(Inlexso Innovative Legal Services) SJED

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 29879/2016

DATE: 2022.01.17

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES : NO
(3) REVISED

In the matter between

IG CHEM (PTY) LTD & ANOTHER

and

MAKOYA INVESTMENTS ZAMBIA LIMITED

J U D G M E N T

DIPPENAAR, J:

This is an action which was commenced in the Commercial Court, for declaratory relief under section 20(9) of the Companies Act 71 of 2008 ("the Act"). Judgment has already been granted against the first defendant. In the present proceedings, judgment is sought against the second defendant. No relief is sought against the third defendant. Where appropriate, the second and third defendants will

collectively be referred to as “the defendants”.

Section 20(9) of the Act provides as follows:

> “If on application by an interested person or in any proceedings in which a company is involved, a Court finds that the incorporation of the company, any use of the company or any act by or on behalf of the company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the Court may:
>
> (a) Declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or in the case of a non-profit company this portion is not relevant; and
>
> (b) make any further order the Court considers appropriate to give effect to a declaration contemplated in paragraph (a)”.

In the present matter, on the morning of the hearing, Mr Venter, the third defendant and the sole director of the second defendant, delivered a consent to judgment by the second defendant, which has been uploaded onto CaseLines at section 0-1 to 2. Mr Venter also under oath confirmed that he was duly authorised to represent the second defendant and was duly authorised to consent to judgment on its behalf. I am

advised that the second and third defendant's attorneys of record withdrew by way of notice dated 1 December 2021.

As the plaintiffs sought declaratory relief, evidence was presented by various witnesses. Plaintiff's' counsel, Mr Myburgh further presented detailed argument in support of plaintiff's case and referred to various documents which the defendants had in a pre-trial conference admitted to be what they purport to be. Various documents were also referred to which had been obtained under subpoena from the accountant of the second defendant.

The relief sought by the plaintiffs has a narrow ambit and pertains to the lifting of the corporate veil pertaining to an amount of R1 607 186, 25 paid as a deposit into the bank account of the second defendant.

As a starting point, in the pleadings the defendants had raised the issue of prescription and I am of the view that in those circumstances, I need to deal with that issue in this judgment. In argument the plaintiff relied on *Gericke v Sack* 1978 (1) SA821 (A) as authority for the proposition that the onus of proof would be on the defendant to prove such prescription. Having consented to judgment, no evidence was led on behalf of the defendants.

I am not of the view that the prescription plea has any merit and can be dismissed on a legal basis. I do not think it necessary to delve into the long factual history of the matter,

although on the facts, as an obiter comment I might add that I am persuaded that the claim has not prescribed. The plea of prescription can be disposed of on a legal basis as having no merit, based on the judgment of Nugent JA, writing for the Supreme Court of Appeal in *Duet and Magnum Financial Services CC and Liquidation v Koster* 2010 4 All SA 154 (SCA), paragraph 13. Although *Duet* dealt with prescription in the context of voidable dispositions under the Insolvency Act, I agree with the plaintiffs' argument that the declaratory order sought under section 20(9) is analogous to declaratory relief which may be sought in relation to voidable dispositions under sections 26 to 31 of the Insolvency Act or under section 424 of the old Companies Act of 1973.

In *Duet*, the Supreme Court of Appeal held that the declaration that is made by a Court brings into existence debts that had not existed before and simultaneously enables the debts immediately to be enforced to the ordinary process of execution. Applied to the present facts, the debt will only arise or be brought into existence once the declaration under s20(9) of the Act is made and therefore any contention that the claim is prescribed lacks merit.

Turning to the requirements under section 20(9) of the Companies Act of 2008, I have been referred to *City Capital SA Property Holdings Limited v Chavonnes Badenhorst and Clair Cooper & Others* 2018 (4) SA 71 (SCA) ("*City Capital*")

and I specifically refer to paragraphs 29 and paragraph 30, which deals with the requirement of "unconscionable abuse" of the juristic personality.

