IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 482/17

In the matter between:

SEAN PRINSLOO **Applicant**

And

EXPIDOR 163 CC t/a THE LEAGUE OF GENTLEMEN **First Respondent**

J.S WILSON **Second Respondent**

Heard: **1 August 2018**

Delivered: **9 May 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] Following his dismissal by the first respondent (Expidor 163 CC t/a the League of Gentlemen) (Incorrectly referred to as '*Explorer* 163 CC t/a The League of Gentlemen' in the arbitration award (and herein referred to as Expidor)), the applicant, Sean Prinsloo referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (The CCMA). Prinsloo subsequently obtained a default award in his favour in the absence Expidor. The second respondent, (JS Wilson) is registered as Expidor's sole member, which is a close corporation.

[2] In a default award issued on 22 February 2016, Commissioner Verhoog of the CCMA found that the dismissal of Prinsloo on the grounds of Expidor's operational requirements was procedurally and substantively unfair. Prinsloo was awarded an amount of R165 669.52, inclusive of compensation equivalent to three months' remuneration, and other outstanding statutory payments.

[3] On 20 January 2017, the default arbitration award was made an order of this Court under case number J935/16 in accordance with the provisions of section 158(1)(c) of the Labour Relations Act (LRA).[1] On 21 February 2017, Prinsloo with the assistance of the Sheriff of the Court attempted to execute the Court order. Wilson had initiated *interpleader* proceedings, claiming sole ownership of all the movables contained in the inventory of goods which the Sheriff sought to attach. The Sheriff returned with a certificate *nulla bona*.

[4] It is against the above background that Prinsloo approached this Court to seek an order in the following terms:

a) That Wilson be joined as a party to these proceedings;

b) That it be the ordered that the Wilson was his true employer;

c) That Wilson is jointly and severally liable with the Expidor for obligations arising from the employment relationship between him and the Expidor;

[1] Act 66 of 1995 (as amended)

d) That the Wilson is jointly and severally liable with the Expidor to comply with arbitration award issued in his favour on 22 February 2016 case number WECT 15946/16

[5] Wilson opposed the joinder application on various grounds, including that Prinsloo had failed to demonstrate that a joinder was permissible and regular in the circumstances. He submitted that he would suffer substantial prejudice if the joinder was allowed. He further contended that Prinsloo had failed to comply with the requirements of section 64 read with section 65 of the Close Corporations Act in demonstrating there was an abuse of the juristic *persona* of Expidor, which necessitated the apportioning of liability to him as a member of the corporation.

[6] In his founding affidavit, Prinsloo in support of the application averred the following;

6.1. He was employed on 4 March 2014 as Marketing Manager for Expidor until 16 October 2016, which was then known as 'The League of Gentlemen' ('LOG'). LOG was an upmarket shuttle service provider, catering for businesses and other entities.

6.2. His employment followed upon an interview with the then Operations Manager of LOG, the late Derrick Stewart, and its owner Wilson. His letter of appointment confirmed his appointment by LOG, which he had signed. Steward signed on behalf of LOG. Whilst employed by LOG, he resided at Wilson's property like all other employees employed by him.

6.3. On 6 July 2015, Stewart passed away, and he (Prinsloo) subsequently held a meeting with Wilson, who had informed him that he intended to close down LOG with immediate effect as he had been supporting Stewart to run it for over a long period without any returns.

6.4. Wilson however proceeded to offer LOG as a business to him for a sum of R297.000.00. The offer came with LOG's clients' data base, all bookings already made, cellular phone and e-mail address. Despite numerous attempts, Prinsloo failed to secure the necessary funding to

acquire the business, and after the deadline set by Wilson came and went, the deal collapsed. He did not hear from Wilson thereafter despite staying on his property.

6.5. On 15 September 2015 and subsequent the intervention of his union (Solidarity), Wilson's attorneys of record in correspondence to Solidarity advised that LOG was the trading name of Expidor 163 CC, and that Prinsloo was employed by the latter entity.

