CASE NO : 9/93 NvH

CAPE PACIFIC LTD Appellant

and

LUBNER CONTROLLING
INVESTMENTS (PTY) LTD 1st Respondent

GERALD LUBNER
INVESTMENTS (PTY) LTD 2nd Respondent

GERALD MERVYN LUBNER 3rd Respondent

SMALBERGER, JA

CASE NO : 9/93 NvH

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

CAPE PACIFIC LTD — Appellant

and

LUBNER CONTROLLING
INVESTMENTS (PTY) LTD — 1st Respondent

GERALD LUBNER
INVESTMENTS (PTY) LTD — 2nd Respondent

GERALD MERVYN LUBNER — 3rd Respondent

CORAM: VAN HEERDEN, SMALBERGER, VIVIER,
F H GROSSKOPF, et VAN DEN HEEVER,JJA

HEARD: 15 February 1995

DELIVERED: 19 May 1995

JUDGMENT

SMALBERGER, JA

This appeal sees the culmination of protracted litigation

resulting 60m the sale in February 1979 by the first respondent to the appellant of shares and a loan account in Findon Investments (Pty) Ltd ("Findon"). The Findon shares entitle their owner to use and occupy a flat (including garages, parking areas and servants' quarters) situated in Clifton in the Western Cape ("the Clifton flat").

The contract of sale was concluded between a certain Shapiro, on behalf of the appellant, and one Swersky representing the first respondent, which at the time was known as Rosebank Parkade (Pty) Ltd. Any reference to first respondent will include, where appropriate, a reference to it by its former name.

The appellant (as plaintiff) unsuccessfully sued the respondents (as first, second and third defendants) in the Cape Provincial Division in an action in which the following relief was sought:

> "(a) An order directing the Second Defendant to deliver the said shares and cede the said loan account to the Plaintiff within a time to be fixed by the above

Honourable Court;

(2) Alternative to (a) herein, an order directing Second Defendant to deliver to First Defendant the said shares and cede the said loan account within a time to be fixed by the above Honourable Court and that the First Defendant then deliver the said shares and cede the said loan account to the Plaintiff within a time to be fixed by the above Honourable Court;

(3) An order directing that the Third Defendant procure that the Second Defendant deliver the said shares and cede the said loan account to the Plaintiff within a time to be fixed by the above Honourable Court.

(4) Alternative relief;

(5) That the costs of this action be borne by the Third Defendant on an attorney and own client basis; alternatively the Second Defendant, the Third Defendant and the First Defendant jointly and severally the one paying the others to be absolved on an attorney and own client basis."

The judgment of the court a quo (NEL, J) directing absolution from the instance is reported as Cape Pacific Ltd v Lubner Controlling

Investments (Pty) Ltd and Others 1993(2) SA 784(C) ("the judgment"). In a later judgment the appellant was ordered to pay the respondents' costs (including the costs of two counsel), but excluding the costs occasioned by the calling of the witnesses Van Zyl, Miller, Stride and Behrmann. (The respondents were in turn ordered to pay certain wasted costs but these do not feature in the present appeal.) The appellant was granted leave to appeal to this Court by the learned trial judge; the respondents were simultaneously granted leave to cross-appeal against the order depriving them of their costs in respect of the aforementioned witnesses. The history of the present matter (including the relevant background facts), the detailed pleadings filed by the parties, the evidence adduced at the trial and the impressions formed by the trial judge of the various witnesses who testified, appear from the judgment at 785G to 814F. It is unnecessary to traverse these in

detail. It will suffice to set out the salient facts as they emerge from the judgment and the relevant evidence.

It appears that the third respondent ("Lubner") was (and presumably still is) an enterprising and successful businessman who conducted his business and private affairs through a number of companies collectively known as "the Lubner group of companies" ("the Lubner group"). Various companies were also owned by four children's trusts ("the children's trusts") created by Lubner's father for the benefit of Lubner's four children. Lubner was one of the trustees of the children's trusts. The first respondent ("LCI") was at all relevant times owned by the children's trusts via a company called Wencor (Pty) Ltd and the Gerald Lubner Family Trust (Pty) Ltd. The latter owned 100% of the shareholding in LCI. Lubner was never a director or shareholder of either company. Nor was he a director of LCI, its sole director at all material times being Swersky. In 1979 Lubner owned all the

