

SOUTH AFRICA / JUDGMENT

Moloney and Others v 3D Design Close Corporation t/a Muga Design (In Liquidation) and Others (JS 201/17) [2019] ZALCJHB 55 (15 March 2019)

[2019] ZALCJHB 55

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

JS 201/17

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 201/17

In the matter between:

SARAH JANE MOLONEY & 12 OTHERS

Applicant

And

3D DESIGN CLOSE CORPORATION t/a

MUGA DESIGN (IN LIQUIDATION)

First Respondent

3D DESIGN JHB (PTY) LTD

Second Respondent

3D EVENTS JHB (PTY) LTD

Third Respondent

CONRAD KULLMAN

Fourth Respondent

JOHN KULLAN

Fifth Respondent

MIBELLA 1045 t/a 3D SHELL

Six respondent

Heard:

11, 12 - 13 March 2019

Delivered: 15 March 2019

JUDGMENT – ABSOLUTION FROM THE INSTANCE

TLHOTLHALEMAJE, J

- [1] In a claim brought under the provisions of section 187(1)(g) read with the provisions of section 191(5)(11) of the Labour Relations Act (LRA)[1], the applicants seek an order declaring that their dismissal was automatically unfair or in the alternative, unfair. Their claim is based on the transfer of the business of the first respondent (3D Design CC t/a Muga Design) (Muga) to the second respondent (3D Design JHB) at the time of their dismissal.
- [2] It was common cause that the applicants were on 30 November 2016 summarily dismissed either individually or as a group, upon being informed that Muga was being liquidated. The applicants further contend that despite their summary dismissal, other employees were transferred to the second, third and sixth respondents.
- [3] The fourth and fifth respondents (The ‘Kullmans’) who are brothers and were the directors or shareholders of the entities (including the first, second, third and sixth respondents) that formed 3D Group of Companies, opposed the applicants’ claim. Subsequent to the applicants having closed their case, the Kullmans had sought absolution from the instance, contending that there was no prima facie evidence adduced to sustain the claim of piercing the corporate veil as pleaded by the applicants in their statement of claim. The applicants opposed the application for absolution from the instance.
- [4] In their statement of claim, the applicants alleged the following;
- 4.1. Prior to and/or in November 2016 the Kullmans were common members of the first and sixth respondents and other entities including JCK Management Services CC, Lumen Electrical CC and Mibella 1039 CC. The entities were collectively referred to as the 3D Group of Companies, and were at all times intertwined and interdependent upon each other and ran as extensions of the Kullmans’ personalities.

4.2. In August 2015, Muga had created an entity called 3D Design t/a 3D Events on its internal accounting system, which had at all times utilised Muga's registration and VAT numbers, and operated as a division of Muga. That entity eventually became known as 3D Design JHB (Pty) Ltd (The second respondent), and was registered on 7 December 2016, with the Kullmans as its directors and shareholders. The third respondent (3D Events (Pty) Ltd) was registered on 12 January 2017, with the Kullmans as its directors and shareholders.

4.3. As at 12 January 2017, the entities forming the 3D Group included the sixth, second and third respondents, in addition to Lumen Electrical CC, JCK Management Services CC and Lumen Electrical. The Kullmans remained the directors and shareholders of the 3D Group of Companies.

4.4. On 30 November 2016, the applicants were individually and collectively verbally informed that Muga was to be liquidated and that their employment services were to be terminated with immediate effect.

4.5. On the same date that the dismissals took place, the 3D Group publicised information on its website which read;

"The 3D Group is in a process of restructuring its business in order to provide clients a better and more personal service in 2017."

In order for us to achieve this we are closing one of our five companies in the group. This does not affect 3d Shell, 3d Furniture, 3d Cape or 3d Furniture Hire.

