IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO:C245/2005

In the matter between:

M E GILDENHUYS (SHERIFF OF THE HIGH COURT, KUILSRIVER — Applicant

and

MELODY SURETA SIEBRITS — First Claimant

KARMA PROPERTY INVESTMENTS 14 (PTY) LTD — Second Claimant

J U D G M E N T

NEL AJ:

[1] I have already granted my order in a brief judgment and indicated that I will provide reason for my decision shortly. These are the reasons for my earlier order. In the words of the first claimant's legal representative, this matter has had a long and tortuous history dating back to November 2004, when the applicant, in his capacity as the Sheriff of the High Court, Kuilsriver, delivered an interpleader notice to the first and second claimants in terms of Rule 58 of the Rules of the

High Court after it transpired to him that the claimants had conflicting claims with respect to property that the applicant had attached in execution (hereinafter referred to "the assets").

[2] The assets comprise some 31 categories of items. Some items reflected on the interpleader notice are no longer the subject matter of these proceedings.

[3] Pursuant to an order by Pillay J on 16 May 2006, the first claimant delivered particulars of her claim by way of a founding affidavit. The second claimant (also referred to further herein as “Karma”) thereafter delivered particulars of its claim by way of an answering affidavit and thereafter the first claimant delivered her replying affidavit. A pre-trial conference was thereafter held and minutes delivered in respect of the facts that were common cause and those in dispute.

[4] It was contended on behalf of the first claimant that the issues to be decided in this matter were by and large two-fold, namely:

- Whether the assets were owned by Club Insomnia (Pty) Ltd ("Club Insomnia" or “the Club”) or by the second claimant pursuant to the purchase by it and/or other methods of transfer of ownership to the second claimant of the assets from Club Insomnia.
- If the second claimant is found to be the owner of the assets, whether this Court should pierce the

corporate veil and hold the second claimant and/or its shareholders liable for the debts of Club Insomnia to the first claimant.

[5] The order sought from this Court by the first claimant is that it should direct the applicant to sell the attached assets in execution pursuant to an order granted by this Court in favour of the first claimant against Club Insomnia. The second claimant in turn seeks an order from this Court dismissing the first claimant's claim, with costs.

Background

[6] The first claimant was employed as the managing director of Club Insomnia until she was dismissed on 12 November 2004. First claimant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") as a result of which she was awarded three months' compensation, the CCMA having found her termination to have been unfair.

[7] It was contended by Club Insomnia that it did not oppose the proceedings in the CCMA as at that stage it had ceased trading and that there was no purpose in pouring further funds into the Club.

[8] The first claimant took the decision of the CCMA Commissioner on review. This Court, in a judgment handed down on 4 August 2005, increased the amount of compensation awarded to the first claimant to 12 months at

the rate of R18 250 per month, together with costs.

[9] Again the proceedings were unopposed, it being contended that Club Insomnia had ceased trading more than half a year prior to the Court's decision. From the judgment it would appear to have been common cause at the hearing that Club Insomnia was no longer trading and that it had, in fact, not been trading in April 2005.

[10] When the first claimant demanded payment of R219 000 from Club Insomnia in August 2005, it informed her that it no longer traded, had no assets and was not in a position to meet her demand.

[11] On 12 August 2005, which the second claimant contends is more than seven months after Club Insomnia had ceased trading, the Sheriff judicially attached the assets that he had located at the premises from where Club Insomnia had operated its business and he completed an inventory of the assets.

[12] On 30 August 2005 the legal representatives of Club Insomnia and the second claimant informed the Sheriff that the assets were the property of the second claimant and requested the Sheriff to either release the assets or to issue an interpleader summons.

[13] The Sheriff, on 28 September 2005, issued an interpleader summons in this Court and the proceedings herein are pursuant thereto.

[14] It was common cause between the parties that the shareholders of Club Insomnia are:

- The Sharick Investment Trust;
- The Te Roller Family Trust;
- Jacqueline Elizabeth Maccioni;
- Terblanche Bosman;
- Brent Lawrence Te Roller;
- Luigi Augusto Te Roller (Jnr); and
- The first claimant

and that he directors of Club Insomnia are:

- H J Te Roller;
- L A Te Roller (Snr);
- B L Te Roller;
- L A Te Roller (Jnr);
- J E Maccioni;
- T Bosman; and
- The first claimant.

[15] The shareholders and directors of Club Insomnia, save for the first claimant and T Bosman (who is a close family friend of the Te Rollers), are inter-related. Whilst the first claimant did not make a financial contribution towards the Club Insomnia venture, the remaining directors/shareholders made financial contributions towards the venture.

[16] The shareholders of the second claimant are:

- The Sharick Investment Trust; and
- The Te Roller Family Trust.

and the directors of the second claimant are:

- H J Te Roller; and
- L A Te Roller (Snr).

