



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 21 April 2023

Status: Immediate

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The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust (Case no 038/2022) [2023] ZASCA 57 (21 April 2023)

The Supreme Court of Appeal (SCA) today dismissed an appeal against an order of the Western Cape Division of the High Court (the high court) concerning a claim for remission and abatement of rent due to *vis major*.

The appeal arose from a dispute between a landlord, the Bymyam Trust (the Trust) and a tenant, the Butcher Shop and Grill CC (the Butcher Shop), in which the Trust claimed payment, in the high court, of arrear rental payable in terms of a lease agreement (the main application). The Butcher Shop brought a counter application seeking remission of rent, due to the impact of the National State of Disaster trading restrictions which were imposed to combat the Covid 19 pandemic (the counter application).

A lease agreement was concluded between the Trust and the Butcher Shop, in February 2014. Immediately thereafter, the Butcher Shop sub-let the premises to Apoldo Trading (Pty) Ltd (Apoldo), which occupied the premises and conducted the business of the Butcher Shop & Grill restaurant from the premises. The Trust became aware of the sub-tenancy in August 2019, when it gave its consent to the sub-letting arrangement.

Following the declaration of a National State of Disaster in March 2020, the Butcher Shop withheld payment of the rent due to the Trust. In doing so, it relied upon the 'lockdown' restrictions as constituting a *vis major* event which severely affected its business, thus entitling it to remission of rent payable to the Trust.

The Trust claimed payment of the full rent due to it in its main application before the high court. The Butcher Shop asserted a right to claim remission of rent notwithstanding that the loss suffered was that of its sub-tenant, Apoldo. In the alternative, it asserted that the common law principles of 'lifting the corporate veil' ought to be applied to ignore the separate corporate identity of Apoldo, since it and the Butcher Shop were no more than their common sole shareholder in corporate guise. It further asserted that, if the common law principles do not apply, the common law ought to be developed to allow the Butcher Shop to rely upon the defence as an equitable defence in the circumstances. The high court dismissed the counter application and found for the Trust on its main application.

Before the SCA four issues arose for consideration. The first, was whether the terms of the agreement precluded a claim for remission of rent. The second, was whether a tenant was entitled to raise, in a

claim for remission of rent, the loss suffered by a sub-tenant. The third, was whether the common law principles relating to the lifting of the corporate veil, were sufficiently broad to countenance the claim by the Butcher Shop; and the fourth issue was, whether the common law ought to be developed to allow for such claim.

The SCA found that upon a proper interpretation of the lease agreement, it did not preclude the tenant from asserting a common law claim for remission of rental due to a *vis major* event. Regarding the sub-letting agreement, the SCA found that the Butcher Shop was not entitled to rely upon the loss suffered by Apoldo in its defence of the claim made by the Trust.

The SCA held that the common law principles relating to the lifting of the corporate veil do not countenance such relief where there has been no abuse of a corporate personality. Where abuse, dishonesty or some form of improper conduct in the use of a corporate personality serves to place an innocent party at some disadvantage, public policy favours the assignment of liability where it falls due. It is for this purpose that a corporate personality is ignored to prevent the person or persons responsible for the abuse benefitting from the shield of a separate legal personality. The SCA found that the common law principles were affirmed by s 20(9) of the Companies Act, 71 of 2008. While the language employed by the section broadened the ambit of what might constitute 'unconscionable conduct', the effect of s 20(9) was to re-affirm the long-established principle that some form of abuse of corporate personality was required.

In this case there was no unconscionable conduct on the part of the Butcher Shop, Apoldo or their sole shareholder. On the contrary, the use of a separate corporate entity for the conduct of the business had involved a choice made by the shareholder to arrange the business affairs of the entities. The SCA accordingly held that there was no basis to 'lift the corporate veil'. To do so, would allow the Butcher Shop to ignore the separate personality of Apoldo, which was not a party to the litigation, so that the Butcher Shop could raise as a defence to the rent claim, a loss suffered by Apoldo, as if it was its own loss.

On the development of the common law principles, the SCA concluded that what was sought, was fact specific. The Butcher Shop had advanced no constitutional imperative for the development of the common law, and none was present. It found that the recent introduction of s 20 (9) of the Companies Act, which had occurred in 2011, strongly signalled an intention to retain the fundamental principles upon which the lifting of the corporate veil was based at common law.

The SCA found that the high court correctly dismissed the counter application and correctly ordered the Butcher Shop to make payment of the rent, as claimed in the main application. The SCA therefore dismissed the appeal with costs.

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