REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 24877/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE: 27.9.2022
SIGNATURE:

In the matter between:

PHILIP HENRY ARNOLD	Applicant
and	
EOH MANAGED SERVICES PS (PTY) LTD	First Respondent
MONICA COWEN N.O.	Second Respondent
ANKIA VAN JAARSVELD N.O.	Third Respondent
JEHAN MACKAY	Fourth Respondent
EBRAHIM ABOOBAKER LAHER	Fifth Respondent
MOKUNYO PATRICK MONYEKI	Sixth Respondent
GARTH SOLOMON MADELLA	Seventh Respondent
CHETTAN OTTAM	Eighth Respondent
MICHAEL FITZGERALD N.O.	Ninth Respondent
ADVOCATE MABASO N.O.	Tenth Respondent

MASTER OF THE HIGH COURT,
JOHANNESBURG Eleventh Respondent

JUDGMENT

TODD AJ

Introduction

[1] The applicant applies to set aside an order of this court dated 30 March 2021 which effectively converted a voluntary winding-up of Silver Touch IT Solutions (Pty) Ltd ("**Silver Touch**") into a compulsory winding-up. He also seeks certain related, consequential and alternative relief.

[2] The background to the matter is that during May 2020 the applicant, who was the sole director of Silver Touch, placed that company in voluntary liquidation.

[3] The first meeting of creditors held in November 2020 was presided over by the tenth respondent. At that meeting the first respondent, which I will also refer to as "**EOH MS**", presented a claim against Silver Touch supported by an affidavit deposed to by a legal advisor. The claim, which arose from a loan advanced to Silver Touch in circumstances that I refer to in more detail later, was allowed by the tenth respondent.

[4] In December 2020 the first respondent brought an application to convert the voluntary winding-up of Silver Touch into a compulsory winding-up. The applicant applied to intervene in that application and his application to intervene and the application itself were heard on 2 February 2021.

[5] Judgment in that application was handed down on 30 March 2021. The applicant's application to intervene was dismissed and the court granted an order converting the voluntary winding-up of Silver Touch into a compulsory winding-up and convening an enquiry into the affairs of Silver Touch in terms of sections 417 and 418 of the Companies Act.

[6] The applicant applied for leave to appeal against that judgment but did nothing to progress the application. In the course of the hearing before me Mr Cook, who appeared for the applicant, informed the court that the applicant had now withdrawn the application for leave to appeal.

[7] In April 2021 the applicant instituted the present application. He attempted by way of urgent application in part A to interdict the section 417 enquiry pending the determination of this application, but that effort was unsuccessful.

[8] What came before me was part B of the application. The issues in part B are essentially these: first, whether there are grounds under the provisions of section 354 of the Companies Act to set aside the order of this court granting the compulsory winding-up of Silver Touch, or in the alternative to rescind that order; and second, whether there are grounds under the provisions of section 151 of the Insolvency Act to review and set aside the decision of the tenth respondent[1] to allow the first respondent's claim against Silver Touch at the first meeting of creditors. The ancillary relief that the applicant seeks depends on the conclusion that I reach on those primary questions.

[9] The facts on which the applicant relies in attacking each of these decisions are essentially the same. They hinge on the contention that the first respondent's claim against Silver Touch, which was allowed by the tenth respondent at the first meeting of creditors and which provided the basis on which the first respondent approached this court for the order made on 30 March 2021, was supported by what the applicant contends was "an inaccurate document, arguably fraudulently created". On a proper consideration of the facts, the applicant contends, the first respondent's claim had in fact prescribed.

[10] I deal with the facts relevant to those contentions next.

The first respondent's claim against Silver Touch

[11] The background facts relevant to the first respondent's claim involved Silver Touch and three entities in the EOH group of companies.

[1] incorrectly referred to as the ninth respondent in the notice of motion, in paragraph 4 of the relief sought in part B

[12] The first entity is EOH Mthombo (Pty) Limited ("**EOH Mthombo**"). The other two entities are wholly owned subsidiaries of EOH Mthombo, namely TSS Managed Services (Pty) Ltd ("**TSS**"), and the first respondent, EOH MS.