[17] The second claimant is the registered owner of immovable properties situated at the corner of William Dabbs and Old Paarl Road, Brackenfell ("the premises").

[18] The shareholders of the Biladele (Pty) Ltd t/a Ranch Meats ("Biladele") are:

- The Sharick Investment Trust; and
- The Te Roller Family Trust

and the directors of the Biladele are:

- H J Te Roller;
- L A Te Roller (Snr); and
- Willem Anne Te Roller.

[19] The shareholders of Ranch Meat Centre (Pty) Ltd ("Ranch Meat") (which is not to be confused with the Biladele t/a Ranch Meats) are:

- The Sharick Investment Trust;

- The Te Roller Family Trust;
- The Wilmar Trust; and
- The Missing Family Trust

and the directors of Ranch Meat are:

- H J Te Roller;
- L A Te Roller (Snr);
- Natalie-Ann Missing (L A Te Roller's sister-in law)
- Willem Anne Te Roller.

[20] All the above-mentioned companies are separate legal entities.

[21] The premises were at the time that the Club was being established, and commenced operating, leased from the second claimant. The premises are currently leased to Biladele.

[22] The validity of a number of resolutions taken by Club Insomnia and relevant for the determination of this matter, is in dispute between the parties. This dispute I believe centres on the question whether a binding shareholders' agreement came into existence between the relevant parties in respect of Club Insomnia.

[23] Mr Gwaunza, who appeared on behalf of the first claimant, agreed that, in the event of me finding that a binding shareholders' agreement did not come into existence, then in essence the first question which I referred to above, namely

whether the attached assets are owned by the second claimant pursuant to the purchase by it of these assets subsequent to resolutions to that effect having been properly passed, would be answered in favour of the second claimant. This was so as Mr Gwaunza conceded that the resolutions did otherwise comply with the requirements contained in the residual provisions of the Companies Act, 1973. I accordingly immediately turn to consider the question whether a legally binding shareholders' agreement came into existence between the shareholders of the Biladele.

[24] The first claimant alleges that her relationship with Club Insomnia as a director and shareholder was regulated in the shareholders' agreement which she contends she concluded together with the other shareholders and directors of Club Insomnia. The second claimant, however, disputes that the shareholders' agreement so regulates the relationship between the parties and it alleges that the agreement was never signed. The first claimant could not produce a signed shareholders' agreement. This shareholders' agreement regulates *quorum* requirements for the meetings of directors and shareholders of Club Insomnia. The requirements for the adoption of resolutions by the shareholders and directors of Club Insomnia are also regulated therein.

[25] The relevance of the shareholders' agreement lies simply therein that, from a number of resolutions filed of record, it appears that on 6 January 2005, at a directors meeting, the Club Insomnia directors present decided to close the business as further trading would expose them to claims based on

reckless and negligent trading. It was further resolved that the sale of some assets belonging to the Club be authorised. This was mainly done because cash was urgently required in order to pay employees and creditors. It was also resolved that the sale of further assets would be investigated. At that stage it was hoped that the Biladele would be able to purchase the assets to resolve the situation.

[26] At a meeting of directors of the Club held on 15 February 2005, it was decided that the name "Insomnia" would be sold at the cost of registration thereof and that the remainder of Club Insomnia's assets, which had not yet been sold pursuant to the previous resolution, would be sold, subject to a resolution from the shareholders to that effect.

[27] On 3 March 2005, the shareholders of Club Insomnia approved the sale of all the Club's assets to the various entities named in the resolution, which included the second claimant. The shareholders further ratified all the sales that had already taken place. It is evident from this resolution that Club Insomnia had at the time of the resolution already ceased trading.

[28] The issue in dispute can be crisply described as being that if I conclude that a valid and binding shareholders' agreement regulating, *inter alia*, meetings of directors and shareholders and requirements for the passing of resolutions by either the shareholders or the directors, then the aforementioned resolutions will be defective, and accordingly, so it was argued, invalid, by reason of non-compliance with the

shareholders' agreement which the first claimant contended existed. Should I however find that no such binding shareholders' agreement had existed at the time of these resolutions having been passed, then as I said it was conceded on behalf of the first claimant that these resolutions were valid and binding. In that event I needed to consider the other grounds put forward on behalf of the first claimant why proprietary rights in and to the assets had not passed to the second claimant and why an order should still be granted as prayed for by the first claimant.

[29] As I have indicated, the first claimant's proposition is that all the resolutions, generally, were not validly taken, as the procedures set out in the shareholders' agreement that had been drafted should have been followed. She alleged that this agreement had been duly signed by all involved and that a binding shareholders'' agreement had come into existence which regulated the shareholders' relationship.

