is borne by the evidence of Shahid Jawed.

[48] The allegations by the applicant that it was an innocent purchaser and unaware of the respondent's lien over the motor vehicles is not borne out by the evidence which suggest that Rashid Minhaz was a director of Nagra Motors when the applicant was formed and that he was involved in the registration, incorporation and operations of both companies. In addition his Japanese company TT Global Inc (Tokyo Trading Inc) was the sole supplier of both companies.

[49] The applicant properly conceded and acknowledged that the transfer and registration of a motor vehicle into the name of a person does not strengthen a contract of sale or confer ownership. The evidence shows that the lien was concluded long before the sale agreement was entered; hence, Nagra Motors did not have the right to sell the motor vehicles at all to the applicant. In addition Shahid Jawed has stated under oath that his signature on the Contract of Sale was forged and that he never signed the contract as a representative of Nagra Motors.

[50] It is important to note that the applicant does not deny that Shahid Jawed was a director of Nagra Motors (PTY) Ltd, managing and running the business on daily basis. Similarly, the applicant does not deny that Nagra Motors undervalued the cars to pay less duty tax in an attempt to maximize profit. The applicant does not deny that the

Notices of Detention and Seizure and the imposition of the embargo on the consignment of vehicles on site was done after the respondent had investigated and found that Nagra Motors had grossly undervalued the cars. It is further not denied that the effect of the embargo was to bring to a complete halt the business of Nagra Motors; this led to the signing of the Acknowledgement of Debt by Nagra Motors which allowed for monthly payments of the debt and the disposal of the cars with the written permission from the respondent. The applicant does not deny that Shahid Jawed signed the Acknowledgement of Debt or that it is his signature that is reflected on the document.

[51] In addition Shahid Jawed made a startling allegation in paragraph 5 of his Supplementary Affidavit that:

> **"The Sole Supplier was TT Global (Japan) run by Mr. Minhaz who was also a director in Nagra. He is the man in charge and we all report to him. He has a similar arrangement with the applicant."**

[52] I am conscious of the fact that the applicant denies what Shahid Jawed says; however, in light of the undisputed evidence that Rashid Minhaz was a director of Nagra Motors (PTY) Ltd during and after the formation of the applicant, he knew the operations of both the applicant and Nagra Motors. In addition it is not denied that he owned

the majority shares at Tokyo Trading Incorporated (TT Global Japan), and that he was also a director of Nagra Motors. Furthermore, Shahid Jawed was also a director of Nagra Motors managing and running the company on a daily basis; he knew Rashid Minhaz as well as the operations of the applicant, Nagra Motors and TT Global (Japan). The applicant does not deny that Shahid Jawed is no longer the Managing Director of Nagra Motors but merely denies that Rashid Minhaz instigated his removal from the company. However, the applicant does not explain how Shahid Jawed was removed as a director of Nagra Motors.

[53] The applicant alleged that it only bought specific motor vehicles from Nagra Motors and not the business which would have required compliance with the Companies Act for purposes of alerting Creditors and the general public. However, the applicant does not deny the following facts: first, that the Agreement includes a cession of Nagra's debtors, sale of office equipment including computers, printers, office furniture, various electronic devices and many other office equipment at the premises during the conclusion of the sale agreement; the stock as well as the premises were also taken over by the applicant. Secondly, that the respondent's lien was long in place when the sale agreement was concluded. These factors show that in reality, the applicant took over the business of Nagra Motors. In addition, as

pointed out in the preceding paragraphs, the evidence shows that the applicant was aware of the respondent's lien at the time of the takeover".

[54] The applicant has argued that the prayer relating to the "interdict" is now academic in view of the grant of the order for the maintenance of the status quo pending the finalization of the prayer relating to "the declaration"; it was further argued that the interim interdict was still operational. The applicant also argued that it seeks to protect its *prima facie* right by the grant of the interim interdict arising from the Sale Agreement and subsequent transfer and registration of the motor vehicles.

[55] It is trite law that in order to succeed in obtaining an interim (temporary) interdict an applicant must establish the following requirements; firstly, a *prima facie* right; secondly, a well-grounded apprehension of irreparable harm if the interim relief is not granted and he ultimately succeeds in establishing his right; thirdly, that the balance of convenience favours the granting of interim relief; and fourthly, that the applicant has no other satisfactory remedy. See *Herbstein & Van Winsen,* the Civil Practice of the Supreme Court of South Africa, 4th edition, Juta & Co., 1997 at pages 1065-1066; *Setlogelo v Setlogelo* 1914 AD at 227.