issued shares in the second respondent ("GLI"). Between then and October 1988 Lubner and Swersky were the sole directors of GLI. They were then joined as directors by a certain Kathleen Smith who was employed by Lubner. In about 1985 the Gerald Lubner Trust, a discretionary trust, acquired a small minority shareholding of 1000 ordinary shares in GLI. The judgment (at 800) contains a diagram depicting, as at 1979, the various companies in the Lubner group (in the left-hand column) and the companies owned by the children's trusts (in the right-hand column). It was conceded on behalf of the respondents that the evidence established that prior to 1979 LCI (as owner of the Findon shares) was the vehicle through which Lubner personally enjoyed the beneficial use of the Clifton flat. It was further conceded that at all material times Lubner was and had been the "moving spirit" behind LCI and GLI "in the sense that he was the prime moving force". It is also common cause that Lubner became a "non-resident" for exchange control purposes in about

1976 when he took up residence overseas.

In February 1979, through the introduction of an estate agent, one Hirschson, negotiations commenced between Shapiro and Swersky in regard to the purchase of the Findon shares. The appellant claimed that a sale eventuated on 22 February 1979; this was denied by LCI. The upshot was that action was instituted by the appellant against LCI for delivery of the Findon shares ("the original action"). Judgment in favour of the appellant was granted in the Cape Provincial Division (FRIEDMAN, J) on 4 August 1987; LCI's subsequent appeal to the Appellate Division was dismissed on 20 March 1989. In the meantime it transpired that in the second half of 1979 the Findon shares had purportedly been sold by LCI to GLI. This first came to the appellant's knowledge when Swersky, on 2 June 1980, filed an affidavit in opposition to an unsuccessful application by the appellant for the delivery by LCI of the Findon shares. In his affidavit Swersky drew the court's attention "to the

fact that on the 30th December 1979 and consonant with the re organisation of the affairs of Lubner in certain of the Companies wherein he was interested" the Findon shares were "transferred" to GLI. In paragraph 9 of its plea in the original action (dated 2 July 1982) LCI stated:

> "The shareholding in and claims on loan account against FINDON INVESTMENTS (PROPRIETARY) LIMITED, previously held by Defendant [LCI], were on or about 30th December 1979 transferred to a Company known as GERALD LUBNER INVESTMENTS (PROPRIETARY) LIMITED [GLI]."

LCI did not in its plea specifically claim that it was unable, because of impossibility of performance or otherwise, to deliver the Findon shares to the appellant. The appellant did not at any stage seek to join GLI in the original action.

LCI failed to deliver the Findon shares to the appellant pursuant to this Court's judgment on 20 March 1989. The appellant then brought an application against, inter alia, the three

respondents to have them declared in contempt of court for failing to do so. The application was dismissed. On 4 August 1989 the appellant instituted the present action seeking the relief set out earlier. The respondents pleaded, inter alia, that the Findon shares had been transferred by LCI to GLI in December 1979; that LCI had called upon GLI to deliver the shares; that GLI had declined to do so; and that LCI was accordingly unable to comply with the order against it.

On the assumption that GLI took delivery of the Findon shares from LCI with knowledge of the appellant's rights to the shares, it was open to appellant, when it came to its notice that the Findon shares had been transferred to GLI, to join GLI in the original action and claim delivery of the shares from it on the basis of the so-called "doctrine of notice" (McGregor v Jordaan and Another 1921 CPD 301 at 308; Tiger-Eve Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd 1971(1) SA

351(C) at 358F-H). The appellant did not avail itself of the opportunity to do so. It is common cause that any action it might have had against GLI on that score has since become prescribed. The consequence this may hold for the appellant will be considered later.

The only cause of action ultimately relied upon by the appellant was that pleaded in paragraph 12.2 of its amended particulars of claim - which is quoted in full in the judgment at 787D-G. What is alleged in essence is that Lubner, with knowledge of the appellant's rights, and in fraud of such rights, and with a view to procuring for himself the continued utilisation of the Clifton flat, caused the Findon shares to be transferred from LCI to GLI; that the court was accordingly entitled, with due regard to all the relevant circumstances, to disregard the separate corporate personalities of LCI and GLI in order to give effect to the judgment in the original action for delivery of the Findon shares to the

appellant (what is commonly referred to as "lifting" or "piercing" the corporate veil).

