REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No. 2145/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE:

SIGNATURE:

In the Matter between:

CORVINE INVESTMENTS CC **Plaintiff**

and

ADVTECH (PTY) LTD t/a PROPERTY DIVISION **Defendant**

JUDGMENT

Todd AJ

Introduction

1. The Plaintiff is a construction company. It issued summons for amounts it claims are outstanding under two construction contracts entered into during 2013. The contracts were concluded by the Plaintiff with representatives of the Advtech group

of companies. They involved the construction of school buildings at two different locations, one on the North Coast of KwaZulu Natal and the other in Bedfordview, Gauteng.

2. In respect of each claim the Defendant has raised special pleas of mis-joinder and non-joinder.

3. The essential contention of the Defendant in the special pleas is that each of the construction contracts under which the Plaintiff makes its claims was entered into between the Plaintiff and a legal entity other than the Defendant. Specifically, it contends that the contracts were entered into between the Plaintiff and a wholly owned subsidiary of the Defendant, the Independent Institute of Education (Pty) Ltd. This entity is generally referred to in the pleadings as "The IIE", and I will refer to it in the same way.

4. The parties agreed that the special pleas should be dealt with separately and upfront.

Citation of the Defendant

5. The Defendant is cited as "Advtech (Pty) Limited t/a Property Division". The company registration number and other details provided in the particulars of claim are, however, those of Advtech Limited, a public company listed on the Johannesburg Stock Exchange.

6. Mr van Niekerk, who appeared for the Defendant, submitted at the hearing that in addition to the issues raised explicitly in the special pleas the fact that no entity as cited in fact exists provides a separate ground on which the court should dismiss the Plaintiff's claims. He submitted that the general denial of the Defendant's citation in the plea was sufficiently wide to raise this issue for decision up front.

7. There is indeed a clear error in the citation of the Defendant. Put simply, the Defendant is a public company, and it is incorrectly cited as a (Pty) Ltd. I do not, however, agree that this point was raised in the pleadings, and it seems to me to be a point that could and should have been raised explicitly, to put the Plaintiff on

notice that there is an error in the citation. It is an error of a kind that has been described as a "mere misnomer" and one that could properly have been corrected by a simple amendment that would result in no change in the identity of the party who is the target of the claims, but only a change in the description of a party that has in fact been brought before court.[1]

8. Since Advtech Limited is the legal entity that has delivered pleadings, including the special pleas, and is the entity that was represented by Mr Van Niekerk in the hearing, I am satisfied that despite its incorrect citation the special pleas should be dealt with on the basis that they have been raised by Advtech Limited as Defendant. In this judgment when I refer to the Defendant I refer to Advtech Limited.

The material facts

9. The Defendant called three witnesses and the parties introduced extensive documentary evidence of relevance to the determination of the special pleas.

10. There was, however, little evidence that established precisely how the Advtech group and the various entities that comprised the Advtech group operated in practice during 2013, at the time the contracts were concluded. The Defendant's first witness, Mr Darren Stevens is currently employed as an internal legal adviser for The IIE, and he also holds broader responsibilities as a legal advisor within the Advtech group. He has, however, been employed within the Advtech group for just under five years, and so was not so employed when the relevant contracts were entered into during 2013.

11. According to Mr Stevens the business of the Defendant, as the listed "parent company" in the group, is solely to trade and operate on the JSE. All of the group's underlying operations are conducted by subsidiaries. Specifically, the group's education business, which operates private education facilities at primary, secondary and tertiary level under a range of different brands, is conducted by The

[1] See *O'Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) at 254 H-J.

IIE. The group's resourcing business, on the other hand, is conducted by the Defendant's subsidiary Advtech Resourcing (Pty) Ltd.

12. Mr Stevens confirmed that there is no entity within the group known as Advtech (Pty) Ltd.

13. Employees within the group generally make use an Advtech email address: @advtech.co.za. This is because, according to Mr Stevens, everyone in the group operates "under the Advtech banner". This is consistent with the email correspondence to which each witness referred, sent both before and after conclusion of the relevant contracts. Emails sent by representatives of the Advtech group generally bore the name of the sender, a description of their role, and appeared above a large banner denoting the Advtech group. They did not identify the specific entity within the group by which the sender was employed, or on whose behalf the correspondence was being addressed.

