DISPUTE RESOLUTION
ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

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IN THIS ISSUE

The thin line between being *"fit and proper"* and doing the job effectively!

In an insolvency enquiry, the commissioner is charged with the unenviable task of digging, probing, and essentially trying to ascertain where the skeletons are buried. Considering the interrogative role of the commissioner, under what circumstances can it be said that there was actual bias or a reasonable apprehension of bias on the part of the commissioner, that may warrant an application for recusal?

Section 417 of the Companies Act 61 of 1973 (1973 Act), makes provision for private insolvency enquiries to be conducted into the affairs of a company that is unable to pay its debts and has been placed under compulsory liquidation. Section 417 of the 1973 Act empowers a court or the Master to investigate the affairs of a company, while section 418 of the 1973 Act permits a court or the Master to delegate such investigative powers to a commissioner.

An insolvency enquiry is essentially a fact-finding mission aimed at uncovering any mismanagement of the company in liquidation or misconduct on the part of its officers, which may have resulted in its liquidation. Therefore, it is not surprising, considering the inquisitorial nature of the proceedings, that the independence or bias of a commissioner may be challenged by a disgruntled witness.

This is what transpired in *Fernandes v Niel N.O and Others* (8923/2021) 2022 ZAGPPHC 492. The applicant was summoned to appear before a Commission of Enquiry (Enquiry), established to investigate the affairs of the sixth respondent, Swifambo Rail Leasing (Pty) Ltd, which underwent compulsory liquidation in 2019. During the proceedings, the applicant, dissatisfied by the conduct of the commissioner towards him and his attorney, launched an application seeking an order declaring the commissioner (cited as the first respondent) not fit and proper to act as a commissioner of the Enquiry and the setting aside of his appointment thereto, in as far as it relates to the applicant's attendance at the Enquiry. The main basis for this application was bias, or at a minimum the reasonable perception of bias on the part of the first respondent. The applicant also requested a punitive cost order against the commissioner in his personal capacity (cited as the second respondent).

DISPUTE OVERVIEW

The applicant was the general manager of a grape growing business operated on a farm owned by Okapi Farming (Pty) Ltd (Okapi Farming), in which the applicant was also a shareholder. The dispute as to the actual or perceived bias was a result of certain questions posed by the commissioner to the applicant in relation to the source of the funds used by the applicant to acquire 40% of the shares in Okapi Farming.

The applicant argued that the commissioner's use of the words *"suspicions"* and *"money laundering"* when questioning the applicant about the funds, that may have emanated from the sixth respondent, constituted bias on the part of the commissioner. The applicant further alleged that the commissioner was hostile toward the applicant's attorney and stated that telling the applicant's attorney to stop making a mockery of the Enquiry amounted to *"strong language"* being used by the commissioner.

The thin line between being *"fit and proper"* and doing the job effectively!

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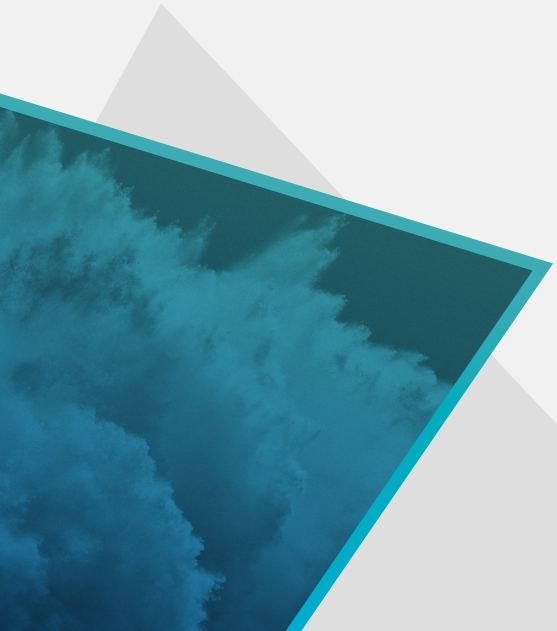

The applicant contended that the commissioner failed to advise the applicant, during the issuing of the summons and the Enquiry, that he was obliged to answer questions relating to money laundering, even though the answers to such questions may amount to self-incrimination. The applicant contended that all these issues amount to a reasonable perception of bias or actual bias.