After a comprehensive review of the evidence the trial judge made the following factual findings:

(6) That Lubner, although only one of the trustees of the children's trusts, had complete control over the affairs of LCI (at 814G);

(7) That until 1985 Lubner was the sole shareholder of GLI and there was no evidence to suggest that he did not also effectively control all the affairs of GLI before or after that date (at 814 I);

(8) That the evidence established that the Findon shares had been transferred by LCI to GLI on the instructions of Lubner in an attempt to evade the appellant's "claim" thereto (at 815G).

Findings (1) and (3) were attacked on appeal by the respondents; finding (2) was not seriously challenged. Notwithstanding these findings the learned judge a quo concluded that it was not appropriate or permissible to disregard the separate corporate

personalities of LCI and GLI. He held that although the transfer of the Findon shares to GLI could be described as "clearly improper", their transfer did not amount to an "unconscionable injustice"; that the appellant "had had full opportunity to recover the shares from GLI but did not do so timeously and is thus the author of its own misfortune" (at 822 B-C). Hence the order of absolution.

I propose to consider the factual findings made by the trial judge and then to determine what legal consequences flow from the proved facts. The evidence of the various witnesses who testified is dealt with in the judgment at 799E to 814C. I shall draw on such evidence, amplified where necessary, in arriving at my conclusions.

Finding 1: That Lubner had complete control over LCI.

For reasons that will appear later, it is not in my view necessary to determine whether Lubner had complete control of

LCI. The real issue is rather whether he exercised absolute control over LCI in relation to its dealings with the Findon shares. As previously mentioned, the Findon shares guaranteed the occupation and utilization of the Clifton flat. They had previously been owned by Lubner and had been sold by him to LCI in 1976 consequent upon the restructuring of his affairs when he became non-resident. According to the evidence, the Clifton flat was regarded by Lubner as his home (or one of them). Hirschson testified that his dealings with Lubner left no question in his mind that Lubner took all the decisions in regard to the Clifton flat. He recalled an occasion when Lubner, in an emotional outburst when speaking over the telephone, claimed "it's his apartment, and nobody's going to make any decisions on his behalf". In a note dated 30 April 1979 Lubner recorded that during his absence "no one is to gain entry to my apartment". It is also not without significance that although LCI purportedly owned the Findon shares,

it was never debited with any expenditure in respect of the Clifton flat, which suggests that its ownership was one of convenience rather than substance.

As previously noted, it was established in the original action that the Findon shares were sold by LCI to the appellant in February 1979. It is common cause that although the ultimate owner of LCI was the children's trusts, the trustees did not take the decision to sell the Findon shares. Everything points to the decision to do so having been taken by Lubner. When it was put to the witness Miller (who at the time was one of the trustees of the children's trusts) that it was not incumbent upon Lubner to consult Miller(or any other trustee, for that matter) if he (Lubner) wished to sell "the flat", Miller replied: "Yes, I was just a trustee of the trust".

Swersky, the sole director of LCI, did not testily at the trial. He did so in the original action as a witness for LCI. The

appellant sought to have the evidence he gave on that occasion admitted in the present proceedings. The trial judge, in the exercise of his discretion in terms of sec 3(l)(c) of the Law of Evidence Amendment Act 45 of 1988, ruled Swersky's evidence admissible. In his reasons for doing so he stated that the probative value of Swersky's evidence was obviously great; that if uncontroverted it would prove that Lubner had full and complete control of the affairs of LCI relating to the Clifton flat "because he controlled Swersky"; that the appellant could not have been expected to call Swersky; and that the only possible prejudice to the respondents was that they might have to call controverting evidence, if such evidence existed. The trial judge's ruling was challenged on appeal, but having regard to all the relevant circumstances, I am satisfied that he exercised his discretion properly.

It is apparent from Swersky's evidence in the original action

that at all material times Lubner personally controlled the destiny of LCI. Asked whether he (as sole director of LCI and other related companies) deferred to Lubner's wishes, Swersky replied "Invariably. I wouldn't do anything without his approval". Lubner was therefore in effective control of Swersky and, through him, the Findon shares. Swersky's evidence makes it perfectly clear that he would never have contemplated selling the Findon shares other than on Lubner's instructions.

