IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 1031/2015

In the matter between

HIL-SEQ DISTRIBUTORS (PTY) LTD
t/a SWAZI MED CENTRE **Applicant**

and

ENLIGHTEN (PTY) LTD **1st Respondent**
JM WHOLESALERS AND SONS (PTY) LTD **2nd Respondent**
JAMES MCCREESH **3rd Respondent**
M J MANZINI & ASSOCIATES **4th Respondent**
REGISTRATION OF DEEDS **5th Respondent**
SHERIFF OF SWAZILAND **6th Respondent**
ATTORNEY GENERAL **7th Respondent**

Neutral citation: *Hil-Seq Distributors (Pty) Ltd t/a Swazi Med Centre vs Enlighten (Pty) Ltd and 6 Others* (1031/2015) [2016] SZHC 58 (21 March 2016)

Coram: **MAMBA J**

Heard: **28 October, 2015**

Granted: **21 March, 2016**

[1] Civil Law – Company Law – piercing or lifting of corporate veil – Company under the control of one individual who is director and 99 holder of shares. Other share held by his wife. Only director and majority shareholder of company solely responsible for day to day operations of company as a matter of Law, court at liberty in its own interpretation of the evidence and state of affairs to look behind the corporate veil and

have recourse to the real or true facts. Company revealed as a sham or mere trading name of single director.

[2] Company Law – section 97 of Companies Act 8 of 2009 – who is a member thereof – subscribers to Memorandum of Association and those whose names entered in Register of members.

[3] Civil Law – Locus Standi – members or shareholders of company have locus standi to impugn actions of directors or sue on behalf of Company where directors' actions ultra vires or directors unwilling to remedy or ratify acts prejudicial to the company. Not desirable to restrict issue of Locus standi to members only. Deciding factor must be persons with direct and substantial interest in the subject matter of litigation.

[1] On 10 February 2016 I confirmed the rule nisi issued by this Court on 10 July 2015. The confirmation of the rule was accompanied by a minor amendment or alteration in that the third respondent was ordered to transfer to the applicant 49% of the shares held by him in the 2nd respondent. The rule nisi referred to 49% of the issued shares. Confirmation of the rule nisi was *ex tempore* and I indicated then that my written reasons for doing so shall follow in due course. What follows in this judgment are those reasons.

[2] It is a matter of immense regret for me that whilst I had wished to hand down my reasons for my decision much earlier than today, I have not been able to do so. Several issues in the form of full bench matters, urgent applications and participation in the Industrial Court of Appeal conspired to frustrate my wishes. It is always my wish and desire to deliver and hand down judgments expeditiously or timeously – to strike

the iron whilst it is still red-hot, so to speak; but circumstances do not always permit this.

[3] The factual issues in this application are largely common cause. They are as follows:

3.1 At all times material hereto, the 3rd respondent (James Seamus Mccreesh) (hereinafter referred to as Seamus) was the holder of 99 of the shares in JM Wholesalers & Sons (PTY) LTD (hereinafter referred to as the second respondent). The other shareholder was his wife Thora Mccreesh who died in October 2008 and they were the only Directors of the 2nd respondent.

3.2 The second respondent was registered and incorporated in terms of the Companies law of Swaziland on 16 December 1985.

3.3 The second respondent is the registered owner of the following immovable or fixed properties viz. Lot 526 and Lot 257 situate at Matsapha Industrial Estates in the district of Manzini.

3.4 On 25 May 2011 a Deed of Sale of shares was entered into and between 'JM Wholesalers and Sons' (Pty) Ltd and the applicant herein. Seamus signed for and on behalf of the seller. (See page 24a).

3.5 The subject of the sale or merx was '49% of all the issued shares in the Company beneficiary owned by the seller'.

3.6 The purchase price was the sum of E700,000.00 ‘in respect of the shares in the Company owned by the seller’. (See clause 3 of Deed of Sale). This amount was paid by the applicant to Seamus in full and within the agreed period.

3.7 Clause 2.4 of the Deed of Sale specifically states that

> ‘2.4 This agreement of selling of shares applies only to the building and the plots. All vehicles, furniture, tools and equipment that were bought prior to this agreement belong to James McCreesh’.