[30] The second claimant denied that such agreement had come into existence or that it was ever signed. It argued that, had such agreement been signed, the first claimant in all probability would have been in possession of such a signed copy. The first claimant in her founding affidavit claims that there were seven copies of this agreement in existence.

[31] It was contended by Ms van Zyl, who appeared on behalf of the second claimant, that on the evidence before this Court, there was no proof of the existence of such a signed and binding agreement other than the say so of the first claimant.

It is apparent from both the founding as well as the answering affidavits that, in June 2004, which is when the first claimant alleged that she had signed the shareholders' agreement, there were still various amendments made to the draft shareholders' agreement.

[32] I am of the view that the first claimant bears the *onus* to prove the existence of a legally binding shareholders' agreement which regulated the relationship between the shareholders and the resolution taken by it and the directors of Club Insomnia. In the papers before me there are serious disputes of fact relating to this issue. I am of the view that, on the issue of whether a binding shareholders' agreement came into being, the first claimant is in the position akin to that of an applicant and that the second claimant is in the position akin to that of a respondent. I am bound to attempt to resolve these disputes on the papers by having regard to the allegations of the respondent party (the second claimant herein) together with the uncontroverted allegations of the applicant party (the first claimant herein). Doing so, I am satisfied that the probabilities support the conclusion that a binding shareholders' agreement had not in fact come into existence. It is highly unlikely that, had the agreement been signed, the fist claimant would not have been in possession of a signed copy. The correspondence between the parties also I believe indicate that a number of issues contained in the proposed shareholders' agreement had not been finalised. It is also further more probable that, had there been a binding shareholders' agreement the directors and shareholders would more like than not have tried to comply with its terms

and prescripts. I am therefor of the view that the first claimant has not succeeded in satisfying the *onus* resting on her in this regard.

[33] This being the conclusion to which I have come, it follows that, insofar as the assets attached by the Sheriff are concerned, I am satisfied that they were in fact sold to the second claimant. Such sales took place in terms of binding resolutions of directors or subsequent ratifications by shareholders. I am satisfied that the relationship of the shareholders was regulated by the residual provisions of the Companies Act, 1973, and that the resolutions of both the directors and shareholders of Club Insomnia had been properly passed in terms thereof.

[34] In the alternative it was argued on behalf of the first claimant that the essential elements in the transfer of real rights had not been complied with in respect of the assets to which the second claimant lays claim. In this regard it was argued that a distinction is made in South African law between original and derivative acquisition of ownership. Original acquisitional ownership is not dependent on the lawful ownership of a legal predecessor, while this is required for a derivative acquisition of ownership. It was argued that these proceedings had to do with the latter mode of acquiring property.

[35] Of the various requirements for the transfer of ownership according to the derivative mode, it was argued that the requirements which were relevant to these proceedings, and which it was argued had not been met, were that if ownership

was passed on the basis of a preceding contract of sale, it was only transferred to the buyer if the full purchase price had been paid, unless credit had been granted by the seller to the buyer (see Concor Construction (Cape) (Pty) Ltd v Santambank Ltd 1993(3) SA 930 (A) at 933B-C; Grosvenor Motors (Potchefstroom) v Douglas 1956(3) SA 420 at 423H – 424F).

[36] The next requirement, which was contended on behalf of the first claimant the second claimant had not met, was that it was argued that the transfer of ownership in the case of movables only takes place if the thing had been delivered to the transferee in a legally acceptable way coupled with a real agreement between the parties. This agreement must contain the intention of the owner to transfer ownership and the intention of the transferee to acquire it. (See Info Plus v Scheelke 1998(3) SA 184 (SCA) at 189E).

[37] In the third instance it was contended that a further requirement, which had not been met, was that the transfer had to be based on a just cause which gave rise to the transfer.

[38] Turning to the first requirement, which the first claimant contended the second claimant had not met, namely to have made payment of the full purchase price in respect of the items in contention, a number of allegations were made by the first claimant in support of this contention. So, by way of example, in respect of a substantial number of items amongst the assets, it was contended that the second claimant had not

paid Club Insomnia the full amount due at the time the assets were judicially attached by the Sheriff.

[39] The reply to this contention was in essence that at the time of filing its reply, the second claimant conceded that not all the invoices issued in respect of these particular assets had been paid. It was, however, contended that the second claimant had been paying off in instalments for these assets in terms of a settlement arrangement with a company by the name of Gourmet Coffee, which had originally supplied the assets to Club Insomnia. In essence it would appear that the defence raised by the second claimant is that it had an agreement with Gourmet Coffee in terms of which it was granted credit to pay off in instalments the outstanding amount, which was due by Club Insomnia. Some 15 individual items which are part of the assets are involved in this particular instance. This was not seriously contested by the first claimant, most likely because of her inability to get all the required information. I am accordingly of the view that I must find that credit had been granted by the seller to the second claimant as buyer in respect of these items amongst the assets.