Lubner, despite being available to do so, failed to testify at the trial. From this it may be inferred that he was unable to contradict Swersky's evidence, or to refute that of Hirschson and Miller. The evidence, coupled with Lubner's failure to testify, goes way beyond the concession that Lubner was the moving spirit behind LCI. It establishes on the requisite balance of probabilities that notwithstanding LCI's corporate identify, Lubner at all material times personally exercised control over the Findon shares (and

hence the Clifton flat) as effectively and completely as if they belonged to him personally. In relation to its dealings with the Findon shares LCI was more than just Lubner's puppet; it was essentially none other than Lubner personally, albeit in a different guise.

Finding 2: That Lubner effectively controlled the affairs of GLI at the relevant time.

In 1979 when the sale of the Findon shares to the appellant, and the subsequent transfer of those shares from LCI to GLI took place, Lubner was the sole shareholder of GLI. He and Swersky were the directors of GLI. Given Swersky's evidence it is apparent that he would have deferred to Lubner in relation to all matters pertaining to the Findon shares. It is in fact common cause that Lubner had complete voting control at that time over GLI. Neither the later acquisition by Gerald Lubner Trust of a minority

shareholding in GLI, nor the appearance of Kathleen Smith as a director of GLI, would have altered the position. It was Lubner's idea to transfer the Findon shares from LCI to GLI. This was not done to further GLI's corporate interests, but to ensure Lubner's continued personal occupation of the Clifton flat. Henceforth Lubner as LCI would no longer enjoy the benefit of the flat; but Lubner as GLI would continue to do so. It was a transfer, as the witness Stride (on a proper reading of his evidence) fairly conceded, from Lubner's left to his right hand. When the situation is exposed for what it really is, the inevitable truth that emerges is that not only did Lubner control the affairs of GLI, but in relation to its acquisition of the Findon shares GLI was Lubner in one of his guises.

Finding 3: That the Findon shares had been transferred by LCI to GLI on Lubner's instructions to evade the appellant's "claim" thereto.

This finding is justified on the evidence, but in my view it would be more appropriate to speak of the evasion of the appellant's "rights" to the Findon shares rather than merely its "claim". The evidence not only establishes that Lubner knew of the appellant's claim, but that he appreciated that it was a valid one, and that the transfer of the Findon shares to GLI was a device or stratagem resorted to by him in a deliberate attempt to thwart the appellant's rights to delivery of the shares. His conduct in the circumstances, if not fraudulent, was at the very least gravely improper.

From the evidence, and certain contemporaneous documentation in particular, it appears that Lubner, who was overseas at the time, was kept fully abreast of the negotiations between Swersky and Shapiro in relation to the sale of the Clifton flat (via the sale of the Findon shares). In a telex from Lubner to Swersky on 19 February 1979 (i.e. three days before the actual sale as found proved in the original action) Lubner states, inter alia,

"I am concerned that you will lose the deal with Shapiro. Anxious to conclude on the basis discussed". In a later telex on 21 February 1979 Lubner exhorts Swersky with the words "This purchase and contract has as its basis an affair of the heart and his enthusiasm will inevitably wane with delay and messing him about". (The references to "his" and "him" are clearly to Shapiro.) On 12 March 1979 Lubner sent a telex to one Bensimon which included the following directive: "Please have Swersky report to me on the Clifton sale". (My emphasis.)

It is apparent from Hirschson's evidence (which was accepted by the trial judge) that Lubner was aware by April 1979 that Shapiro claimed to have concluded an agreement with Swersky (on behalf of LCI) for the sale of the Clifton flat and was intent on enforcing the agreement. Hirschson testified that he had two meetings with Lubner during April at which the sale of the flat was discussed. According to Hirschson, Lubner's attitude at these

meetings was that he wished to renegotiate the terms of the sale. On 30 April 1979 Lubner wrote a letter to Hirschson which is set out in full in the judgment at 805C-E. It refers, in the opening paragraph, to "the trustees' decision not to proceed, at present, with the sale of the Clifton apartment, through no fault of ours". (This was a blatant untruth, for it is clear from the evidence that at no time did the trustees take any decisions, one way or the other, in regard to such sale.) The letter proceeds to reflect an intention "to give effect to the sale of the apartment" after the happening of certain events. In the absence of any explanation by Lubner (which was never forthcoming) the terms of the letter are consistent only with an appreciation or belief that a sale had been concluded, and that an attempt was being made (at any rate for the time being) to avoid its consequences.