14. The other two witnesses called by the Defendant, Mr Werner Swart and Mr Bernard Roccon, were both project managers on one or other of the relevant projects at the time. Their evidence comprised for the most part traversing the various documents that provide the background circumstances in which the two construction contracts were entered into and how they were implemented.

15. Both construction contracts were entered into during July 2013. The Plaintiff was represented in relation to their conclusion by Mr GT Botha. The counterparty to the contracts, referred to in the contracts themselves as "the Employer", was represented by Mr Roccon. He was the project manager initially responsible for managing both contracts on behalf of the Advtech group, and he ultimately signed the contracts on behalf of the contracting counterparty.

16. In email correspondence exchanged with Mr Botha in the run up to the conclusion of both contracts, Mr Roccon's name appeared, without a job title or designation, under a large banner of the Advtech group, and bearing the group's physical address at Advtech House.

17. In an email to Mr Botha dated 2 May 2013 Mr Roccon referred, in relation to the Bedfordview contract, to the fact that the school was being built on land owned by the Italian club, which might as a result have some say in who would be appointed to do the building work. But, he continued, at the end of the day Advtech would be paying, and that "Johan" would have the last say. This referred to Johan Coetzee, the "director" or "CEO" of the Property Division.

18. In an email dated 28 May 2013 dealing with a bill of quantities and architects' drawings, Mr Roccon communicated to various contractors that the contract for the works and the for the project would be circulated by the end of the following week. He continued:

> "*I am sure there will be questions on the contract and Advtech with the professional team will be available on site for any questions and queries…*"

19. On 7 June 2013, interested contractors for the Bedfordview project were sent a copy of what was referred to as the "Advtech Construction Agreement". Again, the project was identified as being one for the Advtech group and a pro forma version of the contract that was eventually concluded, without reference to the identity of the "Employer", was sent to the interested contractors, including the Plaintiff.

20. On 11 June 2013 Mr Roccon sent an email to Mr Botha, coping Mr Coetzee, in which he acknowledged that the pro forma contract was one "*wat net Advtech bevoordeel*". He explained reasons for this in short being that they had previously had a bad experience with the using the standard "JBCC contract".

21. On 25 June 2013 a purchase order was issued to the Plaintiff for the North Coast project. The purchase order was clearly issued by the Independent Institute for Education (Pty) Ltd t/a Property Division. Its name and registration details appear on the purchase order under a large Advtech Group banner, and identify it as a subsidiary of Advtech Limited, the Defendant.

22. On the same date Ms Lindsay Swart addressed an email to Mr Botha, copying Mr Roccon and others, communicating acceptance of the Plaintiff's quotation in

relation to the North Coast project. The e-mail identified Ms Swart as the "Group Projects and Facilities Administrator, Property Division", her designation appearing above the usual Advtech Group banner. The e-mail communicated the "*order number*" for the contract, together with the contract value and similar formal details.

23. Ms Swart continued as follows:

> "*Kindly ensure that the following details are reflected on the invoice:*
>
> *IIE (Pty) Ltd t/a Property Division*
>
> *Vat Number: …*
>
> *[Address]*"

24. For any queries that it might have, Ms Swart directed the Plaintiff to Mr Roccon.

25. On the 26th of June Mr Roccon sent an email relating to the North Coast project to the architects and other professionals responsible for the project, requesting that the latest drawings be issued, communicating that the site had been handed to Mr Botha (as a representative of the Plaintiff) and reminding them that "*any change must be approved by Advtech!*". This email was copied to Mr Botha, Mr Coetzee and various others involved in the project.

26. On the same date, Mr Roccon communicated to the various contractors that had submitted bids for the Bedfordview project that the Plaintiff had been awarded that contract.

27. On 26 July 2013, after having been prompted by Mr Roccon to formally sign the contracts for the respective projects, Mr Botha addressed an email to Mr Roccon explaining that he had completed the contract in a form that had been handed to him for the Bedfordview project and that he had used this as a template to complete a similar contract document for the North Coast project; and he inserted certain comments which he described as "*notes regarding the construction agreement as provided by Advtech*".

28. On 1 August 2013 the Plaintiff's project manager for the Bedfordview project, Mr Oltman Botha, addressed a letter to Mr Roccon setting out a cost breakdown for the Bedfordview project with a detailed priced bill attached to it. The letter was formally addressed to the IIE, with the details as communicated by Ms Swart referred to earlier - specifically to The IIE (Pty) Ltd t/a Property Division, and bearing the other details referred to in the earlier email from Ms Swart. It was addressed for the attention of Mr Bernard Roccon.