The affected company is the 3d Design business, which will become 3d Design Johannesburg (Pty) Ltd as of January 2017. The new company will be positioned for longer term sustainability in terms of supporting the exhibition industry and its stakeholders. We are looking forward to the positive effect that this will have on our business for 2017 and the future"

4.6. The applicants allege that between the period 30 November 2016 to 7 December 2016, the business of Muga was transferred to 3D Design Johannesburg (Ltd) Ltd (the second respondent) and further that certain employees were transferred to the employ of the latter entity.

4.7. The applicants further allege that one or more of the respondents acting individually and/or jointly and/or as the alter-ego of the Kullmans cherry-picked the transferred employees for employment with one or more of the respondents and used this stratagem to unlawfully dismiss them.

[5] Since the dismissals, the applicants further alleged that the following events took place;

5.1 Other employees were transferred to the sixth respondent and paid by that entity.

5.2 The second respondent was created on 7 December 2016, and two days later, Muga was voluntarily liquidated.

5.3 On 12 December 2016, the third respondent was created.

5.4 On 28 June 2017, the Kullmans sold 51% of their shares in the Group for R5.5m to two new shareholders.

5.5 As at February 2018, all the entities in the 3D Group of Companies were liquidated.

- [6] At these proceedings, the summary dismissal of the applicants as it took place on 30 November 2016 and the manner it was effected was not placed in dispute. In the light of all of the entities having been liquidated, and the liquidators not being party to these proceedings, the applicants seek to hold the Kullmans jointly and severally liable for their claims. In this regard, the applicants seeks to have the corporate veil lifted.
- [7] There are no specific guidelines as to when a court would pierce the veil as each case would depend on a close analysis of its facts[2]. It is however accepted that there is no general discretion enjoyed by the courts to disregard the separate juristic personality of a legal entity, and that in the same vein, the piercing of the corporate veil is 'an exceptional procedure', which will be invoked in circumstances where there is 'fraud or other improper conduct in the establishment, or the use of the company/entities, or the conduct of its affairs[3].
- [8] When the veil of incorporation is pierced, the protective covering of the limited liability presented by the company structure is stripped, which may result in its shareholders or directors being held

personally liable. The primary purpose of piercing the corporate veil would simply be to prevent the abuse of the corporate personality by directors and shareholders of the company.

- [9] In this case, and in seeking to hold the Kullmans jointly and severally liable, the applicants' case was that these two individuals as the only members/shareholders/directors of the first, second, third and sixth respondents as well as other entities forming the 3D Group of Companies had utilised the vehicle of these

entities as an extension of their own personalities to fraudulently, alternatively, dishonestly, alternatively, improperly conduct their affairs, or abused the corporate identities and personalities of those entities together with others.

- [10] The applicants had relied mainly on the evidence of Ms Lathisha Heslop (Heslop) who commenced employment with Muga in May 2015 in the position of Assistant Events Coordinator. Her evidence is summarised as follows:

10.1. The operations of the 3D Group of Companies involved the preparation of exhibition stands, live events, furniture rental and shell scheme stands amongst others.

10.2. Its different entities were all housed in one building and divided into different sections or departments. She contended that there was no distinction between the entities as they acted and conducted themselves as one company. This was fortified by the fact that invoices for inter-company services were not paid and everything was done internally.

10.3. There were instances where one entity would be quoted on an asset and the other would pay for it. In some instances, one entity would purchase an asset which would then be delivered and utilised by another entity. There was further an instance on 30 November 2016, when the employees were instructed by the Kullmans to re-issue to clients invoices previously issued by Muga which resulted in the sixth respondent receiving payment instead of Muga. Heslop contended that this constituted fraud.

10.4. Following the dismissal of other employees on 30 November 2016, Heslop and other remaining employees were transferred to the second respondent. Despite this, their salaries for December 2016, were paid from the sixth respondent's bank account. In February 2017, the employees' salaries were paid from the bank account of the third respondent.