During July 1979, and at Lubner's request, Hirschson spent a few days with Lubner at St Tropez. Hirschson's evidence

concerning what transpired between them then and subsequently is

correctly summarised in the judgment at 805G-J as follows:

> "Lubner told him that he was still busy re-arranging his affairs and that he was under a lot of pressure from his family who were very upset about the sale of the flat. Lubner also asked him to apply pressure on Shapiro to buy another flat, in which event Lubner would pay Hirschson $50 000. He declined the offer. Later during the year when litigation became imminent, Lubner asked him to hand over the file and all documentation regarding the sale of the flat to him. When it was pointed out to Lubner that the file had already been handed over to attorneys, Lubner indicated that he would see Hirschson right financially if Hirschson would become a hostile witness; that, according to Lubner, would be a person who was unco-operative with both sides, with the result that neither side would call him as a witness. This Hirschson also refused to do."

Lubner's unsuccessful attempts, in effect, to bribe Hirschson, are indicative of his concerned state of mind regarding the existence of a valid sale of the Clifton flat (through the medium of the Findon shares).

The gist of the respondents' case concerning the transfer of

the Findon shares from LCI to GLI was that it had been considered advisable as part of the restructuring of Lubner's South African interests as a consequence of his becoming a non-resident, as well as being prompted by a concern about a potential tax liability (see the judgment at 802G-J). This was first put forward by the witness Miller in an affidavit Sled by him in the contempt proceedings. It also formed the basis of the summary of his evidence in terms of Rule 36(9)(g) as well as his later evidence at the trial (see the judgment at 799F-J; 802A-G). In addition to Miller the witnesses Van Zyl, Stride and Behrmann gave evidence in this regard; one Lumb testified for the appellant. The latter's evidence is set out at 803A to 804H of the judgment; that of the other witnesses I have mentioned at 806C to 812J. No useful purpose would be served in repeating or analysing their evidence in this judgment.

The trial judge came to the conclusion that the reasons put forward by the respondent for the transfer of the shares were

"obviously false" (at 815B). His reasons for so concluding are encapsulated in the following passage in his judgment (at 815B-G):

> "The restructuring process had started in 1976 and it was then decided that the shares in Findon would continue to be held by Rosebank Parkade [LCI] (RSC 20). One of the stated intentions of the restructuring was to regularise the loan accounts between the two sides of the Lubner group of companies in order to comply with the borrowing restrictions laid down in terms of the applicable foreign exchange regulations and the main object was to eliminate loans between them (RSC 20 and 28).
>
> The effect of the sale and transfer of the shares was, however, to increase and not decrease such borrowing and thus ran counter to this intention. It is also clear from the contents of certain of the documents that the transfer of the shares had nothing to do with the restructuring of the companies and that it had come about as a result of a directive from Lubner. According to the minutes of the meeting held by Lubner's advisers on 3 April 1979 (RSC 25), they were of the view that the flat should be sold. However, on 24 April 1979 Flett advised Behrmann that the flat had to be sold to GLI because Lubner was not prepared to allow it to pass out of the family control for the amount of R140 000 (RSC 1, p18). The further suggestion that the transfer of the Findon shares

> had partly been motivated by a concern about an additional tax assessment is not supported by any documentary evidence. Such a suggestion also conflicts with the transfer of assets to Rosebank Parkade and Gerald Lubner Holdings and the retention of other, more valuable assets. An additional factor to be taken into account is Lubner's failure to testify. He was present in Court during most of the trial and in the circumstances the inference must be drawn that had he given evidence he would not have been able to support the versions contended for on behalf of himself and the first and second defendants."

If proper regard is had to the evidence as a whole (including the documentary evidence) and the credibility and other findings of the trial judge in respect of the witnesses who testified (at 814C-F), his reasoning and logic in arriving at the conclusion he did cannot, in my view, be faulted. Despite the criticism voiced against his factual findings on appeal, there is no acceptable basis for interfering with them. Having regard to such evidence and findings, and the failure of Lubner to testify, the following has in my view been established:

(9) Lubner accepted that there had been a valid sale of the Findon shares from LCI to the appellant;

(10) He unsuccessfully attempted to avoid the consequences of such sale, inter alia, by bribing Hirschson;

(11) He was instrumental in having the Findon shares transferred from LCI to GLI;

(12) The reasons put forward by the respondents at the trial for such transfer were found to be without substance and "obviously false";

(13) The most probable inference to be drawn is that the Findon shares were, at the instigation of Lubner, transferred from LCI to GLI in a deliberate attempt to thwart or defeat the appellant's rights to them, conduct which was fraudulent or, at the very least, seriously improper.

