IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal Case No.21/2016

In the matter between:

ENLIGHTEN (PTY) LTD. Appellant

And

HIL-SEQ DISTRIBUTORS (PTY) LTD.

t/a SWAZI MED CENTRE 1st Respondent

JM WHOLESALERS AND SONS (PTY) LTD 2nd Respondent

JAMES MCREESH 3rd Respondent

REGISTRAR OF DEEDS 4th Respondent

SHERIFF OF SWAZILAND 5th Respondent

ATTORNEY GENERAL 6th Respondent

Neutral citation: *Enlighten (Pty) Ltd. vs. HIL-SEQ Distributors (Pty) Ltd. (21/ 2016) [2016]SZSC 53 (30 June 2016)*

CORAM: **S.P. DLAMINI, JA**

R. CLOETE, AJA

Z. MAGAGULA, AJA

Head: 24th May 2016

Delivered: 30th June 2016

Summary: *Company law – piercing of the corporate veil – lack of Resolution to sign a Deed of Sale – acquiesce to judgment – Sale agreement declared null and void – Appeal dismissed with costs at a normal scale.*

JUDGMENT

S. P. DLAMINI, JA

[1] This is an appeal against the judgment of the High Court dated 10th February 2016. In the proceedings before the court *a quo*, First Respondent filed a notice of motion on an urgent basis which was set down for hearing on Friday 10th July 2015.

[2] The relief sought by First Respondent in the notice of motion is found in pages 3 to 5 of the record of appeal wherein it is stated;

"1. Dispensing with the rules relating to usual forms and procedure relating to the institution of proceedings and service and allowing this matter to be heard as one of urgency.

2. That the Applicant is condoned for non-compliance with the aforesaid rules of the above Honourable Court.

3. That a Rule Nisi do issue calling upon the Respondents to show cause on a date to be set by the Honourable Court why;

3.1 The 3rd Respondent should not be ordered and directed to transfer to the Applicant 49% of the issued shares in the 2nd Respondent Company.

3.2 The 2nd Respondent and 3rd Respondent should not be ordered and directed to hand over to the Applicant the written resignation of its current Directors.

3.3 The 2nd and 3rd Respondents should not be ordered and directed to reconstitute the board of directors of the 2nd Respondent so as to include the Applicant.

3.4 The 2nd and 3rd Respondents should not be ordered and directed to sign and execute all such documents necessary to enable the transfer into Applicant 49% of the issued shares in the 2nd Respondent, failing which that the Registrar and / or Sheriff of this Honourable Court (6th Respondent) be hereby ordered and directed to sign and execute all the documents necessary to effect transfer of 49% of the issued shares in the 2nd Respondent into Applicant.

3.5 The sale agreement entered into by and between the 1st and 2nd Respondents should not be declared null and void *ab initio* and therefore set aside.

4. That the 1st , 2nd ,3rd, and 4th Respondents be and are hereby restrained and interdicted forthwith from proceeding with the sale of immovable property as described hereinafter below in 4.1 and 4.2, pending finalization of this application;

DESCRIPTION OF PROPERTY

4.1 **Property No.1**

Certain: Lot No. 526, Matsapha Town Manzini Region

Measuring: 1500(one five zero zero) square metres.

4.2 **Property no.2**

Certain: Lot No 526, Matsapha Town, Manzini Region

Measuring: 2000 (two zero zero zero) square metres.

ALTERNATIVELY, and in the event that all relevant documents have been lodged with the 5th Respondent:-

5**. The 5th Respondent be and is hereby restrained and interdicted forth with from effecting transfer of the aforesaid immovable properties**

described in 4.1 and 4.2 here-in above pending finalisation of this application.

6. The 2nd and 3rd Respondents should not pay the costs of this application.

7. Further and / or alternative relief.''

[3] First Respondent relied on the founding affidavit of **Charles Bamidele** who describes himself as the managing Director of First Respondent.

[4] Appellant opposed the notice of motion. When the matter came for hearing before the court *a quo* on 10th July 2015, only the Appellant, 1st, 4th and 5th Respondents were represented. The court *a quo* after hearing the parties that were represented issued a rule nisi on the terms set out in the notice of motion that was returnable on the 7th August 2015.

[5] Thereafter, appellant proceeded to file its answering affidavit together with a confirmatory Affidavit. Anis Dagger deposed to the answering affidavit and describes himself as a director of Appellant. The confirmatory affidavit was deposed to by **Mabandla Jacob Manzini**, an Attorney trading as **M.J. Manzini Attorneys** and Fourth Respondent in the Court *a quo* proceedings. The 1st Respondent then filed a replying affidavit.

