IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. A39/2007
REPORTABLE

In the application between:

AMLIN (SA) PTY LIMITED APPELLANT

and

RIJK VAN KOOIJ RESPONDENT

JUDGMENT DELIVERED ON 30 OCTOBER 2007

DLODLO, J

INTRODUCTION

[1] The matter served before us as an Appeal against the Judgment of Tulbagh Magistrate. The Appellant issued summons against the Respondent on 6 May 2005 for the payment of the sum of seventy thousand rands (R70 000) allegedly being money lent and advanced by the Appellant to the Respondent at the latter's special instance and request. The document, purporting to be a loan agreement, appears on page 135 of the record. It is written on top "FAX MESSAGE" and is marked for the attention of Helmuth Luttig. It is dated 8 December 2003 and is signed by C.R. Kooij (Respondent). It reads as follows:

"Dear Mr Luttig,

I herewith confirm reception of R70 000.00 received from Amlin SA (Pty) Ltd as a loan (R120 000.00 in Week 41, R50 000.00 in Week 49)."

[2] The Respondent resisted the action by filing and serving Notice of intention to defend. An unsuccessful application for summary judgment in terms of the Magistrates' Court Rules was lodged. In an Affidavit in opposition to the summary judgment application the Respondent stated *inter alia* the following:

"2.1 I did not borrow any money from the Applicant.

2.2 The Applicant asked me during 2003 to give his representative in South Africa a letter confirming receipt of an amount of R70 000.

2.3 This amount was no loan but part payment of a total sum of €100 000 the Applicant and his company Amlin Holdings owed me…"

[3] In his Plea the Respondent denied the existence of a loan agreement and pleaded specifically as follows:

"3.2.1 Amlin Holdings, a company registered in the Netherlands, owed Defendant the sum of €100 000 which sum is due and payable to Defendant.

3.2.2 Part payment of the aforesaid amount to Defendant was facilitated through Plaintiff and hence the sum of R70 000 was paid to Defendant.

3.2.3 In the premises the sum of R70 000 was not a loan but part repayment of a debt."

Upon conclusion of the trial that ensued, the magistrate found in favour of the Respondent. The Appellant appealed to this Court. Mr. Engela and Mr. Swanepoel appeared before us for the Appellant and the Respondent respectively.

THE EVIDENCE

[4] Mr. Von Waesberghe testified that he is a director of the Appellant company. According to his evidence the Respondent was never an

employee of the Appellant. However, the Respondent was in the employ of Amlin Holdings BV, which rendered professional services to the Appellant. Amlin Holdings BV at some stage owed the Respondent an amount of €100 000. According to Mr. Von Waesberghe at that time the finance of Amlin Holdings BV was in a rather weak state. At a meeting on 16 August 2003, according to Mr. Von Waesberghe, it was agreed that the Respondent would continue to be employed by Amlin Holdings BV until 1 January 2004, where-after he would be employed by the Appellant. Mr. Von Waesberghe testified further that on 8 October 2003 the Respondent received an amount of twenty thousand rands (R20 000) from the Appellant, as a loan, and on 1, 3 and 4 December 2003 he received the further amounts totalling Fifty Thousand Rands (R50 000), from the Appellant company as a loan. The Respondent signed a written document confirming the loan.

[5] Mr. Von Waesberghe testified that the aforementioned amounts totalling seventy thousand rands (R70 000) had never been repaid to the Appellant company. Under cross-examination, Mr. Von Waesberghe clarified to the Court *a quo* the relationship between Amlin Holdings BV, the Appellant and the Respondent. He told the Court that the Respondent's salary was paid by Amlin Holdings BV but the day-to-day expenses incurred by the Respondent were paid by the Appellant. In his testimony Amlin Holdings BV "assigned" Respondent's services to the Appellant. In his own words on the salary and/or the commission of the Respondent, Mr. Von Waesberghe testified thus:

> "You cannot pay a person's bonus or commission from out a South African account, that is impossible. From out a complete other entity which is called Amlin SA, yes you cannot do that."

Inasmuch as the Respondent requested that the Appellant make

part payment to him of the debts owed to the latter by Amlin Holdings BV, Mr. Von Waesberghe testified that:

"…No, he tries out as if I am willing to put out of Amlin SA which is complete other company to pay R250 000 I would never agree. I could never agree because it cannot happen like that."

