REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA 05/11

In the matter between:

NATIONAL UNION OF MENTALWORKERS	
OF SOUTH AFRICA	**Appellant**
and	
LEE ELECTRONICS (PTY) LTD	**First Respondent**
SOUTH SOUND (PTY) LTD	**Second Respondent**
CHEN HSUNG LEE	**Third Respondent**
Heard:	**14 September 2012**
Delivered:	**08 November 2012**

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal, with the leave of the court *a quo,* against the decision that the second and third respondents were not jointly and severally liable together with the first respondent for relief afforded to the individual

appellants, pursuant to the determination that the dismissal of second to eighty first appellants (the individual appellants) by first respondent was both procedurally and substantively unfair. Second and third respondents cross-appealed, with the leave of the court *a quo,* that, in dismissing appellants claim, the court ought to have directed that the appellants pay their costs.

Common cause facts

[2] First and second respondents were registered as corporate entities during 1984 and 1989 respectively. They commenced operations in Dimbaza which, at the time, fell within the so called Republic of Ciskei. The third respondent was the sole shareholder of both first and second respondents. It appears that first respondent was a manufacturer and distributor of radios, while second respondent manufactured and distributed television sets. These operations were conducted out of premises in Canal Road Dimbaza and it appears that first and second respondent operated out of premises on opposite sides of that road.

[3] During 1998, first appellant sought to recruit employees who had been employed by first respondent, which campaign had been strenuously resisted by first respondent. It does not appear to be in dispute that first respondent was openly hostile to this recruitment drive on the part of first appellant.

[4] The evidence suggests that first respondent reduced the employees' toilet facilities and ceased rendering any medical assistance to employees who became ill. During the 1998 Christmas recess, first respondent decreed that there would be a 2 – 3 month shutdown which coincided with the commencement of first appellant's recruitment drive.

[5] On 10 March 1999 a manager of first respondent who was known to the appellants as Mr Soul switched off the lights of first respondent's factory. During the next week negotiations took place between shop stewards representing the individual employees and Mr Soul, together with Mr Chang,

who appeared to represent first respondent. It is clear from the evidence that the first respondent had resolved to close the factory and on 19 March 1999 Mr Chang approached the various individual employees, handed over to them their salaries for the week that they had worked together with leave money. As a result, the dispute was conciliated on 15 September 1999 under the auspices of CCMA but remained unresolved because first respondent did not attend.

[6] According to appellant's statement of case, which averment does not appear to have been placed in dispute, certain individual applicants were reemployed, including Mr Andile Victor Jackson, whose role in this dispute will become apparent shortly.

[7] Appellants' case was to the effect that these individual applicants including Mr Jackson were selectively reemployed by first and/or second respondent and that first respondent continued to operate 'in a clandestine manner including operating at night and, at times trading as South Sound with inter alia the employees it had reemployed.' Given the alleged confusion as to which of the first or second respondent continued to conduct the business that previously had been conducted by first respondent prior to the dismissal of the individual appellants, the appellants averred in their amended statement of case:

> 'By virtue of his controlling interest in the first and second respondents, the third respondent was, at all material times hereto an employer as defined in the LRA of the individual applicants in the circumstances pleaded below'.

Appellants' case

[8] Apart from the common cause facts, the critical evidence insofar as appellant's case was concerned was given by Mr Jackson. Mr van de Riet, who appeared on behalf of the appellants, emphasised the following passage of Jackson's evidence.

'MR SMUTS: I put it to you that after the electricity was cut off at the Lee Electronics premises there was no manufacturing of radios by Lee Electronics. --- That is not correct because the time when everything …….. up until today I am still with them.

I put it to you further that when you were then in due course employed by South Sound you participated in the commencement of a repair, radio repair operation at South Sound. ---That is not true.

And that you continued in that operation working for South Sound until the premises where you were working were closed down by the South African Bureau of Standards. ---That is correct sir.

But you then moved with other to the so-called Von Leer factory premises which are owned by South Sound. --- Yes, that is correct.

And on those premises South Sounds imports and cuts carpets. ---

Yes, that is correct.

And that there they just continued to repair radios? --- Yes there are repairs that are being done there.

But there too there has been no manufacturing of radios. --- They were manufactured and then the manufacturing stopped during April to May…

And when he asked whether you are employed at the moment you said I am still employed at Lee Electronics. ---Yes that is correct.

And is that your case, that the business originally conducted by Lee Electronics is still conducted by Lee Electronics. ---Yes, that's correct because I was never told of any changes and my boss is still the same.'

[9] Mr van der Riet therefore submitted, on the basis of this evidence that Mr Jackson, under cross-examination, had accepted that, at various points, he had worked for both first and second respondents and that this concession

reinforced the key submission of appellant that third respondent as the controlling shareholder of first and second respondents had used these entities interchangeably in order to subvert the organisational rights which otherwise would have been enjoyed by the individual appellants.

[10] Furthermore, relying on the one witness which was called by the respondents namely the accountant for first and second respondents, Mr Le Roux, appellants contended that third respondent, either through the vehicle of first or second respondent, continued to produce radios for distribution and sale for between five or six years after it had represented to the South African Revenue Service that the radio production had ceased in its entirety. Furthermore, neither first nor second respondent maintained proper employment records and the financial statements of both entities were so severely qualified that very little of significance could be read into them. In short, the submission was made by appellants that third respondent chose to employ either the first or second respondent when it so suited his particular interests. For this reason therefore Mr van der Riet submitted that, absent any further evidence provided by respondents, appellants had shown that at all material times it was third respondent, through his manipulation of two close corporations, which he controlled, who was the employer of the individual appellants. It was not disputed on appeal that first respondent had dismissed the individual appellants in both procedurally and substantively unfair manner. Thus appellants contended that the second and third respondents should have been held jointly and severally liable.