The commissioner both in his professional and personal capacity opposed the application on the grounds that the applicant's reference to the commissioner's conduct, choice of language and alleged hostility towards the applicant were not sufficient to found a claim of actual or alleged bias on his part. The commissioner argued further that the application was an abuse of process, and that the applicant was not acting in good faith.

WELL-ESTABLISHED TEST FOR BIAS

The court deferred to the well-established test for bias, confirmed in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), which asks whether a *"reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge [or chairperson of an enquiry] has not or will not bring an impartial mind to bear on the adjudication of the case"*.

The court held that relief will not be easily granted if it is against the benefit of all interested parties, however a court does have a discretion to remove a commissioner that has not acted in accordance with the principles of natural justice which require that a commissioner act fairly and impartially at all times. A delicate balance is to be struck between the various competing interests for the benefit of all parties, and in doing so the context and circumstances are important considerations.

In terms of the timing of the application for recusal, the court acknowledged, in order to minimise disruptions, that it is more likely to grant an application for recusal at the start of an enquiry than at the end. The court took issue with the fact that the applicant only objected to the questioning after being asked about the source of the funding for the purchase of the shares in Okapi Farming, despite the applicant having received the summons detailing the *"suspicions"* of the origins of the aforementioned funds. According to the court, the applicant should have objected to these aspects of the summons upon receipt of the summons, before testifying or during testifying.

With regard to the commissioner's use of the word "suspicions" during the Enquiry, the court viewed this within the context of the summons and the purpose of the Enquiry. Paragraph 3 of the summons recorded the concerns relating to the origin of the funds used to purchase the shares in

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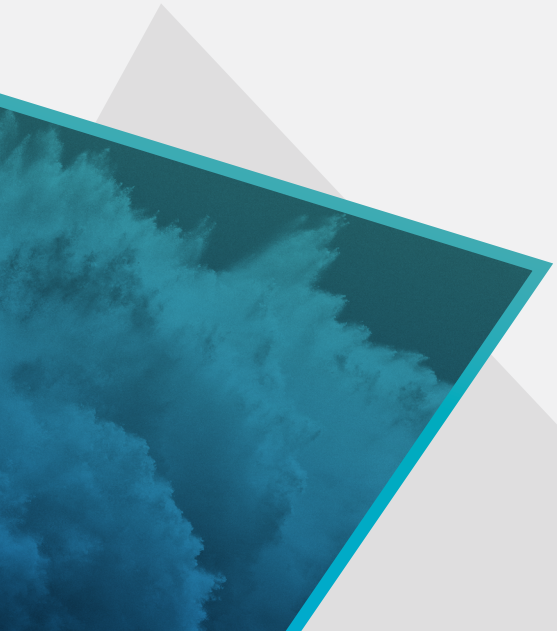

Okapi Farming and the need for the applicant to testify to this. The court reasoned that the use of the word *"suspicions"* did not demonstrate any foregone conclusion, on the contrary, it indicated that there was merely a suspicion, which could only be confirmed upon further investigation, questioning and evidence.

DEALING WITH DISRUPTED PROCEEDINGS

When dealing with the issue of the commissioner's attitude and expressed annoyance towards the applicant's attorney, the court relied on *Schutte v Can der Berg & Ord NNO* 1991 (2) SA 717 (C), wherein it was said that "*justifiable annoyance*" of a commissioner, even if blatantly expressed, seems to be a "*highly questionable basis for a successful recusal application*". The court concluded that while the commissioner's choice of words was unfortunate, any annoyance felt by the commissioner, on its own was not enough to warrant his recusal. Additionally, the court sympathised with the commissioner who was attempting to control the proceedings which were being disrupted by the applicant's attorney who was speaking at length without justification.

The court swiftly handled the applicant's allegation relating to self-incriminating testimony by referring to the long-standing dictum in *Ferreira v Levin NO and Others' Vryenhoek and Others v Powel NO and Others* 1996 (1) BCLR 1, that no incriminating testimony given in terms of section 417(2)(b) of the 1973 Act can be used in criminal proceedings against that person.

Accordingly, the court held that the applicant had failed to demonstrate a basis for actual bias, or a reasonable apprehension of bias and the application was dismissed in its entirety.