[6] In cross-examination it was constantly put to Mr. Von Waesberghe that the amounts paid over to the Respondent was not a loan, but was a "part payment of a debt' and/or was paid "in reduction of the debt" owed by Amlin Holdings BV to the Respondent. Mr. Von Waesberghe denied and maintained that Amlin Holdings BV and the Appellant were two independent and separate entities, distinct from each other. The following portion of cross-examination of Mr. Von Waesberghe deserves to be quoted:

"Were you the sole director of Amlin Holdings?.... Yes.

Who own (sic) the shares in Amlin Holdings?....Amlin Belgium, O! Amlin Vere Verena.

Yes, but did you hold the shares?....Yes
You hold the shares?....Yes
So is it correct to say that you were in total control of Amlin Holdings. You were the sole director and you would control all the share holding in Amlin Holdings?....Yes and Vere Verena.

……..Is it fair to say Mr. Von Waesberghe that you were in control of Amlin Holdings and you were the managing director of Amlin SA, and you were also in total control of Amlin SA?....I was, yes.

Mr. Von Waesberghe it is not our case that Amlin Holding and Amlin SA is the same identity, we know they are two different companies. But my proposal to you that you controlled Amlin Holdings?....Yes.

And the shares in Amlin South Africa, the Plaintiff in this matter that all hold by the Pro Trust?....Yes.

And that is your trust?....No, besides me it was a family trust.

But you said that you were one of the beneficiaries?....Yes.

It is common cause that Amlin Holdings owed a lot of money to Mr.

Van Kooij?....Yes, Amlin Holdings does.
So I think can this Court today accept Mr. Von Waesberghe that Amlin Holdings owed Mr. Van Kooij the sum of 103 156 euros and 80 cent?....Yes."

[7] The Respondent, Mr. Van Kooij, testified that he spoke to Mr. Von Waesberghe telephonically and told the latter he needed money. According to the Respondent Mr. Von Waesberghe's response was, "I cannot do much but I can pay you a R100 000.00 from Amlin SA." The Respondent asked Mr. Von Waesberghe for more money whereupon the latter said "the best thing I can do at the moment is R20 000.00 and I have to pay that through Amlin SA." The Respondent's testimony regarding the further payment of R50 000 was similar to the above. The Respondent's version throughout his evidence remained that "in his mind the payments would have been deducted from the debt owed to him by Amlin Holdings BV. It was the Respondent's evidence that he appended his signature on B15 because Mr. Von Waesberghe repeatedly asked him to do so, so that the books of Amlin SA could balance. Asked specifically if he heard the evidence by Mr. Von Waesberghe that it was in fact a loan, loaned to him by the Appellant, the Respondent reiterated that money was never a loan but part repayment of what was owed to him. Asked if he saw Mr. Von Waesberghe after the payment to him of the money under discussion, the Respondent replied as follows:

"It was discussed that of course already knew by telephone that Amlin Holdings was liquidated and he wanted to meet me. And we met each other in Paarl and he wanted to go on with Amlin SA and he wanted me to do it together with him and if it would be a great success then he could repay my debts in the future."

[8] The Seventy Thousand Rands (R70 000) was never reclaimed by either the Appellant or Mr. Von Waesberghe for the whole of 2004 nor subsequently. The Respondent conceded under cross-examination that the document he signed was important but added that he was forced to do so by Mr. Von Waesberghe. It was put to him that Mr. Von Waesberghe repeatedly called the Respondent requesting the document but that did not amount to force. In response the Respondent stated, *"well he is my boss so I had to do what he wanted me to do." The Respondent under cross-examination repeatedly explained that "it was never a loan. It was always agreed that it will be deducted from the debts of Amlin Holdings. It was never agreed to be a loan."*

Asked if he found it strange that Amlin SA, for whom he rendered service on behalf of Amlin Holdings, paid his expenses, the Respondent said that Amlin Holdings could not pay his expenses and that was why Amlin SA had paid him those expenses.

