REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 31301 /2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

SIGNATURE **DATE: 28 June 2022**

In the matter between:

LEBAMANG OCTAVIA KOLISANG Applicant

And

ALEGRAND GENERAL DEALERS AND AUCTIONEERS
t/a GRAND AUCTIONS First Respondent

ISMAIL DAWOOD JASSAT Second Respondent

Coram: Nichols AJ

Delivered: 28 June 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *Caselines* and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 28 June 2022.

JUDGMENT

NICHOLS AJ

Introduction

[1] The applicant, Lebamang Octavia Kolisang (the applicant), in this matter seeks relief against the second respondent, Ismail Dawood Jassat (the director), for the indebtedness of the first respondent, Alegrand General Dealers and Auctioneers (Pty) Ltd T/A Grand Auctions (the Company) for a judgment debt granted in her favour against the company.

[2] The application is premised on the common law, alternatively the provisions of s20(9) of the Companies Act, 71 of 2008 (the Act). It may be described as an application for the piercing of the corporate veil. The relief sought is twofold. Firstly, the company be deemed, in terms of Section 20(9) of the Act, to not be a juristic person in respect of any right, obligation or liability of the company. Secondly, the director be held personally liable for the damages and/or loss sustained by the applicant in an amount of R177 560.

[3] It is common cause that the amount of R177 560 sought from the director is the amount of the default judgment and order granted in the applicant's favour against the company by the Protea Magistrate's Court on 14 June 2019 (the judgment).

The relevant and common cause facts

[4] The factual matrix underlying the judgment are largely common cause and bear brief recitation. On or about 17 August 2016, the applicant attended a public auction arranged by the company at its premises. She purchased a vehicle described as a 2012 Golf GTI motor vehicle with registration number DM 26 FG GP (the motor vehicle). The applicant avers that the director represented the company at all material times and he specifically represented that the motor vehicle was as described. In consequence of these representations, the applicant paid a purchase price of R177 560 for the motor vehicle.

[5] It later transpired that the motor vehicle was in fact a 2010 Golf GTI motor vehicle with registration number DM 26 FG GP. As a result, the applicant cancelled the sale agreement, returned the motor vehicle to the company and sought restitution of the purchase price. The company confirmed the cancellation of the sale but refused to refund purchase price. This resulted in the magistrate court proceedings against the company where the applicant sought repayment of the purchase price. Although the company initially opposed this action, judgment was ultimately granted by default against it, after its attorney

of record withdrew in August 2018 and the company failed to appoint a new attorney or continue with its defence of the action.

[6] The applicant has travelled a long road in her attempts to execute against the judgment. During this journey, it was ascertained that the director resigned as a director of the company effective 1 January 2019; the registered and business address of the company changed from Rose Avenue, Lenasia, Johannesburg to Main Road, Parklands, Cape Town; the director held directorships in various companies that conducted the business of motor vehicles sale and/or auction from the same address in Rose Avenue, Lenasia, Johannesburg; and there was another court judgment against the company arising from similar facts.

[7] The majority of the averments by the director relate to the merits of the claim against the company. He sought to contest the merits of the applicant's claim against company but the validity of the judgment however is not questioned and it is common cause that no application has been instituted to rescind the judgment. It is trite that judgments and orders are valid and binding until set aside.[1]

[8] The director avers that the company ceased trading from July 2017 and was in the process of deregistration because it was unable to pay for its financial returns. It vacated the business premises occupied in Rose Avenue, Lenasia, Johannesburg and he was unemployed as a result. He admits the withdrawal by the company's attorney of record in August 2018 because she received no further instructions from him or the company and he contended that the attorney was not informed of the company's new address or circumstances.

[9] He averred that he ceased being a director of the company after he sold the company, as a going concern in December 2018, to Anele Pearl Lefuma (Lefuma). Although the company was struggling financially, Lefuma wanted to acquire the company to use the business idea and company name in Cape Town. They therefore concluded a partly oral, partly written sale of business as a going concern agreement. He submitted that a material term of this sale was clause 6, which provided for his indemnification in relation to any claims by Lefuma. In support of these averments, he annexed a copy of the written sale of business as a going concern agreement (the agreement) to his answering affidavit.

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[1] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) paras 180 – 188; Section 165 (5) of the Constitution.

The issue

[10] The issue for determination is whether the director misrepresented to the applicant that the motor vehicle was a 2012 Golf GTI, and that such misrepresentation induced her to purchase the motor vehicle. Further, whether such misrepresentation, if established, amounted to unconscionable conduct by the director entitling the applicant to the relief sought.

