

SOUTH AFRICA / JUDGMENT

Butcher Shop and Grill CC v Trustees for the time being of the Bymyam Trust (038/2022) [2023] ZASCA 57; [2023] 3 All SA 40 (SCA); 2023 (5) SA 68 (SCA) (21 April 2023)

[2023] ZASCA 57

COURT

Supreme Court of Appeal

BEFORE

Van der Merwe, Mbatha, Carelse, Weiner, Goosen

CASE / FILE NUMBER

038/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 038/2022

In the matter between:

THE BUTCHER SHOP AND GRILL CC

APPELLANT

and

THE TRUSTEES FOR THE TIME BEING OF THE

BYMYAM TRUST

RESPONDENT

Neutral citation: The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust (038/2022) [2023] ZASCA 57 (21 April 2023)

Coram: VAN DER MERWE, MBATHA, CARELSE, WEINER and GOOSEN JJA

Heard: 2 March 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 21 April 2023.

Summary: Lease – remission and abatement of rent – vis major – subtenant suffering loss of use and enjoyment of leased premises – whether tenant entitled to claim remission –

piercing of corporate veil – application of common law principles – whether common law to be developed – appeal

dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Pangarker AJ, sitting as court of first instance): judgment reported sub nom The Trustees for the time being of the Bymyam Trust v The Butcher Shop and Grill CC 2022 (2) SA 99 (WCC)

The appeal is dismissed with costs.

Goosen JA (Van der Merwe, Mbatha, Carelse and Weiner JJA concurring):

- [1] This appeal raises the question of a lessee's entitlement to claim remission of rent payable to a lessor in circumstances where vis major has interfered with the beneficial use and enjoyment of leased property by a sub-lessee. The question arises in the context of the economic disruptions caused by the Covid-19 pandemic and the consequent declaration of a national state of disaster.
- [2] The respondent, the trustees for the time being of the Bymyam Trust (the Trust), owns sections in a sectional title scheme that applies to a building (Amalfi) situated in Mouille Point, Cape Town. In 2014 it concluded a lease agreement in respect of a section of the scheme (the premises) with the appellant, the Butcher Shop & Grill (Pty) Ltd (the Butcher Shop).[1] The premises were occupied in February 2014 for the purpose of conducting business as the Butcher Shop and Grill (the restaurant).
- [3] During 2019 the Trust became aware that the premises were occupied by Apoldo Trading (Pty) Ltd (Apoldo), which was conducting the business of the restaurant. Apoldo is related to the Butcher Shop inasmuch as its sole shareholder is the same as the sole shareholder of the Butcher Shop, a Mr Pick. The Trust and the Butcher Shop then entered into an Addendum Agreement (the addendum) to the lease agreement. Its primary effect was to grant consent to the subletting arrangement between the Butcher Shop and Apoldo.
- [4] The advent of the Covid-19 pandemic and the promulgation of a National State of Disaster in March 2020 gave rise to the present dispute. It is common cause that the imposition of trading restrictions on restaurants and on the sale of liquor initially precluded and subsequently limited the operation of the restaurant during certain stages of the national 'lockdown'. The Butcher Shop withheld payment of rent due to the Trust. It contended for a

remission of rent on the basis that it had suffered a significant loss of turnover. It claimed that since it was denied beneficial use of the premises because of the lockdown restrictions, it was not obliged to make payment of the full amount of rent due in terms of the lease.

- [5] On 13 October 2020, the Trust launched an application in the Western Cape Division of the High Court, Cape Town (the high court) in which it claimed payment of an amount of R1 576 919.20 for amounts due (the main application). The Butcher Shop opposed the application and filed a counter application (the counter application) in which it sought: (a) that the main application be stayed; (b) a declaration that it is entitled to remission of the base rental payable in a specified amount; and (c) that the main application be dismissed.
- [6] The Butcher Shop's case was that its loss of the use and enjoyment of the premises caused it a significant loss of turnover in its business, which entitled it to remission or abatement of rent. Insofar as the sub-tenancy of Apoldo was concerned, it based its case upon the following contentions:
- (a) A lessee is entitled to claim remission of rental arising from the loss of a sub-lessee's beneficial occupation on account of vis major or casus fortuitus.
 - (b) In the alternative, that the Butcher Shop and Apoldo are in effect, Mr Pick, their sole shareholder, in corporate guise and therefore one business entity. The common law either recognises or ought to recognise as a remedy in equity, the entitlement of the Butcher Shop to claim remission of rent because of the loss of beneficial occupation suffered by Apoldo.
- [7] On 19 November 2021, the high court dismissed the counter application and granted an order in the main application, requiring the Butcher Shop to pay an amount of R2 703 191,17[2] together with interest and costs on an attorney and client scale. Leave to appeal to this Court was granted on 22 December 2021.
- [8] It is common cause that from the commencement of the lease, the Butcher Shop, as tenant, sublet the whole of the premises to Apoldo. Apoldo conducted the business of the restaurant. The Addendum was concluded on 14 August 2019. It was signed by Mr Shapiro on behalf of the Trust and by Mr Pick on behalf of both the Butcher Shop and Apoldo. It inter alia recorded that:
- ‘(a) The Tenant hereby agrees to remain [responsible] for all the terms and conditions of the Lease.
- (b) APOLDO TRADE (PROPRIETARY) LIMITED hereby agrees to be jointly and severally equally responsible for the term of the Lease.’