[56] It is also settled that the *prima facie* right which forms the subject-matter of the claim for an interdict must be a legal right based on substantive law and legally enforceable. The right in the case of a final interdict and the prima facie right in the case of an interim interdict are the most important of the requirements for an interdict in the absence of which the remedy cannot be granted. The court only deals with the other requirements once "the clear right" and/or "*prima facie* right" respectively is established. In the absence of "the right" established, the inquiry into the requirement as to injury cannot arise. An interim interdict cannot be granted if a *prima facie* right is not established. See *Herbstein and Van Winsen (supra) at 1068 – 1070, Setlogelo v. Setlogelo* (supra) at 227.

[57] As stated in the preceding paragraphs, the Sale Agreement was concluded in the face of respondent's lien; hence, it cannot grant a *prima facie* right upon the applicant enforceable at law.

[58] It is not legally correct that the applicant has no alternative remedy. It is trite law that where a party acts in breach of contract, the innocent party is entitled to cancel the contract and claim damages in *lieu* thereof; he may elect to maintain the contract and sue for specific performance. See the Supreme Court decision in the case of

Swaziland Polypack (PTY) Ltd v. The Swaziland Government and Swaziland Investment Promotion Authority Appeal case No. 44/2011 at para 40.

[59] The requirement of a balance of convenience is only relevant where the court is satisfied that the applicant has a *prima facie* right to the claim; where such right is not established, the court has no discretion to grant an interim interdict even though the balance of convenience favours the applicant. I have already intimated that the applicant has not established a *prima facie* right; hence, the existence or otherwise of a balance of convenience is irrelevant.

[60] I appreciate the fact that the court granted the interim interdict on the 17th January 2012; however, the record shows that on the 10th February 2012, the rule was extended to the 2nd March 2012, but, it was never extended beyond that date. This means that the Rule lapsed on the 2nd March 2012; hence, I reject the argument by the applicant that the interim interdict is still operational.

[61] The applicant further argued that the issue of urgency was now academic since it pertained to the interim interdict and has since been rendered nugatory. The applicant has failed to discharge the peremptory provisions of Rule 6 (25) (b) which requires that in urgent

applications, the applicant shall set forth explicitly, in the founding affidavit, the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course. The basis of urgency in terms of paragraphs 40 and 41 of the founding affidavit is that the respondent is removing the motor vehicles from its premises to the State Warehouse where the storage would be visited with charges. It is common cause between the parties that the applicant was advised of the detention and embargo on the 18th and 19th August 2011 in terms of Annexures "TT5" and "TT6". Again on the 25th August 2011 the respondent advised the applicant in writing that the fifty three motor vehicles were still under embargo and lien since 18th May 2011; and, that according to sections 108 and 104, goods placed under an embargo and lien could not be removed without the permission of the respondent. Notwithstanding knowledge of the imminent seizure of the motor vehicles, the applicant did not lodge the application timeously. The applicant only brought the urgent application on the 17th January 2012 pursuant to the removal of the motor vehicles on the 16th January 2012.

[62] The respondent in its Counter-Application seeks an order that the corporate veil be pierced in respect of the applicant, Nagra Motors (PTY) Ltd and Tokyo Trading Inc. in order to ascertain if the promoters,

directors and shareholders of these companies are not the same people. The applicant does not oppose the first prayer relating to the piercing of the corporate veil. I have dealt with this point in the preceding paragraphs and highlighted that the evidence shows that the applicant was formed by Nagra Motors and Tokyo Trading Incorporated after it became apparent that Nagra Motors was sinking into financial crisis and unable to pay its taxes to the respondent. The applicant was formed in order to evade the obligations of Nagra Motors (PTY) Ltd to its creditors and was actually dealing in *fraudem creditorum*.

[63] It is trite law that a company upon its formation acquires legal personality and it exists apart from its members. As a separate entity, it acquires the capacity to have its own rights and duties. The assets and profits of the company belong to it and not its members. The members are merely entitled to dividends declared by the company as well as a division of the company assets upon liquidation. The mere fact that a member holds all the shares in a company or the majority thereof enabling the member to control the company does not make the company the agent of the member; and no member is legally entitled to act or represent the company except those people appointed as representatives in accordance with the Articles of Association can bind the company. See “Corporate Law” by *Cilliers*

and Benade, 3rd edition, published by *Butterworths in Durban in 2000* at pages 5-10; *S v. De Jager 1965 (2) SA 616 (A)* at *625; Salomon v. Salomon & Co. Ltd (1897) AC 22*.

[64] *Lord Halsbury* in the leading case of *Salomon v. Salomon & Co. Ltd* (supra) at 30 states the following:

> **"Once the Company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and … the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."**

[65] *Lord Macnaghten* in the Salomon case (supra) at 51 states the following:

> **"The company is at law a different person altogether from the subscribers to the Memorandum; and, though it may be that after incorporation the business is precisely the same at it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers."**

[66] *Innes CJ* in *Dadoo Ltd and Others v. Krugersdrop Municipal Council 1920 AD 530* at 550-1 stated the following.