[13] During December 2012 Silver Touch, of which the applicant was the sole director, concluded a loan agreement with TSS under which TSS advanced to Silver Touch an amount of R1.2 million as an interest free enterprise development loan. Under the initial terms of the loan it was repayable by no later than 31 December 2013.

[14] The signatories to the loan agreement were the applicant on behalf of Silver Touch, and the fourth respondent on behalf of TSS.

[15] The fourth respondent was at all material times a director of each of the three EOH entities concerned, that is TSS, EOH MS and their parent company EOH Mthombo.

[16] In July 2013, for reasons that are not explained on the papers, the loan claim was ceded or "transferred" from one subsidiary of EOH Mthombo to another, from TSS to EOH MS. The transfer was not recorded in a written agreement but is reflected in EOH MS's general ledger. The loan claim is also reflected in EOH MS's annual financial statements for the financial years 2013 through 2018.

[17] Silver Touch was the beneficiary of the interest free loan throughout this period. It was represented at all times by the applicant, who was its sole director.

[18] The document on which the controversy centers is a short agreement recording an extension of the repayment date for the loan. That agreement was purportedly entered into during July 2013, at around the time of the cession of the loan claim from TSS to EOH MS. The agreement's only material term extended the repayment date for the loan from 31 December 2013 until 31 January 2015.

[19] The document was originally created during July 2013 by an unidentified employee of the EOH group. In fact two documents were created at this time in relatively quick succession, and it is necessary to deal with both.

[20] The first document, which the applicant and fourth respondent both confirm having signed, was an agreement entered into between Silver Touch on the one hand and EOH Mthombo on the other. It was signed by the fourth respondent on behalf of EOH Mthombo on 25 July 2013 and by the applicant on behalf of Silver Touch on 30 July

2013. The evidence indicates that it was scanned and saved onto the relevant EOH server at 14h12 on 30 July 2013.

[21] This first document records, in a preamble, the transfer of the loan claim from TSS to EOH Mthombo - and not EOH MS - and in its only material substantive provision it extends the date for repayment of the loan by Silver Touch to 31 January 2015.

[22] In fact, transfer of the Silver Touch loan claim to EOH Mthombo was not what was intended within the EOH group at or around that time. The general ledger entries and financial statements of EOH MS clearly reflect the assumption of the loan claim by EOH MS in July 2013. A former financial manager of the EOH group, Ms Bredenkamp, confirms that this was what was in fact intended.

[23] There is no evidence before me that provides any explanation for the production in July 2013 and signature by the applicant and fourth respondent of a document that reflects the transfer of the loan claim to EOH Mthombo instead of EOH MS. Neither the applicant nor the fourth respondent, who were at all relevant times including in July 2013 the representatives of Silver Touch and the EOH group of companies respectively and who were responsible for arrangements concerning the loan, have explained it. Ms Bredenkamp's evidence is that it was not intended.

[24] Shortly after the first document was created and signed a second document was created, this time reflecting the transfer of the loan claim to EOH MS. The evidence also does not establish at whose instance and in precisely what circumstances the second document was created, but it appears that the document was created by the fourth respondent's personal assistant. It was saved to the relevant server approximately an hour after the first document, at 15h18 on 30 July 2013.

[25] This second document was essentially a replica of the first, but reflecting EOH MS and not EOH Mthombo as the entity to which the Silver Touch loan claim had been transferred.

[26] The person who created the second document, however, apparently did not think it necessary to rescind the first document or to procure signatures of the applicant and fourth respondent afresh on the new or corrected version of the document. Instead, they took a short cut, simply attaching the completed signature page from the earlier signed document to the new version, now reflecting EOH MS as the loan creditor. They

went further, performing the digital equivalent of scratching out the name of the company on whose behalf the fourth respondent had affixed his signature to the first document, EOH Mthombo, and replacing it with EOH MS.

[27] This was of course an impermissible and manipulated shortcut. The first respondent speculates that the fourth respondent's personal assistant had either been informed of or had noticed the error in the first version of the document, and had decided simply to replace the first page with a corrected version and amend the name of the entity on whose behalf the fourth respondent had signed the document. No more plausible explanation is put up by the applicant or fourth respondent, and on the papers before me this would appear to be the most probable explanation for what occurred.

