



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 11877/2020

In the matter between:

**THE TRUSTEES FOR THE TIME BEING
OF THE BYMYAM TRUST**

Applicant

and

THE BUTCHER SHOP AND GRILL CC

Respondent

Date of hearing: 17 December 2021

Date of judgment: 22 December 2021 (delivered electronically)

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

PANGARKER AJ

1. In the judgment which I delivered on 19 November 2021, I dismissed the respondent's counter application for rental remission with costs and ordered it to make payment to the applicant of R2 703 191, 17 which represented all amounts due by the respondent to the applicant in terms of the provisions of the lease concluded between the parties in February 2014 (Judgment, par 111). Additionally, in terms of the Order at paragraph 111 of the judgment, the respondent was ordered to pay interest on the amount as well as costs on the scale as between attorney and client plus VAT. The applicant's applications to strike out were dismissed with costs, including costs two counsel.

2. I refer to the parties as they were cited in the main proceedings before me in August 2021. The respondent delivered its Notice of Application for Leave to Appeal on 25 November 2021 and save for the order regarding the two striking out applications, seeks leave to appeal to the Supreme Court of Appeal (SCA), alternatively, to the Full Bench of this Division against the whole of the judgment and orders (including costs).

3. In summary, the grounds upon which the application is based are: firstly, that I erred when I dismissed the counter application on the basis that the respondent had failed to make out a case to pierce the corporate veil or disregard the separate juristic personalities of the respondent and Apoldo Trade (Pty) Ltd (Apoldo), the sub-lessee of the leased premises. Secondly, that I had erred when finding that the respondent had failed to prove, on a balance of probabilities, a lack of beneficial occupation of the leased premises which had the result that I had incorrectly found that it was not entitled to claim rental remission from the applicant (Judgment, par 108).

4. The application falls squarely under section 17 (1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 read with Uniform Rule 49(1). It is the respondent's contention that there are reasonable prospects that another Court would find that this Court erred

in arriving at certain findings which culminated in its dismissal of the counter application on the grounds as stated. It is also submitted that there exist compelling reasons to grant leave to appeal to the SCA. The applicant opposes this application, submitting that there are no reasonable prospects of success on appeal and that the dispute between the parties is a factual dispute.

5. In his submissions on the first aspect relating to piercing the corporate veil, the respondent's counsel is of the view that this Court was incorrect to have applied section 20(9) of the Companies Act 71 of 2008 in respect of prayer 1A of the counter application which sought a declaration that the separate juristic personalities of Apoldo and the respondent ought to be disregarded for the purpose of the rental remission claim. It is submitted that I should have applied and extended the common law, which, as was found in Ex parte Gore and Others NNO 2013 (3) SA 382 (WCC) at par 34, supplements section 20(9) of the Companies Act.

6. Given the various factors on which the respondent based its case for such relief (that the two entities have the same shareholder, the same directors, share the same banking institution, the same suppliers, the same administrative staff and accountants, etc.), it is argued that I should have found in the circumstances of the matter, that justice required that the corporate veil be pierced or that the separate juristic personalities were to be ignored. It is submitted that the result of the judgment on the issue of piercing the corporate veil, is unfair.

7. The respondent's counsel referred to *LAWSA, 2nd ed, Vol 4, Part 1*, submitting that fraud and/or an unconscionable abuse of the separate corporate personalities need not always be present and therefore I should have developed the common law given the circumstances of the case. Furthermore, I should have found that in a group of companies scenario, Courts were more inclined to pierce the corporate veil or ignore

the separate juristic personalities (the reference is to Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd & Others 1995 (4) SA 790 (A)). The respondent contends that my finding that the corporate veil should not be pierced seen against the backdrop of the facts and the COVID regulations resulted in a situation where the landlord received a windfall in circumstances where the lessee did not occupy the leased premises.