[6] When the pleadings were closed which included the delivery of heads of argument by the parties, the court *a quo* heard the matter on the 7th August

2015. The court *a quo* confirmed the rule nisi that the court had issued on 10th July 2015 with an amendment together with the reason for the judgment namely that Third Respondent was ordered to transfer to First Respondent 49% of the shares held by him in the Second Respondent. Appellant then lodged the present appeal.

[7] The Court *a quo* summarized the issues for consideration before it as follows;

a. Piercing or lifting of the corporate veil the Court *a quo* concluded that;

> "……. as a matter of Law, the Court is at liberty in its own interpretation of the evidence and state of affairs, to look behind the corporate veil and have cognizance of the real facts……";

b. The determination of membership and subscribers to the Memorandum of Association as provided for in Section 97 of Companies Act of 2009, and

c. Locus Standi. The Court *a quo* held that locus standi is not to be restricted to members only but should be extended to persons with direct and substantial interest in the subject matter of litigation.

[8] The Court *a quo* confirmed the *Rule nisi* with costs, inter- alia, on the following grounds;

a. That the circumstances of the case warranted that it unmasked the real parties to the transaction by invoking the doctrine of piercing

the corporate veil. The court came to the conclusion that the Second Respondent was nothing but a trade name and conduit or trading style by Seamus (Seamus is Third Respondent herein). The Court *a quo* concluded further at paragraph 10 of the judgment;

> **"All the transactions were done by Seamus. He held 99 of the shares. The remaining 1 share was ostensibly held by his wife Thora. When Thora died in 2008, Seamus** remained effectively and truly the sole shareholder and **Director of the Second Respondent. The Second Respondent was just his alter ego.''**

b. That Third Respondent having sold 49% of his interest in Second Respondent to First Respondent, he did not have the mandate to sell the properties to the Appellant. Therefore, the purported sale of the properties was deemed void *ab initio* and of no force and effect at law;

c. That the First Respondent had the necessary locus standi to challenge the purported sale between Appellant and Third Respondent even though it was not registered as a shareholder in Second Respondent; and

d. That it is inconsequential that Appellant is a bona fide purchaser in the whole transaction.

[9] The background of the matter is sufficiently set out in paragraphs 4 and 5 of the judgment of the Court *a quo* at pages 217 to 219 of the record of appeal;

a. Essentially, the dispute arises out of the sale agreement of shares in Second Respondent by Third Respondent who, together with his late wife, was a shareholder in the Second Respondent. On 25th May 2011 First Respondent and Third Respondent entered into a deed of sale in terms of which the latter sold 49% of his shares in Third Respondent to First Respondent for the sum of E700,000.00;

b. The purchase price was paid in terms of the deed of sale and certain steps including transfer of the purchased shares, registration of First Respondent as a Director in Second Respondent and the removal of the directors nominated by the Third Respondent were to take place upon the payment of the purchase price;

c. The First Respondent complied with its obligations under the Deed of Sale. However, the Third Respondent did not comply with his obligations especially those set out in article 3.8 of the deed of sale and summarized above; and

d. The second transaction was concluded between the Appellant and the Third Respondent on 7 May 2015 whereby the deed of sale of the

immovable properties held by the Second Respondent were sold to the Appellant. The Purchase price was E1, 750,000.00.

[10] At the hearing of the matter before this court, the Learned Counsel for the Appellant conceded the following:

a. That apart from the issue of the piercing of the corporate veil at the hearing by the court *a quo*, Appellant has no other basis to approach this court;

b. That the Second and Third Respondents, by not appearing in court and/or filing papers, had acquiesced to the judgment of the court *a quo*; and

c. That the purported Deed of Sale between J.M. Wholesalers and Sons (Pty) Ltd and Enlighten (Pty) Ltd was not valid owing to the fact that when it was executed on 7th May 2015 there was no resolution empowering anyone to sign it for and on behalf of the First Respondent (the Deed of Sale is **ANNEXURE "CB4"** and it is found at page 66 of the record). The Resolution marked **ANNEXURE "AD2"** was only signed on 26th May 2015 and no steps were taken to validate the anomaly. This is more so because the Power of Attorney **(ANNEXURE "AD1")** was also only signed on 26 May 2015.

[11] Appellant was the only party that opposed the application before the Court *a quo*. Its basis for opposition was as summarized in the judgment of the Court *a quo* a page 8 as follows,

"(a) **That the Applicant is not a share-holder of or in the Second Respondent and therefore has no legal standing to impugn or challenge an act done or committed by and between the First and Second Respondents; and**

(b) the sale of shares agreement was between the Applicant and Seamus and not the Second Respondent and therefore the Applicant can only have recourse against Seamus and not the Second Respondent.''