The

issues

- [9] The appeal raises four issues. The first is whether the lease agreement excludes the claim for remission of rent raised by the Butcher Shop. If the answer to this question is positive, it would dispose of the appeal. If not, the further issues require consideration.
- [10] The second question is whether the Butcher Shop, a tenant, may claim remission of rental in circumstances where the loss of use and enjoyment of the property is suffered by its sub-tenant, Apoldo.
- [11] The third issue concerns a so-called reverse piercing of the corporate veil. Essentially, the question is whether, on the facts of this case, this Court should disregard the separate legal personality of Apoldo, to allow the Butcher Shop to raise as a defence to the Trust's claim for payment of rent, a defence that Apoldo would be entitled to raise against it.
- [12] The fourth issue arises if the answer to the third is negative. In that event, the Butcher Shop contends that the common law ought to be developed to permit this Court to disregard the corporate personality of Apoldo in the present circumstances.

The lease agreement and remission

- [13] The circumstances in which a tenant is entitled to claim remission of rent, at common law, are not controversial. A lessee is obliged to fulfil all obligations which were expressly or impliedly undertaken by agreement with the lessor. It is obliged to pay the rent; to care for the property let; not to use it for a purpose other than for which it was let; and to restore it in the same good order upon termination of the lease. The lessee must pay the full amount of rent due less that which is remitted by law.[3] For the present we need only deal with entitlement to remission when the property is not placed at the disposal of the lessee, either by the lessor or because of an intervening circumstance. The principle was set out in *Hansen, Schrader & Co v Kopelowitz*:

‘... [A] lessee is entitled to remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent in making use of the property for the purposes for which it was let, by some vis major or casus fortuitus, provided always that the loss of enjoyment of the property is the direct and immediate result of the vis major or casus fortuitus, and is not merely indirectly or remotely connected therewith.’[4]

- [14] Parties may limit or exclude the right to claim remission of rent in circumstances of vis major. When construing a lease agreement, it is assumed that they intend the operation of principles of the common law. As stated in *First National Bank of SA Ltd v Rosenblum & Another*,

‘In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties

intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness of approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application. (See [South African Railways and Harbours] v Lyle Shipping Co Ltd 1958 (3) SA 416 (A) at 419D-E).’[5]

(My emphasis.)

[15] The Trust contended that the lease agreement did not envisage a claim for remission of rental. It based its argument on the premise that,

- (a) the lease restricted beneficial occupation to physical occupation and control.
- (b) the obligation to pay the base rent was not reciprocal, as the base rental was payable in advance; and
- (c) the Butcher Shop had assumed the risk of a vis major event such as had occurred.

[16] Clause 1 of the lease defines ‘beneficial occupation’ to mean the physical possession and control of the leased premises. It was submitted that the restrictive definition reflected an intention to place the lessee in physical possession of the premises in exchange for the payment of a base rental. Since the payment of turnover rent related to the conduct of the restaurant business as a separate charge, the conduct of the business from the premises did not form part of the commodus usus conferred by the lease. The lease did not contemplate a common law-based claim for remission of base rental other than provided by clause 34, which deals with the physical destruction of the premises.

[17] The argument loses sight of the context of the lease agreement construed as a whole. The term ‘beneficial occupation’ does not define the use and enjoyment that is conferred by the lease agreement. Clause 3 records that the premises are leased ‘. . . on the terms and conditions set out in the Agreement and Schedules 1 and 2 attached . . . ’ to the agreement. Schedule 1 deals with the period of the lease and the rates applicable to the calculation of the base and turnover rental. Paragraph 16, under the heading ‘right of use’ states that:

‘The Tenant will open an upmarket steakhouse, butchery, wine shop in section 1 and will be responsible for all licences and planning

submissions

required by local or national authorities.’