29. Also on 1 August 2013 a purchase order was issued to the Plaintiff for the Bedfordview project. As in the case of the North Coast project the purchase order was issued by the Independent Institute for Education (Pty) Ltd t/a Property Division with the same identifying details

30. On 6 August 2013 Ms Swart sent an email essentially similar to the one quoted in paragraph 22 above, confirming the appointment of the Plaintiff for the Bedfordview project as well. That email similarly communicated the order number and the request that the invoices for the project should reflect details of the IIE (Pty) Ltd t/a Property Division with the VAT number and related details included.

31. The Plaintiff in due course followed the instruction regarding the billing entity, and it issued a series of invoices to The IIE in respect of progress payments on both projects. All of these invoices (with the exception of those that have given rise to the present claims), were duly paid by the IIE.

32. From further email correspondence in April 2014, it appears that the two contracts sent under cover of Mr Botha's e-mail of 26 July 2013 (referred to above) had not in fact been signed at the time and had probably not been signed by April 2014 either. In the event, however, it is clear from the documents presented at the trial that those agreements were ultimately signed by Mr Botha on the one hand and by Mr Roccon on behalf of "the Employer" counter party on the other.

33. Mr Roccon could not explain why the Advtech group's own representatives had provided details of an incorrectly described or non-existent entity as the contracting counterparty, nor why he did not himself notice this error. Whether he

should refer to The IIE or Advtech in particular situatinos was, Mr Roccon conceded, “a bit of a grey area”. But in common with Mr Swart he asserted, primarily by reference to the document trail, that the contracting entity was The IIE, and that this was the entity that should have been reflected as the Employer in the contracts themselves.

34. In an email dated 25 April 2014 Mr Swart referred to completion lists and various other matters concerning the “snag list” for one of the projects. Mr Swart’s e-mail identified his title as “Project Manager” under the banner of the Advtech Group, as usual bearing the address shared by all of the entities in the group.

35. During 2018, various exchanges took place between the Plaintiff’s erstwhile attorneys and representatives of the Advtech group concerning the question of the Plaintiff’s claim for amounts allegedly outstanding in respect of both projects. (The correspondence makes reference to a third project on which the Plaintiff had been engaged on behalf of the Advtech group as well, but that is not relevant for present purposes.) These exchanges did not succeed in resolving the issue.

36. The Advtech group initiated a process to appoint quality surveyors to determine whether any amounts were outstanding in respect of the projects. By September 2018 the Plaintiff, having apparently lost patience with that process before it had been finalized, issued letters of demand through its attorneys. The letters of demand were addressed to Advtech (Pty) Limited, the counterparty identified in the contracts.

37. This resulted in a response from the Defendant’s attorneys of record dated 9 October 2018. In their response the Defendant’s attorneys advised that they acted on behalf of both Advtech Limited and the Independent Institute of Education (Pty) Ltd. They further advised that while they were not aware whether an entity known as Advtech (Pty) Ltd existed, they assumed that the letters was intended to be addressed to Advtech Limited and to the IIE. They recorded that there was a dispute regarding whether any amounts were outstanding in relation to the relevant contracts and that to the extent that the Plaintiff had any claim in the

matter "*that claim does not lie against Advtech Limited but against the Independent Institute of Education (Pty) Ltd*".

38. The letter further communicated that in fact no final tax invoices had yet been delivered for the projects, and that any amounts that might yet be shown to be due would not be due by Advtech Limited but by The IIE.

39. This stance was firmly repeated in a follow up email dated 10 October 2018. Specifically, the Plaintiff's attorneys of record re-iterated that the claims should have been addressed to The IIE, that Advtech (Pty) Limited does not exist, and that Advtech Limited was a listed entity.

40. Following further exchanges between the parties it appears that the envisaged quantity surveyors report was produced. Comments on the report were communicated to the Defendant's attorneys of record by the Plaintiff's then attorneys by way of an email dated 6 August 2019. Ultimately, however, the differences between the parties were not resolved through that process.

41. On 9 January 2020 the Plaintiff's current attorneys of record issued fresh letters of demand. Once again, these were addressed to Advtech (Pty) Limited.

42. In late January 2020 the present proceedings were instituted.

Evaluation

43. I deal with the question of non-joinder first. The Defendant raises special pleas of non-joinder in relation to both claims. Essentially it objects to the Plaintiff's failure to join The IIE as a Defendant in the proceedings, and asserts that The IIE was the actual and only counterparty to the contracts under which the claims arise.