6.6. On 23 September 2015, Prinsloo with the assistance of Solidarity then referred an unfair labour practice dispute to the CCMA. Wilson had attended the conciliation proceedings, and advised the CCMA conciliating Commissioner that LOG was insolvent, and confirmed that Prinsloo was dismissed.

6.7. Upon the advice of the CCMA Conciliating Commissioner, Solidarity referred another dispute (unfair dismissal) on or about 19 October 2015, citing Wilson and Expidor 163 t/a The League of Gentlemen as the respondents. Wilson had attended the second conciliation hearing convened on 9 November 2015, and when the dispute could not be resolved, it was referred for arbitration.

6.8. Wilson however failed to attend the arbitration proceedings, resulting in the default arbitration award, which was subsequently made an order of Court.

6.9. Prinsloo averred that he only became aware that Expidor existed when LOG contemplated his dismissal during August 2015. Prior to that period, he had held the view that the LOG was his employer and that Wilson was its Sole Proprietor.

<u>The issues for determination:</u>

[7] Two principal intertwined issues are up for consideration in this case. The first pertains to whether Wilson should be joined as a party in circumstances where Prinsloo is in possession of a favourable arbitration award, and aligned

to that is whether this Court should pierce the corporate veil for the purposes of finding Wilson liable in terms of that arbitration award.

Application for a joinder:

[8] Prinsloo is of the firm belief that Wilson ought to be joined for the purposes of liability on the following grounds;

8.1 The address at which the luxury vehicles of LOG were stored is essentially the same premises the personal vehicles of Wilson were also stored and/or repaired.

8.2 The restoration of all the vehicles at this address were done by Wilson and four other employees, and his premises also served as business and/or operating offices.

8.3 Wilson had indicated that Expidor was conceptualised for the benefit of his friend, Stewart, and Wilson had consistently directed finances to Expidor, which was running at a loss during that period.

8.4 Wilson had offered to sell LOG, together with its website and personal vehicles to him. He was also the provider of tools and infrastructure for the operation of the business, his personal vehicles were utilised to operate the business, and he had paid his remuneration during his employment.

8.5 Wilson assumed responsibility for the statutory amounts owing to him, and that concession accordingly was inconsistent with Wilson's defence that Expidor was the true employer. The acknowledgment of debt was further indicative of an admission that Wilson was the true employer, or that both legal personalities were indistinguishable for the purpose of the operation of the business.

[9] In opposing the application for a joinder, Wilson relied on *Riding for Disabled v Regional Land Claims Commissioner & Others*[2] for the proposition that it was desirable for the affected party to be afforded an opportunity to be heard in proceedings that culminated in the judgment debt. Wilson argues that should he be joined to the proceedings at this point, he may be substantially

[2] 2017 (5) SA 1 (CC) at 10

prejudiced on the basis that he would have played no role in the proceedings that resulted in an outcome that shall affect him personally in view of the fact that the unfair dismissal proceedings have been concluded in the CCMA. In the result, he contends that his right to a fair trial (*i.e.* the right to be heard) would be unjustifiably infringed and a joinder in circumstances where it might cause prejudice is impermissible.

[10] The test to apply in considering whether a party should be joined in proceedings is whether the party sought to be joined has "substantial interest in the subject matter of the proceedings[3]. Central to this dispute however is whether a joinder is permissible where it is only sought for the purposes of executing a court order.

[11] The approach of our courts has been that a party may not be joined to proceedings if that party had not been a party to the conciliation process, and further that a joinder may not take place after judgment has been handed down[4]. The reasoning behind this approach is that any party should be afforded an opportunity to be heard in a matter where it has a direct and substantial interest[5]. A further important factor is that a party sought to be joined is entitled to be heard on the specific question of the relief[6].

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[3] See *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA); 2009 (1) BCLR 44 (SCA) at para 9, where the court said:

> "…The issue in our matter… is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party, who is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case, supra, it was found that "the question of joinder should not depend on the nature of the subject matter but on the manner in which, and the extent to which, the court's order may affect the interests of third parties".