[18] Clause 9.1 states that the tenant shall not use the leased premises for any purpose other than that set out in paragraph 16 of Schedule

1. Although clause 9.2 expressly excludes a warranty that the leased premises 'has been configured for the purposes' of the business, other clauses serve to ensure that the premises may be put to the use contemplated by the lease agreement. Thus, in clause 9.15 the Trust warranted that the property had been zoned for the contemplated use. Clause 10.1 contains a similar warranty in relation to the body corporate rules of the sectional title scheme.
- [19] These provisions plainly and unambiguously indicate that the property was let for the purpose of conducting a restaurant business from the premises. The term 'beneficial occupation' therefore did not restrict the use and enjoyment of the property to mere physical occupation and possession. The context, furthermore, indicates that beneficial occupation was given in order to allow the fitting-out of the premises as a restaurant, prior to the commencement of trading. The responsibility for the fitting out of the premises, the installation of electrical, gas and other services was that of the Butcher Shop. It was obliged to submit building plans to the local authority for approval. To this end provision was made for a power of attorney given to the Butcher Shop to authorise submission of the plans. Common sense dictates that physical occupation and control of the leased premises would necessarily be required in order to enable the Butcher Shop to carry out its obligations in the development of the premises.
- [20] The beneficial occupation date was set as the first business day after the last of three identified documents were delivered. These were the power of attorney referred to above; a practical completion certificate issued by an architect; and a partial occupation certificate. This latter certificate was defined to mean:

'a letter of consent issued by the Landlord ... or a certificate/ approval/consent issued . . . as may be required which allows the Tenant to commence its fit out of the Leased Premises by allowing the Tenant's contractors and other professionals access to the Building, Property and Leased Premises....'
- [21] These provisions, considered in their proper context, point to the conclusion that the restrictive definition of 'beneficial occupation' does not define the use and enjoyment of the premises. Since the lease in fact conferred use and enjoyment beyond mere physical possession and control, a vis major event, which did not interfere with physical possession and control, could give rise to a claim for remission.
- [22] Clause 34 also does not assist the Butcher Shop. It contemplates two scenarios. The first is where the leased premises is destroyed or damaged 'to an extent which prevents the Tenant from being able to conduct its business'. In that event, if the premises cannot be restored to its condition within a period of nine months, the landlord has an election to cancel the lease. If the landlord does not notify the tenant of its election, the lease is deemed to have been cancelled. It is then provided that the tenant shall have no claim against the landlord and that the tenant is not liable for the payment of rent and operating costs 'from the date of destruction'. If the landlord elects not to cancel, it is obliged to reinstate the premises and the tenant is excused from the payment of rent and operating costs for as long as it is unable

to conduct its business. The total physical destruction is not confined to circumstances arising from a vis major event.

- [23] The second scenario involves partial destruction or damage by whatever cause, provided that the damage was not caused by a vis major event or by the tenant. In such event the agreement shall not be cancelled. It is provided that the rent and operating costs payable by the tenant shall be reduced pro rata and to the extent to which the tenant's turnover is reduced. Apart from this, the tenant shall have no claim whatsoever against the landlord as a result of the damage, no matter how caused. Clause 34 therefore does not purport to limit or restrict the appellant's right to rely upon common law principles, which regulate the consequences of a vis major event.
- [24] The further argument based on the absence of reciprocity was, correctly, not pressed with enthusiasm. The requirement that the rent be paid monthly in advance has the effect that the payment of the rent is not reciprocal to the delivery of the use and enjoyment of the leased property. Such clause does not, however, preclude the right to claim a remission or abatement of rent which arises by operation of law.[6] Nor does a clause which requires that payment be made without deduction or set-off.[7]
- [25] The Trust's contention that the Butcher Shop had voluntarily assumed the risk of a vis major event such as that upon which it relied, was based on clause 15.1 of the agreement. It stated that,
- 'The Tenant shall not contravene or permit the contravention of any law, by-law, ordinances, proclamation or statutory regulation or the conditions of any licence relating to or affecting the carrying on of any business in the Building.'
- [26] This clause, so the argument went, is sufficiently broad to cover the imposition of general trading restrictions as were imposed pursuant to the declaration of the National State of Disaster. It should therefore be accepted that the Butcher Shop had assumed the risk that its business operations may be precluded by law or regulation.
- [27] The language employed in the clause is directed to compliance with laws and regulations which affect the business of the tenant. It says nothing of the consequences which flow from the curtailment of business activities. It prohibits contravention of laws. The clause must be read in context. I have already pointed to several provisions of the lease agreement which placed upon the Butcher Shop the obligation to obtain the required licences and local authority approval for the conduct of its business. In addition, the lease indemnified the Trust from liability arising from the Butcher Shop's failure to comply with licencing or local authority requirements.
- [28] It follows that the first question must be answered in the negative. The lease agreement did not preclude a claim for remission of rent arising from a vis major event such as that relied upon in this case.