3.8 It was a further term of the agreement of sale that:-

> ‘5.1 On the effective date and at the offices of W.L. MKHATSHWA (Attorneys) the seller and the purchaser shall meet the following shall take place:
>
> 5.2 The original share certificate in respect of the sale shares together with the transfer forms in respect thereof, duly completed by the registered owners on the sales shares in accordance with the articles of association of the company shall be delivered to the purchaser. The transfer of the shares will only be effect after the full payment of the purchase price.
>
> 5.3 The seller shall simultaneously hand the purchaser:

5.3.1 Written resignation of all the Directors of the Company appointed by the seller;

5.3.2 A resolution passed by the Directors of the Company in accordance with the articles of Association of the company;

5.3.2.1 A resolution passed by the Board of Directors of the Company to include the purchaser;

5.3.2.2 Accepting the registration of the Directors as provided for in 5.2.1, secretary (if applicable) and public officer of the company and the Auditors if required;

5.3.2.3 Approving registration of transfer of the sales shares from seller to the purchaser.

5.3.2.4 Noting the cession of claims in favour of the purchaser or their nominees;

5.3.2.5 Noting that the nominees of the Purchaser shall become the signatories to all Bank accounts held by the Company.

3.9 The applicant (purchaser) has complied with all the terms of the agreement but the seller has failed to comply with any of its obligations contained therein.

[4] Seamus was duly served with this application and has not filed any papers herein.

4.1 The sale of shares agreement was prepared by a firm of Attorneys.

4.2 On 7 May 2015, the second respondent, represented by Seamus, signed a Deed of Sale of the aforesaid immovable properties with and to the first respondent for the purchase price of E1,750,000.00. This Deed of sale was also prepared by a firm of Attorneys.

4.3 The applicant states that the sale of the immovable properties

> '18.2 … basically divests the [2nd respondent] of the only assets of note and value therein without the two plots and the building thereon, the company is valueless and so would be its shares. In fact the only reason applicant bought into the company was because of its ownership of the land in issue.
>
> 18.3 The purported sale of the land was done without me being consulted thereon, neither did I approve of same. Further, I do not agree with the sale as it would basically amount to a liquidation of the company as it would be left without any assets. This is moreso

because all vehicles and furniture used in the business have been declared to belong to the third respondent as per the terms of paragraph 2.4 of the agreement for sale of shares.

18.4 …I have a right to be consulted on every major policy decision of the 2nd respondent. This would be moreso where the decision would have impact on the viability of the 2nd respondent and or its business. Any such decision taken without me being consulted is liable to be set aside.

18.5 … the sale was entered into with a fraudulent intent, as the 2nd and 3rd respondents were fully aware that the 2nd respondent company is absolutely worthless without the two plots in issue herein'.

[5] The first respondent is the only entity that has opposed this application.

[6] It is significant to mention that although the Deed of Sale between the first respondent and second respondent is so labeled on its cover (see page 54 of the Book of Pleadings), its very first page refers to it as an 'Offer to Purchase.' The offer is made by the first respondent to the second respondent and the parties are referred to as purchaser and seller

respectively. Page 4 of this document has been omitted in the papers before me. On page 5 thereof both parties execute or sign the document in those capacities as well, ie, Seller and Purchaser.

[7] The first respondent opposes this application essentially on two grounds namely:

(a) That the applicant is not a share-holder of or in the second respondent and therefore has no legal standing to impugn or challenge an act done or committed by and between the first and second respondents and

(b) the sale of shares agreement was between the applicant and Seamus and not the second respondent and therefore the applicant can only have recourse against Seamus and not the second respondent.

[8] It is also not insignificant to note that after the death of Thora McCreesh in 2008, her shareholding or shares vested in or were, in law held by her executor. Her executor, however, did not automatically assume the role of Director of the 2nd respondent. (Vide BBX (Pty) Ltd v Muziwandile Leander Hlatshwayo N.O. and 3 Others (61/2014) (2015) SZSC 32 (09 December 2015). Therefore since Thora's death, the second respondent has been run or operated by Seamus as its sole director until perhaps in

April 2015 when Shereen McCreesh was appointed as a Director. She is a daughter of Seamus. The resolution to sell the fixed properties to the first respondent was taken by these two directors on 26 May 2015.

[9] It has long been accepted by the law that the role of the court is not just to follow blindly what litigants call or refer to their acts or transactions. The role and or function or duty of the court is to unmask the act or transaction, ignore its labels or appellation and interpret it in its true form or nature. For instance, whilst the transaction between the first and second defendants is referred to as an offer to purchase, it is clear from a true reading thereof that this is a Deed of Sale of the immovable properties. The parties are therein referred to as seller and purchaser rather than offeror or offeree or such like terms. Again, there is nowhere in that document where the owner (offeree) of the property signifies its acceptance of the offer to purchase.