- [11] The applicants further led the evidence of Mr Masilo Kwenabaholo an erstwhile employee of Muga who was also dismissed on or about 30 November 2016. His evidence to the extent that it is relevant to the issue for determination was to confirm that all the entities under the Group operated under one roof.
- [12] The evidence of Ms Sarah Moloney (Moloney), who was also dismissed on 30 November 2016 mainly related to the circumstances leading to her dismissal, and is only relevant insofar as she had also confirmed that the entities all operated under one roof.
- [13] To the extent that the Kullmans sought absolution from the instance, this pertained mainly to the question whether the applicants had laid a basis for the piercing of the corporate veil.
- [14] The principles applicable to applications for absolution from the instance are trite. Absolution is not readily granted unless it can be demonstrated that the applicants' case was so weak that no reasonable court could find for them. The established test to an absolution application was set out in *Gordon Lloyd Page & Associates v Rivera and Another*[4] as follows;

'[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:

"...(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)"

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; *Schmidt Bewysreg* 4th ed at 91-2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93). The test has from time to time been formulated in different terms, especially

it has been said that the court must consider whether there is “evidence upon which a reasonable man might find for the plaintiff” (Gascoyne (*loc cit*)) – a test which had its origin in jury trials when the “reasonable man” was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another “reasonable” person or court. Having said this, absolution at the end of a plaintiff’s case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.’

[15] Applying the above principles to the facts of this case, it is apparent that the applicants must have adduced evidence relating to the elements of the claim or contention that the corporate veil ought to be pierced. This entails that they must have placed evidence which demonstrates that this Court applying its mind reasonably to such evidence, could find that the Kullmans had either fraudulently, or dishonestly, or improperly conducted the affairs of the entities forming the 3D Group, or that they had abused the corporate identities and personalities of those entities, for the purposes of finding them jointly and severally liable for their unfair dismissal. The onus on the applicants in this regard is however less onerous.

[16] There are certain worrisome features with the Kullmans’ case that casts doubt on whether the interests of justice will be better served by the exercise of the discretion to grant absolution. These features can be identified as follows;

16.1 The first is that the grossly unfair and appalling manner with which the dismissal of the applicants was effected on 30 November 2016 is not placed in dispute. In the light of the constitutionally guaranteed right to fair labour practices, fairness and the interests of justice dictate that the Kullmans must give an account and explain the circumstances leading to the dismissals. This is particularly so since in some instances, the Kullmans had personally verbally informed the employees of their summary dismissal.

16.2 On the Kullmans’ version as stated in the opening address by Mr Nel on their behalf, Muga was liquidated but yet certain of its functions were continued, resulting in some of the employees being transferred to other entities, which on their version, were created to employ those employees.

16.3 Immediately upon the dismissal of the applicants, the Group issued an announcement on its website justifying the reason Muga was closed down or placed under liquidation, whilst at the same time establishing a new company in the form of the second respondent.

16.4 It was further conceded on behalf of the Kullmans that the entities within the Group operated in tandem, and it was further contended that each of the financial transactions in-between the entities could be explained to demonstrate that no fraudulent activities took place.

16.5 A further worrying feature with the Kullmans’ case pertains to the pleadings, where they had in their statement of response, made bare denials, including to paragraphs 3 – 21 of the applicants’ statement of claim, which incorporates averments in regards to the identities of the

parties, including their own. Despite raising preliminary points in that regard, including contending that no employment relationship had existed between the applicants and any of the entities, those points were ultimately abandoned. Even worse, at paragraph 21 of the statement of response, the dismissal of the applicants in the manner described was denied.

16.6 It is appreciated that certain allegations made by Heslop in her evidence in chief were countered under cross-examination, particularly those related to some financial transactions made in respect of certain clients. Be that as it may, certain aspects of her evidence remained unchallenged including that it was the Kullmans who had decided which of the employees were kept and transferred; that no changes took place after the transfers to other entities, which entity had paid the monthly salaries; that the second and third respondents had no bank accounts; and that there was no distinction between the entities.