The effect of the Apoldo sub-tenancy

- [29] The next question which arises is whether the Butcher Shop has a claim, in law, for the loss of use and enjoyment of the premises suffered by Apoldo. Counsel for the Butcher Shop placed heavy reliance upon the judgment in *North Western Hotel Ltd v Rolfes, Nebel & Co*[8] to support the proposition that a tenant may seek remission of rent in circumstances where a sub-tenant has suffered the loss of use and enjoyment of the leased property as a result of vis major.
- [30] The facts of that matter were as follows. The plaintiff, North Western, owned a property on which was constructed an hotel. It let the property to the defendant, Rolfes, Nebel & Co (Rolfes), who in turn sub-let the property to two sub-tenants who conducted the business of an hotel on the property. The lease conferred on the tenant the right to cancel the lease if its liquor licence was revoked. At the outbreak of the South African War, the Government of the Zuid Afrikaanse Republiek prohibited the sale of liquor at hotels and bars. When the sub-tenants wanted to cease operating the hotel, they were compelled to continue its operation under threat that the Government would take over the operation. At some point thereafter the liquor licence was restored, and they were able to operate the hotel along normal lines. Still later, the British military authorities took occupation of the hotel. It was then used to accommodate a military unit and as a site for accommodating refugees. During this latter period considerable damage was done to the property and the furniture of the hotel.
- [31] North Western brought an action to recover rent due to it; for compensation for the damage to the furniture; and that Rolfes deliver the property in proper repair or pay an amount sufficient to undertake such repairs. Rolfes resisted the claim on the basis that the sub-tenant had been deprived of its use and enjoyment of the property and that the damage caused to the furniture and the property occurred casus fortuitus. It sought determination of the remission by way of a claim in reconvention. The court granted judgment in favour of North Western for rent which was payable during the period from the outbreak of war until 5 August 1900 when the British forces commandeered the hotel. It allowed Rolfes full remission of rent for the period 5 August 1900 until 15 July 1901 on the basis that the British occupation of the hotel deprived the sub-tenants of the beneficial use of the property. It also granted full remission of rent for the period from July 1901 until the tenants quit the hotel in September 1902. The court did so on the basis that the damage to the furniture rendered the property unfit for the purpose for which it was let. It found that the circumstances in which the property came to be damaged, was not within the contemplation of the parties; that Rolfes had not assumed such risk and had not assumed the landlord's obligations to keep the property in proper repair. The court therefore dismissed the claim for payment of the damage caused to the furniture and the buildings.

[32] While these facts suggest, at face value, that the court in North Western Hotel found that a lessee may rely upon the loss suffered by a sub-lessee, it did not. The court was not called upon to decide that question. That issue, although raised on the pleadings, was disposed by the acceptance, at trial, that the lessee and sub-lessee could be regarded as one party. The judgment states:

‘The contention of the defendants that they are in the same favourable position as the sub-lessees is practically admitted by the plaintiff company; for though the company denies generally the amended plea of the defendants, their counsel, Mr Leonard, boldly accepted this position and argued his whole case from the standpoint that the lessees and sub-lessees were one.’[9]

[33] What the court was required to decide in relation to the remission of rent, was whether the election not to cancel the lease in the face of the imposed restrictions, and the fact that compensation for losses was claimed from a third party, constituted a waiver of the right to assert non-beneficial occupation by reason of vis major. The court held that it did not constitute a waiver. A claim lodged against the party that caused the loss of beneficial occupation did not preclude a claim for remission as against the landlord. No compensation had been paid. Importantly, the court held that

different considerations would apply if compensation had been received. It held:

‘If the lessees had been paid the full rent and damage suffered by the forcible ejectment either by the military power that ejected them or by someone else, and they then claimed a remission of rent from the lessors, they would have been met by the exceptio doli mali, and if hereafter they are paid compensation the lessors can for similar reasons claim any money so paid to them.’[10]

[34] North Western Hotel is therefore not authority for the proposition advanced by counsel for the Butcher Shop. It is, if anything, against the proposition,

since it holds that actual loss must be established by the party seeking remission of rental. This accords with general principle.

Remission of rent is available to a lessee or tenant who suffers loss consequent upon the interference with its use and enjoyment of the leased property. It is an equitable remedy which seeks to ameliorate the prejudice caused by circumstances beyond the control of the parties to the lease. It may only be claimed by the party who suffers the loss. Such loss must be directly attributable to the vis major event and must be substantial.[11]

[35] In this instance, Apoldo, a separate legal entity, occupied the premises; had use and enjoyment thereof and conducted the business of the restaurant. In terms of the sub-letting arrangement between the Butcher Shop and Apoldo, it stood in the position of tenant vis-à-vis the Butcher Shop as landlord. As a matter of fact, the loss of beneficial use and enjoyment of the sub-leased premises was suffered by Apoldo, not the Butcher Shop. The existence of the sub-tenancy in law precludes a claim for remission based on loss suffered by the sub-tenant.