SUBMISSIONS AND THE LAW

[9] Mr. Engela advanced three (3) reasons on the basis of which the Respondent's version that "in his mind" the amount of seventy thousand rands (R70 000) would have been deducted from the debt owed to him by Amlin Holdings BV, should be rejected. The three (3) reasons advanced were:

a) The Respondent admitted under cross-examination that at August 2003 (before receipt of the loan of R70 000), the balance of €88 000.00 was owed to him by Amlin Holdings BV.

b) In his letter to Mr. Von Waesberghe dated 11 February 2004, he claimed this exact amount from Amlin Holdings BV, without

having deducted the loan of R70 000.

c) His explanation as to why he still claimed the amount of €88 000.00 from Amlin Holdings BV during February 2004, notwithstanding the "part payment of the debt" is highly improbable. He either "unfortunately forgot to deduct the R50 000.00 as well", or he was again, on his own version, dishonest.

[10] In a letter dated 10 April 2005 the Respondent himself admitted to the R70 000.00 having been "borrowed" from the Appellant. Mr. Engela referred us to a formulation contained in ***National Employers Mutual General Insurance Ass. v Gany*** 1931 AD 187 at 199 dealing with mutually exclusive versions in evidence. The formulation reads as follows:

"Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. …It must be clear to the Court of first instance that the version of the litigant upon whom the onus rests is the true version, and that in this case ***absolute reliance can be placed upon the story as told by A Gany. ……."***

We were also referred to ***Maitland and Kensington Bus Co (Pty) Ltd v Jennings*** 1940 CPD 489 at 492, a judgment wherein the aforementioned formulation was criticised and elaborated upon. In the ***Maitland and Kensington Bus Co (Pty) Ltd v Jennings*** case *supra* the Court stated as follows:

"With the very greatest deference I venture to think that the use by the learned Judge of the word 'absolute' cannot be correct. Even in a criminal case, the jury would not be told that they must be satisfied that 'absolute' reliance could be placed on the version of the complainant: they would, I suggest, be instructed that they must be satisfied that ***sufficient reliance could be put on it, so that they were certain beyond reasonable doubt that it was true. And in a civil case, of course, the onus is less heavy. For judgment to be given for the plaintiff the Court must be satisfied that sufficient reliance can be***

placed on his story for there to exist a strong probability that his version is the true one. And if I have one further remark to make. When I speak of "his version" and "his story" being true, I mean not necessarily entirely true, but true in the main and in its essential features."

Mr. Engela placed reliance on the aforementioned cases and made a submission that if applied and the factors counting in favour of the Appellant considered, this court should place reliance on the version of the Appellant and proceed to reject that of the Respondent. I undertake to deal with these submissions further on in this Judgment. For the moment, I merely mention that Mr. Engela simplified a rather complex matter. There is, in my view, much more involved in this matter.

[11] Mr. Swanepoel on the other hand submitted that the Appellant failed to prove on a balance of probabilities that the amount of seventy thousand rands (R70 000) was lent and advanced by it to the Respondent. Expanding on this submission Mr. Swanepoel brought to the attention of this Court that whilst much reliance was placed on the document on page 135 of the record, being a fax sent to Mr. Helmuth Luttig of Amlin SA confirming the R70 000 to be a loan, Mr. Luttig who was in control of the Appellant's administration, was not called as a witness nor was any explanation for this witnesses' "conspicuous" absence given. Further elucidating his point Mr. Swanepoel submitted that given the Respondent's plea and statements to Mr. Von Waesberghe that the document at page 135 of the record was needed to balance the books, it was incumbent on the Appellant to call Mr. Luttig as a witness. Mr. Swanepoel made a submission with which I fully agree, namely, that it is clear that Mr. Von Waesberghe was in total control of both Amlin Holdings and Amlin SA. He proceeded to be rather critical of Mr. Von Waesberghe's evidence labelling it, as incoherent, illogical and inconsistent. He further submitted that Mr. Von Waesberghe repeatedly and almost "in a computerized fashion" stated that Amlin SA was a separate entity

whereas it is clear from the evidence that the affairs of Amlin Holdings BV, Amlin SA and even his own affairs were very much intermingled.

[12] In my view, the questions raised in this matter suggest that it might be necessary to "pierce the veil" and treat the two companies involved as a single entity. This necessitates that a Court of law (as it does in comparatively rare instances) "opens the curtains" of the corporate entity in order to see for itself what obtained inside. This only becomes necessary and obligatory in circumstances where justice will not otherwise be done to the litigants.

