

SUPREME COURT OF SWAZILAND

Appeal Case

No.53/09

In the matter between:

QHAWE MAMBA **1ST**
APPELLANT

ULTIMATE PRODUCTIONS (PTY) LTD **2nd**
APPELLANT

JOUZ MEDIA (PTY) LTD **3RD**
APPELLANT

AND

THE CENTRAL BANK OF SWAZILAND **1ST**
RESPONDENT

FIRST NATIONAL BANK OF SWAZILAND **2nd**
RESPONDENT

NEDBANK SWAZILAND LIMITED **3RD**
RESPONDENT

STANDARD BANK SWAZILAND LTD **4TH**
RESPONDENT

CORAM: FOXCROFT JA

EBRAHIM JA

FARLAM JA

FOR THE APPELLANT MR. P.M. SHILUBANE

FOR THE RESPONDENT MS. J.M. VAN DER WALT

JUDGMENT

Review application – points in limine of misjoinder and lack of locus standi upheld in Court a quo and reconsidered on appeal – piercing of corporate veil – pyramid scheme – whether findings on piercing were obiter – court of appeal should not remit in such circumstances – appeal dismissed.

FOXCROFT JA:

[1] The background to this appeal is set out in the judgment of this Court delivered by Magid AJA in May, 2009. That appeal to this Court was struck off the roll, it being held that the ruling of Maphalala J in the Court *a quo* converting an application into a Rule 53 review was not appealable. The review proceeded and two points *in limine* raised by the respondents were upheld, with costs. The unsuccessful applicants appealed to this Court in an attempt to set aside the seizure and freezing of their bank accounts and assets by the first respondent.

[2] In the judgment of the Court *a quo*, Maphalala J dealt with the merits of the matter after upholding the respondents' points *in limine* but stressed that his judgment "should be regarded as *obiter dictum*" on the merits. What led to this lengthy litigation was a letter to the first appellant on the 26th November, 2008 informing him that bank accounts of all three applicants had been seized by the first respondent pursuant to the provisions of the Financial

Institutions Act, 2005. Unlawful deposit-taking was said to be the reason for the seizure, and the first respondent alleged in his answering affidavit that the first applicant had created a pyramid scheme which had unlawfully taken substantial deposits from the public. In his second judgment in the matter Maphalala J found that -

“the affidavits further demonstrate conclusively that over R12 million was obtained from unsuspecting members of the public by the first applicant in the furtherance of his pyramid scheme”.

[3] On appeal before this Court, Mr. Mabuza, for the appellants, submitted that the Court *a quo* had erred in upholding the first point *in limine* (misjoinder) in stating that the application was “bad in law for unlawful misjoinder” and that “on this ground as well, the application stands to be dismissed”. Mr. Joubert, for the respondents conceded, correctly in our view, the validity of this submission. Misjoinder, being a dilatory plea, should not have resulted, even in part, in the dismissal of the application. See: *Tabha v. Moodley 1957(1) SA (N) 659* at 660 C-D.

[4] In dealing with the second point *in limine* of lack of *locus standi* on the part of the “fourth applicant”, Mr. Mabuza then referred to the well-known rule in *Salomon v. Salomon & Company (1897) AC 22 (HL)*, which established the legal principle of the separate legal personality of a company from its members. The piercing of this “corporate veil” may only occur in certain exceptional circumstances when the Court -

“either ignores the company and treats its members as if they were the owners of its assets and were conducting its business in their personal capacities, or attributes rights or obligations of the members to the company”. See the title

Companies by the late Professor Blackman in *Lawsa*, First Reissue Vol.4 (1) para 41.

and where the members of the company have not only complete (or near complete) ownership and control of the company, but also such control that the company has “no separate mind, will or existence of its own”. *Lawsa, op.cit para 43*.

[5] While these are necessary but not sufficient conditions for “piercing” the veil, it has become accepted that the court will only do so where the facts indicate that the separate existence of the company is in some sense being abused in order to perpetrate fraud or where the company is being treated as the “alter ego” or instrumentality of the controlling shareholders to promote their private, extra-corporate interests. *Lawsa, op. cit para 44*

[6] Mr. Mabuza contended that the *obiter* conclusion of the Court *a quo* that the first appellant had taken millions from innocent citizens of Swaziland and had siphoned money from his ‘alter egos’ to fund his luxurious lifestyle (*Judgment, paragraphs 23, 33, 40, 43*) had no basis in law.