The piercing of the corporate veil

- [36] This brings me to the nub of the case for the Butcher Shop. It was this: the Butcher Shop and Apoldo are no more than their sole shareholder and controlling mind, Mr Pick, in corporate guise. Apoldo has traded the restaurant since the start of the lease agreement. It has paid the rental due to the Trust. Apoldo and the Butcher Shop are, vis-à-vis the Trust essentially a single entity and the Trust drew no distinction between them, save by formal consent to the sub-lease in 2019. On this basis, it was submitted, the common law principles which allow a separate legal personality to be disregarded, ought to apply. These principles, it was argued, are sufficiently flexible to allow the Butcher Shop to put up the loss suffered by Apoldo as a defence to the Trust's claim for rent payable by the Butcher Shop.
- [37] The argument, in the main, was that the existing principles of the common law support the outcome. The alternative argument was that, if it is found that the common law does not permit the 'piercing of the veil', then it should be developed to allow the remission claim in this case.[12]
- [38] It is necessary, given the arguments advanced, to begin by considering whether s 20(9) of the Companies Act 71 of 2008 (the Companies Act) has codified, in the sense of having replaced, the common law in relation to when corporate personality may be disregarded. Section 20 deals with the validity of company actions. It contains several provisions which relate to actions taken by a company contrary to any limitation or restriction imposed by its memorandum of incorporation and with instances of conduct which is ultra vires the authority of the directors or officers of the company. Many of these provisions implicate principles which find expression in the common law.[13]
- [39] Subsection (9) provides that:
- '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, a member the company, or of another person specified in the declaration; and
 - (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).'
- [40] The question is one of interpretation. As noted in *Ex Parte Gore and Others N N O (Gore)*, [14] there is no language which expresses an intention either way. In *Gore, Binns-Ward J*, concluded that there was no discord between the section and the approach to piercing the veil set out in the cases decided before the section was enacted.[15] The learned judge held that the provision 'broadens the bases upon which the courts in this country...have hitherto

been prepared to grant relief that entails disregarding corporate personality'.^[16] Section 20(9), therefore does not replace the common law, it supplements the common law. This Court, in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others*,^[17] expressed the view that the section supplements the common law.

[41] The section does not contain language which evidences an intention to abolish or replace the common law, such as that contained in s 165(1) of the Act.^[18] This, for me, is the decisive consideration. It must therefore be accepted that s 20(9) does not replace the common law nor establish a defined set of circumstances in which a court may disregard the separate legal personality of a company.

[42] The next enquiry is what general common law principles apply when the question of piercing the corporate veil arises. Smalberger JA, in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*,^[19] observed that a company might be used as a façade even though it was not originally incorporated with any deceptive intention. He observed that the law is far from settled regarding such circumstances and that each instance involves an enquiry into the facts, which may be decisive.^[20]

[43] However, having made this observation, Smalberger JA proceeded to assert several principles which were sufficiently clear to apply to the facts of the case. The first is that a court has no general discretion to simply disregard a company's separate legal personality whenever it considers it just to do so.^[21] The second, drawing upon the judgment of Corbet CJ in *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*,^[22] is that, as a matter of policy, the separate corporate personality ought to be upheld. 'Piercing' or 'lifting'

of the corporate veil will not lightly occur, and then only when considerations of policy favour it. The learned judge held:

'It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate legal personality but should strive to uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct ... are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil...'^[23]

[44] The third principle, encapsulated in the quoted passage, is that the balancing of policy considerations will only arise where there is some element of fraud, abuse or dishonesty in respect of the corporate personality. The fourth, is that the purpose of piercing the corporate veil is to fix the person or persons responsible for abuse with liability.^[24]

[45] These principles were affirmed in *Hülse-Reuter and Others v Gödde*,^[25] where the court emphasised that the misuse or abuse of the distinction between the corporate entity and those who control it should result in some unfair advantage to them. In the context of that

case, the availability of an alternative remedy to the party seeking to have the corporate identity disregarded, was decisive.[26] It was held that the dictum in Cape Pacific to the effect that piercing of the veil is not necessarily precluded if another remedy exists,[27] means no more than that the existence of such remedy is a relevant factor to be weighed in the policy judgment applied when disregarding

the separate corporate personality.[28]

[46] These are clear guiding principles which have consistently been applied in matters where the separate legal personality of a company is sought to be disregarded. The argument by counsel for the Butcher Shop was that these principles, applied with the required flexibility to the facts of this case, entitle the Butcher Shop to the relief it sought in its counter application for remission of rent.