[10] Similarly it is plain to me that the second respondent was nothing but a trade name and conduit or trading style by Seamus. It was in reality not a true company. All the transactions were done by Seamus. He held 99 of the shares. The remaining 1 share was ostensibly held by his wife Thora. When Thora died in 2008, Seamus remained effectively and truly the sole shareholder and Director of the second respondent. The second

respondent was just his alter ego. A close reading of clause 2.4 of the sale of shares agreement points to this fact and this fact alone. It clearly records that the excluded property belongs to Seamus and not the Company ie, the second respondent. So clearly, the only property Seamus wanted the applicant to have an interest in was the fixed property and nothing more.

[11] In *Prest v Petrodel Resources Ltd [2013] UKSC 34* Lord Sumption stated the principle or doctrine of lifting the corporate veil as follows:

> '34. These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about….
>
> 35. I conclud that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal

restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.'

[12] In *Charles Mafika Ndzimandze v Thandiwe Ndzimandze Case No. 4285/10* at para 11 and 12 I had occasion to state as follows:

'[11] This court is not unmindful of the capacity under which the applicant has filed this application. Again, this court is mindful of the fact that the Trust and not the husband of the respondent owns the house. It is not insignificant though that the said husband is the sole Trustee. The sole Trustee and the respondent are married. They have, for a long time, used the house as a family home. The respondent has lived in that house for over ten years and calls that house her home. I am of the considered and firm view that in a situation such as this, it would be too casuistic, artificial and

inconsistent with sound legal reasoning and jurisprudence not to pierce or lift the corporate veil herein; unmask the façade, look beyond the legal fiction and disregard the existence of the Trust and treat Mr Ndzimandze as the real owner of the house herein and the Trust as his Alter Ego. His position as the sole Trustee satisfies the concept or doctrine of 'unity of interest and ownership' as it obtains under American Commercial or Corporate law.

[12] I acknowledge that this is not, strictly speaking, the traditional doctrine of lifting or piercing the corporate veil as stated in SALOMON v SALOMON [1897]. It is close to an inverse or reverse form of the doctrine. The court is, however, merely analysing, characterising, interpreting and giving the circumstances pertaining the ownership of the house its real or true meaning.'

Again in *Art Signs (Pty) Limited & Another v Nkosinathi Simelane & 2 Others* (394/2014) [2014] SZHC (10 June 2014)

'[6] For the sake of completeness of this matter, this court makes the following observations, in passing (obiter). From the evidence before me on how the deceased ran or operated the first applicant, ie the Company, there appears to be merit in the first respondent's assertion that the deceased was in reality the sole director and sole shareholder thereof. The company was nothing more than the trading name of the

> deceased. It was his alter ego. He willy nilly appointed and removed some of his children as directors and shareholders of the company. These children, including the 2nd applicant had no real say whatsoever on the day to day business operations of the company. In a word, they were mere passengers or token directors or shareholders, as the case may be. This is what I think the first respondent means by them being appointed by the deceased as directors for or of convenience. I am fortified in this view, I think, by the way or manner his family, including in no small measure, the 2nd applicant treated the 1st applicant immediately upon the death of Mr Simelane. After his death, the family unanimously agreed that his funeral and all attendant costs and expenses were to be borne by the Company, and so was the general welfare and upkeep of the family. They treated the company as the sole property of the deceased. That is what piercing the veil reveals in these circumstances.'

Although the issue in the *Ndzimandze* (supra) pertained to a trust, the observations therein are equally applicable in this case. The second respondent was nothing but the personal trading business and property of Seamus. He cannot be allowed to hide behind such a facade or farce. The real and true nature of the sale to the applicant is that Seamus sold

49% of his interest in the fixed property to the applicant. This analysis is also true of the transaction Seamus purported to conclude with the first respondent. Where the issue of lifting the corporate veil has to be determined or considered as a matter constituting fraud or some other wrongdoing, it must be specifically pleaded and proved. But where, as in the present case, it is purely a matter of assessing or analysing the evidence, it need not be so pleaded and established.

[13] Having lawfully sold 49% of his interest in the immovable property to the applicant, Seamus had no mandate to sell the same property to the first respondent. Thus, the purported sale is null and void *ab initio* and of no force and effect in law. It was a non-act. It is not surprising at all that neither Seamus nor the second respondent has opposed this application. In any event, as I have found above, the second respondent exists only on paper. It is Seamus only by another name. ('But what's in a name? That which we call a rose by any other name would still smell as sweet.' *Romeo and Juliet, 2)*

[14] When the applicant bought and paid for a 49% stake or interest in the immovable properties, it legally became the joint owner thereof. The other owner was Seamus. That the applicant was not the registered joint owner thereof did not in law, detract from this fact. From that moment,

Seamus had no power or mandate to dispose of the said properties without the approval of the applicant.