See also Rule 22 of the Rules of this Court which provides that:

> '(1) The court may join any number of persons, whether jointly, jointly and severally, separately, or in the alternative, as parties in proceedings, if the right to relief depends on the determination of substantially the same question of law or facts.
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> (2) (a) The court may, of its own motion or on application and on notice to every other party, make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
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> (b) When making an order in terms of paragraph *(a)*, the court may give such directions as to the further procedure in the proceedings as it deems fit, and may make an order as to costs'.

[4] See *Temba Big Save CC v Kunyuza and Others* [2016] ZALAC 36; [2016] 10 BLLR 1016 (LAC); (2016) 37 (ILJ) 2633 (LAC); *Ngema and Others v Screenex Wire Weaving Manufacturers (Pty) Limited and others* (2012) 33 ILJ 681 (LC) at para 22 ; *National Union of Mineworkers of South Africa v Intervalve (Pty) Ltd and Others* [2015] 2 BCLR 182 (CC).

[5] See *Snyders and Others v de Jager* [2016] ZACC 54 at para 9, where it was held that;

[12] The question of whether Wilson should be joined in these proceedings is in my view moot. Inasmuch as the legal principles relied upon in regard to the question of joinder are irrefutable, the facts and circumstances of this case however indicate that it is not even necessary to get to that point. My reasons in this regard are as follows;

12.1 From the annexures to the founding affidavit, a second referral[7] was launched at the CCMA on 19 October 2015, with Wilson being cited as a party.

12.2 In the referral form, Prinsloo or Solidarity had on his behalf under paragraph 2 ('*Details of the other party (Party with whom you are in dispute'*)), cited both Expidor and Wilson. Wilson's denials that he was not cited are thus patently untrue, as the referral form indicates otherwise.

12.3 Having been cited, Wilson had attended the conciliation meeting. His contention that he had elected not to participate in the proceedings before the CCMA as at the time he did not run any risk of liability does not avail him. The risks were always there that such liability may arise, and he was aware of them as he had sought to mitigate them when he attended the first and second conciliation proceedings. To that end, any prejudice he may have suffered as a consequence of that election is clearly self-inflicted.

12.4 It is true from a reading of the arbitration award that the Commissioner may not have specifically made an order against Wilson. That however is not the point in that an award was made against Expidor, giving rise

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"A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard"

[6] *Ngema and Others v Screenex Wire Waring Manufactures* at para 14

[7] Annexure 'SP6' to the Founding Affidavit

to questions surrounding his liability. However, to the extent that he was cited and had failed to attend the arbitration proceedings even though he had attended the conciliation proceedings, it cannot be argued that he was not afforded an opportunity to be heard prior to the default award. He had effectively waived his right to be heard.

[13] In the light of the above, it is apparent that the application for a joinder was not necessary in the first place, as Wilson was properly cited in the CCMA referral.

[14] Inasmuch as Wilson seeks to deny liability, he nonetheless sought to attack the award on a variety of grounds, which attacks are in any event belated. If he was aggrieved by the outcome of the award as he appears to suggest in his answering affidavit[8], it was up to him to pursue rescission proceedings. It can further not be correct as he had suggested, that he would not have had *locus standi* to seek a rescission. As already indicated, he was cited, and thus a party to the proceedings before the CCMA,. To this end, any averments made and objections raised by Wilson in regards to the arbitration award are immaterial to this application as correctly pointed out on behalf of Prinsloo.

Piercing the Corporate veil:

[15] The only issue for consideration to the extent that the arbitration award does not specify Wilson's liability is whether facts have been placed before the Court for the piercing of the corporate veil, in order for a conclusion to be reached that Wilson was Prinsloo's employer and therefore liable for the payments arising from the arbitration award.

[16] When the veil of incorporation is pierced or lifted, the consequences thereof are that the protective covering of the limited liability presented by the company structure is stripped away[9]. It is trite that courts do not enjoy a general discretion to disregard the separate juristic personality of a legal entity, and that the piercing of the corporate veil is 'an exceptional procedure'.