44. Ms van der Walt, for the Plaintiff, made it clear that the Plaintiff makes no claim against The IIE. Consequently the Plaintiff has not sought either to join The IIE as an additional Defendant or to substitute it in place of the Defendant as a party to the proceedings.

45. The Plaintiff has, then, clearly elected not to pursue claims against The IIE. It is not obliged to institute proceedings of this kind (for payment of sums alleged to be due to it) against any particular party, and if it elects not to do so, whether or not it has a good claim against that party, this is no grounds for a plea of mis-joinder. Not having been sued, The IIE has no legal interest in the outcome of the proceedings.

46. As a result, the special pleas of non-joinder stand to be dismissed.

47. The special pleas of mis-joinder, on the other hand, raise the question whether the Defendant, as the party against whom the Plaintiff has brought its claims, is a party to or otherwise bears liability under the contracts that give rise to the claims. If the Defendant demonstrates that no claims lie against it under those contracts, the pleas of mis-joinder should succeed. This would dispose of the Plaintiff's claims as far as the Defendant is concerned.

48. Having raised the point upfront, by way of special pleas, the Defendant bears the onus at this stage of the proceedings.

49. The Defendant contends that the only counterparty to the construction contracts on which the Plaintiff's claims are founded was The IIE. It must show, if it is to succeed in the special pleas of mis-joinder, not only that it was not itself a party to those contracts, but also that it bears no liability to pay the amounts claimed by the Plaintiff under those contracts.

50. The counterparty to the contracts was not correctly identified in the contracts. Both written contracts identified the counterparty as Advtech (Pty) Ltd t/a Property Division. No such entity exists.

51. In advancing the contention that the true counterparty was in fact The IIE, Mr Van Niekerk placed reliance in particular on the purchase orders issued by the IIE to the Plaintiff in respect of each contact, the emails addressed by Ms Swart to the Plaintiff when the respective contracts were awarded which identified The IIE as the entity to which invoices should be directed, and the subsequent conduct of the

Plaintiff in issuing various invoices to The IIE during the course of the projects, which were in turn settled by the IIE. He submitted that it was clear from this evidence that The IIE was the true counterparty to the contract. There was no subterfuge, nor any misuse of corporate identity. The incorrect description of the counterparty in the written contracts could have been corrected by a simple rectification. The party that commissioned the work, that was invoiced, and that paid all amounts claimed up until the dispute arose, was The IIE. There were no grounds on which to claim that the Defendant was itself either a party to or liable under the terms of the contracts. Consequently, he submitted, the pleas of mis-joinder should succeed.

52. Ms Van der Walt, who appeared for the Plaintiff, advanced two principal submissions. The first was that on the facts the actual counterparty to the construction contracts was the Defendant and not The IIE. In elaborating on this submission Ms Van der Walt submitted that any reasonable person in the position of the Plaintiff would have been confused as to the identity of the counterparty, that consistent references to “Advtech” and the “Advtech group” in emails emanating from representatives of the Advtech group in exchanges before and after the contracts were concluded, and the description of the counterparty (the Employer in the contracts) as Advtech (Pty) Ltd, as provided or endorsed by the Advtech group’s own representatives in the process, constituted evidence that the true counterparty responsible for the contractual obligations of the Employer under the contracts was in fact the Defendant. The requirement that invoices be directed to its subsidiary, the IIE (Pty) Ltd, was a matter of convenience to the Defendant and merely formed part of its own internal administrative arrangements in discharging its obligations under the contract, and was not evidence that the Defendant was not itself liable to the Plaintiff for any default in the discharge of those obligations.

53. Ms Van der Walt’s second principle submission, advanced in the alternative, was that if the true contracting party was indeed The IIE, this was a case in which the “veil should be pierced”. In advancing this submission Ms Van der Walt referred to *Ex parte Gore & Others NNO 2013 (3) SA 382 (WCC)*. Since the Defendant was

the ultimate holding company or "controlling mind" of the group, she submitted, it should be treated as the true counterparty responsible for the contractual obligations of the Employer under the contracts, and should effectively be held liable for the obligations of its subsidiary.

54. As regards the Plaintiff's first submission, it is certainly clear that at all times in the run up to conclusion of the contracts the Plaintiff was dealing with representatives of the Advtech group without regard or reference (by either party) to the specific entity in that group with which the Plaintiff would be contracting.