CASES DEALING WITH PIERCING THE VEIL OF INCORPORATION

[13] The leading cases concerning piercing the corporate veil on the basis of agency are the Supreme Court of Canada's decisions in ***Toronto (City) v Famous Players Canadian Corp*** (1936) 2 D.L.R. 129 and ***Aluminium Co of Canada v Toronto (City)*** (1944) 3 D.L.R. 609. In these cases the Court justified piercing the veil on the basis that the parent effectively controlled the policies and the operations of its subsidiaries. In ***Aluminium Co*** *supra* the Judge stated that veil may be pierced where *"it can be said that the (subsidiary) company is in fact the puppet of the (parent); when the directing mind and will of the (parent) reaches into and through the corporate façade of the (subsidiary) and becomes, itself, the manifesting agency"* (ibid. 15).

[14] In the case of **Lockharts Ltd. v. Excalibur Holdings Ltd. et al. (1987) 47 R.P.R. 8,** a decision of the Nova Scotia Supreme Court (Trial Division), Davison J. sets out an exhaustive summary of the

law relating to piercing the corporate veil in order to find the individual shareholder liable. The court in this case held that; *"… the fundamental principle, enunciated in Salomon v. Salomon & Co., namely that a company is a legal entity distinct from its shareholders is good law in Canada save for certain exceptional cases. The Courts have the duty to look behind the corporate structure if it is being used for a fraudulent or improper purpose or as a "puppet" to the detriment of a third party…"*

The court in this case held that the evidence clearly established that the corporate entities owned by Mr. Harrison were used as "puppets" to the detriment of the plaintiff and in that respect was used for fraudulent and improper purposes.

A reference was made to the case of ***Salomon v Salomon & Co*** (1897) A. C. 22, (1895-9) All E.R. Rep. 33 (H.L.) where the following formulation appears:

"… ***it has been a clear principle of law that a company is an independent legal entity distinct from its shareholders. In this case, the plaintiff asks me to "lift the corporate veil" on the grounds of fraud. The plaintiff says Mr. Harrison used Excalibur to strip the assets of Baron to avoid payment to the plaintiff of the amount of the judgment…"***

[15] Herron CJ in ***Commissioner of Land Tax v Theosophical Foundation (Pty) Ltd*** (1966) 67 SR (NSW) 70 described "lifting of the corporate veil" as an "esoteric" label stating further that:

> "Authorities in which the veil of incorporation has been lifted have not been of such consistency that any principle can be adduced. The cases merely provide instances in which courts have on the facts refused to be bound by the form or fact of incorporation when justice requires the substance or reality to be investigated…" (Ibid, 75)

Similarly Rogers AJA in ***Briggs v James Hardie & Co (Pty) Ltd***

(1998) 15 NSWLR 549 (NSWCA, Hope and Meagher JJA concurring), stated the following:

> "[T]here is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities." (Ibid, 567)

[16] In ***O'Donnell v Weintraub***, 67 Cal. Rptr. 274 (C.A. 1968 at 277-78) it was held among other things that the corporate veil may be lifted under the alter ego doctrine when the corporation is organised and operated as a mere tool or conduit of another corporation or individual. Courts will look to the total dealings of the corporation and individual in each case to determine whether the corporate veil should be lifted. These specific factors include: Absence of corporate formalities; inadequate capitalization; degree to which corporate and individual property have been separated; amount of financial interest of the individual in the corporation; degree of control individual has over the corporation; and whether the individual has used the corporation for personal purposes.

[17] In the United States one must have regard to the **case of the Supreme Court, Nassau County in the matter of *NASSAU COUNTY, Plaintiff, v. RICHARD DATTNER ARCHITECT, P.C.* 2007 WL 1529599 (N.Y.Sup.), 2007 N.Y. Slip Op. 51065(U)**, where it was said that a corporate veil will be pierced: *"... to achieve equity, even absent fraud, where the officers and employees of a parent corporation exercise control over the daily operations of a subsidiary corporation and act as the true prime movers behind the subsidiary's actions and secondly where a parent corporation conducts business through a subsidiary which*

exists solely to serve the parent." The court referred to New York law where piercing the corporate veil can take place where there has been a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment.