[40] It would appear as if it is further contended that it was agreed that ownership of these items passed to the second claimant subject to it making full payment in the end. It being clear that at the time that the judicial attachment took place, the second claimant had at least made part-payment for the assets, it follows that it may very well have paid for some, if not all of the items attached and forming part of the assets. In any event, it contends that, in terms of the settlement

arrangement with the seller, it is in agreement with the seller that it may pay off in instalments.

[41] If I am wrong to conclude that ownership of these items had passed by reason of the goods having been delivered, coupled with credit having been granted to the purchaser, then I still do not believe that I am able to determine which, if any, assets had been fully paid for and which not by the time that the judicial attachment had taken place. In any event, if ownership had not at the time of attachment passed from Gourmet Coffee to Karma because it had not fully paid for the items, it would follow that ownership had also not gone over to the Club for the same reason. It must be remembered that Karma alleges that it agreed to take over the Club's debt to Gourmet Coffee in respect of these items of the assets. The first claimant will then in any event also not be able to have these items belonging to Gourmet Coffee sold in execution to satisfy her claim against the Club. The disputes of fact remaining on the papers are such that it is not possible for this Court to determine this particular part of the matter on the papers and without hearing oral evidence.

[42] In respect of two further items contained amongst the assets, the first claimant alleged that the full purchase price in respect thereof had not been paid by the second claimant to Club Insomnia at the time when these items were judicially attached by the Sheriff. Only the labour costs in respect of the fitting of the attached items in question had been paid and not the costs of the items themselves, so alleged the first claimant. Yet again a dispute exists between the parties as

the second claimant alleges that these are fixtures which had accrued to it as a result of them having been built into, or attached to the second claimant's immovable property. It was contended that if one calculated the remainder of the debt in respect of these items, the second claimant had more than offset the balance of the debt. It accordingly denied the first claimant's allegations of non-payment. It further contended that, even where the particular purchase price had not actually been paid by the second claimant, it had taken over the indebtedness of Club Insomnia in respect thereof and it was under an obligation to pay. It would appear that in respect of these items, ownership of the goods may still have vested in a third party other than the Club. Alternatively these items may have become the property of the second claimant by reason of them having been attached to its immovable property. Either way, on these facts, I am not able to order that the Sheriff may sell these assets as they appear not to belong to the judgment debtor, the Club. I certainly have insufficient clarity as to exactly who these assets belong to. Again I am of the view that the disputes of fact on the papers make it impossible for this Court to determine this issue.

[43] Then it was contended by the first claimant that in a number of instances the purchase price in respect of certain items part of the assets had not been paid by the second claimant but by H J Te Roller, a director of Club Insomnia. The reply to all of these instances by Mr Te Roller was that he, as a director of the second claimant, had a loan account in the company and that he regularly lent funds to Karma in the event of it not having the necessary cash flow to conclude a

particular transaction. His loan account in Karma is allegedly credited with the amount of every such loan and Karma remained indebted to him in respect of all such payments, which he made on its behalf.

[44] I believe that I will correctly summarise the first claimant's response to this allegation as being that she contended that the common trend of the companies within the Ranch Group, including Club Insomnia, was that the directors and/or shareholders were predominantly members of the Te Roller family and/or various trusts benefiting the Te Roller family. The first claimant did not dispute that the companies in the Ranch Group were separate corporate entities. She did however dispute that the companies were conducted as separate enterprises. The manner in which some of the companies in the Ranch Group had run their businesses, including the Club, was not at arms length according to the first claimant. I will revert to this contention later herein. I am nevertheless again also in respect of these items confronted with disputes of fact, which I believe cannot be resolved on the papers and without oral evidence.

[45] Lastly, under this heading of the first claimant's argument, it was contended that the purchase price in respect of other items had not been paid by the second claimant but by Biladele. I believe that in essence the answer to this proposition was that although originally companies other than the second claimant, such as Biladele, had paid for some of the items contained amongst the assets, it was later on resolved that the second claimant would in fact assume

responsibility for liability in respect of all these assets. Yet again the disputes on the papers are too many for me to be able to determine the matter in dispute.

[46] I turn to deal with the arguments on behalf of the first claimant that, for transfer of ownership to have taken place in respect of movables, it only happens if the thing was delivered to the transferee in a legally acceptable way. It was conceded by the first claimant that the assets in question were in possession of the second claimant at the time. They were purportedly sold to it by Club Insomnia. It was accordingly also contended that the delivery that is applicable under circumstances where a party is in possession is the so-called delivery with a short hand (*traditio brevi manu*). Such delivery occurs when the intended transferee is already in possession of the thing in respect of which he will acquire ownership. Ownership would pass as soon as the parties respectively had the requisite intention to transfer and acquire ownership. This is provided that all the other general requirements for the derivative acquisition of real rights, for example the payment of the full purchase price and the existence of a just cause, which gives rise to the transfer, had been complied with.