55. The evidence shows that neither Mr Roccon nor Mr Swart were entirely clear at the time who the contracting party actually was, and they could not explain the reason why the party was described incorrectly (as it was) in the contracts.

56. It also appears that both Mr Roccon and Mr Swart, like Mr Stevens, perceived themselves to be working in what may reasonably be described as "group functions". They corresponded with the Plaintiff as duly authorised representatives of the Advtech "group" and in particular of its "Property Division" without identifying exactly where in the group (in what entity) the Property Division was located.

57. Those facts do not, however, provided a basis for concluding that the Defendant as the ultimate holding company in the group was in fact the contracting counterparty.

58. While the concept of a "group" of companies is clearly recognised in our law,[2] in certain respects attracting specific legal consequences, our courts have been careful to emphasise the continuing significance of the separate legal personality of a group's constituent parts. In *R v Milne & Erleigh (7)*[3] the then Chief Justice described the position as follows –

> "*The word "group" has been used with many shades of meaning. … the persons who wield the controlling power are the only legal personae apart from*

[2] A group of companies is defined in the Companies' Act, and their existence attracts various consequences: see generally Cilliers & Benade Corporate Law Butterworths at 26.03 to 26.11
[3] 1951 (1) SA 791 (AD) at 827F to 828A.

the companies themselves. There is no persona which is the group, and there are no interests involved except the interest of the companies and the interest of the controllers. This is not mere legal technicality. No doubt it may be convenient to talk of the interests of the group, but no one could seriously think of the group as having interests distinct from those of the companies and controllers. …. No business man would be deceived into thinking that in a group there is, in effect, a pooling of assets and a right in the controllers to deal with assets belonging to the companies without regard to their respective interests."

59. This remains the legal position. The exceptional circumstances under which courts have held a holding company liable for the obligations of a subsidiary, whether in the context of a group of companies or otherwise, have arisen under the doctrine of "piercing the veil" – the topic of the Plaintiff's second main submission, dealt with further below.

60. It is so that there may be circumstances, absent piercing of the veil, in which more than one entity in a group might be found to have undertaken contractual obligations, jointly, in favour of a third party. In *Board of Executors Ltd v McCafferty*[4], for example, a holding company was held to be "at least a co-employer" of an employee of a subsidiary because the holding company had ultimate, direct control over the employee's activities within the group of companies concerned. On the facts, the court concluded that whatever efforts might have been made to structure the affairs of the group so that the holding company had no employees, a contractual relationship had in fact come into existence directly between the employee and the holding company.

61. There will be circumstances in which the conduct of representatives of a group of companies is found to establish contractual relations between a third party and more than one entity in the group, or with a group entity other than the entity claimed by the group.

[4] 2000 (1) SA 848 (SCA)

62. In the present matter, however, despite the strong presence of a group identity in the course of the parties' dealings with one another, there is no evidence from which it could reasonably be concluded that the Defendant, as the ultimate holding company in the group, had bound itself as the contracting counterparty. It certainly did not help that the counterparty was misdescribed in the contract itself by the group's own representatives. But the counterparty, even as misdescribed, was not the Defendant.

63. The identity of the actual counterparty was readily ascertainable from the purchase order and the specific requests made regarding invoicing. The fact that the project managers and other representatives of the "Employer" under the contracts referred consistently to "Advtech" and used "Advtech group" emails and addresses takes the matter no further. While the Defendant is indeed the ultimate holding company in the group, The IIE is equally part of the "Advtech group", operates from the same address, and its representatives generally assert its identity as part of the group, using common email addresses and other group identifiers. But in the absence of improper conduct of some kind, which might warrant piercing the corporate veil, these considerations cannot by themselves serve to establish contractual relationships between the Plaintiff and the Defendant.

64. Ms Van der Walt submitted that the terms of the respective emails requesting that invoices should be directed to The IIE indicated that this was a contract being entered into by the holding company in respect of which part of its performance only (the issuing of invoices) was delegated to a subsidiary, in this case The IIE.

65. I do not find this submission persuasive, for a number of reasons. First, the language used in the emails, while not expressly stating that The IIE was the counter party to the contract, clearly identifies it as the entity responsible for performing crucial obligations of the "Employer" under the contract. The wording is at least as consistent with the proposition that The IIE was the counterparty to the contract as it is with the alternative advanced by Ms Van der Walt. This is particularly so when considered in conjunction with the purchase orders generated

by The IIE. The Plaintiff accepted this, and at all times during the conduct of the contract it issued invoices for payment to The IIE, and not to the Defendant.