[28] At all material times thereafter, the EOH group presented EOH MS as the creditor in respect of the Silver Touch loan. This was consistently reflected in EOH MS's financial statements. It was also confirmed when the parties subsequently agreed to a further extension of the repayment date for the loan, in January 2015.

[29] This time the extension was recorded in a document entitled enterprise development agreement "first amendment". The document recorded in its preamble that the transfer of the original loan with Silver Touch "*is now made between TSS Managed Services to EOH Managed Services PS [EOH MS] on 25 July 2013*".

[30] This accords with what the evidence indicates the parties had intended in July 2013. The preamble also recorded that "the agreement" - apparently referring to the July 2013 agreement - had served to extend the loan repayment period, and that the parties had further agreed to amend the terms and conditions of that agreement. The document then recorded a further extension of the repayment period, this time to 20 January 2020.

[31] This "first amendment" agreement was, the applicant and fourth respondent both confirm, signed by them in January 2015, in the case of the applicant on behalf of Silver Touch and in the case of the fourth respondent on behalf of EOH Mthombo. The agreement records, correctly from the perspective of the EOH group and consistently with its financial records, that the loan creditor was EOH MS. The agreement's unequivocal purpose, endorsed by both signatories, who were also the signatories to the original loan agreement, was to extend the period for repayment of the loan until 20 January 2020.

[32] Two and a half years after signature of the "first amendment" agreement, in a letter dated 26 September 2017 signed by the applicant on behalf of Silver Touch, the applicant confirmed receipt by Silver Touch of the benefit of an interest free loan from EOH MS in the amount of R1.2 million during the period ending 31 July 2017. The letter recorded that this was an interest free loan with a balance, as at 31 July 2017, of R1.2 million.

[33] When EOH MS, the first respondent, presented its claim at the first meeting of creditors of Silver Touch in November 2020, it did so in the form of an affidavit deposed to by a legal advisor of the first respondent, Ms Jordaan. In that affidavit Ms Jordaan stated that she had personal knowledge of the facts, and then recited the circumstances in which the claim had arisen. As regards the July 2013 agreement, the deponent referred to and attached only what I have described as the second document, amended and manipulated in the manner described above, in terms of which the revised payment date was initially extended to 31 January 2015.

[34] In fact Ms Jordaan did not have personal knowledge of the sequence of events, had not been employed by the company when the relevant documents were created in 2013, and was relying on the records and information available to her in her capacity as legal advisor of the company. Following further investigation, once the document actually signed in July 2013 had been produced by the applicant and fourth respondent and its authenticity established in the course of the present proceedings, Ms Jordaan acknowledged and confirmed the sequence of events regarding production of both documents, as I have described them above.

[35] Before dealing with the parties' submissions on the strength of these facts, I deal briefly with the legal principles applicable to the applicant's causes of action in this application.

Applicable legal principles

[36] Section 354 of the Companies Act, 1973, provides as follows:

> *"(1) The court may at any time after the commencement of a winding-up, on the application of any liquidator or member, and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting*

aside the proceedings or for the continuance of any voluntary winding up on such terms and conditions as the court may deem fit.

(2) The court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence."

[37] On interpreting this provision, both parties referred me to *Ward v Smit in re: Gurr v Zambia Airways Corporation Limited*[2], which establishes a number of principles arising from the section. These include: that the language of the section is wide enough to afford the court a discretion to set aside a winding-up order both on the basis that the order ought not to have been granted in the first place and also on the basis that it falls to be set aside by reason of subsequent events; that where an applicant contends that an order should not have been granted in the first place it must demonstrate exceptional circumstances that warrant a setting aside; that for a court to exercise its discretionary power under the section no less would be expected of an applicant than of an applicant who seeks to have a judgment rescinded at common law; that the object of the section is not to provide for a rehearing of winding-up proceedings or for the court to sit in appeal upon the merits of a judgment in respect of those proceedings; and that other relevant considerations include any delay in bringing the application and the extent to which the winding-up has progressed.