16.7 Other than the above, certain versions were put to Heslop under cross-examination which were either confirmed or denied. In such circumstances, once certain facts are put to witnesses under cross-examination, there is an expectation that witnesses will testify as to such facts and be cross-examined. If absolution is granted, that opportunity is lost as the Kullmans would not be called upon to answer to the applicants' claims, thus resulting in an unfair result to them.

[17] In conclusion, it is trite that in reaching a conclusion whether absolution should be granted, it is not required of this Court to critically look at all the evidence, as would be required of a Court at the end of a trial in order to deliver judgment. The primary consideration is whether there is evidence on which a court could or might find for the applicants.

[18] In the light of the above considerations, having had regard to a variety of factors including the evidence led thus far in these trial proceedings, the versions put to the witnesses under cross-examination and as opposed to the Kullmans' version in their statement of response, the pleadings as they are before the Court, the documentary material placed before it, the applicants' uncontested version in regards to the nature and manner of their dismissal, the overall interests of justice, and the primary objective of ensuring fair trials, I am satisfied that the applicants have established a prima facie case, which the Kullmans must answer to. To that end, it is deemed appropriate to refuse absolution.

[19] In regards to the issue of costs associated with the application for absolution, it is deemed prudent that these be determined at the end of these trial proceedings.

Order:

[20] In the premises, the following order is made;

1. The respondent's application for absolution from the instance is dismissed.
2. Costs associated with the application for absolution from the instance are to be in the cause.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants:

T. Anestidis of Eversheds Sutherland

For the Fourth and Fifth Respondents: A.J Nel

Instructed by:

Lee and McAdam Attorneys

[1] Act 66 of 1995, as amended

[2] Hülse-Reutter and Others v Gödde 2001

(4) SA 1336 (SCA)

[3] See Amlin (SA) Pty Ltd v Van Kooij 2008 (2) 558 (C); Airport Cold Storage [Pty] Ltd v Ebrahim and Others

[2007] ZAWCHC 25; 2008 (2) SA 303 [C]; The Shipping Cooperation of India Ltd v Evdoman Corporation and Another

[1993] ZASCA 167; 1994

(1) SA 550 [A] at 566C-F; Bargaining Council for the Furniture Manufacturing Industry, Kwazulu-Natal v UKD Marketing CC and Others 5 [2013] 2 BLLR 119 (LAC); (2013) 34 ILJ 96 (LAC) at para 21, where it was held that; 'It is now possible to examine appellant's argument about lifting the corporate veil. In Cape Pacific Ltd v Lubner Controlling

Investments (Pty) Ltd, Smalberger JA noted that: '[o]ver the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil.' At 803 G He warned that 'it is undoubtedly a salutary principle that our Courts should not likely disregard a company's separate personality but should strive to give effect to and uphold it. To do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attached to it.' At 803 H The learned judge of appeal then went on to say that, where fraud dishonesty or other improper conduct was to be found, then further considerations would influence the overall assessment as to whether the corporate veil should be pierced. In this connection, the court would proceed to examine the substance rather than the form of the adopted structure in order to determine whether there has been a misuse of corporate personality which would justify it being disregarded. Smalberger JA then noted that fraud or improper conduct was not the only basis by which the corporate veil could be lifted. Citing Gower (The Principles of Modern Company Law

(5ed at 133)) at 804 C ‘it also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intentions; what counts is whether it has been used as a facade at the time of the relevant transactions.’

[3] See *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) 558 (C); *Airport Cold Storage [Pty] Ltd v Ebrahim and Others*

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[4] 2001

(1) SA 88 (SCA) at 92E-93A: See also *See Carmichele v Minister of Safety and Security*

[2001] ZACC 22; 2001 4 SA 938 (CC) at para [79], where it was held that; ‘An order for absolution from the instance is an appropriate order to make at the end of the plaintiff’s case where a court,

applying its mind reasonably to the evidence, could not or might not find for the plaintiff. The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances. A determination of what is in the interests of justice necessarily involves the exercise of a discretion.’

[4] 2001

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