[8] Paragraphs 62 - 67 of the Answering Affidavit
[9] See *Footwear Trading CC vs Mdlalose* [2005] 5 BLLR 452 (LAC)

[17] Exceptional circumstances permitting the piercing of the corporate veil will ordinarily include instances where there is fraud, dishonesty or other improper conduct in the establishment or use of the corporation or the conduct of its affairs[10]. These principles were considered in detail in *Airport Cold Storage (Pty) Ltd V Ebrahim and Others*[11], where the Court held as follows;

> 9. "Whatever form it takes, veil piercing is an 'exceptional procedure', and, as pointed out by Scott JA in *Hülse-Reutter and Others v Gödde*, a court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so. However, the circumstances in which a court will disregard the distinction between a corporate entity and those who control it are 'far from settled':
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> "Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what is, I think, clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter."
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> 10. In *The Shipping Corporation of India Ltd v Evdomon Corporation and Another* Corbett CJ required proof of 'an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs' before a court can pierce the corporate veil.
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> 11. This requirement of fraud or other improper conduct finds resonance in the provisions of s 65 of the Act, where the legislature, with regard to close corporations, has created a statutory remedy 'which is equivalent to (the court's) jurisdiction at common law to ''pierce the corporate veil'' in relation to a company'. Liability under this section depends on a finding of 'gross abuse of the juristic personality of the corporation as a separate entity'. However, no attempt has been made in the section to indicate the

[10] See *The Shipping Cooperation of India Ltd v Evdoman Corporation and Another* 1994 (1) SA 550 [A] at 566C-F*; Bargaining Council for the Furniture Manufacturing Industry, Kwazulu- Natal v UKD Marketing CC and* Others [2013] 2 BLLR 119 (LAC); (2013) 34 ILJ 96 (LAC) at para 21; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A); *Knoop NO and Others v Birkenstock Properties (Pty) Ltd and Others* (FB) (unreported case no 7095/2008, 4-6-2009)
[11] 2008 (2) SA 303 [C]

facts or circumstances that would qualify as a gross abuse of the juristic personality of the corporation as a separate entity. The courts are required, in other words, to give content to the open-ended concept of 'gross abuse', based on the facts of each particular case. This exercise does not take place in a vacuum, however, and it is axiomatic that the principles and categories developed with regard to piercing the corporate veil in the context of company law will serve as useful guidelines in this context.

12. The starting point is that veil piercing will be employed 'only where special circumstances exist indicating that it [i.e. the company or close corporation] is a mere façade concealing the true facts'. Fraud will obviously be such a special circumstance, but it is not essential. In certain circumstances the corporate veil will also be pierced 'where the controlling shareholders do not treat the company as a separate entity, but instead treat it as their ''alter ego'' or ''instrumentality'' to promote their private, extracorporate interests': Although the form is that of a separate entity carrying on business to promote its stated objects, in truth the company is a mere instrumentality or business *conduit* for promoting, not its own business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one. In these cases there is usually no intention to defraud although there is always abuse of the company's separate existence (an attempt to obtain the advantages of the separate personality of the company without in fact treating it as a separate entity).

13. Against this background, I turn to consider whether the plaintiff has established that the defendants have in fact abused the separate juristic personality of the close corporation in question."[12] (Citations omitted)

[18] Prinsloo seeks to have the corporate veil pierced and for an order to be made that would allow him to recover the amounts due to him by virtue of the arbitration award from Wilson. In this regard, he submitted that;

[12] *Airport Cold Storage (Pty) Ltd V Ebrahim and Others* supra At pages 307 -308; See also *Hülse–Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para 20, where it was held that the test as to whether it would be appropriate to pierce the corporate veil involves a consideration at least, of some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage afforded to the latter.

18.1 Once a corporation is nothing but an alter ego of its members, then there was nothing in law that would preclude a party from seeking relief from its members who are shown to have acted improperly[13].

18.2 In matters where the piercing of the corporate veil must occur, the courts will consider the corporate's scope of operation, the members' role and their function and powers, the amount of debt, the extent of the financial hardship, the prospect of recovery and the extent of the harm caused by the members' conduct[14].

18.3 In this case, Wilson misused and abused the principal corporate personality of Expidor, to improperly avoid liability for obligations incurred as a result of his unfair dismissal from his employ, and therefore, the need to preserve the separate corporate identity would have to be disregarded in the light of considerations which arise in favour of piercing the corporate veil.