[47] It was submitted that under circumstances where a party is in possession of the moveable goods sold to it, the intentions of the parties must be closely scrutinised in order to see that one has to do with a genuine transaction and that there was *bona fides* on the part of the parties to the transaction.

[48] It was argued on behalf of the first claimant that the purported sale by Club Insomnia of the assets to the second claimant was done in bad faith. In support of this contention it was argued that the first mention of the sale of the assets to the second claimant took place after the directors' meeting on 15 February 2005.

[49] It was further contended that the fact that the purported ratification and approval of the sale by Club Insomnia to the second claimant only took place on 3 March 2005. Notwithstanding these facts, so argued the first claimant, the second claimant alleged that it had purchased the assets from Club Insomnia even before any mention of the second claimant as a purchaser had been made. As examples I was referred to the fact that the invoices purportedly issued by Club Insomnia to the second claimant in respect of some of the assets preceded the applicable resolution. The invoices referred to were dated 6, 7 and 25 January 2005 and 18 February 2005. All the invoices except the last one had even preceded the notice, which was allegedly issued on 16 February 2006 in which, for the first time, mention of the sale of the assets to the second claimant was made.

[50] Attention was further drawn to the fact that certain of the alleged payments of the purchase price in respect of some of the attached assets were made even before any mention of the second claimant as a purchaser of the assets had been made and before the applicable resolution had been passed. In addition, in support of the contention that the purported sale was not done in good faith, reference was made to the

fact that several of the payments of the purchase price in respect of some of the assets had not been made by the second claimant but by H J Te Roller. It was accordingly argued that, regard being had to these factors, and careful scrutiny thereof, should drive me to conclude that the transactions in question were not *bona fide* on the part of either Club Insomnia or the second claimant and that consequently there had not been a proper transfer of ownership *brevi manu* pursuant to a sale and purchase of the assets.

[51] In reply hereto it was argued on behalf of the second claimant that it should be evident from the circumstances surrounding the various transactions that many arrangements had been made with Club Insomnia's creditors regarding the payment of debts on behalf of the Club. It was accordingly argued that one cannot therefore, as the first claimant attempted to do, simply apply the general requirements for transfer of ownership in cases of derivative acquisition of ownership without examining the specific circumstances of each transaction. If one were not to do so, that is examine the specific circumstances of each transaction, that would ignore the fact that, as an example, only a rebuttable presumption was created that a sale was for cash and that the prevailing circumstances might indicate that the presumption could not stand.

[52] A further important factor I was called upon to take into account in each event was the intention of the parties to the particular transaction. It was contended that the first

claimant, save for the propositions which I referred to a moment ago, had not offered any evidence upon which I should conclude that the transactions were not *bona fide* or that they were not based upon a just cause.

[53] One of the issues in dispute between the parties herein is that the first claimant persisted in her proposition that the second claimant, Biladele, Ranch Meat Centre and Club Insomnia all formed part of a group of companies known as the Ranch Group, which companies were owned and controlled, so contended the first claimant, by the Te Roller family. In support of this contention the first claimant contended that the shareholders of the second claimant are Sharick Investment Trust and the Te Roller Family Trust and the directors in turn are H J Te Roller and L A Te Roller (Snr). She contended that the common thread in the companies within the Ranch Group, including Club Insomnia and the second claimant, was that the directors and/or the shareholders were predominantly members of the Te Roller family and/or the various trusts benefiting the Te Roller family.

[54] There can be little doubt that the Te Roller family is central to all the legal entities involved herein. So one can see from the answering affidavit deposed to by H J Te Roller that the Te Roller Family Trust is a trust which was set up for the benefit of the children and wife of H J Te Roller's brother, L A Te Roller. One further sees that the Sharick Family Trust is a trust set up for the benefit of the children and wife of H J Te Roller. The one non-Te Roller party who is a director of Ranch Meat Centre, Natelie-Ann Missing, is the sister-in-law of Luigi Te Roller.

[55] One then sees that the Wilmar Trust, which is a shareholder in the Ranch Meat Centre, is in turn a trust set up for the benefit of the wife and children of Willem Te Roller. Another shareholder in Ranch Meat Centre, the Missing Family Trust, is in turn a trust set up for the benefit of Natalie-Ann Missing's husband and children.

[56] One of the reasons put forward on behalf of the second claimant why Club Insomnia does not form part of the Ranch Meat Group is that it had nothing to do with the meat trade. What is, however, apparent is that directly and indirectly the majority shareholding in Club Insomnia is held by, or for the benefit of the Te Roller family. With the exception of the first claimant, who is a 10% shareholder in Club Insomnia, it would appear that the only non-Te Roller shareholder is one Terblanche Bosman who according to H J Te Roller is a long-standing employee of the Ranch Meat Group.