[38] The second basis on which the applicant approaches the court is for judicial review of the decision of the tenth respondent, under the provisions of section 151 of the Insolvency Act. Those provisions provide as follows:

"Subject to the provisions of section 57 any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, if the case may be, and any person whose interests are affected..."

[2] 1998 (3) SA 175 (SCA) at 180-181

[39] Insofar as the applicant relies on this provision it accepts that grounds of review must be established under PAJA, although it has not specified any particular provision of PAJA on which it relies.

[40] Insofar as the applicant relies on grounds for rescission of this court's order converting the voluntary winding-up to a compulsory winding-up, the applicant relies on section 149(2) of the Insolvency Act and common law grounds of rescission which are well established and which I do not restate at any length here. In essence, at common law a judgment can be set on grounds of fraud, provided that it has been established that the party concerned was privy to the fraud and that the facts presented to the court diverged from the truth to such an extent that the court would have given a different judgment had it known the true state of affairs.[3]

[41] In *Storti v Nugent*[4] the court held that its discretionary power conferred by section 149(2) of the Insolvency Act is not limited to rescission on common law grounds; that unusual or special or exceptional circumstances must exist to justify the relief; that the section cannot be invoked to obtain a rehearing of the merits of sequestration proceedings; that where it is alleged that the order should not have been granted the facts should at least support a cause of action for a common law rescission; that where reliance is placed on supervening events an applicant must show that being confined to the ordinary rehabilitation machinery would involve unnecessary hardship or that the circumstances are very exceptional, and that a court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

[42] What is apparent from all of these sources is that relief of the kind sought by the applicant will ordinarily be granted in exceptional circumstances only or on good cause shown; and that it is a matter of the exercise of this court's discretion whether relief of this kind sought should be granted.

The submissions of the parties

[43] Mr Cook submitted that insofar as the deponent to the affidavit presented by the first respondent to prove its claim against the estate of Silver Touch stated that she had personal knowledge of the facts giving rise to the claim, this statement had been shown

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[3] see for example *Rowe v Rowe* 1997 (4) SA 160 at 166 I

[4] 2001 (3) SA 783 (W) at 806 D-G, followed in *Naidoo and another v Mathlala NO and others* 2012 (1) SA 143 (GNP)

to be untrue. The deponent had now confirmed that in presenting the facts she had been relying on records of the first respondent that were in the first respondent's possession and control rather than on her personal knowledge of those facts. This meant, Mr Cook submitted, that her affidavit asserting personal knowledge of the facts was untrue. Had this been known, he submitted, the tenth respondent and this court would not have made the decisions which the applicant now seeks to set aside.

[44] Turning to the first respondent's reliance in proving its claim on what the applicant referred to as the fraudulent document, Mr Cook submitted that the first respondent's claim against Silver Touch was founded on fraud, and that "fraud unravels everything"[5]. If the tenth respondent had known the true facts, including specifically regarding the manipulated production of the July 2013 document relied upon by the first respondent, he would not have accepted the first respondent's claim as proved. Similarly, had this court known the true facts it would not have ordered compulsory winding-up in terms of its order of 30 March 2021.

[45] In developing this submission Mr Cook argued that in fact EOH Mthombo was the true creditor in respect of the loan to Silver Touch, that EOH MS had misrepresented that it was the creditor in reliance on a fraudulent or fabricated agreement, that this court should not sanction reliance by a party before it on fabricated documents, and that this was sufficient to bring the matter within the ambit of section 354 of the Companies Act.

[46] On setting aside the decision of the tenth respondent, Mr Cook submitted that the provision of PAJA apply, and submitted that where a decision had been procured by means of a fraudulent misrepresentation it was liable to be set aside on review.

[47] In response to the submissions by the first respondent in its heads of argument that the application was an abuse of process and that the public interest militated against the setting aside of the order, Mr Cook submitted that the extensive material in the answering papers introduced to demonstrate that the applicant and Silver Touch had been instrumental in large scale fraud perpetrated on the first respondent and the EOH group more broadly was extraneous and irrelevant, had been introduced for impermissible collateral purposes, and that it was this, and not the applicant's conduct in bringing this application, that constituted an abuse of process.