8. As to the second ground of appeal relating to beneficial occupation and that the respondent was not entitled to claim rental remission, the submission is that while I was correct to hold that North Western Hotel Ltd v Rolfes Nebel & Co. 1902 TS 324 was not binding authority on this Court, I was incorrect to hold that there was a requirement of physical occupation of the leased premises. It is submitted that there is a reasonable prospect that another Court would come to a different conclusion and hold that there is nothing in principle which precludes a lessee from claiming rental remission where the premises are occupied by the sub-lessee. It is argued that North Western Hotel is good in law and has not been overturned. With reference to the Addendum which the applicant introduced in the matter at a late stage, the submission is, as in the main hearing, that it is a tripartite agreement and created a contractual relationship between the applicant and Apoldo.

9. In contrast, the applicant's counsel submits that section 20(9) of the Companies Act codifies the common law and what the respondent wanted the Court to do was to have found that it be permitted to ignore the separate juristic personalities for purposes of succeeding with its counter application. It is submitted that such a finding would have made a mockery of corporate legal personalities and in circumstances where Apoldo was not a party to the proceedings. Furthermore, it is submitted that the judgment was correct not to ignore the separate juristic personalities of the two entities. The applicant contends that in terms of par 52 of Cool Ideas 1186 CC v Hubbard and Another [2014] ZACC 16, equity and fairness considerations were seen to be invoked on a case by

case basis in order to subvert the meaning of a statutory provision which applies (here, section 20(9) of the Companies Act). It is submitted that the shareholders themselves sought to pierce the veil.

10. The applicant's response to the complaint that this Court should have developed the common law in relation to the piercing of the veil is that with reference to section 39 (2) of the Constitution (Interpretation of the Bill of Rights), the respondent does not specify which rights were infringed by this Court's judgment when it refused to pierce the corporate veil and what constitutional point could possibly be relied upon.

11. Insofar as the rental remission ground of appeal is concerned, the applicant persists that the North Western Hotel judgment is not binding on this Court. It is submitted that this Court could not ignore the general principles of contract. There was no contractual relationship between Apoldo and the applicant, and the counter application was based on the lease agreement. The Addendum, which the respondent submits was a tri-partite agreement, was merely a consent to sub-let the premises and no more. It is argued that the Addendum does not create rights and obligations between the applicant and Apoldo and it does not bring about a change in the contractual relationship between the parties. The applicant holds the view that the Court was correct when it found that the respondent had not proved a loss of beneficial occupation which would entitle it to claim rental remission.

12. Objectively considered, my judgment took account of the authorities such as Ex parte Gore and the circumstances where a party seeks an order to pierce the corporate veil. This discussion included the situation related to a group of companies (Judgment, para 74 to 83). I also considered the factors listed in the respondent's papers and those cited again in this application relevant to both juristic entities and their relationship to each other. While I am satisfied that a Court does not have a general discretion to

ignore the juristic personalities of companies and that Courts should not lightly disregard their separate juristic personalities, the facts of each case must be considered, which I had done (see for example, Cape Pacific at 803G-H).

13. One of the complaints raised relates to my finding of an absence of an unconscionable abuse of the separate juristic personalities. The respondent relies on the findings of the authors in *LAWSA* for its argument that a Court will pierce the corporate veil in certain circumstances '*where the interests of justice or fairness or right dealing so demand*' (*LAWSA*, par 88, p125). I am mindful that the legal fiction of piercing the corporate has garnered much consideration by the authorities, some referred to in the judgment, and that these authorities remind one that a flexible approach is needed and that the legislation is supplemented by the common law (see Ex parte Gore). Having regard to the judgment objectively, the submissions, the facts of this matter, the relationship between the respondent and Apoldo and the authorities, I am of the view that another Court may reach a different conclusion than I had.