I turn now to what is really the crux of the present appeal. The fundamental issue is whether the appellant, having regard to the

facts found proved, is entitled to the relief which it seeks. An essential pre-requisite for the grant of such relief is that the separate corporate personality of LCI and GLI would have to be disregarded insofar as their dealings with the Findon shares are concerned. Unless that can be done, no legal basis exists on which the judgment which the appellant obtained in the original action against LCI can be enforced against GLI or Lubner, as there would otherwise be no privity between them.

It is trite law that "[a] registered company is a legal persona distinct from the members who compose it" (Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 550). 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. (I shall confine myself to the use of the word

piercing.) The focus then shifts from the company to the natural person behind it (or in control of its activities) as if there were no dichotomy between such person and the company (Henochberg on the Companies Act: 5th Ed: Vol 1, p 54). In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality.

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. 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 regards the substance rather than the form of things, - a doctrine common, one would think, to every system 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.) Whatever the position, it is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so (Botha v Van Niekerk en 'n Ander 1983(3) SA 513(W) at 524A; Gower's Principles of Modern Company Law : 5th Ed, 133).

Much of what is considered to be the current law on the subject is set out in the judgment at 815H to 821C. I do not deem it necessary or advisable in the present appeal to attempt to formulate any general principles with regard to when the corporate veil may be pierced. I propose to do no more than apply what I conceive to be the appropriate legal principles to the facts of the present matter.

The principle of a company's separate juristic personality was first asserted in the House of Lords in Aron Salomon v A Salomon and Company Limited [1897] AC 22. 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.

(See, in this regard, the speeches of Lord Halsbury at 33 and Lord

Macnaghten at 52/3.) And over the years it has come to be

accepted that fraud, dishonesty or improper conduct could provide

grounds for piercing the corporate veil. Recently this was

confirmed in The Shipping Corporation of India Ltd v Evdomon

Corporation and Another 1994(1) SA 550(A) where CORBETT CJ

expressed himself as follows at 566C-F:

> "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 conduct of its affairs. In this connection the words 'device', 'stratagem' 'cloak' and 'sham' have been used...."

Two matters arising from the quoted passage merit further comment. First, reference is made to "those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil". 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 (and I confine myself to such situations) are found to be present, other considerations will come into play. The need to preserve the separate corporate identify would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil (cf Domanski : Piercing The

Corporate Veil- A New Direction : 1986 SALT 224). 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 own merits.

The second is the reference to the inclusion of "an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs". (My emphasis.) It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded (as appears in some respects to have been the view of the trial judge - see the judgment at 821G-J). As Gower, op cit, states (at 133):

> "It also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intention; what counts is whether it is being used as a facade

at the time of the relevant transactions."

Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should not be permitted.

I revert to the facts of the present matter. It will be recalled that the Findon shares, which guaranteed Lubner (and his family) personal occupation of the Clifton flat, were initially owned by Lubner. They were transferred to LCI in 1976 when Lubner became a non-resident. They were held by LCI on Lubner's behalf as a matter of convenience. Lubner exercised complete control

over LCI in respect of the Findon shares via Swersky who did his bidding. LCI did not transfer the Findon shares to GLI for a legitimate reason. It did so at Lubner's behest solely for the purpose of thwarting or defeating the appellant's rights to the shares. With the same purpose in mind GLI, over whom Lubner exercised absolute control, and acting on his instructions, took transfer of the Findon shares from LCI. Neither LCI nor GLI stood to benefit from the transaction, only Lubner. The transfer was in fraud of the appellant's rights; at the very least it was carried out with an improper purpose - the evasion of legal obligations - in mind. Lubner's motive in transferring the Findon shares from LCI to GLI, or causing them to be transferred, is a highly relevant consideration - see Adams and Others v Cape Industries p1c and Another [1991] 1 All ER 929 (CA) at 1022j, 1024j. The misuse by Lubner of both LCI and GLI amounted to an abuse of their separate corporate identities. In reality, in relation to their dealings with the Findon

shares, both LCI and GLI were Lubner's alter egos. There was but one purpose - that of Lubner, and one will - that of Lubner. Policy considerations strongly suggest that the veil of corporate personality should be pierced in relation to LCI's and GLI's fraudulent or improper dealings with the Findon shares in order to reveal Lubner as the true villain of the piece. To pierce the corporate veil for that purpose would not detract from the otherwise legitimate and proper corporate activities of LCI and GLI or prejudice their shareholders. It is within Lubner's power to compel GLI to disgorge the Findon shares. In the circumstances the separate corporate identities of LCI and GLI in relation to their dealings with the Findon shares should, in my view, be disregarded unless there is some other consideration which precludes that being done.