[57] It was contended on behalf of the first claimant that in the event of this Court not being persuaded in the first instance that the resolutions in terms of which the sales and purchases of the assets herein took place were invalid, and secondly if the Court is not persuaded that it can conclude that a transfer of the assets had not taken place to Karma by reason of non-compliance with the legal requirements for the transfer of moveable assets, then the Court should pierce the corporate veil and ignore the separate legal entities and treat the members of the legal entities as if they were the owners of its assets who were conducting the business of these legal

entities in their personal capacities. Alternatively the Court should disregard Karma's separate juristic personality and hold it or the so-called Ranch Group liable for Club Insomnia's debt to the first claimant on the basis of the various circumstances set out in the first claimant's papers.

[58] In this regard it was argued by Ms van Zyl that a court has no general discretion to disregard a company's separate legal existence whenever it considers it just to do so. I was referred to Joubert (ed): The Law of South Africa (First Reissue) Volume 4 Part 1 paragraphs 43-47). Ms van Zyl argued that "the Court may 'lift the veil' only where otherwise as a result only of its existence fraud would exist or manifest justice would be denied. (See Kunst (ed): Henochsberg on The Companies Act Volume 1 at 53-56; Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995(4) SA 790 (A) at 803A-804D; Die Dros (Pty) Ltd & Another v Telefon Beverages CC & Others [2003] 1 All SA 164 (C) at para [23])

[59] It has been held that it is not necessary that the company should have been conceived or founded in deceit, and never had been intended to function genuinely as a company, before its corporate personality can be disregarded. If a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality could not be disregarded in relation to the transaction in question (in order to fix the individual responsible with personal liability) while giving full effect to it in other respects. (See in this regard the Cape Pacific Ltd

case (supra) at 804B-D.

[60] In H¸lse-Reutter & Others v Gödde 2001(4) SA 1336 (SCA) (at 1346A) it was confirmed that a court has no general discretion to disregard a company's separate corporate existence and that the separate legal personality may only be disregarded in the most unusual circumstances. The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. It is a clear matter of principle that there must be some misuse or abuse of the distinction between the corporate entity and those who control it, which resulted in an unfair advantage being afforded to the latter. It is also clear that only where exceptional circumstances exist will a court pierce the corporate veil.

[61] Mr Gwaunza argued that once it had been established that the separate personality of a company had not been maintained, a court, taking into account all relevant circumstances, would pierce the veil where the interests of justice or fairness so demanded.

[62] In support of the contentions, why I should disregard the second claimant's corporate status, it was stated that some payments which were allegedly due by the second claimant to Club Insomnia had been made by various other persons or entities which were connected to the Ranch Group and/or the Te Roller family. So, for example, H J Te Roller and L A Te

Roller who were, *inter alia*, directors of both Club Insomnia and the second claimant, and trustees of the two trusts that held shares in Club Insomnia and the second claimant, made payments on behalf of second claimant. I was further reminded that H J Te Roller had on some occasions assumed payments for Club Insomnia's liabilities whilst on other occasions he had assumed payments for the second claimant's liabilities.

[63] The first claimant's salary had, on occasions, allegedly been paid by other companies in the Ranch Group or the shareholder/directors thereof. The second claimant had allegedly paid some of the wages of the Club's staff. Staff wages were allegedly also on occasion paid by other companies in the Ranch Group. Some payments which were allegedly due by Ranch Meat Centres were made by the second claimant to Absa. Certain invoices for services that were rendered to Club Insomnia by third parties were issued to other companies in the Ranch Group and not to Club Insomnia, despite the services having been rendered to Club Insomnia. In other instances goods were purchased on behalf of Club Insomnia by using a Biladele account with a service provider which goods were then utilised by Club Insomnia.

[64] It was accordingly argued on behalf of the first claimant that there seemed to have been a general tendency of some of the companies within the Ranch Group, or directors/shareholders of these companies, to assume payments of the liabilities of other companies in the Ranch Group. The separate existence of Club Insomnia and the second claimant was not being

maintained in the full sense, with the result that the separation between the two entities and its shareholders/directors was not strictly maintained, according to the first claimant.