66. The use of the same rather unusual "trading name" ("Property Division") in the erroneous description of the counterparty in the contracts and in the description of The IIE (described in the purchase order and subsequent invoices as "The IIE t/a Property Division") supports the conclusion that the true or intended contracting party was the subsidiary of the Advtech group in which the Property Division was held, rather than the listed holding company.

67. On the evidence before me The IIE was the entity in which the group's "Property Division" was located, and The IIE was, despite its incorrect description on the contracts themselves, the contracting party or "Employer" under the construction contracts under which the Plaintiff claims.

68. It follows that the Defendant has succeeded in establishing that it was not in fact a party to those contracts either by itself or as a "co-party"[5].

69. This leads to the Plaintiff's second submission, which is that in these circumstances there are grounds on which to "pierce the corporate veil", and consequently to find the Defendant liable for the contractual obligations of its subsidiary.

70. Insofar as the Plaintiff advances this alternative submission the Defendant is clearly the right legal entity for the Plaintiff to pursue, and it could be contended that the plea of mis-joinder should fail for that reason. But the issue has been raised by the Plaintiff squarely in the context of argument on the special plea, the parties have been given a full opportunity to lead evidence and to argue the point, and it seems to me that it is appropriate to deal with it at this stage.

71. In making her submissions on piercing the veil Ms van der Walt did not make it clear whether the Plaintiff relies on the common law doctrine or the provisions of section 20(9) of the Companies Act. She referred me to the decisions in *Airport*

[5] In the sense found to have been the case in *Board of Executors v McCafferty* (supra).

Cold Storage (Pty) Ltd v Ebrahim & others[6] (which involved abuse of the juristic personality of a close corporation) and *Ex parte Gore & Others NNO*[7] *(*which decided that section 20(9) of the Companies Act introduces a statutory basis for piercing the corporate veil that supplements but does not replace or substitute the common law doctrine). I will assume that the Plaintiff relies on both.

72. Our courts have consciously avoided formulating general principles with regard to when the corporate veil may be pierced.[8] Nevertheless, it is well established that a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so[9]; and that a court should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it, as 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*."[10]

73. In *Ex parte Gore,* after reviewing the authorities on piercing the veil the court concluded that clearly determinable principles were elusive[11]. The court noted an "*apparent trend during the 1960s and 1970s towards a readier willingness to ignore the separate personality of individual companies in the group context*"[12], and referred to the decision in *Ritz Hotel Ltd v Charles of the Ritz Ltd*[13] which referred in turn to decisions in the United Kingdom approving a statement in Gower (in its third edition) suggesting "*a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group*".[14] The court (in *Ex Parte Gore*) pointed out, however, that subsequent decisions of our courts[15] appear to have retreated from

[6] 2008 (2) SA 303 (WCC)
[7] *2013 (3) SA 382 (WCC)*
[8] See for example *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 (4) SA 790 (A) at 802H to 803B*
[9] *Cape Pacific Ltd supra at 802A*
[10] *Cape Pacific Ltd supra* at 803H, referring to *The Shipping Corporation of India Ltd v Evdomon Corporation 1994 (1) SA 550 (A) at 566C-F*)
[11] at para [21]
[12] at para [27]
[13] 1988 (3) SA 290 (A)
[14] *Ritz Hotel Ltd* supra at 315F-H, referring to *DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 (CA)*
[15] Referring to *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A), *Macadamia Finance*

this kind of approach, and to have followed the "more recent conservative trend" in the English courts, espousing a "judicial philosophy that the separate personality of juristic persons should be disregarded only in exceptional circumstances and as a last resort"[16].

74. Although no closed list of circumstances has been established in which it would be appropriate to pierce the veil, some form of impropriety involving the misuse of legal personality is invariably required.