“A registered company is a legal persona distinct from the members who compose it. In the words of *Lord McNaghten* (*Salomon v. Salomon & Co. 1897 AC* at 51), ‘the company is at law a different person altogether from the subscribers to its memorandum; and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them’. That result follows from the separate legal existence with which such corporations are by Statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This conception of the existence of a company as a separate entity distinct from its shareholders is not merely an artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members.”

[67] However, the courts have a discretion to pierce the corporate veil in certain instances despite the separate corporate personality of a company. *Corbett CJ* in the case of *Shipping Corporation of India Ltd v. Evdomon Corporation 1994 (1) SA 550* (A) at 556 states the following:

“It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify ‘piercing’ or ‘lifting’ the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a government. I do not find it necessary to consider, or attempt to define the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conducts of its affairs.”

[68] *Smalberger JA* in the case of *Cape Pacific Ltd v. Lubner Controlling Investments (PTY) Ltd 1995 (4) SA 790* (A) at 802F – 803.

“It is trite law that (a) registered company is a legal persona distinct from the members who compose it’ ….Equally trite is the fact that a court would be justified in certain circumstances in disregarding a company’s separate personality in order to fix liability elsewhere for what are ostensibly acts of the company. This is generally referred to as lifting or piercing the corporate veil…. The focus then shifts from the company to the natural person behind it (or in control of its activities as if there was no dichotomy between such person and the

company…. In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality…

There already it appears to have been recognised that proof of fraud or dishonesty might justify the separate corporate personality of a company being disregarded …. And over the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil."

[69] The court in the Cape Pacific Ltd case (supra) quoted with approval the decision of the Supreme Court of South Africa in the case of *Shipping Corporation of India Ltd v. Evdomon Corporation* (supra) at page 803 H *His Lordship Justice Smalberger JA* stated the following:

"It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct … is found to be present other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil…. And a court would then be entitled to

look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its merits."

[70] In light of the evidence adduced, this is a proper case in which the corporate veil should be pierced. The evidence shows that there has been a misuse of the corporate personality of the applicant. It is apparent from the evidence that the applicant was formed in order to enable Nagra Motors (PTY) Ltd to evade paying taxes to the respondent. The Agreement between the applicant and Nagra Motors was a sham intended to facilitate a transfer of ownership of the motor vehicles to the applicant and thereby enable Nagra Motors to evade its tax obligations to the respondent. The person behind the formation of the applicant is Rashid Minhaz, who happens to hold majority shares in the applicant, Nagra Motors (PTY) Ltd as well as Tokyo Trading Inc. in Japan. Incidentally the applicant does not oppose the counter-application relating to the piercing of the corporate veil. It is evident that the applicant is dealing "in *fraudem creditorum*", and, that certain promoters, directors and shareholders of the applicant are those of Nagra Motors (PTY) Ltd as well as Tokyo Trading Incorporated.

[71] Similarly, the applicant is approaching this court with unclean hands by dealing in *fraudem creditorum*. As stated in the preceding paragraphs, the applicant was formed solely to circumvent and defeat the respondent's lien over the motor vehicles; there is no dispute that the respondent's lien existed before the conclusion of the Agreement between the applicant and Nagra Motors (PTY) Ltd. In addition the formation of the applicant was aimed at frustrating creditors of Nagra Motors and in particular the respondent. Similarly, the agreement contravenes section 24 of the Customs and Excise Act which provides the following:

"24. (1) Except with prior permission of the Commissioner –

(a) the owner of any dutiable goods in a Customs and Excise Warehouse may not enter into any agreement whereby –

(i) his ownership is transferred to any other person;

(ii) such goods are pledged or otherwise hypothecated in favour of any other person;

(b) any person in whose favour goods referred to in paragraph (a) have been pledged or hypothecated may

not enter into any agreement whereby any rights obtained by him by virtue of such pledge or hypothecation are ceded to any other person.