[12] Firstly, Appellant contended that the court *a quo* by piercing or lifting the corporate veil misdirected itself. Furthermore, the Appellant contended that at the hearing in the court *a quo*, the case turned on issues that were not properly adjudicated upon. These points are made in paragraphs 16 and 17 of the Appellant's Heads of Argument at page 7 wherein it is stated;

1. ***"16. As a result, neither of the parties was afforded an opportunity by His Lordship to address him on whether, in the first place, piercing or lifting the corporate veil was justified under the circumstances, and, secondly, what the effect thereof would be on the case submitted for***

determination by the court. Thus, the Appellant's case turns around issues which should have ordinarily been raised and addressed in the court a quo, had they been pleaded and/or had His Lordship invited the parties to address in their oral submissions.

4 17. That the issue of piercing or lifting of the corporate veil became a central theme and/ or the basis of his judgment is evidenced by the following excerpts from the judgment."

[13] Secondly, it is contended by Appellant that the Court *a quo* failed to apply correctly the principles in relation to joint ownership. This point is made in, inter alia, paragraphs 25 and 26 at pages 9 to 10 of the appellant's Heads of Argument and it is stated:

"25. The Appellant submits, with due respect, that His Lordship, having pierced or lifted the corporate veil as he did, failed to apply the correct principles of joint ownership when he concluded that the sale agreement was null and void ab initio on the basis that "Seamus had no mandate to dispose of the properties without the mandate of the Applicant".

26. As a starting point the judgment clearly fails to distinguish between "bound or tied co-ownership" and "free co-ownership". The former type exists between common owners as a result of an underlying legal

relationship between co-owners, which forms the basis for their common ownership of the thing or things and which implies that the common owners cannot terminate the common ownership while the legal relationship in still in existence. While the other type means that the only legal relationship which exists between the parties, is the co-ownership between the parties." of the thing or things. No other underlying legal relationship exists between the parties.'

[14] This court agrees with the judgment of the Court *a quo* but without reliance on the application of the doctrine of piercing the corporate veil. Aside the issue of piercing the corporate veil, this court is satisfied that the Court a *quo* did not misdirect itself in confirming the *rule nisi* and the reasons it relied upon for doing so. Therefore, the issue of the piercing of the corporate veil is of no relevance to the judgment of this court for the fallowing reasons;

a. As a matter of law, First Respondent ought have been consulted on the purported transaction between Appellant and Third Respondent and he was not consulted, despite being a de facto owner of 49% of the shares in Second Respondent ;
b. Second and Third Respondents did not oppose the application in the Court *a quo* nor have they filed any papers in this appeal hence they are deemed to have acquiesced to the order;

c. The purported deed of sale is invalid because, inter alia, there was no authority empowering the Third Respondent or anyone to sign it when it was being executed. In addition, any purported rights which the Appellant may have had in the matter, arise out of such invalid agreement and in the absence of such rights, coupled with the acquiescence of the Second and Third Respondents to the order of the Court a quo, had no right at law to approach this Court for any relief.

[15] It is not in dispute that the immovable properties that Third Respondent purported to sell to Appellant constitute a major portion of the assets of the Second Respondent and their sale would affect the value of the shares and that when this transaction was undertaken First Respondent was not consulted and he did not give his consent to it. As matter of fact he objected to it by way of the proceedings before the Court *a quo.*

[16] Regarding the contention that Appellant is a bona fide innocent purchaser, this Court concurs with the conclusion of the Court *a quo* that whether Appellant is a bona fide innocent purchaser or not does not take the matter any further. In any event, Appellant is not facing situation of any irreparable harm compared to the First Respondent. Appellant has available to it alternative remedies such as action against the Third Respondent for any loss incurred as a result of the purported transaction and/or to recover the sum of E1,7500,000.00 held in trust by M.J Manzini and Associates being the purchase price in connection with the

transaction in question. Therefore, the balance of convenience is not in Appellant's favour and the law is firmly on the side of First Respondent in this matter.

[17] In view of the aforegoing, the appeal is hereby dismissed.

ORDER

In the premise, the court orders that;

a. The appeal is dismissed with costs; and

b. The order of the Court *a quo* is hereby confirmed.

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S.P. DLAMINI

JUSTICE OF APPEAL

I agree

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R. CLOETE

ACTING JUSTICE OF APPEAL

I agree

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Z. MAGAGULA

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: **Mr M. Ntshangase**

FOR THE 1st RESPONDENT: **Mr. N. Ginindza**