18.4 He was never aware of the existence of Expidor, and was never advised that he was employed by Expidor and not Wilson until the timing of his dismissal. He had however reported directly to Wilson or Stewart, and Wilson had acted as his employer at all times. To this end, Wilson and Expidor were inseparable as far as his employment with LOG was concerned.

[19] Wilson in opposing the application made the following submissions;

19.1. He and Stewart conceived an idea of a business of an up-market shuttle service. At the time, he was a sole member of a Close Corporation (Expidor) and owned luxury vehicles which he earmarked for the business venture (operating the shuttle service). The shuttle business would utilise his luxury vehicles in a form of a loan to operate and earn an income for Stewart and his family.

[13]In reference to *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC) at para 34
[14] In reference to *Ebrahim and another v Airport Cold Storage*

19.2. Wilson further bought (on behalf of the Expidor), the same business idea for a third party for an amount of R100 000, which included a motor vehicle, a client book and secured bookings. The idea resulted in the birth of LOG.

19.3. Expidor operated the business of LOG which had its own banking account, an accountant, and was operated on day-to-day basis by Stewart and his wife. In the end, Expidor owed him loans in an amount equivalent to R347 962.00.

19.4. He further averred that he had no personal involvement in the day-to-day operations of LOG, and that his role was limited to bankrolling the business when the need arose.

19.5. He further denied that he had interviewed Prinsloo for the position of Marketing Manager and contended that that his role in the appointment was limited to approving Prinsloo as a candidate, as he was the financial sponsor of the business.

19.6. The relief sought by Prinsloo when holistically viewed was tantamount to that as contemplated in the provisions of section 65 of the Close Corporations Act and in the circumstances, Prinsloo ought to have sought an order declaring that Expidor was not a separate juristic *persona* and his claim lay with Wilson.

19.7. Prinsloo according to Wilson had failed to meet stringent requirements for a successful claim for piercing of the corporate veil, and the Court did not have a general discretion to pierce the corporate veil for the purposes of attributing liability to the individual member.

19.8. For a successful claim for piercing the corporate veil, Prinsloo had to prove fraud and/or improper conduct in the running of the corporation's affairs. Thus the burden of proving that Expidor was ran in a fraudulent or improper manner with the intent of avoiding its obligations was on Prinsloo.

19.9. Considering these factors, Wilson contends that the inability of the corporation to satisfy the judgment debt does not constitute improper conduct that may justify the piercing of the corporate veil, nor did it justify the holding of its members liable for the corporation's obligations and liabilities.

19.10. Prinsloo had not revealed any improper conduct except to erroneously allege that he only became aware during August 2015 of the existence of Expidor. In view of the fact that Prinsloo was provided with documents in respect of the proposed sale of the business, it is inconceivable that the he only became aware of Expidor in August 2015.

[20] Wilson contends that what Prinsloo seeks as can be gleaned from the prayers in the Notice of Motion is an order in terms of section 65 of the Close Corporation Act[15], and under those circumstances, he ought to have sought an order declaring Expidor not to be a juristic person in respect of the right he seeks to enforce against him. It was further contended that absent such relief being sought and granted, the separate corporate personality of Expidor must be recognised, and any of its obligations remains its own only.

[21] The difficulty however with the above argument is that nowhere in his pleadings does Prinsloo make any reference to the provisions of section 65 of the Close Corporation Act. His main contention was that what needs to be determined is whether upon the piercing of the corporate veil, Wilson should be found to be the true employer. There can therefore be no merit on the reliance of the provisions of section 65 of the Close Corporation Act, when Prinsloo's case is not grounded on those provisions.

[15] Act 69 of 1984, which provides that;

"**Powers of Court in case of abuse of separate juristic personality of corporation.**

Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration."

[22] What Prinsloo seeks is an order declaring that Wilson was his true employer for the purposes of joint and several liability in respect of obligations arising from his employment relationship with Expidor. In any event, it was held in *L & P Plant Hire BK v Bosch*[16] that the provisions of section 64[17] should not be applied where the corporation was in a position to meet the debt in question, and that it should be of no concern to the creditor if the person who acted on behalf of the close corporation has been reckless or even fraudulent, as the creditor's only interest is to recover the debt owed to him[18].