Application of the law

[11] It is trite that a company is a juristic entity that is separate and distinct from its shareholders. As a juristic entity, a company can acquire enforceable rights and incur legal duties. The debts of company cannot be regarded as debts of its shareholders or directors. The directors of a company administer and manage the company, subject to their common law and statutory fiduciary obligations.

[12] A director's fiduciary obligations have been partially codified by the Act. Section 76(3) of the Act states:

'(3) … a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director:

(a) in good faith and for a proper purpose;
(b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person—
    (i) carrying out the same functions in relation to the company as those carried out by that director; and
    (ii) having the general knowledge, skill and experience of that director.'

[13] Section 20(9) of the Act provides the court with a statutory discretion to pierce the corporate veil. It provides as follows:

'*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 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).'

[14] The requirement for piercing the corporate veil under section 20(9) of the Act is the unconscionable abuse of the juristic personality of a company as a separate legal entity. The locus classicus on s 20(9) is the judgment by Binns-Ward J in the case of *Ex parte Gore.*[2] Although lengthy, the following dictum from this judgment is apposite. It traverses all the key issues relevant to this matter. At para 34 the court held:

'*The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an à priori diffidence. By expressly establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or 'drastic'. This much seems to be underscored by the choice of the words 'unconscionable abuse' in preference to the term 'gross abuse' employed in the equivalent provision of the Close Corporations Act; the latter term having a more extreme connotation than the former. The term 'unconscionable abuse of the juristic personality of a company' postulates conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like 'sham', 'device', 'stratagem' and the like used in that connection in the earlier cases, and - as the current case illustrates - conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced. Having regard to the established predisposition against categorisation in this area of the law and the elusiveness of a convincing definition of the pertinent common law principles, it seems that it would be appropriate to regard s 20(9) of the Companies Act as supplemental to the common law, rather than substitutive. The unqualified availability of the remedy in terms of the statutory provision also militates against an approach that it should be granted only in the absence of any alternative remedy. Paragraph (b) of the subsection affords the court the very widest of powers to grant consequential relief. An order made in terms of paragraph (b) will always have the effect, however, of fixing the right, obligation or liability in issue of the company somewhere else.*'[3]

[15] The nub of the applicant's contention in support of the application is the director's misrepresentation of the details of the motor vehicle that induced her to purchase it thereby resulting in her loss of R177 560. The applicant contends that the director's

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[2] *Ex parte Gore NO and Others NNO (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries)* [2013] 2 ALL SA 437 (WCC).

[3] *Ex parte Gore* ibid para 34.

misrepresentation was deliberate such that it amounted to fraud, alternatively dishonesty, further alternatively improper conduct.

[16] It is common cause that the company has not discharged or settled the judgment. The company's latest registered and business address is in Cape Town and the sheriff has reported that he is unable to execute against the company at this business address because it does not exist, alternatively the sheriff is unable to locate the address.

[17] The director contends that relief sought in s 20(9) may only be granted where there is an unconscionable abuse of the juristic personality of the company as a separate entity, namely the use of the company's juristic personality 'as a front'. He avers that no evidence has been advanced to support such relief and he specifically disputes any evidence being advanced to support a finding that he 'made the alleged misrepresentations to the applicant whilst using the company's juristic personality as a front'. This argument is ill conceived and is not supported by any authorities.

[18] Fraud and the improper use of a company or conduct of the affairs of a company are regarded as sufficient reason to pierce the corporate veil in terms of the common law.[4] It is also clear that s 20(9) is regarded as providing a statutory basis for piercing the corporate veil.[5] The plain wording of s 20(9) permits a court to disregard the separate juristic personality of a company where its incorporation, use or an act performed by or on its behalf (my underlining) constitutes an unconscionable abuse of the juristic personality of the company as a separate entity. In this matter, it is the act performed by the director, by or on behalf of the company, which the applicant contends constitutes an unconscionable abuse of the juristic personality of the company, justifying the relief sought. That act is the director's misrepresentation regarding the year of the motor vehicle, which induced her to purchase the motor vehicle.

[19] This is the sum total of the director's response on the merits of the application. He does not address or respond to the applicant's averments regarding his misrepresentation on the papers at all. In his argument that the claim is *res iudicata,* he, however accepts the judgment against the company and that the cause of action for the judgment is based upon his misrepresentation to the applicant. Accordingly, I am satisfied that the applicant has

[4] *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 566C-F.
[5] *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO) 85*/2017) [2017] ZASCA 177 (1 December 2017) para 28.

established that the director misrepresented the details of the motor vehicle to her, that such misrepresentation was material and induced her to purchase the vehicle. Further that the director's misrepresentation was deliberate such that it amounted to fraud, alternatively dishonesty, further alternatively improper conduct.