[65] The first claimant further reminded me that the second claimant had alleged that it had purchased some of the assets and made payments thereof by, *inter alia*, paying various creditors of Club Insomnia and taking ownership of the assets to the value of the payments made. It was suggested that the second claimant might have been used for an improper purpose. As an example it was suggested that the Club and the second claimant both knew, as early as November 2004 that, barring reinstatement, the first claimant would be claiming R219 000 from Club Insomnia as compensation. Club Insomnia did not bother to oppose the unfair dismissal proceedings in the CCMA and in the Labour Court. Instead, Club Insomnia and the second claimant went about divesting Club Insomnia of its assets in full knowledge of the first claimant's claim against Club Insomnia, thereby frustrating her as a creditor of Club Insomnia. It was therefore contended on behalf of the first plaintiff that Club Insomnia and the second claimant had gone about trying to put the attached assets beyond the first claimant's reach with the full knowledge of the first claimant's claim.

[66] On behalf of the second claimant it was however contended that all the factors listed by the first claimant which individually or cumulatively would justify a piercing of the corporate veil, were countered by the proposition that Club

Insomnia had no link with the meat industry and that it was not regarded as part of the Ranch Meat Group. I was reminded that the payments made on behalf of Karma had been fully explained by the second claimant in its answering affidavit. Likewise the payment of wages on behalf of Club Insomnia had been explained, so contended the second claimant. Similarly, it was contended that the circumstances relating to Club Insomnia's decision not to oppose the proceedings in the CCMA and the Labour Court had also been explained. It was therefor argued that, the fact that some of the shareholders or directors in Karma and Club Insomnia overlapped, did not create an identity of interest between the two companies to the extent that Karma could or should, in the absence of any proof of fraudulent dealings, be held liable for Club Insomnia's debts.

[67] It was in conclusion argued that the fact that Club Insomnia was initially regarded as a potential investment for the benefit of the Te Roller children did not create an identity of interest between Karma and/or the Ranch Meat Group and the Club to such extraordinary extent that the corporate identities of the juristic persons should be negated.

[68] It was contended on behalf of the second claimant that the Supreme Court of Appeal, in the H. Ise-Reutter matter (supra) (at 1346F-1347B), had rejected the contention previously held by the courts namely that, as a general rule, the existence of an alternative remedy did not preclude an action to pierce the corporate veil or that the existence of an alternative remedy was an irrelevant consideration. It was therefor argued that

the first claimant did have another remedy at her disposal, namely that she may apply for Club Insomnia's liquidation, so that a liquidator could investigate the company's financial affairs and its relationship with the companies in the Ranch Group. The liquidator would further be able to establish whether Club Insomnia, Karma and possibly the Ranch Meat Group of companies and their directors and shareholders have all been part of an elaborate fraud on the first claimant. Accordingly it was contended that no reason existed for this Court to exercise its discretion in "piercing the corporate veil" in favour of the first claimant. This, so it was suggested, was not a matter where such drastic and extraordinary steps should be taken.

[69] As I have said, there is little doubt that the Te Roller family plays a controlling role in all the entities relevant herein, namely Club Insomnia, the second claimant, Biladele and Ranch Meat Centres. I believe that the first claimant is justified in her belief that all these legal entities form part, if not of the Ranch Group of companies, then certainly they all are effectively controlled by the Te Roller family or the trusts set up for the benefit of Te Roller family members. It is further apparent, particularly from the second claimant's answering affidavit, that members of the Te Roller family in their individual capacities or through the legal entities over which the Te Roller family had control, had made arrangements with creditors of Club Insomnia regarding the payment of debts on behalf of the Club. This has been done in full knowledge by these individuals or legal entities of the fact that the first claimant was also a creditor at the time of

these arrangements being made with Club Insomnia's creditors. No effort whatsoever has been made to even possibly reach a settlement with the first claimant by also offering to pay her an amount on behalf of the Club in full and final settlement of her claim against the Club.

[70] It is said that the directors of Club Insomnia had decided not to liquidate the company but that it is dormant. It was contended on behalf of the second claimant that, upon taking legal advice on the aspect of the possible liquidation of Club Insomnia, the shareholders were advised that such process would be costly. Because they had already suffered severe losses as a result of the venture, the shareholders decided not to proceed with the liquidation of the company.

[71] It would, however, appear as if these same shareholders and/or directors of the legal entities under the control of the Te Rollers, as I said, had decided how and which of the creditors of Club Insomnia they or the legal entities they controlled would step in on behalf of Club Insomnia and pay its debts or take them over. It is contended that instead of the R1,7 million which the first claimant allegedly projected investors would have to inject into the company, it ended up having invested approximately R4,2 million in Club Insomnia. Nowhere is this Court given some indication as to what happened to this investment and how much of this invested figure was in respect of wages, for instance, and how much of it was in respect of assets.