In the United States District Court, D. Arizona In re *ELEGANT CUSTOM HOMES, INC., Debtor. Elegant Custom Homes, Inc., et al., Appellants, v. Elaine M. Dusharm*, Appellee as decided on May 14 2007, the court sought to address the issue as to whether fraud was a necessary element in the determination to pierce the corporate veil. The court noted that *"... It was shown that it has long been the law in Arizona that the corporate form will be disregarded when the corporation is the alter ego of one or more individuals and "the observance of the corporate form would sanction a fraud or promote injustice."*

[18] In ***Clarkson Co. v. Zhelka,*** [1967] 2 O.R. 565, 64 D.L.R. (2d) 57 the court expressed approval of the following statement: *"If a company is formed for the express purpose of doing a wrongful or unlawful act, or, if when formed, those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed. In such cases, or where the company is the mere agent of a controlling corporate, it may be said that the company is a sham, cloak or alter ego, but otherwise it should not be so termed."*

[19] In England in the case of ***City of Glasgow District Council v Hamlet Textiles Ltd***; ***Atlas Marine Co SA v Avalon Maritime Ltd*** **Error! Hyperlink reference not valid.** (CA), it was argued that the

court taking into account all relevant circumstances would pierce the veil only where the interests of justice or fairness or right dealing so demand. Until the facts have been established, it is not possible to say whether the circumstances are sufficiently special to justify piercing the veil. The general rule is that a court will pierce the corporate veil *"only where special circumstances exist indicating that it is a mere facade concealing the true facts"*, so that the separate existence of the company is in some sense being abused or, at least, is not being maintained in the full sense, with the result that separation between the company and its members does not in fact exist. The question to ask is whether there are any exceptional or special circumstances in this case, which would warrant the piercing of the veil? The Courts in England, United States and domestically had no single, coherent principle upon which to base decisions to disregard the separate juristic personality of a company. This, however, has changed.

[20] Le Roux J in ***Lategan & Another NNO v Boyes & Another*** 1980 (4) SA 191 (T) put it rather bluntly as follows:

> ***"I have no doubt that our Courts would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality."***

The court, however, did not proceed to "brush aside the veil of corporate identity" in ***Lategan's*** case *supra* because there was no question of fraud that arose. The Judge's blunt utterance was merely obiter which exemplifies the tendency of Judges to think in terms of categories for purposes of piercing the veil. One would have thought the Court would proceed to ignore the corporate

identity in ***Banco de Mozambique v Inter-Science Research and Development Services (Pty) Ltd*** 1982 (3) SA 330 (T). But, Goldstone J concluded differently, stating at page 345 B-C of the Report:

> "In the present case no single reason has been advanced for creating a new category of case where corporate personality should be ignored. In Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 the Appellate Division enshrined the inviolability of corporate personality."

[21] Another case in which the test was also expressed obiter is ***Botha v Van Niekerk en 'n Ander*** 1982 (3) SA 330 (T). In **Botha's** case *supra* the Applicant asked the court to pierce the veil of incorporation so as to enforce the contract of sale against the First Respondent regardless of the existence of the company. The Court, however, declared that the First Respondent could be held personally liable on the contract only if there were at least a conviction that the Applicant had suffered unconscionable injustice as a result of what right-minded persons would perceive to be clearly improper conduct on the part of such first Respondent. The Court held that it could not arrive at a finding of personal liability of the First Respondent for the amount owed to the seller by the company. The tests propounded in both ***Lategan*** and **Botha's** cases *supra* having been obiter, South African Courts are free to consider alternative approaches to piercing the corporate veil.

[22] In this country the Courts will disregard the corporate entity where, for example, the separate legal personality of a company is used as a means or device to conceal wrongdoing or to avoid obligations. (See: ***Adams v Cape Industries plc*** 1990 ch 433 544; 1991 (1) All ER 929). A company may always act as an agent for those persons who happen to

be its shareholder in matters connected with their shareholding. See: **LAWSA Vol 4 part 1 para 45 2006 Cumulative Supplement).** In ***Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*** 1993 (2) SA 784 (C), the Court defined lifting the corporate veil as ***"... a means of disregarding the dichotomy between a company and the natural person behind it (or in control of its activities) and attributing liability to that person where he has misused or abused the principle of corporate personality..."*.** It is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it regards it as just to do so. It has, however, come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.