A case somewhat analagous to the present where the court disregarded a company's separate legal personality where the

company was used to facilitate the evasion of legal obligations is that of Jones and Another v Lipman and Another [1962] 1 ALL ER 442 (Ch.D). In that case Lipman, after concluding a contract to sell land to Jones, formed a company and conveyed the land to it in order to defeat Jones's right to specific performance. The court granted specific performance against both Lipman and the company, holding that such relief could not be resisted by a seller in Lipman's position who had absolute ownership and control over the company concerned. See too Gilford Motor Co Ltd v Home and Another [1933] ALL ER 109 (CA).

As previously pointed out, the trial judge held that the transfer of the Findon shares from LCI to GLI did not result in an "unconscionable injustice" because the appellant failed limeously to recover the Findon shares from GLI, as it could have done. (The test of "unconscionable injustice" is that formulated by FLEMMING J in Botha v Van Niekerk en 'n Ander (supra) at 525F where he

held that piercing the veil would be justified "as daar ten minste 'n oortuiging was dat .... 'n onduldbare onreg aangedoen word en wel ten gevolg van iets wat vir die regdenkende duidelike onbehoorlike optrede……is". With due respect to the learned judge I would avoid, in a matter such as the present, what is perhaps too rigid a test and opt for a more flexible approach - one that allows the facts of each case ultimately to determine whether the piercing of the corporate veil is called for.) It seems implicit in the trial judge's finding that the remedy of piercing the corporate veil is only available where a plaintiff has no other remedy at his disposal. No authority was quoted for this proposition. Nor did the respondents, who support it, refer us to any.

In principle I see no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists. As a general rule, if a person has more than one legal remedy at his disposal he can select any one of them; he is not obliged to pursue

one rather than another (although there may be instances where once he has made an election he will be bound by it). If the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief. The existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance. In this regard it is relevant to note that the appellant took timeous steps to enforce its contractual claim against LCI. Although it had knowledge of the transfer of the Findon shares to GLI, impossibility of performance by LCI was never specifically pleaded as a defence. Given the structure of the Lubner group and the extent of Lubner's interest and control over the relevant companies, the appellant had no reason to believe that effect would not be given to any judgment

obtained in the original action. It clearly lay within Lubner's power to do so. Whatever laxity or "fault" there may have been on the part of the appellant in failing to pursue its rights under the doctrine of notice pales into insignificance compared to the impropriety of Lubner's conduct. Yet respondents seek to rely upon such failure to deny the appellant relief. Policy considerations dictate that they should not be permitted to do so. In the circumstances the appellant's failure to pursue its remedy under the doctrine of notice does not in my view operate as a bar to the relief it seeks.

The respondents contended on appeal that the appellant's failure to establish in the present action that there had been a sale of the Findon shares by LCI to it was fatal to its case. In the original action the appellant succeeded in proving such a sale against LCI. GLI and Lubner were not parties to that action. They were accordingly not afforded an opportunity to contest that

there had been a sale. In the present action the appellant disavowed from the outset any intention to again prove the sale from LCI to it. The respondents contend that the judgments in the original action, finding and upholding on appeal that there had been a sale between LCI and the appellant, are not admissible for the purpose of proving such sale as against GLI and Lubner. They rely in this respect on the controversial rule in Hollington v F Hewthorn & Company Limited [1943] 2 ALL ER 35(CA) that a previous judgment is not admissible in a civil action against someone who was not a party thereto, as well as the fact that no privity exists between LCI, GLI and Lubner. If, as the respondents contend, no sale has been proved between the appellant and LCI as against GLI and Lubner, then the circumstances surrounding the transfer of the Findon shares from LCI to GLI are no longer relevant and the validity of that transaction not open to challenge. The respondents' argument in this respect does not, in my