[47] It was submitted that several factors rendered the matter exceptional. The two corporate entities, the Butcher Shop and Apoldo, were in essence Mr Pick in corporate guise. Mr Pick, as sole shareholder, conducted a family business, in which his son was also involved, and he did so via the two corporate entities. The business was that of Mr Pick. Seen from this perspective, it was suggested that there was no de facto distinction between the Butcher Shop and Apoldo. Furthermore, the addendum to the lease agreement was a tripartite agreement. The involvement of Apoldo in the conduct of the business was known, and accepted, by the Trust. Invoices for the monthly rental were submitted to Apoldo, and the base rent was paid by Apoldo. These facts indicated that the Trust treated the Butcher Shop and Apoldo as a single trading entity.

[48] It was argued that these facts call for an equitable treatment of the two corporate entities. If the court did not treat the two entities as one for the purpose of the rent remission claim, it would give rise to an anomaly in relation to the Butcher Shop's liability to the Trust for turnover rental, inasmuch as the turnover from the business was that of Apoldo rather than the Butcher Shop. The Trust would therefore not be entitled to turnover rental based on Apoldo's turnover.

[49] Flexibility, as enjoined by the judgment in Cape Pacific,[29] does not imply that the guiding principles are jettisoned. It means no more than that careful consideration be given to the facts of the case and that the matter is not approached on the basis that the principles apply only in a set category of cases. Counsel's

argument proceeded from the acceptance that this is not the usual case in which a piercing of the veil is sought. This, it was

submitted, was akin to 'reverse piercing', where the members or shareholders of a company seek to have the corporate

identity of the company disregarded to advance rights which would otherwise accrue to the company, as their rights.[30] It was argued that the remedy is not only available to an outside party or creditor who seeks to ignore the consequences of the

separate legal personality of a company in order to fix liability upon the shareholders of the company.

[50] This submission is, so far as it goes, accurate. It is true that none of the reported cases specify it as a requirement that the remedy is only available at the instance of a creditor. The question, however, is this: is the Butcher Shop entitled to ignore the corporate personality of Apoldo so that it may assert rights which accrue to Apoldo? Counsel submitted that fraud or dishonesty, or unconscionable conduct is not a pre-requisite for the remedy. The submission is, however, in conflict with established authority of this Court. There is no authority for the proposition that the ordinary employment and use of a corporate form, involving no abuse, misuse or unconscionable conduct would entitle a court to ignore the separate legal personality of a company.

[51] The lease agreement between the Butcher Shop and the Trust was premised on the fact that the Butcher Shop would occupy and use the leased premises for the purpose of running the restaurant. Yet, the premises were sub-let to Apoldo, and it conducted the business. This choice of business arrangement was not explained. The rationale is not strictly relevant. What is relevant is that Mr Pick, who on the submission of counsel is to be regarded as the person conducting the business, chose to do so in the form of a corporate entity.

[52] In *Ochberg v Commissioner for Inland Revenue De Villiers CJ* said, in relation to the distinction between a company and its shareholder,

‘The wisdom of allowing a person to escape the natural consequences of his commercial sins under the ordinary law, and for his own private purposes virtually to turn himself into a corporation with limited liability may well be open to doubt. But as long as the law allows it the Court has to recognise the position. But then too the person himself must abide by that. A company, being a juristic person, remains a juristic person separate and distinct from the person who may own all the shares, and must not be confused with the latter. To say that a company sustains a separate persona and yet in the same breath to argue that in substance the person holding all the shares is the company is an attempt to have it both ways, which cannot be allowed.’
[31]

[53] A similar view was expressed in *Tunstall v Steigmann*. [32] In that case it was contended that a sole shareholder of a company should be held to occupy premises for the purpose of a business

conducted by the company. The Court of Appeal rejected the notion. It said:

‘But the fact remains that she has disposed of her business to a limited company...It is to be assumed that the landlord in this case assigned her business to the limited company for some good reason which she considered to be of an advantage to her. She cannot say that in a case of

this kind she is entitled to take the benefit of any advantages that the formation of the company gave her, without at the same time accepting the liabilities arising therefrom. She cannot say that she is carrying on the business or intends to carry on the business ... and at the same time say that her liability is limited as provided in the Companies Act.’[33]

[54] As I have demonstrated, there is no scope for the application of the remedy of disregarding the corporate identity, upon the existing principles of the common law, on the facts of this case. What the Butcher Shop seeks is to disregard, for its own benefit, the separate corporate personality of Apoldo, in circumstances where their joint shareholder has deliberately arranged that Apoldo operates the restaurant even though the Butcher Shop is the Trust’s tenant. The common law does not countenance disregarding corporate identities to allow this to be done.

The development of the common law

[55] This brings me to the alternative argument advanced by counsel for the Butcher Shop. It was that, in the light of the circumstances of the case, the existing principles of the common law ought to be developed in order to make available the remedy of piercing the veil in circumstances such as the present.