> "…*the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy-based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal consideration that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other.*"[17]

75. After concluding that the principles embodied in section 20(9) are essentially similar to the common law doctrine, the court found that in the case before it the manner in which the business of a group of companies had been conducted, with scant regard for the separate legal personalities of the individual corporate entities of which it was comprised, in itself constituted a gross abuse of the corporate personality of all of the entities concerned, bringing the matter within the ambit of the unconscionable abuse of juristic personality contemplated by section 20(9).[18]

76. Turning to the present facts, I am unable to find that the use of a strong group identity, even where this may from time to time have served to obscure the distinct legal personalities that existed within the group, can or should be equated with

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Bpk v De Wet en Andere NNO 1993 (2) SA 743 (A) and *Hulse-Reutter v Godde* 2001 94) SA 1336 (SCA)

[16] at para [27]

[17] *Ex parte Gore* at para [29]

[18] at para [33]

conducting business with scant regard for the separate legal personalities of individual corporate entities involved, or that in the present case this involved an abuse of the corporate personality of the entities involved.

77. It is so that the personnel employed by the group or subsidiaries in the group did not, in their dealings with the Plaintiff, at all times distinguish between the different entities, or make these distinctions clear. Instead, it appears that the business of the group was (at the time at least) conducted as business of the group, with reference to the name Advtech or the Advtech group generally or widely used. The witnesses who gave evidence considered themselves, for the most part, to have held roles or responsibilities both for The IIE and for Advtech as a group. But this does not itself constitute abuse, and I agree with Mr van Niekerk that there is no evidence in the present matter of any form of subterfuge, nor misuse of the corporate identify to obscure, conceal or avoid obligations.

78. I have referred earlier to the unequivocal communication of the Defendant's attorneys, before proceedings were instituted, asserting that The IIE was the true contracting party and not the Defendant. It is not clear whether this response was communicated to the Plaintiff's new attorneys when the Plaintiff switched legal representatives, or whether there was some other reason why the Plaintiff chose to ignore it.

79. Once proceedings had been instituted, the same point was made in the Defendant's special pleas. No uncertainty could reasonably have persisted after that. Faced with the clear and repeated assertions of the Defendant's legal representatives (in the correspondence referred to earlier) the Plaintiff had ample opportunity to investigate the position, and either to seek to amend the citation of the Defendant by substituting it with the The IIE or to join The IIE as a Second Defendant. An application to achieve this would have been determined primarily by reference to prejudice, and it is difficult to see what prejudice either the Defendant or the IIE could successfully have raised that would have precluded such an amendment.[19] The IIE operated from the same premises as the

[19] having regard to the decisions in cases such as *O'Sullivan* (supra at footnote 1) and *Luxavia (Pty) Ltd v*

Defendant, shared legal representatives with it, and was clearly aware of the claims. At some point, if it persisted in proceeding against the current Defendant, the Plaintiff would have had to amend its description of that entity too, but for present purposes that is neither here nor there.

80. While the representatives of the group of companies which the Defendant controls contributed to creating some confusion about the identity of the contracting party, there are no grounds on which to find any misuse or abuse of corporate personality, nor any conduct that may reasonably be characterized as unconscionable.

81. In failing to institute proceedings against the entity that had issued the relevant purchase orders to it, in failing to heed the clear assertion by the Defendant's attorneys about the description of the entities and the identity of the contractual counterparty, and in failing to amend its pleadings when the special pleas were raised, the Plaintiff is the author of its own misfortune.

82. In summary, I find that there are no grounds on the evidence before me to support the Plaintiff's second contention, that veil piercing is appropriate to hold the Defendant liable for the obligations of its subsidiary.

83. The Defendant has discharged the onus of demonstrating that it was not contractually liable under either of the contracts giving rise to the claims. It follows that the Defendant's pleas of mis-joinder should succeed.

84. Since the Plaintiff elected to pursue the Defendant only, and has sought no amendment to its pleading or substitution of one party for another, the successful pleas of mis-joinder are dispositive of the matter.

Costs

85. Neither party mentioned any reason why costs should not follow the result, and I can find no reason to depart from that principle. I should state, however, that a substantial number of the pages included in the Defendant's witness bundle were

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unnecessary to the determination of the special pleas and were not referred to. No costs should be allowed arising from the inclusion of superfluous documents, including those at items DB2, DB3 and the approximately 270 pages of annexures to the email which is item DB74 of the Defendant's witness bundle.

ORDER

In the circumstances, I make the following order –

The Plaintiff's claims are dismissed, with costs.

_____

C.Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Plaintiff:	Adv. M M Van der Walt
Instructed by:	Lily Rautenbach Attorneys
For the Defendant:	Adv. Dean Van Niekerk
Instructed by:	Cliffe Dekker Hofmeyer Inc.

Judgment reserved: 19 July 2022

Judgment delivered: 17 August 2022