Evaluation

[11] The argument developed by appellants raises the question of the conditions for piercing of the corporate veil, in that their essential argument, on the evidence so provided to the court, is that third respondent was the ‘real employer’ of the individual appellants. The two corporate respondents thus had been used by the third respondent to subvert the rights of the individual

appellants. As the court noted in *Amlin (SA) (Pty) Ltd v Van Kooij,*[1] piercing the corporate veil necessitates:

> 'That a court… 'opens the curtains' of the corporate entity in order to see for itself what obtained inside. This only becomes necessary and obligatory in circumstances where justice will not otherwise be done to the litigants.'

The issue of piercing the corporate veil now finds application in terms of section 20(9) of the Companies Act 71 of 2008 and if, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).'

In this case however, no application in terms of this provision was brought by appellants. It appears as if their argument was based upon common law principles.

[12] In *Cape Specific Ltd v Lubner Controlling Investments (Pty) Ltd,*[2] the Supreme Court of Appeal appeared to suggest that our law does not have a fixed set of categories in order to justify the piercing of corporate veil. Smalberger JA said:

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[1] 2008 (2) SA 558 (C) at para 12.
[2] 1995 (4) SA 790 (A) at 802.

> '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, maybe of decisive importance. And in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality, one must bear in mind 'the fundamental doctrine that the law regard a substance rather than the form of things – a doctrine common, one would think to every systems of jurisprudence and conveniently expressed in the maxim plus valet quod agitur quam quod simulate concipitur' (Dadoo Ltd and Others v Krugersdorp Municipal Council (supra at 547)).'

[13] More recently, in *Hülse-Reuter v Jodde*,[3] the Supreme Court of Appeal adopted a narrower approach to when the corporate veil may be pierced. The court held that it had no general discretion to disregard the existence of a separate corporate identity simply whenever it considered it just or convenient to do so. The circumstances in which a court might pierce the corporate veil depended on a careful analysis of the particular dispute read together with considerations of policy. However,

> 'As a matter of principle… there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.'[4]

[14] This caution is of particular relevance to the present case. Much of appellants' case turned on the averment that third respondent attempted to subvert the legitimate labour rights of the appellants, read together with allegations that third respondent had played 'fast and loose' with the Revenue authorities. On its own, these arguments are not sufficient to pierce the corporate veil of the two corporate respondents. What is required is a careful examination of the evidence which was placed before the court by the first appellant. In this connection that means the evidence of Mr Jackson, its sole witness.

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[3] 2001 (4) SA 1336 SCA.
[4] *Hulse-Reuter v Jodde* at para 20.

[15] As Mr Smuts, who appeared on behalf of the respondents, noted, it had been put to Mr Jackson in cross-examination that his employment with first respondent had been terminated after the electricity to first respondent's premises had been disconnected. Not only was this averment accepted by Mr Jackson, but he estimated that the event had taken place in 2006/2007. He further conceded that he had then claimed and received unemployment insurance benefits.

[16] Mr Jackson was confronted with the difficulty that he had so received unemployment insurance benefits but denied that his employment with first respondent had ever been terminated. He explained that, although he was never dismissed 'because my name was on the list I thought that I should make an application (for UIF)'.

[17] Accordingly, whatever the evidence of Mr Jackson, which was not the model of clarity, it certainly revealed clearly that, as at 11 October 2004, it cannot be that when the amended statement of case was lodged with the court *a quo*, Jackson was not employed by first respondent. There is no evidence to suggest that at that time there had either been a transfer of the business from first respondent to second respondent or that Jackson had been employed by any other entity other than first respondent to whom he paid the UIF contributions, as a result of which he had received payment from the UIF.

[18] On the basis of this evidence and in the absence of any further evidence made available to the court as to how employees operated interchangeably between the corporate entities, there is no justification for invoking the principle of piercing the corporate veil which, as noted, must be used sparingly. In the light of clear evidence, as at 11 October 2004, it cannot be found that there was an abuse of a distinction between the corporate entity and the person who controlled that entity, namely third respondent which resulted in an unfair advantage being afforded to third respondent.

[19] For these reasons, I consider that the court *a quo* correctly held that the appellant's claim must fail against the second and third respondents.

[20] Mr Smuts submitted, in the light of second and third respondent's successful defence against them, there were no grounds for failing to award them costs. Accordingly, the court *a quo* had erred in declining to so award costs. While it is correct that the court *a quo* did not give reasons for its decision not to award costs, as Mr Wade, (who had prepared the heads of argument on behalf of the appellants) noted, the respondents had conducted themselves in an unfortunate fashion in that they had consulted Mr Jackson without conferring with the appellants' attorneys and therefore had appeared to place pressure on Mr Jackson not to give adverse testimony. Accordingly, there are grounds for the conclusion that this was a case in which justice dictated that no adverse costs order should be made against individual appellants who had unquestionably been subjected to an unfair dismissal, albeit not by second and third respondents.

[21] For these reasons therefore, the appeal is dismissed as is the cross-appeal. The decision of the court *a quo* is confirmed. Appellants are ordered to pay the costs of this appeal.

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DAVIS JA

I agree,

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NDLOVU JA

I agree.

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MUSI AJA

APPEARANCES:

FOR THE APPELLANT:	Hans Van der Riet
	Instructed by Gray Moodley attorneys
FOR THE SECOND AND	
THIRD RESPONDENTS:	I J Smuts SC
	Instructed by Hutton Cook attorneys