[72] I am in the end of the view that the first claimant has not succeeded in persuading me that the assets have not legally transferred to the second claimant. I also believe the first claimant has not put sufficient facts before me which may justify this Court in lifting or piercing the corporate veil and ignoring the separate legal persona of the second claimant in particular and treating its members or shareholders as if they were the owners of the assets which Karma contends it had acquired from Club Insomnia. I am, I believe, in any event precluded herein from piercing the corporate veil where an alternative remedy is not only available to the first claimant, but in any event would seem to me to be the one which in actual fact begs to be followed. The first claimant, as a major creditor of Club Insomnia, should have applied for the liquidation of Club Insomnia when she became confronted with all the allegations, which have been made herein by the second claimant. In fact I believe she should have done so long ago. Why I am in particular driven to this conclusion is that, in the first instance, it was patently clear to the first claimant that serious disputes of fact arose on the papers before me. Particularly as there is an alternative remedy than to refer the matter to oral evidence, I do not believe this matter is one where, in the exercise of my discretion, I should order that the matter be referred to oral evidence. I do believe that there at least appears to possibly be reason to believe that some creditors may have been preferred, or benefited, to the exclusion of others. As suggested on behalf of the second claimant, a liquidator will be able to investigate Club Insomnia's financial affairs and its relationship with the companies in the Ranch Meat Group. A liquidator, I believe,

will best be able to establish whether Club Insomnia, Karma or the Ranch Meat Group and/or the directors and/or shareholders of these legal entities had at all been part of any improper conduct or that some creditors have been favoured at the expense of others, in particular, the first claimant. If the insolvency laws have been breached, a liquidator is best suited to establish that through the relevant investigative powers he enjoys. Had assets been disposed of in an improper manner and/or at the time at Club Insomnia was insolvent, that would have its own legal consequences. I am on the papers before me not satisfied that the most unusual circumstances required to be present before a court would pierce the corporate veil has been shown to be present. I cannot on the papers as they stand find fraud, dishonesty or improper purpose on the part of the second claimant or its shareholders or directors.

[73] Whilst I am in the end, and in conclusion, of the view that I am driven to dismiss the first claimant's claim, in determining the issue of costs, I have come full circle to my opening remark. I am personally aware of the tortuous route the first claimant has had to follow, and the emotional roller coaster this whole matter must have caused her. The Court wishes to express its appreciation to both the representatives of the claimants for the very useful arguments presented. In particular, I believe that Mr Gwaunza and his firm are to be commended for having come to the assistance of the first claimant. I am aware that Mr Gwaunza and his firm have not been involved in this matter from the outset and I am sure that they will continue to ably assist and advise the first

claimant how best to pursue her claim against Club Insomnia in the future.

[74] I am of the view that, notwithstanding the fact that the first claimant has accordingly not been successful herein, she has at least placed sufficient evidence before me to have created doubt in the mind of this Court as to whether there may not have been breaches by the second claimant and/or the other legal entities under the control of the Te Roller family of the provisions of the Insolvency Act. I am particularly alive to the fact that under the clear guidance of members of the Te Roller family, a number of creditors of Club Insomnia have had their claims against Club Insomnia paid by other legal entities within the Te Roller group of companies and even by individual members of the Te Roller family. The clear exception has been the first claimant. No basis or reason has been put before me for this distinct differentiation, if not discrimination, between the various creditors of Club Insomnia.

[57] I am in the first instance accordingly not now going to make a final order for costs. For the moment my provisional ruling will be that each party is to pay its own costs. I am, however, going to suspend this part of the order for costs to allow the first claimant to approach this Court again, on the same papers, but amplified, in the event of Club Insomnia having been liquidated and there being a conclusion by a liquidator that there has been any improper dealings with the assets of Club Insomnia or making any finding which may possibly influence this court in making a final order of costs. In that

event the Court will hear argument and consider what appropriate costs order to make. In the event of Club Insomnia not being liquidated within the next six months from the date of this order, then the order for costs which will automatically take final effect will be that each party is to pay its own costs.

[58] The applicant's costs, if any, is to be paid in equal proportions by the first and second claimants herein. The order that I accordingly make herein is the following:

1. The first claimant’s claim is dismissed.
2. The Court provisionally orders that each party pay its own costs. In the event of Club Insomnia (Pty) Ltd being liquidated within six months of this provisional costs order and an adverse finding is made against the second claimant during the liquidation proceedings, the first claimant may approach this Court on the same papers, amplified as necessary, to argue what it contends the final order of costs herein should be. Should Club Insomnia (Pty) Ltd not be liquidated within the next six months from the date of this order, then the provisional order that each party is to pay its own costs will take final effect.
3. The first and second claimants are ordered to pay the applicant’s costs, if any, in equal portions.

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DEON NEL

Acting Judge of the Labour Court.

DATE OF HEARING: 23 November 2006.

DATE OF JUDGMENT: _____

APPEARANCES:

FOR THE FIRST CLAIMANT: Mr Itayi Gwaunza of Edward Nathan Sonnenbergs.

FOR THE SECOND CLAIMANT: Adv Susan van Zyl instructed by Fairbridges.