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[5] adopting, presumably, the words of Lord Denning in *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 CA at 345c

[48] Mr Blou, for the first respondent, submitted that for the purpose of determining both legs of the applicant's application, whether relying on section 354 of the Companies Act or section 151 of the Insolvency Act, applying the rule in *Plascon Evans*[6] all of the factual material put up by the first respondent in the answering papers must be accepted.

[49] Mr Blou further submitted that an applicant under section 354 is required to show more than a *bona fide* defence and must show in addition, among other things, that there are no unpaid creditors and adequate provision has been made to pay the liquidators,[7] and that the relief sought is "*conducive to commercial morality*" and in the interests of the public at large, even beyond the interests of creditors and members. It must be shown, he submitted, that "*the trading operations have been fair and above-board*"[8].

[50] Mr Blou submitted, as regards the contention that the claim had not been validly ceded to EOH MS, that no formality is required for the cession of a loan claim of the kind which occurred here or for the extension of terms of repayment, and that the written agreements in the present matter were matters of evidence rather than compliance with any required legal formality.

[51] Mr Blou emphasized that this court does not sit in an appeal in relation to the approval of the claim, that the onus was on the applicant to demonstrate that exceptional circumstances existed to warrant setting aside the winding-up order under the provisions of section 354, and that the section placed emphasis on other relevant considerations including the interests of justice and the public interest that must justify the conclusion that the company should be released from compulsory winding-up.

[52] He submitted that there were no grounds on which to find that the first respondent's claim against the insolvent estate was bad or that it had prescribed, but that even if there were, the first respondent had clearly established that it would not be in the public interest for the winding-up order to be set aside. It was clearly established on the papers, he submitted, that the trading operations of Silver Touch had not been "*fair and above board*" in the sense contemplated in Re *Telescriptor Sydicate Ltd,* approved in *Klass.*

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[7] referring to *Klass v Contract Interiors* 2010 5 SA 40 (W)

[8] *Klass* supra at [57], [61] and [65], referring to Re *Telescriptor Sydicate Ltd* [1903] 2 CH 174 at 180 – 182,

[53] Ultimately, Mr Blou submitted, even if this court considered that the claim relied upon by the first respondent was flawed in one or other respect, the public interest requirement was not satisfied and it would not be in the public interest to set aside the winding-up order.

[54] In reply Mr Cook accepted that the applicant and fourth respondent would readily have agreed to the terms reflected in the fabricated or manipulated document, but he submitted that this did not render the terms of the document effective, or relieve the first respondent of the consequences of the fact that it had been fraudulently manipulated.

[55] Mr Cook submitted that this court should find that the loan was not in fact repayable to EOH MS and that on the terms of the extension agreement I should find that EOH Mthombo was the true creditor of Silver Touch. He submitted that reliance by the first respondent on the fabricated document, including in the court proceedings in which the first respondent had secured the compulsory winding-up order, provided the "*something special*" or exceptional circumstances that were required, that the claim depended on tainted evidence, that this could not have been a *bona fide* error, and that consequently the court would not have granted the compulsory winding-up order if it knew the facts that are now presented to this court in the present proceedings.

Evaluation

[56] The applicant's attack on the first respondent's claim centers on the manipulated July 2013 extension agreement which was put up by the deponent to the affidavit in support of the claim when it was presented for approval by the tenth respondent at the first meeting of creditors.

[57] As regards the applicant's submission that the affidavit contained a false assertion that the deponent had personal knowledge of its contents, I do not think, absent the underlying issue concerning the authenticity and manipulation of one of the documents on which the deponent relied in presenting the claim, that either the tenth respondent or this court would have made any different decision merely on grounds that the deponent asserted personal knowledge of the matters dealt with in it when she was in fact relying on the authenticity of documents in her possession.

[58] Deponents to affidavits of this kind should, of course, be careful not to misrepresent the extent of their personal knowledge of the facts. It seems to me, however, that it was in any event apparent from the context, even if not expressly stated, that Ms Jordaan did not claim to have been present when the relevant agreements were concluded, and that in the context in which the affidavit was submitted her personal knowledge included knowledge gained from the records of the first respondent that were in her possession. There is certainly no basis for a conclusion that Ms Jordaan either knew or should have known at the time that she deposed to her affidavit of the facts that have subsequently come to light concerning the two documents produced in July 2013.