2. **Any agreement entered into contrary to subsection (1) shall for the purposes of this Act be deemed to be null and void."**

[72] *Nathan CJ* in the case of *Photo Agencies (PTY) Ltd v. The Commissioner of Police and the Government of Swaziland* 1970-1976 SLR 398 (HC) at 407D quoted with approval the case of *Mulligan v. Mulligan 1924 WLD 164* at 167-168:

> **"Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands, where he himself, through his own conduct makes it impossible for the processes of the Court… to be given effect to, he cannot ask the court to set its machinery into motion to protect his civil rights and interest… were the court to entertain a suit at the instance of such a litigant it would be stultifying its own process and would, moreover, be conniving and condoning the conduct of a person, who through his flight from justice, set law and order in defiance."**

[73] The applicant also seeks the grant of a *mandament van spolie* in the prayer relating to the restitution of possession of motor vehicles

removed by the respondent. The essence of this remedy is to restore possession to an aggrieved applicant who has been deprived of possession unlawfully; and, the purpose of this remedy is to preserve public order by restraining persons from taking the law into their own hands and submit the matter to the jurisdiction of the Courts. In order to obtain a *mandament van spolie*, the applicant must prove two essentials: first, that he was in peaceful and undisturbed possession of the thing; and, secondly, that he was unlawfully deprived of such possession. See "*the Law of Things*" by *CG Van der Merwe, Butterworth's Publishers, 1987* at paragraphs 75and 78; *Silberberg and Schoeman* "*The Law of Property*, 3rd edition, *Butterworths*, 1992 at page 130.

[74] Four defences are available to the respondent; firstly, that the applicant was in peaceful and undisturbed possession at the time of dispossession; secondly, that the dispossession was not unlawful and did not constitute spoliation; thirdly, that restoration of possession is impossible; and fourthly, that the respondent acted within the limits of counter-spoliation in regaining possession of the article. See **paragraph 79 of "The Law of Things" (supra); Silberberg and Schoeman (supra) at page 136.**

[75] There is no spoliation committed where a person is lawfully deprived of his possession; and, the respondent can justify his dispossession of the applicant by showing that he was authorised by a Court Order or by Statute to dispossess the applicant. See paragraph 78 of "The Law of Things" (supra). In the present case the applicant was dispossessed of the motor vehicles in terms of section 108 of the Customs and Excise Act No. 21 of 1971 which has been quoted in full in paragraph 26 of this judgment.

[76] In the case of *Dlamini Malungisa v. Msibi Timothy* 1987-1995 (2) SLR 121 at 122 *Dunn J* said the following:

> **"In order to succeed in a *mandament van spolie* an applicant must show that he was in quiet and undisturbed possession of the property sought to be returned and that he was unlawfully deprived of such possession. There can be no spoliation if the removal of the property was lawful."**

[77] In the case of *Makhubu v. Maziya* 1982-1986 (1) SLR 99 at 100 *Nathan CJ* said the following:

"…an application for a spoliation order can only be defeated if the respondent has bona fide parted with the property."

[78] The applicant further seeks a declaratory order that it is a *bona fide* purchaser of the motor vehicles which are subject to these proceedings. In light of the conclusion to which I have arrived that the Agreement between the applicant and Nagra Motors (PTY) Ltd is a sham concluded for the sole purpose of evading the creditors of Nagra Motors (PTY) Ltd, this prayer cannot succeed. The alleged contract of sale was concluded in *fraudem creditorum* in order to undermine and pervert the respondent's lien over the motor vehicles. As stated in the preceding paragraphs, the applicant was aware of the lien and concluded the Agreement in order to circumvent it. The evidence clearly shows that the applicant was established by Nagra Motors (PTY) Ltd and that Rashid Minhaz who has majority shares in both the applicant and Nagra motors (PTY) Ltd was the brainchild behind the formation of the applicant; in addition he holds majority shares in Tokyo Trading Incorporated which is the company supplying motor vehicles to both the applicant and Nagra Motors. The Agreement concluded by Nagra Motors (PTY) Ltd and the applicant is tainted with fraud as it was entered into in *fraudem creditorum*; hence, it is null and *void ab initio*.

[79] In addition the contract in null and void by virtue of section 24 of the Customs and Excise Act as alluded to in the preceding paragraphs. In the circumstances, the applicant does not have a legally enforceable right. See the cases of *P.E. Bosman Transport WK Com v. Piet Bosman Transport* 1980 (4) SA 801 (t) at 804 B-E; *Milani and Another v. South African Medical and Dental Council and Another* 1990 (1) SA 899 at 902 G.

[80] Section 24 of the Customs and Excise Act makes it clear that Nagra Motors (PTY) Ltd could not legally transfer ownership of the motor vehicles to the applicant in view of the respondent's Lien, and that such transfer of ownership is null and *void ab initio.* Nagra Motors could not legally pass transfer in the motor vehicles to the applicant without the consent of the respondent.

[81] In the circumstances, the following orders are made:

(a) The application is dismissed with costs on the ordinary scale.

(b) The interim order issued herein is discharged.

(c) The Counter- Application is accordingly granted.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT

For Applicant	Attorney M. Mabila
For Respondent	Attorney N. Mabuza