He referred to the *Sixth Edition of Gower: Principles of Modern Company Law (1997)* at page 148 as authority for certain propositions which he advanced and then referred to section 102 of the Companies Act No.7 of 1912, which is not relevant for present purposes, and section 186(1) of the same Act.

[7] The latter section deals with the power of the Court, in the course of a winding-up, on the application of the Master, liquidator, creditor or contributory to examine the conduct of the promoter, director, manager, liquidator or officer of the company before ordering repayment or restoration of misappropriated money or property. The section has no bearing upon the doctrine of the

piercing of the corporate veil, and can have no relevance to a dispute such as the one before this Court.

[8] Another category listed by Mr. Mabuza where the veil may be pierced was of premature trading.

The reference to premature trading appears to be misplaced. In the *Seventh Edition of Gower and Davies' Principles of Modern Company Law*, one finds the topic dealt with in Chapter 9 (which is headed *Statutory Exceptions to Limited Liability*) at page 194. Section 117(8) of the English Companies Act provides that a public limited company, newly incorporated, may not –

“do business or exercise any borrowing powers”

until it obtains from the Registrar of Companies, a certificate that it has complied with certain provisions of the Act.

While the unincorporated Channel S Proposed Savings & Credit Co-operative Society Limited (“Channel S”) did collect large sums of money from the public, there was never any question of piercing its veil, since it did not have one. The other categories listed by Mr. Mabuza which he submitted permitted piercing of the veil, namely abuse of company names, misdescription of the company, and company groups also appear in Chapter 9 of Gower, *op. cit.* and are statutory exceptions to limited liability.

[9] Chapter 8 in the work cited is where the piercing of the corporate veil is dealt with. Under the rubric “Façade or sham at page 185 the writer refers to the leading English case of *Adams v. Cape Industries Plc* [1990] Ch 433; [1991] 1 All ER 926 (Ch and CA) as authority for the statement that the exception is generally expressed as permitting disregard of the company when the corporate structure is a “mere façade concealing the true facts”.

The court also declined to “attempt a comprehensive definition of the principles which should guide a court in determining the presence of “*a mere façade*”. (at 543D)

[10] One finds similar sentiments in *Cape Pacific Ltd v. Lubner Controlling Investments (Pty) Ltd*, 1995 (4) SA 790 (AD) at 802 H where Smalberger JA said the following:

“The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts which, once determined, may be of decisive importance”.

At page 803 of the judgment, there is reference to what Corbett, CJ said a year before in *The Shipping Corporation of India v. Evdomon Corporation & Another* 1994(1) SA 550 (A) at 566 C-F:-

“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 conduct of its affairs”.

[11] The first appellant’s conduct in this matter is dealt with in the supplementary answering affidavit of M.P. Dlamini, Secretary to the Board of the first respondent. He sets out in detail how the first appellant had –

“embarked upon a course of conduct which has led to unsuspecting members of the public investing millions of Emalangi into what has now transpired to be a massive and illegal pyramid scheme. Investigations so far have disclosed that as much as E10,000.00 was paid into the various Bank

Accounts opened by him as also the accounts of the 2nd and 3rd applicants”.

He added that copies of relevant Bank Statements had been obtained which revealed the indiscriminate transfer of funds from the accounts of the various entities to each other. No attempt was made to separate the funds of depositors from the funds of the first three appellants in their bank accounts. Details of transfers of depositors' funds from one of the accounts controlled by the first appellant to another are set out in this affidavit. In all, the appellants have seven bank accounts with Nedbank.

[12] The reply to these allegations was that the first appellant simply denied that he was conducting an illegal pyramid schemes, and that as much as E10 million was paid into the “bank accounts opened by me”. All that he says about the movement of cash between these accounts is that the first respondent “has been highly selective in the documentation of bank accounts that they have obtained alternatively that it has not been open with the Court in that it has not disclosed documentation received from the Bank which is in its possession”.

[13] This last allegation is not correct since it appears from paragraph 30.9 of the answering affidavit of Mr. Dlamini in the review application that the first respondent had analysed the accounts and prepared a brief analysis of these accounts and appendix.