[59] Even if Ms Jordaan had, on a proper construction of her affidavit, misstated the extent of her personal knowledge of the facts this would not by itself support a conclusion that the tenth respondent and this court respectively would not have reached the decisions that they reached. Unless there is merit in the applicant's contentions regarding the first respondent's reliance on the fraudulent or manipulated July 2013 agreement, I have little doubt that the same decisions would have been reached in each case.

[60] The real question is whether knowledge of the facts now brought to light concerning the July 2013 agreement would have materially affected the decisions of either the tenth respondent or this court to an extent that I should now interfere and set those decisions aside.

[61] In considering this I have had some difficulty in understanding precisely what consequences in law the applicant contends should follow from the fact that the second July 2013 agreement was manipulated and not in fact signed.

[62] On the one hand, Mr Cook submitted that the agreement was a fraud, and that "fraud unravels everthing". Another submission was that in fact the loan claim was ceded to EOH Mthombo under the first and properly signed July 2013 agreement, and was not ceded to EOH MS. Yet another submission was that there was no valid cession of the loan claim at all, with the result that the claim prescribed three years after the original repayment date agreed between Silver Touch and TSS.

[63] In the context of the facts of this matter I am not persuaded by any of these submissions.

[64] Whatever the reason for the clumsy manipulation of the July 2013 agreement, no sensible or rational explanation has been provided in the papers or presented to me in argument other than that this was the method chosen, however ill-advised, by the person responsible for correcting an administrative error.

[65] The revised document reflected the same extension of the repayment date, the only substantive term of the agreement, but this time recording in the preamble the transfer of the loan from TSS to EOH MS rather than to its parent company EOH Mthombo.

[66] On the probabilities, on the evidence before me, this was in fact the mutual intention of the contracting parties. Certainly that is what the same representatives of the same parties confirmed when they concluded the further extension in the "first amendment" agreement in January 2015.

[67] Mr Cook submitted that although the January 2015 agreement recorded the transfer of the loan credit to the first respondent, the fourth respondent had signed it on behalf of EOH Mthombo and not EOH MS, and that in the absence of proof of authority or agency this did not establish the agreement of EOH MS to an extension of the date for repayment. I do not agree.

[68] There can be no doubt that the intention of the applicant on the one hand, and the EOH group on the other, was unequivocally communicated. The "first amendment" agreement recorded the transfer of the loan credit to EOH MS, and it extended the date for repayment of the loan until 20 January 2020.

[69] That the applicant himself understood that this is what had occurred is evidenced by the letter that he subsequently signed on behalf of Silver Touch, dated 26 September 2017.

[70] Mr Cook submitted that it was apparent from the face of that letter that this was simply a document issued for the purpose of supporting EOH MS in claiming BBBEE points, and that it did not necessarily reflect or confirm the true state of affairs.

[71] This is a surprising submission, for a number of reasons. First, the applicant himself, despite being the author of the document and knowing that it was relied upon and had been presented in support of the first respondent's claim at the first meeting of creditors, said nothing about it at all in the founding affidavit in this application. Second, I must surely assume, in favour of the applicant, that when he authored the document

he genuinely believed it to be true, and that he was not intending to publish a false representation aimed at assisting EOH MS to claim BBBEE points for enterprise development to which it was not entitled.

[72] In support of his submission Mr Cook referred me to the assertion of the fourth respondent that enterprise development loans within the EOH group "*were continuously moved around between the EOH entities in order to maximise BEE points at certain points in time*". This statement says nothing about the facts in the present matter. If I were to make anything of it at all it would be to take it as an indication of the kind of abuse of corporate personality that might justify this court disregarding the separate corporate personality of entities within a group of companies where the abuse is aimed at securing an advantage as against third parties.

[73] In this respect, and taking into account the manner in which the fourth respondent and the relevant EOH entities documented the extension of the enterprise development loan to Silver Touch, the situation is reminiscent of that in *Ex Parte Gore NO*[9], where "*...the affairs of the group were in material respects conducted in a manner that maintained no distinguishable corporate identity between the various constituent companies in the group*"[10].