[20] The balance of the opposition by the director is formulistic in nature. As mentioned earlier, he contends that this claim is *res iudicata* because it has already been determined by the judgment that is premised on the same cause of action, namely his misrepresentation. He also contends that there is a risk of double compensation because the applicant has not attempted to properly execute on the judgment against the company. These contentions can be disposed of summarily. They are pertinently addressed in *Ex Parte Gore*[6] in the passage referred to supra. An order in terms of s 20(9)(b) will have the effect of fixing the right, obligation or liability in issue of the company somewhere else. In this matter, the liability is the judgment and that liability is sought to be transferred to the director. The issue of double compensation therefore does not arise and I reject these contentions as meritless.

[21] The director also contended that the company remained liable for the judgment and the applicant was obliged to exhaust her remedies against it before proceeding against him personally. This argument is also rejected as *Ex Parte Gore* clarified that the remedy provided by s 20(9) may be granted when the facts justify the relief sought and there is no requirement for a party to first exhaust all other forms of relief.[7]

[22] He also argued that the judgment was granted when the company was already owned by its new director, Lefuma and clause 6 of the agreement indemnified him in respect of any claims against the company. The following glaring omissions were, however noted in respect of the agreement:

(a) It does not support the director's contention of it being a partly oral and partly written one. It has a clause specifically recording that it constitutes the entire agreement between the parties. It also contains a non-variation clause that requires any changes or amendments be effected in writing to be valid and binding.

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[6] *Ex Parte Gore* fn 3 above.

[7] *Ex Parte Gore* fn 3 above.

(b) It does not specify and/or describe the business conducted by the seller; the effective date; the premises that the business is conducted from; the name of the seller; the purchase price; the manner for payment of the purchase price and addresses for the service of notices.

(c) Annexures referring to listed fixed assets, leased assets, trademarks, and brands are not attached.

(d) The agreement is signed by the director but there is no clarification on this document or beneath his signature of the capacity in which he signs.

(e) The covering page of the agreement records the agreement as being for the sale of a business between the director and Lefuma. The name of the company does not appear on the covering page or anywhere in the body of the agreement.

(f) A confirmatory affidavit was not provided by Lefuma.

[23] In the circumstances, the agreement is defective in many material respects and I do not consider it as the agreement contended for by the director. It is unlikely that the director, involved in numerous companies in such capacity naively believed an agreement with these omissions was valid and binding. Instead, I consider the agreement a fabrication by the director. The purpose of the fabrication can only be for presentation to this court to distances the director from any personal liability. The director’s contention that he sold the company to Lefuma is accordingly rejected.

[24] Notwithstanding my rejection of the agreement, the manner in which the director described his relationship with the company and adduced his facts in support of his opposition to the application are significant. His version, although rejected, speaks to the manner in which he viewed the company and his role as a director. They lead me to the ineluctable conclusion that he considered himself the owner of the company. He claimed that he sold the company to Lefuma and the indemnity provided for by clause 6, which he contended for related to the seller and not a director.

[25] Additionally as the director and owner, he acted with cavalier disregard for the interests of the company. He allowed judgment to be taken against the company by default by failing to properly instruct new attorneys or himself continuing with the defence for the company after August 2018. He provided no explanation or reason for his failure to do so. He did not notify the purchaser of an existing legal action against the company and thereafter sought to rely on an indemnity for himself in respect of that legal action. Such conduct is

manifestly not in the best interest of the company and may be considered reckless and dishonest. This conduct was indubitably with callous disregard for its effect on the company as a separate legal entity and at a time when he describes its financial situation as being parlous. Therefore, whilst a director is entitled to resign at any time, his resignation cannot be used as a means of evading his fiduciary duties as a director.[8]

[26] The provisions of s 20(9) are similar to the provisions of s 65 of the Close Corporations Act 69 of 1984 (the CC Act), which enables a court in appropriate circumstances to disregard the separate legal personality of a close corporation in instances of 'gross abuse of the juristic personality of the corporation as a separate entity.' In a case that addressed ss 64(1) and s 65 of the CC Act, *Ebrahim and Another v Airport Cold Storage (Pty) Ltd,*[9] Cameron JA explained that:

'[i]t is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.'[10]

[27] The director also contends that reference to similar matters constitutes similar fact evidence, which is ordinarily inadmissible and should be ignored. He contends that reference to a court judgment in a matter in which the company was a respondent should be ignored. The default position however is court proceedings and court documents are public.[11] No reason has been advanced for this Court to deviate from this position in this matter. Accordingly, I now refer to the unreported judgment of Mudau J in the matter of

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[8] *Findaload (Pty) Ltd v CMT Transport (Pty) Ltd* 2019 JOL 46156 (FB) para 29.