This analysis of accounts was attached to the Supporting Affidavit of Wellington Motsa and marked “MPD 11A”. It did not form part of the appeal record but Mr. Mabuza informed us that he had delivered the files containing the affidavit and accounts to the High Court. In any event, the allegation by the first appellant that the Bank had not disclosed relevant accounts is without any foundation. Mr. Joubert

displayed in Court the thick ringbinder file containing the accounts which should have formed part of the appeal record, adding that the earlier affidavit of Wellington Motsa (“MPD 8”) was a summary of “MPD 11A”). There was no response on this aspect of the matter from Mr. Mabuza.

[14] It soon became apparent that Mr. Mabuza considered that this appeal concerned only the upholding of the points *in limine* in the Court *a quo*. He went so far as to say that he was not briefed to deal with the merits of the matter and submitted that the matter should be remitted to the High Court so that the merits could be considered there. He added that in so far as Maphalala J had reached certain conclusions on the issue of piercing of the veil *obiter*, this Court should have no regard thereto.

[15] Mr. Joubert countered this submission by contending that Maphalala J had in fact held on the facts before him that the corporate veil should be pierced.

[16] In paragraph [22] of the judgment (Record, 422) Maphalala J stated that –

“In view of the fact that I have ruled in favour of the Respondents on the points in limine I ought to dismiss the application but in view of the very important question brought about by this application on the worldwide phenomenon of pyramid schemes I am duty bound to also consider the merits of the case. I must stress though that my judgment in this regard should be regarded as obiter dictum as I have already dismissed the application on the points in limine raised by the Respondents”.

It is clear from this passage that the learned Judge *a quo* did consider the merits of the case before him.

[17] If the views of this Court were to accord with that of the Court *a quo*, it would be absurd to adopt the position that this Court may not reach the same conclusion as the Court *a quo* because the learned Judge *a quo* had in effect shut the door to such an approach by recording that his remarks on the merits were *obiter*. Section 33(3) of the Court of Appeal Act enjoins this Court to “make any order which ought to have been made and may make such further or other order as the case may require”. *A fortiori* should that be the position where the learned Judge *a quo* states, as he did, that he would have decided the matter on the merits in favour of the respondents. A remittal and further appeal to this Court would result in the same conclusion being reached.

[18] The extent of the first appellant’s control of the second and third applicants is conveniently set out in paragraph 28 of the Answering Affidavit of Mr. M.P. Dlamini in the review. There is no replying affidavit.

[19] Mr. Mabuza also submitted that the Court *a quo* had erred in deciding the point *in limine* as to the *locus standi* of what was described as the ‘fourth applicant’ in that Court since second, third and fourth applicants had not been afforded a hearing before the seizure of the bank accounts. As for the ‘fourth applicant’, it could not be given a hearing since it had no *locus standi* and in fact never came into existence as it was never registered in terms of the Co-operative Societies Act 5 of 2003. In any event, it only purported to become a party to these proceedings after the review application was authorized by the Court, long after the seizure. As pointed out by Mr. Dlamini at paragraph 6.3 of his answering affidavit.

“The learned Judge appears to have lost sight of the fact that it was common cause on the papers that the so-called
“Proposed Savings and Credit Co-operative Society”

*had not, and at no stage has, applied for registration as co-operative in terms of Section 8 of the **Co-operative Societies Act, (Act 5 of 2003)** and has at no stage enjoyed provisional registration as set out in **Section 13 of the Act** in question”.*

This is not gainsaid since there is no replying affidavit. Nor did Mr. Mabuza question the correctness of this statement before us.

[20] In regard to the position of the second and third appellants, and as the learned Judge *a quo* pointed out, this is palpably untrue since the first appellant, on his own version, had discussions with first appellant’s representatives, received correspondence from the first respondent and responded unsatisfactorily to the Bank’s queries before action was taken against him. Having regard to the controlling position which he held in second and third respondents, it would have been ridiculous for separate discussions to have been held with him in his personal capacity, and in his various representative capacities. As Mr. Joubert rightly put it, the second and third respondents “were there” in the person of the first appellant when the various discussions and communications with the Bank took place.

[21] There is, in my view, no merit in any of the submissions of Mr. Mabuza save for the point *in limine* of misjoinder. In the result, the appeal is dismissed with costs, it being recorded that Mr. Joubert appeared in the capacity of Senior Counsel, and that the taxing master should have regard thereto.

J.G. FOXCROFT

JUSTICE OF APPEAL

I AGREE _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I AGREE _____

I.G. FARLAM

JUSTICE OF APPEAL

DELIVERED IN OPEN COURT OF THIS MAY 2010