[74] Where there is "*an unconscionable abuse*" of the concept of separate legal personality by founders, shareholders, or controllers of a company the courts "*have shown an acute appreciation that juristic personality is a statutory creation and that 'their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted'.*"[11]

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[9] 2013 (3) SA 382 (WCC)

[10] At paragraph [8]

[11] *Ex Parte Gore* at paragraph [29]. The court went on to conclude, at paragraph [33], that the manner in which the business of the group of companies was conducted in that case, with scant regard for the separate legal personalities of the individual corporate entities of which it was comprised, by 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) of the Companies Act. See also *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) at paragraphs [16], [19] and [23]. Although, as pointed out in *Ex Parte Gore* at paragraph [27], it appears that our courts have followed a "more recent conservative trend by the English courts", pulling back from an earlier willingness to ignore separate personality of individual companies in the context of a group (as in, for example, *Ritz Hotel Ltd v Charles of the Ritz Ltd* 1988 (3) SA 290 (A)), in *Ebrahim* the SCA considered that in contrast with the position in the United Kingdom "*the jurisprudence of this court evidences claimants' spirited reliance on the provision. Though courts will never 'lightly disregard' a corporation's separate identity, nor lightly find recklessness, such conclusions when merited can only help in keeping corporate governance true*". There seems to me to be much to be said for a willingness in appropriate circumstances to ignore the separate personality of entities within a group and to look instead at the economic entity of the group as a whole, especially "*when a parent company owns all the*

[75] Although the exceptional circumstances under which our courts have been willing to hold one company within a group liable for the obligations of another have usually arisen under the doctrine of piercing the veil, there are also circumstances in which the conduct of representatives of a group of companies has been found to have consequences for the contractual relations between a third party and more than one entity in the group, or for a group entity other than the entity claimed by the group[12].

[76] It is not necessary, for present purposes, to apply this line of reasoning in the present matter. There is quite simply no factual basis on the papers before me to reach any conclusion other than that what the applicant communicated in the letter of 26 September 2017 was within his personal knowledge and represented the true position.

[77] Certainly the applicant has not stated to this court that his statement was untrue at the time. That statement is clearly consistent only with a clear understanding on the part of the applicant (i) that the loan creditor was EOH MS and (ii) that however poorly this had been documented, both he and the fourth respondent had, as duly authorized representatives of borrower and lender respectively, agreed to extend the loan period to January 2020.

[78] This is the only sensible construction that can be put on the sequence of events. There is no requirement in law that the extension of a time period for repayment of a loan of this kind be in writing. A written recordal, albeit signed ostensibly on behalf of the parent entity in the EOH group, but by a person - the fourth respondent - who was a director both of the parent and of the subsidiary loan creditor, recording that the loan repayment date was extended cannot in my view be said to be anything other than a clear recordal of that extension. There is no doubt that at least the second extension, by way of the document titled "first amendment" of the loan agreement, establishes that all relevant parties were aware of and agreed to this.

[79] In those circumstances, while it is clear that the impugned document was the subject of manipulation, probably by the fourth respondent's personal assistant at the time, who thought it appropriate or was instructed to attach the signature page from the

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shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says." (*DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 3 All ER 462 at 467 b-c)

[12] See for example *Board of Executors Ltd v McCafferty* 2000 (1) SA 848 (SCA)

earlier document to a corrected version, there are no grounds on which to find that this constituted a fraud that unravels the EOH MS claim to repayment of the loan.

[80] All relevant principals who were required to endorse the arrangements understood the true position clearly, and the records of the EOH Group were consistent in recording the loan creditor as EOH MS. The fourth respondent was, as I have stated, at all material times a director of both EOH Mthombo and EOH MS.

[81] In summary, there are a number of reasons why I am not persuaded that the manipulated document in July 2013 is fatal to the first respondent's claim against Silver Touch.

[82] First, the evidence establishes the intention within the EOH group that the loan creditor should be EOH MS. This was clear and consistent, as reflected in the EOH MS financial statements.