[23] I accept that "opening the curtains" or piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties. The general criteria relied upon in determining whether the corporate veil should be pierced include instances of fraud, agency, evasion and abuse of the corporate form. The veil could also be lifted where there is a façade i.e. where the company is a mere façade concealing the true state of affairs. The guiding principle is that veil is lifted only in exceptional circumstances.

[24] I accept that the Appellant in the instant matter (Amlin SA) is not even a subsidiary of Amlin Holdings BV. The latter company is not mother company to the Appellant company. The latter was incorporated and registered in terms of the company laws of the Republic of South Africa. But Mr. Von Waesberghe was a 100% shareholder of Amlin Holdings BV. He was also director of the Appellant company. The evidence established that Mr. Von Waesberghe was in total control of both companies.

[25] Many activities that obtained in the Appellant company indicated that the so-called separate legal entities were separate only in name and for the convenience of Mr. Von Waesberghe. Evidence revealed that the Appellant company paid the Respondent's expenses in South Africa whilst the latter remained employed by Amlin Holdings BV. Monies that were due to Amlin Holdings BV by an entity known as DGB were also deposited in the Appellant company's bank account. Since Mr. Von Waesberghe was the controlling figure in both companies and the activities of the companies being inter-linked, it was, in my view, more probable than not that when the Respondent was paid part of what was owed to him, such payment was indeed meant to be part payment of the larger amount owed to him.

[26] It is common cause that the Respondent was called upon to sign

the document currently relied on by the Appellant long after payment of R70 000 had been made to him. He was told the necessity for the document was merely to balance the books. Common sense tells me that Mr. Von Waesberghe must have reconstructed a loan once he came to this country and discovered the said document. His own evidence is telling, “if it is written here then I want it back.” The “catch” actually started when the Respondent was asked to sign the document needed only to balance the books of the Appellant company. Mr. Von Waesberghe wanted to claim this back in future hiding behind the corporate identity of the Appellant company.

[27] It may also have been by design that Mr. Luttig (the man in SA) was not called as a witness. Mr. Luttig, as I understood, was a legally qualified person who knew how an acknowledgement of debt is prepared. The document relied upon by the Appellant hardly resembles an acknowledgment of debt. Understandably, Mr. Von Waesberghe had grave difficulties in this regard under cross-examination. He could not tell the Court when the “loan” was to be repaid. Later on he testified that had he applied his mind, he would have put “down payment” in.

[28] If the Seventy Thousand Rands (R70 000) was a loan as testified to by Mr. Von Waesberghe, what prevented the Appellant company from claiming same back much earlier? Despite the regular contact Mr. Von Waesberghe had with the Respondent, a period of fifteen (15) months went by before a lawyer’s letter was sent to the Respondent. It appears that the claim only became a reality as a matter of afterthought when Mr. Von Waesberghe came across the “loan” document.

[29] The Respondent’s version is indeed the more probable one compared to that of the Appellant. The true position is that Amlin Holdings BV owed the Respondent a substantial amount of money which despite his consistent demands was never paid in full to him. Part payment was facilitated through Mr. Von Waesberghe and Amlin SA, an entity directed and controlled by Mr. Von Waesberghe. The Respondent’s evidence that the document was submitted because the latter needed it to balance the books of Amlin SA, remained uncontested. I should mention that Mr. Von Waesberghe made an attempt to dispute the Respondent’s assertion, but that was in vain, his chief difficulty being that he was not present at the critical time and place.

[30] I accept that in the instant case there are indeed two versions that can fairly be described as mutually destructive. But the fact of the matter is that I am not satisfied that the version presented by the Appellant (on whom the onus rested) is true or that any reliance can at all be placed thereon. No judgment can be given in favour

of a party bearing the onus unless the Court is placed in possession of evidence of such a quality that it places the Court in a position of being satisfied that sufficient reliance can be placed thereon. Even if I am found to have been wrong in "piercing the veil" of the corporate entities, in my view, the Appellant can still not succeed. Apart from relying on a questionable document, the Appellant did not counter the defence put up by the Respondent. I am of the view that this appeal cannot succeed.

In the result I would propose that the appeal be dismissed with costs.

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DLODLO, J

I agree and it is so ordered.

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BOZALEK, J

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