In handling the request for a punitive cost order, the court was not convinced by the applicant's argument that the commissioner, in his professional capacity, erred in opposing the application rather than merely filing a report, and held that that the commissioner, in his personal capacity was entitled to defend any claim for a cost order to be granted against him in his personal capacity. The court rejected the request for a punitive cost order based on its finding that there was no objectionable conduct on the part of the commissioner justifying an award of this nature. A cost order was instead granted against the applicant.

In light of the above, it is clear that the success of a recusal application is dependent on the facts and circumstances of each case and the courts adopt a balancing approach which favours the interests of all the parties involved. A frustrated or annoyed commissioner and any reference to suspicious activity or dealings by the commissioner during questioning, on its own is not enough to warrant a claim of bias, particularly in the context of an insolvency enquiry which is established to investigate suspicious activity.

LUCINDE RHOODIE, MUWANWA RAMANYIMI AND JENNY HARWIN

Debunking the prospect of piercing the corporate veil

The concept of piercing the corporate veil is often one that provides a sense of trepidation. Traditionally it was difficult and relatively rare to succeed with piercing the veil, but it has become, for good reason, less challenging.

Piercing of the veil by the court is something exceptional, as it strips away the corporate identity of a juristic person and exposes its directors and shareholders to personal liability.

Its purpose is to ensure that a company is not used as a shield to protect abusive directors and shareholders from personal liability.

It usually involves corporate misconduct that unsurprisingly leads to sensationalist news headlines and TV documentaries exploring the directors' dodgy dealings. The concept of more easily holding unscrupulous directors or shareholders accountable for their unconscionable actions is what legislators envisaged when section 20(9) of the Companies Act 71 of 2008 (Companies Act) was promulgated. The recent unreportable judgment of *Lebamang Octavia Kolisang v Alegrand General Dealers and Auctioneers t/a Grand Auctions and Another* deals with the considerations a court is tasked with when faced with a section 20(9) application.

Section 20(9)(b) of the Companies Act provides that:

> *"A court may 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 of 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)"*

FACTS

The matter involved a misrepresentation surrounding a Golf GTI purchased at an auction. In August 2016, Ms Lebamang Octavia Kolisang (the applicant) purchased a vehicle which at the time was described as, *inter alia*, a 2012 Golf GTI from Alegrand General Dealers and Auctioneers t/a Grand Auctions (the company). Mr Jassat (the second respondent) represented the company in this transaction. Jassat was also the director, and also found to be the owner, of the company at the time.

The applicant paid the purchase price and took possession of the motor vehicle. Shortly thereafter she discovered that the motor vehicle was actually a 2010 Golf GTI (not 2012). The applicant consequently cancelled the sale agreement, returned the

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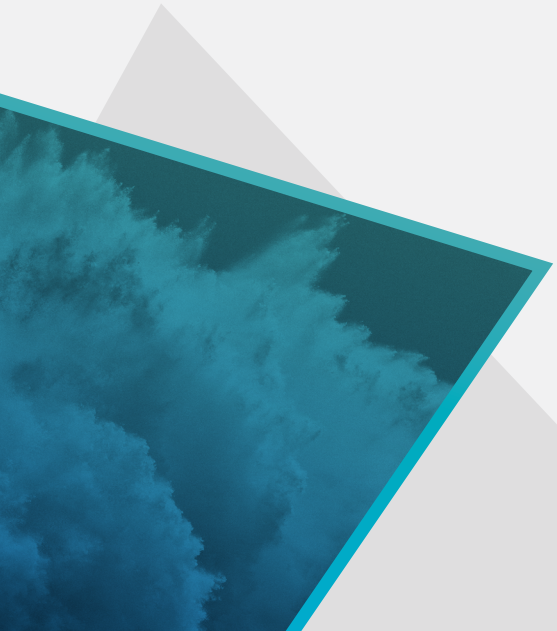

motor vehicle to the company, and sought a refund of the purchase price. The company accepted the cancellation and the return of the vehicle but refused to refund the purchase price. The applicant summarily instituted proceedings against the company. Default judgment was ultimately granted in the applicant's favour as the company failed to defend its position in court.

While attempting to execute the successful default judgment, the applicant ascertained that the second respondent resigned as director, the registered address and business address of the company were changed, and the company was in the process of deregistration. This made it arduous for the applicant to execute and satisfy the judgment debt against the company. Although the second respondent made submissions regarding the merits of the claim by the applicant against the company, no rescission application was ever instituted or reasons given for the company not having defended itself in the initial proceedings.