[56] The Butcher Shop’s case for the development of the common law was not based upon a claim that an existing common law rule conflicts with a provision of the Constitution. The injunction to develop the common law arises, instead, in the context of the court’s inherent jurisdiction to do so, in the interests of justice.[34] Once the court is engaged in developing the common law, it is enjoined to do so in conformity with the Constitution and in a manner

that promotes the spirit, purport and objects of the Bill of Rights.[35]

[57] The first difficulty which confronts the Butcher Shop is that, apart from contentions in argument, no proper case has been made out upon which the Court can engage in the development of the common law in a constitutional context. In *MEC for Health and Social Development, Gauteng v D Z obo WZ*, the approach to the development of the common law in the context of s 39(2) of the Constitution was held to require that:

‘... [a] court must: (1) determine what the existing common-law position is; (2) consider its underlying rationale; (3) enquire whether the rule offends s 39(2) of the Constitution; (4) if it does so offend, consider how development in accordance with s 39(2) ought to take place; and (5) consider the wider consequences of the proposed change on the relevant area of the law.’[36]

[58] The argument for the development of the common law was premised upon the particular facts of the case. No general policy considerations were raised as being a conceivable basis for such development. The proposition was that the common law ought to recognise the availability of the remedy of disregarding corporate identity as a generally available equitable remedy to meet the exigencies of this case. The proposition would require this Court to hold:

- (a) that our law accepts that the courts will pierce the corporate veil in the interests of justice.
- (b) that the remedy is available even in circumstances where the use of a corporate personality involved no misuse, abuse, or other form of unconscionable conduct.
- (c) that a court may disregard the existence of a separate legal personality in order to confer upon a third party, who is not a shareholder of the corporate entity, rights which vest in the corporate entity so disregarded.
- (d) that it may do so even if the corporate entity whose personality is to be disregarded and its shareholder are not before the court.

[59] Such development is, in truth, not a development of the common law so much as an abrogation of the principles of the common law, long accepted by the courts of this country; duly recognised in statutory form by s 20(9) of the Companies Act; and consonant with legal principles applied in international jurisdictions.

[60] The existence and effect of s 20(9) of the Companies Act cannot be overemphasised. It was introduced to the Companies Act by an amendment effected in 2011. As explained earlier in this judgment, the section does not abrogate or replace the common law. It supplements the common law. The judgment in *Gore* explains, correctly, that use of the term ‘unconscionable conduct’ broadens the reach of the doctrine. The section, however, clearly contemplates some form of misuse or abuse of a separate corporate identity as a necessary condition for the application of the remedy.

[61] A court will exercise its inherent discretion to develop the common law sparingly.[37] It will approach the task, as indicated in *Carmichele v Minister of Safety and Security and Another*:

‘... [M]indful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro*, which was cited by Kentridge AJ in *Du Plessis v De Klerk*:

“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. ... In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. ... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.” [38]

[62] In this instance the legislature has recently considered the questions that arise in this case. It enacted s 20(9) of the Companies Act in the form that it did. It did not introduce a general discretion to disregard the separate corporate personality of a company and it chose to confirm, even if in broader formulation, an essential requirement for the granting of the remedy, namely some form of unconscionable conduct. It was not suggested that s 20(9) offends a provision of the Constitution.

- [63] This is not a case where there is any warrant for the sort of development of the law sought by the Butcher Shop. All that might notionally be available to it is some ‘incremental change which keeps the common law in step with the dynamic and evolving fabric of our society’. In the preceding section dealing with the application of the common law principles to the facts of this case, I indicated that they do not countenance the relief sought by the Butcher Shop. Two further considerations militate against any form of ‘incremental’ fact-based development to accommodate the position of the Butcher Shop.
- [64] Firstly, the existence of separate corporate identities and the consequences which attach thereto are by no means inherently unfair or unjust. Nor is there anything to suggest that the enforcement of the obligations undertaken by the Butcher Shop will bring about an injustice. Secondly, our law does not countenance a casuistic resort to equity and fairness to circumvent statutory provisions or the rules of the common law.[39]

Conclusion

- [65] The appeal was argued primarily on the issues raised in the counter application brought by the Butcher Shop. There was, in effect, no contest in relation to the relief which was sought in the main application brought by the Trust. Counsel accepted that the lease agreement precluded the withholding of payment of the base rental. It was accepted that the Butcher Shop had withheld payments and, in the absence of success in the counter application, the relief was properly granted in the main application. The conclusions reached on the four issues which were debated before this Court mean that the high court’s orders must stand.
- [66] In the result, the appeal is dismissed with costs.