[15] I may mention that it is common in the disposal of fixed property owned by a company to only sell the shares in the company and thus avoid the extra costs of paying the conveyancing and transfer costs associated with the transfer and registration of immovable property.

[16] Just for the sake of completeness of this matter, I examine briefly the issue of *Locus standi* or more precisely, the lack thereof that has been raised by the first respondent. This argument is of course premised on the assumption that the second respondent exists as a separate entity from Seamus and that it owned the property in question. This court has already removed, pierced or lifted the carapace of the corporate entity or found that this was just Seamus conducting business in another name. Again, it is common cause that the applicant has fully complied with the terms of the sale of shares agreement. The only argument by the first respondent is that the applicant is not a member or shareholder in the second respondent simply because its name has not been entered and registered in the register of members. Reliance or support for this argument is said to be section 97 of the Companies Act 8 of 2009, which provides that:

> ‘97. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company upon its incorporation, and shall forthwith be entered as members in its register of members.
>
> (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.’

The argument by the first respondent is taken a step further by asserting that only members of the Company may have *locus standi* to question or impugn a transaction or act purportedly done by the company.

[17] I must state from the outset that the above approach to *Locus standi* is not entirely correct in my judgment. It is too formalistic and simplistic. It is not a vehicle to justice and this court must as a matter of law and sound jurisprudence, refuse to limit it in this way. The guiding principle must, in my view be based on the traditional approach that every person who has a direct and substantial interest in the subject matter of the litigation, has *locus standi* to sue and be sued in that litigation. I find no acceptable reason why *locus standi* in a matter such as the present application should be restricted in the way advocated by the first respondent. Section 97 as quoted above lays down who is a member of a company. It does not

circumscribe the ambit or parameters of the incident of *locus standi*. That is a matter for substantive law.

See *Meshack Dlamini v Sandile Thwala and Others* (3210/10) [2013] SZSC 4 (30th September 2013).

[18] In the present case the applicant is the purchaser of the shares – even if it be accepted that it purchased them from Seamus – in the second respondent. The applicant is, for all intents and purposes, the holder and owner of those shares. The only problem is that these shares have not been registered into its name or that its name has not been entered into the register of members. I find no reason or logic in law why such a substantive legal right should be dependent on such a fortuitous event as simple registration or the lack of it. Besides this issue or fact of non-registration in the register of members, the mere purchase of and payment for the shares entitled the directors of the applicant to be directors of the second respondent. As directors, they would have had the mandate to run or operate the affairs of the second respondent. This did not occur and this was due in no small measure to the omission by Seamus. The appointment of Shereen as a director of the second respondent in 2015 was itself unlawful as the directors of the applicant did not take part in that decision. They had the right to do so. On this score, the sale of the properties to the first respondent is again tainted with illegality. It is null

and void and of no force and effect in law. This is equally valid in the instance where Seamus was the only one acting on behalf of the second respondent.

[19] That the first respondent is an innocent or bona fide third party in the whole transaction is, in my judgment, inconsequential. It has a remedy against Seamus who was and is the perpetrator or author of its misfortunes. Such lack or want of mandate on the part of Seamus cannot cloth the transaction with legal validity simply because an innocent third part is now involved in the exercise or deal. This, to my mind, is not what the Turquand rule holds or provides. See *Letseng Diamonds Ltd v JCI Ltd and Others 2009 (4) SA 58 (SCA)* at para 31.

There the headnote reads: 'Notwithstanding that a Company and a third party with whom it entered into an agreement have, at all times, considered themselves to be bound by the agreement, an individual shareholder in the company has locus standi to approach the court for a determination of issues relating to the validity of the agreement.'

[20] Lastly, the derivative right of a shareholder to sue on behalf of a Company, where the directors are failing to do so would also find application in this case. I say so of course on the conclusion that the applicant was a shareholder in the second respondent notwithstanding

that its name had not been registered in the register of members. (See *BARNAD V CARL GREAVES BROKERS (PTY) LTD & OTHERS 2008 (3) SA 663 (C)*).

[21] These, then, are my reasons for confirming the rule nisi with costs.

MAMBA J

For Applicant: **Mr. M. Sithole**

For 1st Respondent: **Adv. M. Mabila**