view, assist them in the present matter. I consider the appellant to be correct in contending that it has a judgment debt against LCI which it is entitled to follow and enforce against both GLI and Lubner. That it can do so is a logical consequence of piercing the corporate veil and disregarding the separate juristic personalities of LCI and GLI. To hold otherwise would be to negate the very reason for piercing the veil. In casu the facts establish that, in relation to the dealings with the Findon shares, Lubner was both LCI and GLI. Acccordingly, the judgment against LCI was in substance and effect one against Lubner. It should therefore be effective against Lubner in any guise. Once that basic truth is asserted it matters not that GLI and Lubner were not formally parties to the original action. Lubner was there in his LCI hat, and it is idle and unrealistic to suppose that in his GLI hat or personally he is likely to have done anything which could have altered the course of the original action or influenced its outcome. Once

therefore the sale of the Findon shares by LCI to the appellant was proved in the original action, and the corporate veils of LCI and GLI pierced in the present, effect can be given to the judgment in the original action against all three respondents. It follows that in my view the appeal must succeed and that the appellant is entitled to an order in terms of prayers (a), (b) and (c) of its particulars of claim.

The respondents' cross-appeal is directed against the finding of the trial judge that the four witnesses whose costs were disallowed were called to establish a defence which, to the knowledge of Lubner, was untruthful. In my view, in the light of his unassailable factual findings, the exercise by the trial judge of his discretion against the respondents in that respect cannot be faulted. In any event, a consequence of the appellant's success on appeal will be to deprive the respondents of their award of trial costs in the court below, so that the issue of whether they should

otherwise have been awarded the costs of the four witnesses falls away. The cross-appeal consequently falls to be dismissed.

The appellant seeks an order for costs in the court below on an attorney and own client scale. The essential difference between an order for costs on such a scale, as opposed to costs simply on an attorney and client scale, appears from the decision in Cambridge Plan AG v Cambridge Diet (Pty) Ltd and Others 1990(2) SA 574(T). Notwithstanding Lubner's conduct, an award of costs on the very punitive attorney and own client scale is, in my view not justified. However, as a mark of this Court's disapproval of his conduct in refusing to give effect to the judgment in the original action when he was in a position to do so, and thereby compelling the appellant to again come to court in order to enforce its rights, it would in my view be appropriate and just to award the appellant its trial costs on an attorney and client scale.

One further matter requires mention. The present action was

originally set down for hearing on 6 June 1991. The parties agreed to a postponement at a late stage leaving the issue of the wasted costs to be decided. CONRADIE J made an adverse order as to costs against the respondents, but granted them leave to appeal to this Court. The intention all along was that that appeal should be heard at the same time as the present. The respondents filed heads of argument relating to the appeal which the appellant's counsel were prepared to deal with. However, the respondents failed to set the appeal down for hearing and it was accordingly not before us. That much was conceded by the parties. The appellant seeks an order for wasted costs arising from these circumstances. As that appeal was not before us it would be inappropriate to make any costs order in relation thereto. The appellant will be entitled to raise the matter again, if it so wishes, when the appeal is heard in due course.

In the result the following order is made:

(14) The appeal succeeds with costs, such costs to include the costs of two counsel.

(15) The order of the trial court of absolution from the instance on 7 September 1992, and order (a) of its order of costs made on 10 December 1992, insofar as it directed the appellant to pay the respondents' costs, are set aside and replaced with the following order:

> "(a) The second defendant is ordered to deliver the shares and cede the loan account in Findon Investments (Proprietary) Limited (which form the subject matter of the action between the parties) to the plaintiff within thirty days of 19 May 1995;

(16) Alternatively, within the aforesaid period, the second defendant is to deliver the said shares and cede the said loan account to the first defendant which in turn is to deliver the said shares and cede the said loan account to the plaintiff;

(17) The third defendant is ordered to take all such steps as may be necessary to procure that the second defendant deliver the said shares and cede the said loan account to the plaintiff, either directly or through the

first defendant, within the aforesaid period;

(18) The plaintiffs costs are to be paid by the third defendant, alternatively, the first, second and third defendants jointly and severally, on a scale as between attorney and client;

(19) The costs are to include the costs of two counsel and the qualifying expenses, if any, of the witness Lumb."

3. The cross-appeal is dismissed with costs, including the costs of two counsel.

J W SMALBERGER
JUDGE OF APPEAL

Vivier, JA)
F H Grosskopf JA) concur
Van den Heever, JA)