G G GOOSEN

JUDGE OF APPEAL

Appearances

For the appellant: J Muller SC and L Kelly Instructed by: Werksmans Attorney, Cape Town Lovius Block Inc, Bloemfontein. For the respondent: P A Corbett SC Instructed by: Van Rensburg & Co, Cape Town Symington de Kok Inc, Bloemfontein.

- [1] The lease agreement was concluded with the Butcher Shop & Grill CC, which subsequently changed its corporate structure to that of a limited company. The lease was concluded on 20 February 2014.

- [2] The Trust had supplemented its papers in the high court to claim further amounts. which became due after the launch of the main application.

- [3] A J Kerr, The Law of Sale and Lease 3rd ed at 350.

- [4] Hansen, Schrader & Co v Kopelowitz 1903 TS 707 at 718-719; see also Thompson v Scholtz [1998] ZASCA 87; [1998] 4 All SA 526 (A); 1999 (1) SA 232 (SCA) at 237H-238C.
- [5] First National Bank of SA Ltd v Rosenblum & Another [2001] 4 All SA 355 (SCA); 2001 (4) SA 189 (SCA) para 6.
- [6] Kerr fn 3 above at 353.
- [7] Ibid at 357.
- [8] North Western Hotel Ltd v Rolfes, Nebel & Co 1902 TS 324 (North Western Hotel).
- [9] Fn 8 above at 329.
- [10] Ibid at 332.
- [11] Kerr fn 3 above at 353 – 356; , Du Bois et al Wille's Principles of South African Law (2007) 9 ed at 916.
- [12] I deal with the 'development of the common law' argument later in this judgment. See para 55 below.
- [13] For example, matters which arise in relation to the Turquand rule and the protection of persons who, bona fide, rely upon the conduct of directors and officers of a company purportedly carried out with authority to bind the company.
- [14] Ex Parte Gore and Others 2013 (3) SA 382 (WC); [2013] 2 All SA 437 (WCC) (Gore) para 31.
- [15] Ibid para 32.
- [16] Ibid para 33.
- [17] City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others [2017] ZASCA 177; 2018 (4) SA 71 (SCA).
- [18] Section 165 deals with derivative actions. Subsection (1) states that: 'Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.' Section 161 deals with the protection of the rights of holders of securities. It provides in subsection (2) that the right to approach a court conferred by the section is in addition to the rights conferred at common law. It is not without significance that subsection (2) was amended by the Companies Amendment Act 3 of 2011, which is the same amending legislation which introduced s 20(9) to the Act.
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[19] Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others

[1995] ZASCA 53; [1995] 2 All SA 543 (A); 1995 (4) SA 790 (A) at 804C-D (Cape Pacific).

[20] Ibid at 802H-I.

[21] Ibid at 803A.

[22] The Shipping Corporation of India Ltd v Evdomon Corporation and Another [1993] ZASCA 167; 1994

(1) SA 550 (A) at 566C-F.

[23] Cape Pacific fn 19 above at 803H-I.

[24] Ibid at 804D.

[25] Hülse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA); [2002] 2 All SA 211 (A) para 20.

[26] Ibid para 23..

[27] Cape Pacific fn 19 above at 805G-I. The court held that ‘[t]he existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance’.

[28] Hülse-Reutter fn 25 above para 23.

[29] Cape Pacific fn 19 above at 805F.

[30] The Law of South Africa (LAWSA) 3rd ed, Vol 6, Part 1, para 64, where it is described as: ‘Veil piercing is referred to as “reverse veil piercing” when the persons who sought to have the veil set aside were the shareholders themselves. Thus, while the more usual situation is for a creditor to attempt to pierce the corporate veil in order to impose personal liability on the corporate members, in the case of a reverse piercing the members of the company attempt to pierce the corporate veil from within, usually by claiming that the court ought to treat them as the true owners of the business or assets of the company.’

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[31] Ochberg v Commissioner for Inland Revenue 1931 AD 215 at 232.

[32] Tunstall v Steigmann 1962

(2) Q.B. 593; [1962] 2 All ER 417 (CA).

[33] Ibid at 420I-421A.

[34] Constitution s 173.

[35] Constitution s 39(2).

[36] MEC for Health and Social Development, Gauteng v DZ obo WZ

[2017] ZACC 37; 2018 (1) SA 335 (CC) para 31; see also Thebus and Another v S

[2003] ZACC 12; 2003

(6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 28.

[37] Phillips and Others v National Director of Public Prosecutions

[2005] ZACC 15; 2006 (1) SA 505 (CC) paras 51 & 52.

[38] Carmichele v Minister of Safety and Security [2001] ZACC 22; 2001

(4) SA 938 (CC); 2001 (10) BCLR 995 (CC) para 36.

[39] Cool Ideas 1186 CC v Hubbard and Another

[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 52; S v Zuma and Others

[1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) para 18.

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