[23] In this case, it was Prinsloo's contentions that his claim against Expidor qualified him as a creditor in any liquidation proceedings that may have been initiated by or against Expidor. He had submitted that he had not however been approached or advised of any liquidation proceedings. To that end, and to the extent that Wilson in the pleadings had not responded to his contentions that Expidor had not been liquidated, it should be concluded that it was not.

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[16] 2002 (2) SA 662 (SCA)

[17] "**Section 64. Liability for reckless or fraudulent carrying-on of business of corporation**

(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) Without prejudice to any other criminal liability incurred where any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence. **[as substituted by S 224(2) of Act 71 of 2008]"**

[18] See also *Saincic and Others v Industro-Clean (Pty) Ltd and Another* [2006] ZASCA 83; [2006] SCA 77 (RSA); 2009 (1) SA 538 (SCA) at para 13, where it was held that;

"The *L & P Plant Hire* case dealt with s 64 of the Close Corporation Act 69 of 1984 the section which may be regarded as the counterpart of s 424. This court held that it had to be interpreted restrictively as far as creditors were concerned and that it could not be relied on by a creditor where the corporation, in spite of the fact that its business had been conducted in a reckless or grossly negligent manner, was still able to meet the creditor's claim. The first reason given (at 677E-F) was that a creditor whose claim the corporation was able to discharge had no interest in the manner in which the corporation's business is conducted. The second reason given (at 677I-678A) was that it was not the intention of s 64 to provide creditors of a corporation whose business had been conducted recklessly or grossly negligently with co-debtors of the corporation against whom they might proceed. The court, however, left it open (at 677J) whether the position might not be different where the corporation's business had been conducted fraudulently."

[24] To the extent that it was Prinsloo's contentions that Wilson was the only member of the Close Corporation and in effect the same person as the corporation wearing different hats, it is accepted that in certain cases the Court has disregarded the company's separate legal personality and focused on the natural person or persons 'behind' the company as if there were no dichotomy between such person or persons and the company[19]. In this regard, it is further accepted that in certain instances, the corporate veil ought to be pierced where the business of a close corporation was so enmeshed with that of the respondent company that the respondent could be regarded as the real employer of the applicant. In some instances, it has also been held that it was not even necessary for the purposes of establishing an employment relationship formally, to pierce the corporate veil[20].

[25] Prinsloo in substantiation of his claim that the corporation was the mere *alter ego* or *business conduit* of Wilson, averred that the LOG was effectively Wilson's operation based on the following:

25.1 Wilson did not disclose the existence of Expidor or true identity of the corporation until his contemplated dismissal;

25.2 Wilson was effectively involved in the day-to-day operations of the business, and the appointment of employees. Furthermore, all the financials of the corporation were vested in him;

25.3 Wilson had at all material times acted as his employer and the sole proprietor of Expidor and in the result, the juristic *persona* of Expidor and Wilson were inseparable and indistinguishable.

25.4 Almost all the assets including the means of operations (the vehicles) were owned by Wilson in his personal capacity, and the business address and the storage facility was under the control of Wilson.

25.5 Wilson had accepted liability for the retrenchment package (severance pay), he was entitled to in terms of legislation;

[19] Henochsberg (Delport et al) n 16 p 85
[20] See *Board of Executors Ltd v McCafferty* [1997] 7 BLLR 835 (LAC)

25.6 The employees were at all material times were under the impression that Wilson was the owner of the LOG.

25.7 The identity of Expidor was withheld and misused in order to avoid the obligations arising from the employment relationship and in particular the unfair dismissal claim.

[26] Wilson disputed the above contentions and submitted that in view of the dispute of facts, the application ought to be dismissed. The disputed facts raised by Wilson are as follows;

26.1 He was effectively not involved in the employment of Prinsloo, had not interviewed him or provided him with a letter of appointment, or entered into any agreement with him in regards to the terms of his employment. He denied having provided him with accommodation as part of his employment agreement.