It was under these circumstances that the applicant sought to pierce the corporate veil, as permitted under section 20(9)(b) of the Companies Act, and hold the second respondent personally liable for the judgment debt.

The court in this matter focused on two issues: (i) the misrepresentation by the second respondent; and (ii) whether such misrepresentation justified the piercing of the corporate veil.

The court found that the second respondent had misrepresented the facts, and the key issue before the court became whether, as required by section 20(9)(b), that misrepresentation amounted to *"unconscionable conduct"* by the second respondent as the director and owner of the company.

UNDERSTANDING SECTION 20(9)

The court firstly outlined the purpose of section 20(9) of the Companies Act. One of the benefits afforded to a company, its directors and owners is that a company entitled to its own juristic personality that is distinct from its shareholders. This means, amongst other things, in the normal course of business, the debts of a company cannot be regarded as the debts of the shareholders or directors.

This notwithstanding, directors are required to act according to their fiduciary, statutory and common law duties. If they do not then, irrespective of the company's juristic personality, a director can be held personally liable for their actions. It is more difficult to hold a a shareholder/owner liable, and the ability to pierce the corporate veil becomes especially important when trying to hold shareholders accountable for a company's actions.

Section 20(9) empowers a court to exercise its statutory duty to pierce the corporate veil to disregard the distinction between the juristic personality and a director's personality. This disregard deals with setting aside a company's juristic personality and personally holding a director or shareholder liable.

Debunking the prospect of piercing the corporate veil

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The Companies Act requires an *"unconscionable abuse of the juristic personality"* to be present when considering whether to pierce the veil.

The court affirmed in the case under discussion that this test has made it much easier for the veil to be pierced than ever before.

Our courts have accepted that fraud and improper use of a company are considered sufficient grounds to pierce the corporate veil, especially as this goes against the interest of a company itself.

In this case, the applicant contended that the purchase of the motor vehicle was caused due to the misrepresentation by the second respondent and that it was deliberate, clearly amounted to fraud, and was unconscionable conduct.

The second respondent admitted that his misrepresentation was the cause of the judgment against the company, but denied that the corporate veil could be pierced.

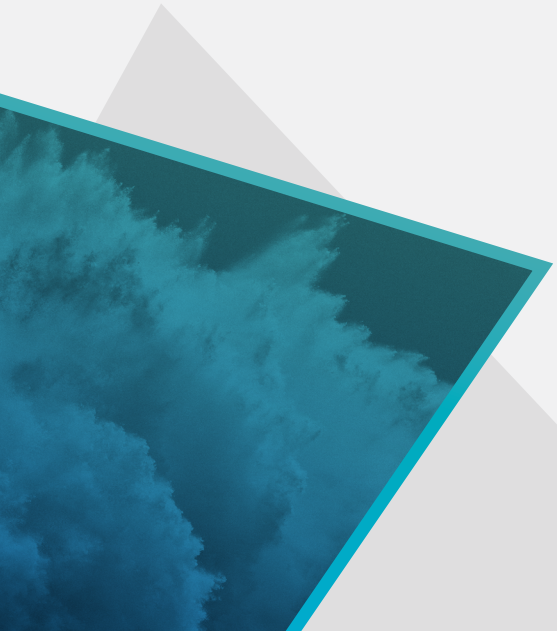
Ultimately the court was satisfied that the applicant had successfully established that the second respondent's misrepresentation was material, deliberate, amounted to fraud, was against the best interest of the company, was self-serving and amounted to an unconscionable abuse of the company's juristic personality. The judge was satisfied that the corporate veil could be pierced in terms of section 20(9)(b) and the second respondent held liable.

CONCLUSION

Once again, this should act as a warning to directors and shareholders who believe they can escape liability for misconduct by trying to hide behind a juristic personality. Directors must conduct themselves at all times in a manner that is in the best interest of the company and in line with their fiduciary duties. Shareholders should always ensure, while enjoying their rights as shareholders, that they do not act in a manner detrimental to the company or which gives the appearance that the juristic personality is being abused.

While it can also serve as a warning, section 20(9) is a welcome relief for proper corporate accountability to be upheld.

BELINDA SCRIBA AND NSEULA CHILIKHUMA



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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