[9] *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA).

[10] *Airport Cold Storage (Pty) Ltd* ibid para 15.

[11] *City of Cape Town v South African National Roads Authority Limited and Others* (20786/2014) [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) (30 March 2015) para 19.

Rocker v Alegrand General Dealers and Auctioneers (Pty) Ltd t/a Grand Auctions.[12] In this matter, the company was the respondent in an opposed application in which the applicant, Rocker sought cancellation of a sales agreement based on an alleged misrepresentation by the respondent. An order was sought, inter alia, compelling the respondent to refund the purchase price of the motor vehicle purchased under the sales agreement.

[28] Notably, the court recorded the crux of the respondent's case as being that the applicant purchased the motor vehicle in question 'as is'; that he inspected the vehicle prior to the auction; was aware of the terms and conditions attached to bidding for a vehicle at the company's auctions and he bound himself to these terms and conditions. Regardless and based on the facts, Mudua J concluded that the respondent accepted the misrepresentation with regard to the motor vehicle's engine capacity and that such misrepresentation was material when it accepted the return of the motor vehicle. The respondent was ordered to, inter alia, pay the applicant the purchase price of the motor vehicle.

[29] This judgment was delivered on 1 December 2017 and the director's current attorneys represented the company in this matter. The director is referred to in the judgment as the company's representative. The company's defence in the *Rocker* matter is more or less similar to the defence raised by the director on behalf of the company in the Protea Magistrate's Court action. When he tried to argue the merits of judgment in the application before this Court, the director similarly argued that the company's defence was essentially that the applicant signed the company's terms and conditions to participate in a public auction; these terms and conditions stipulated that goods were sold as is; it was the applicant's duty to inspect the motor vehicle; and the differences between a 2010 and 2012 model were cosmetic.

[30] Therefore regardless of whether the facts and circumstances of the *Rocker* matter constitute similar fact evidence, they lead me to conclude that the findings of this judgment in all probability caused the director to form the view or conclude that the applicant's action in the magistrate's court would also be equally successful against the company. That this is actually the reason why no further instructions were provided to the attorneys resulting in their withdrawal in August 2018 and why the director has sought to distance himself from the company and any claims for personal liability against himself. It also exacerbates the

[12] *Rocker v Alegrand General Dealers and Auctioneers (Pty) Ltd t/a Grand Auctions* (93039/2016) [2017] ZAGPPHC 896 (1 December 2017).

dishonesty of his conduct when, on his version, he sold the company to Lefuma when this judgment had already been granted against the company.

Conclusion and order

[31] On a conspectus of the evidence, I am satisfied the misrepresentation by the director to the applicant was fraudulent, alternatively dishonest, further alternatively improper conduct and it was intended to and did in fact induce the applicant to purchase the motor vehicle. The director conducted himself, at all times in a manner that was not in the best interest of the company but rather designed to protect himself from personal liability. This is evident by the manner in which he acted on behalf of the company and /or used and /or managed the company. I am satisfied that the conduct of the director adversely affected the applicant in a way that reasonably should not be countenanced and which constitutes an unconscionable abuse of the company's juristic personality.

[32] In the result, the following order is issued:

(a) It is hereby declared, in terms of section 20(9) of the Companies Act 71 of 2008 (as amended), that Alegrand General Dealers and Auctioneers (Pty) Ltd t/a Grand Auctions, shall be deemed not to be a juristic person, but a venture of Ismail Dawood Jassat personally, in respect of its obligations and/or liability to Lebamang Octavia Kolisang pursuant to the judgment and order of the Protea Magistrate's Court under case number 3542/2017 dated 14 June 2019 in the amount of R177 560.00 (the Protea Court judgment debt);

(b) Pursuant to the declaration in paragraph (a), Ismail Dawood Jassat is declared personally liable to the Lebamang Octavia Kolisang for the Protea Court judgment debt, including all interest and associated costs;

(c) Ismail Dawood Jassat is ordered to pay Lebamang Octavia Kolisang:

(i) the sum of R177 560.00;

(ii) interest on the aforesaid amount at the prescribed rate calculated from 14 June 2019 to date of payment;

(iii) all of her party and party costs, on the magistrate's court scale for the Protea Court judgment.

(d) Ismail Dawood Jassat is ordered to pay the costs of this application.

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T NICHOLS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

Date Heard:	12 August 2021
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