26.2 Wilson disputed that he exercised any form of authority over Prinsloo, and further disputes that he paid him his salary, including an amount of R12 225.00 per month as he had alleged at the CCMA.

26.3 Despite Prinsloo being informed in July 2015 after the death of Stewart that Expidor would cease trading with immediate effect, he informed the CCMA that he only got to know of his retrenchment in October 2015.

[27] It is trite that in motion proceedings, disputes of fact arising from the pleadings where a final order is sought are resolved by the application of the principles enunciated in *Plascon-Evans Plaints (TVL) Ltd v van Riebeck Plaints (Pty) Ltd*[21]. These principles were further explained in *National Director of Public Prosecutions v Zuma*[22] as follows;

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[21] *Plascon-Evans Plaints (TVL) Ltd v van Riebeck Plaints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 at H-I where it was held that;

> "…It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers..."

[28] In applying the above principles to the facts of this case, it ought to be concluded that based on the observations as shall be illustrated below, Prinsloo's claim should succeed on the basis that Wilson's denials are not genuine dispute of facts that could necessitate the dismissal of the claim or a referral of this dispute for oral evidence[23]. Further emanating from the

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to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; Da Mata v Otto, NO, 1972 (3) SA 585 (A), at p 882 D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf. Petersen v Cuthbert & Co Ltd 1945 AD 420, at p 428; Room Hire case, supra, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e.g. Rikhoto v East Rand Administration Board, 1983 (4) SA (W), at p 283 E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra, at p 924 A)."

[22] [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) at para 26

[23] See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13, where it was held that;

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputed party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the

pleadings, the Court is of the view that Wilson's allegations and denials are clearly fictitious, palpably implausible, far-fetched and/or so clearly untenable that they ought to be rejected merely on the papers. My conclusions in this regard are based on the following;

28.1 Wilson did not dispute that on Stewart's advice, a pre-employment meeting with Prinsloo was convened to assess his suitability for the position of marketing manager. Wilson attended that meeting and in his answering affidavit, he merely disputed the purpose of that meeting, contending that he attended it as a 'favour' to Stewart, who may have wanted his approval as the financial muscle of the operations.

28.2 Wilson had admitted discussing the operations of the LOG in that meeting, with a view of adopting a turnaround strategy, and had from that meeting, formed a view that Prinsloo was competent and suitable for the position of marketing manager. His contentions that he merely discussed the business in broad terms without interviewing him seems to be far-fetched.

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disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If 28 2008 (3) SA 371 (SCA). 49 that does not happen it should come as no surprise that the court takes a robust view of the matter."

See also Erasmus: Superior Court Practice Van Loggerenberg Erasmus: Superior Court Practice (Vol 2) 2nd edition Service 4, 2017 D1-74, where it is stated that;

"A bare denial of the applicant's allegations in his affidavits will not in general be sufficient to generate a genuine or real dispute of fact. It has been said that the court must take 'a robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence."

28.3 Wilson met Prinsloo at the commencement of his employment, and however denied that he had instructed Steward to present him (Prinsloo) with a letter of appointment.

28.4 According to Prinsloo, his salary was paid by Wilson in cash and he stayed on his property during the period of his employment. Wilson's contentions are that Prinsloo stayed on his property as he did him a favour as he was struggling to sort out his accommodation.

28.5 Although Wilson denied being responsible for the day-to-day running of the operations, he nonetheless admitted that he was the sole member of the corporation, which was revived with the sole purposes of operating the LOG. He had further admitted that he provided periodic financial injection to the operations, regularly attended at the premises of the business and that the assets of the corporation were stored and maintained under the same roof. He conceded that 'notionally, he owned' the business, even though he never traded through it other than to assist Stewart to operate the LOG.