14. Furthermore, in the specific context of the impact of the COVID 19 regulations on restaurants during 2020 - 2021, another Court may well arrive at a conclusion that fairness, justice and equity dictate that the corporate veil be pierced or that the separate corporate personalities of Apoldo and the respondent be ignored. In those circumstances, another Court may very well extend the common law and find that the corporate veil may be pierced in favour of a debtor. Thus, on the first ground in this application, I am satisfied that the respondent has not only established reasonable prospects of success but also compelling reasons why leave to appeal should be granted.

15. On the second ground regarding my finding that the respondent was not entitled to claim a rental remission, my view is that the judgment dealt in some detail with the

North Western Hotel judgment. Its facts and findings and the reasons why I was of the view that it did not establish a principle that a lessee who does not occupy the leased premises may claim rental remission where the sub-lessee's loss of beneficial occupation occurred were set out (Judgment, para 97 – 105). I held that the facts and circumstances of North Western Hotel differed from those in this matter. Counsel for the respondent does not agree and submits that these facts (in this matter) make out a stronger case for the applicability of North Western Hotel, that is, that a lessee may claim rental remission where its sub-lessee suffered a loss of beneficial occupation.

16. While I appreciate the respondent's stance, I must add that I am still inclined to agree with the applicant's view that the counter application was premised on the lease and that no contractual relationship existed in terms of the lease between the applicant and Apoldo. The parties are still at issue as to the effect and import of the Addendum. Whether another Court may consider that North Western Hotel laid down principles which the respondent submits it had, would be a question of its understanding and reading of the judgment, and within the context of the law applicable to leases, landlord and tenant, and sub-tenant (see Judgment, par 105-106). In my view, while the facts of this matter are simple and mainly undisputed, the law may not be that straight forward given that neither counsel nor I were able to find any later authority than the 1902 North Western Hotel.

17. Having regard to the submissions by counsel and my judgment considered objectively and dispassionately, I am of the view that another Court could or may come to a different conclusion on the understanding and applicability of North Western Hotel and the question of loss of beneficial occupation in the circumstances where a lessee does not occupy the leased premises. It is important that there be legal certainty on the questions raised in this matter: whether fairness, justice and equity required a finding that the corporate veil be pierced or the separate corporate personalities of Apoldo and the respondent be ignored; whether the common law related to piercing the corporate

veil should be extended; whether a debtor such as the respondent would be entitled to avail itself of the common law legal fiction of piercing the corporate veil; whether North Western Hotel laid down a legal principle that a tenant (lessee) is entitled to claim rental remission from a landlord for the sub-tenant's (sub-lessee's) loss of the full use and occupation of the leased premises (loss of beneficial occupation); and, whether (in the instances of this matter) the Addendum created a contractual relationship between Apoldo and the applicant.

18. I am satisfied that reasonable prospects of success exist on appeal. In addition, as there is a request that the common law related to piercing the corporate veil should be developed (as indicated in the respondent's written submission), it would be reasonable to grant leave to appeal. I must add that I am of the view that the outcome of this matter on appeal would hold great significance not only to these parties but also to other commercial tenants and landlords in South Africa, more so in the persistent shadow of COVID 19 regulations which impact upon them. For all of these reasons, I believe that there are compelling reasons to grant leave to appeal to the SCA.

19. As for costs, my view is that the fairest and most appropriate order would be that costs should be costs in the appeal. Counsel are thanked for their instructive written and oral submissions in the application for leave to appeal and for attending to the application during the end of year recess period.

20. In the result, I grant the following order:

Leave to appeal is granted to the Supreme Court of Appeal in terms of section 17(1)(a), read with sections 17(2)(a) and 17 (6)(a)(i) of the Superior Courts Act 10 of 2013.

Costs of the application shall be costs in the appeal.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For applicant: Mr P Corbett SC
Instructed by: Van Rensburg & Co.
Per: Mr L J van Rensburg

For respondent: Mr J Muller SC with Mr L Kelly
Instructed by: Werksmans Attorneys
Per: Mr R Gootkin