[83] Second, the subsequent written extension signed by both applicant and first respondent in January 2015 correctly identified EOH MS as the loan creditor. The fact that the fourth respondent signed on behalf of the loan creditor's parent and not the loan creditor itself, a wholly owned subsidiary of which he was also a director, does not detract from the clear purpose of the document which was to record in writing the extension of the repayment period to January 2020.

[84] Third, the applicant's own unequivocal representation in 2017 that EOH MS was the loan creditor at that stage cannot be reconciled with any contrary understanding or version.

[85] There is no credible suggestion that the actual or true loan creditor was EOH MS Mthombo. The fourth respondent was fully conversant with the facts and circumstances under which the loan was originally advanced, was a director of the company to which the loan claim was ceded in July 2013 - EOH MS, must have known that the claim was reflected in EOH MS' financial statements annually thereafter, and could only reasonably have understood the January 2015 extension to have extended the period for repayment to EOH MS, notwithstanding the fact that he purported to approve that extension on behalf of the parent company. The applicant himself was similarly fully appraised of all of these facts and circumstances, and as the sole director

of Silver Touch accepted all of the benefits of the extension of the loan on Silver Touch's behalf.

[86] In those circumstances, it seems to me, agency could be implied, and Silver Touch and the applicant cannot rely on the failure of compliance with internal arrangements within the EOH group to avoid the consequences of an extension that was patently to the advantage of Silver Touch.

[87] I do not suggest that these points are exhaustive of the reasons why there are no grounds to interfere with the decision of the fifth respondent that the claim was proved, but they are in my view sufficient to dispose of the application.

[88] It follows from this that I find no reason to review and set aside either the decision of the tenth respondent or to vary or set aside the order of this court, whether acting in terms of section 354 of the Companies Act or otherwise.

[89] Even if I were not correct in the conclusion I have reached on the facts, however, I agree with the submission of Mr Blou that it would in any event not be in the public interest to set aside the winding-up order under section 354. I say so for a number of reasons, including the evidence before me of extensive wrong-doing in the conduct of the business of Silver Touch, and the extent to which the winding-up and the inquiry have progressed since the order was granted.

[90] I would also have regard to the fact that the case on which the applicant has approached this court, supported by the fourth respondent, discloses and seeks to rely on clear abuses of corporate legal personality within the EOH group of companies and in particular those of which the fourth respondent was a director at the time.

[91] Consequently, even if I were not correct regarding the facts as I have assessed them above, I would not have granted the order and would not have exercised this court's discretion to either review, rescind or otherwise interfere with the winding-up order granted by this court and the ongoing consequences or *sequelae* of that order, including the inquiry and related summonses.

Costs

[92] Both parties contended that costs should follow the result, and that these should include the costs of two counsel where so employed.

[93] The first respondent sought costs on an attorney and client scale.

[94] Our courts will generally grant costs on a punitive scale only where a party has been put to unnecessary expense in consequence of conduct by a litigant that can reasonably be characterized as unreasonable or obdurate.[13] An award of this kind requires "*special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party*".[14]

[95] In my view this is a case where attorney and client costs are warranted. The applicant has approached this court with an attack on the validity of the extension of the loan agreement in circumstances in which he had, with full knowledge of the relevant facts, unequivocally acknowledged liability in favour of the first respondent. His attempt to rely on administrative incompetence and manipulation within the EOH group in documenting that liability, where this occurred in the office of the fourth respondent and under his authority, was unreasonable and warrants a special costs order.

Order

[96] In the circumstances I make the following order:

The application is dismissed with costs on an attorney and client scale, including the costs of two counsel where so employed.

C Todd

Acting Judge of the High Court of South Africa

[13] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at paragraph [11]

[14] *Swartbooi v Brink* 2006 (1) SA 203 (CC) at paragraph [27], approving *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607

REFERENCES

For the Applicant:	Adv. O Cook SC and Adv. R Shepstone
Instructed by:	Adam Creswick Attorneys
For the First Respondent:	Adv. J Blou SC and Adv. JE Smit
Instructed by:	Werksmans Attorneys
Hearing date:	07 September 2022
Judgment delivered:	27 September 2022