28.6 Wilson admitted that he conceived the business, provided it with infrastructure and finances. He held ownership of the vehicles which were the core of the operations of the Expidor's business, and the vehicles were retained in his name, *albeit* he contended that this was done in order to mitigate against any loss that the business may suffer and in order to protect his investments, and for the luxury vehicles to serve as security for the loans granted in favour of Expidor.[24]

28.7 Wilson contended that the LOG was conceived for the purpose of assisting Steward in generating an income after his previous business venture collapsed. Even if those factors were relevant for the consideration of personal liability, in line with what was stated in *Cape Pacific Ltd v Lubner Controlling Investments,* it was immaterial whether the corporation was established for a legitimate purpose in

[24] Para 26 of answering affidavit

circumstances were fraud, dishonestly or improper purposes has been shown.

28.8 Wilson admitted that he had advised Prinsloo of his dismissal and offered to pay him a retrenchment package in respect of his contemplated dismissal on account of Expidor's operational requirements. He however denies that he had offered the severance package in his personal capacity. At the time that the offer of a severance package was mentioned, it was disclosed that LOG was a close corporation, something that was never brought to Prinsloo's attention at the time of his employment

28.9 Wilson had offered to sell LOG, its website, bookings, and vehicles to Prinsloo. On his version, when Stewart's health started to deteriorate, he had the vehicles and administration of the business moved to his own smallholding, as he was 'concerned with the welfare of Stewart'. The question that needs to be asked in these circumstances is why Wilson would want to sell assets that did not belong to him, even if he had financially supported the business. If the business was insolvent upon the death of Stewart, the issue is how he could have on his own wished to dispose of those assets without any legal proceedings having been instituted insofar as other creditors, if any, were concerned. It is apparent from the attempted sale of the assets, that Wilson made not distinction between himself and Expidor, a corporation of which he was the sole member.[25]

[29] In the light of the above observations, and further having examined the substance rather than the form of the business of Expidor, it is my view that Prinsloo has discharged the evidential basis to disregard a company's separate personality, and a case has been made out as to why the corporate veil in respect of Wilson should be lifted. Furthermore, the facts and circumstances of this case are such that the business of Expidor was so enmeshed with that of Wilson that Prinsloo's impression that he (Wilson) was indeed his true employer was reasonable under the circumstances.

[25] Page 54 - 55 index to pleadings

[30] It is apparent that the affairs of Expidor were conducted in the manner that they were indistinguishable from those of Wilson in his personal capacity, and clearly the corporate personality of Expidor was misused and abused as a facade by Wilson, resulting in an unfair advantage to him as an individual controlling Expidor. In this regard, it is worth repeating that Wilson was the sole member of Expidor, owned all the vehicles used by Expidor, provided Expidor with all financing, premises, and vehicles to conduct its business. He provided operational capital and had assumed all responsibility of Expidor's debts after the death of Stewart, and further sought to sell Expidor's assets. Other considerations are that Wilson's personal luxury vehicles were stored and maintained in the same premises in which those of LOG were stored and maintained by the same employees. In the absence of any formalised arrangements in respect of the maintenance and storage of the vehicles, the invariable conclusion to be reached is that indeed the assets were considered as one for all purposes.

[31] A further worrisome consideration is that the true identity of the business was only revealed after the death of Stewart and when a dismissal was to take place. In my view, it is irrelevant whether Prinsloo got to know the true identity of the business in July or October 2015, in that this ought to have been made clear and disclosed to him when he joined the business in March 2014. To this end, the only inference to be drawn is that Wilson made the disclosure at the point that he did, with the improper intention of avoiding his obligations and liabilities in relation to any steps that may have been taken against Expidor, with the intention to place Prinsloo or any other creditor in a disadvantaged position.

[26] In the light of the above conclusions, it follows that Prinsloo's claim ought to succeed. I have further had regards to the requirements of law and fairness, and I am of the view that a costs order is not warranted in this case.

[27] In the premises, the following order is made;

Order:

1. The Second Respondent (J.S Wilson) is liable for the obligations arising from the employment relationship between the Applicant and the First Respondent (Expidor 163 CC t/a the League of Gentlemen).

2. The Second Respondent is liable to comply with the arbitration award issued in favour of the Applicant dated 22 February 2016 under case number WECT 15946/15, which award was made an order of this Court on 20 January 2017 under case number J935/16.

3. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr W. Jacobs of Willem Jacobs & Associates

For the Respondents: Adv. T. Möller, instructed by Johan Venter & Associates