In paragraph 29, it is stated that "unconscionable in the Oxford English Dictionary includes: Showing no regard for conscious, unreasonably, excessive, egregious, blatant, unscrupulous". The court went on to state:

> "It is in my view undesirable to attempt to lay down any definition of unconscionable abuse. It suffices to say that the unconscionable abuse of the juristic personality of a company, as in the meaning of section 20(9) of the 2008 act includes the use of or an act by a company to commit fraud or for a dishonest or improper purpose or where the company is used as a device or facade to conceal the true facts. Thus where the controllers of various companies within a group use those companies for a dishonest or improper purpose and in that process treat the group in a way that draws no distinction between a separate juristic personality of the members of the group, as happened in this case, this would constitute unconscionable abused of the juristic personality, the constituent members, justifying an order under section 20(9) of the 2008 act."

I agree with the plaintiff's argument that the facts in this matter illustrate just such conduct and that the plaintiffs have established unconscionable abuse of the juristic personalities of the first and second defendants.

I was further referred to the judgment of Binns-Ward J in *Ex Parte Gore and Others NNO* 2013 (3) SA 382 (WCC) ("*Gore*"), which I agree, supports the plaintiffs' case and pertains to circumstances similar to the present.

Various witnesses testified in this matter, including Mr Indiveri, the director of the plaintiffs and Mr De Villiers, the financial manager of the first and second plaintiffs. Both Mr Indiveri and Mr De Villiers confirmed the contents of the detailed witness statements delivered. Mr de Villiers dealt extensively with the relevant facts which confirmed that the importation of the material took place through the second defendant, rather than the first defendant and that the first defendant did not nor could it comply with its obligations under the supply agreement concluded between it and the plaintiffs.

Mr Taljaard, who was subpoenaed and was the erstwhile attorney of the second and third defendants, confirmed that Mr Venter, the third defendant conducted his business activities through the second defendant. The relevance of his evidence is further that he is a trustee of the Tanabi Family Trust, which the defendants had contended owns the shares of the second defendant. Mr Taljaard was unaware of the dishonest attempt

by Mr Venter to change and back date the share certificate of the second defendant during 2018 and during the course of this litigation. He confirmed that the Tanabi Trust had no assets or financial records and was effectively dormant.

The evidence of Mr Taljaard directly refutes the contents of the second defendant's plea that its shareholding was never held by the Mr Venter, but rather that it was held by the Trust. This evidence was also supported by the evidence and documentation presented by Mr Barnard, who was the accountant for Mr Venter's entities, who testified and produced various documents under subpoena.

It appears that Mr Venter went so far as to instruct his accountants to effectively commit a fraud by trying to backdate the shareholder certificates. As indicated by Mr Barnard, the shareholding was never in fact changed. The evidence supports the plaintiff's version of improper, untoward and abusive conduct on the part of the second defendant.

The defendants' denial that Mr Venter was the sole shareholder of the second defendant was thus false and the evidence established that he was the sole controlling mind of both the first and second defendants.

Mr Barnard's evidence established that the first defendant never had any books of account, never had any financial records and never submitted any VAT returns. On the facts I am satisfied that the plaintiffs established that the first

defendant in fact never traded. The evidence further established that the first defendant could not produce any banking account. All assets were in the name of the second defendant, all funds flowed through the second defendant. I conclude that the evidence established that the first defendant was effectively a device used to conceal the true facts.

I further agree with the plaintiff's argument that the ultimate concession by Mr Venter and the second defendant in the consent to judgment indicates that the version proffered by the defendants in the pleadings simply has no merit.

I am further satisfied that the conduct here in issue, as particularised in the particulars of claim and in the eloquent argument presented by Mr Myburgh, is supported by the oral and documentary evidence which was led in the matter. It is also supported by the contents of the witness statements.

Considering all the facts and applying the principles enunciated in *Gore* and *City Capital* I am satisfied that the plaintiffs have made out a proper case for relief under section 20(9) of the Act and that they are entitled to the declaratory relief sought.

In relation to the costs, the normal principle is that costs follow the result. There is no basis to deviate from this principle. Mr Myburgh in detail illustrated the large amount of work which the erstwhile senior and junior counsel involved in the matter had done in order to get this matter trial ready and ultimately

to discover the true facts and the untoward conduct of Mr Venter in relation to the share certificates and the like. Under those circumstances I am satisfied that an order including the costs of two counsel, where employed, should be granted.

I therefore grant an order in terms of the draft marked X, which is initialled and dated and which appears on CaseLines under section 0, at pages O3 to O4.

10 [redacted].

DIPPENAAR, J

JUDGE OF THE HIGH COURT

DATE DELIVERED: 17 January 2022

DATE JUDGMENT REVISED: 19 January 2022