IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

Case No 34/2000

In the matter between

HANNS-CHRISTIAN HÜLSE-REUTTER	***First Appellant***
SIMONE HÜLSE-REUTTER	***Second Appellant***
GOLDLEAF PROPERTIES LTD	***Third Appellant***
and	
JOSEF GöDDE	***Respondent***

CORAM : ***HEFER ACJ, HARMS, SCOTT, MTHIYANE JJA et FRONEMAN AJA***
HEARD : ***6 SEPTEMBER 2001***
DELIVERED : ***25 SEPTEMBER 2001***

Attachment to confirm jurisdiction – *prima facie* case – mere assertions not enough – piercing corporate veil – need for some misuse or abuse of distinction between company and those who control it.

J U D G M E N T

SCOTT JA/…

SCOTT JA:

[1] The first and second appellants are German citizens and *peregrini* of the Republic of South Africa. The third appellant is a company with limited liability incorporated and registered according to the laws of the Isle of Man. It is not registered in South Africa, nor has it established a place of business in this country. On 3 December 1998 the respondent, also a German citizen and *peregrinus* of South Africa, applied *ex parte* to the Cape Provincial Division for a rule *nisi* calling upon the appellants to show cause on a specified day why certain property of the first and second appellants should not be attached to confirm the jurisdiction of the Court in an action which the respondent proposed instituting against them. An order for an interim attachment was also sought and granted pending the return day. No relief was claimed against the third appellant which was joined by reason of the interest it had in the proceedings. The property sought to be attached

comprised certain trust monies said to be in the possession of a firm of Cape Town attorneys as well as substantial claims which the first and second appellants had against the insolvent estate of one Jürgen Harksen. It subsequently transpired that the firm of attorneys, which was cited as the fourth respondent in the Court below, was not in possession of the trust monies in question and it played no part in the proceedings. The first and second appellants' claims against the insolvent estate were however attached in pursuance of the interim order. On the return day the matter was opposed and in due course set down for hearing on 20 April 1999 before E Steyn AJ. On 7 September 1999 judgment was granted confirming the rule. The first, second and third appellants appeal with the leave of the Court *a quo.*

[2] At common law, where both the plaintiff and defendant are *peregrini,* as in the present case, an attachment or arrest is insufficient to establish jurisdiction. There must be present, in addition, a recognised *ratio*

jurisdictionis. In its absence an attachment or arrest will be refused. (See *eg* *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 258 I - 259 D.) The appellants sought leave to appeal on the ground that no *ratio jurisdictionis* had been established and it was on this basis that leave was granted. In this Court, however, the appellants sought and were granted leave to broaden the scope of the appeal by raising certain other issues and in particular whether the respondent had succeeded in making out on the papers a *prima facie* case in respect of his claim against the first and second appellants. (*Cf Douglas v Douglas* [1996] 2 All SA 1 (A) at 8 i – 9 d; *S v Fourie* 2001 (2) SACR 118 (A) at 120 i – 121 h.)

[3] In response to the respondent's founding papers two short affidavits were filed on behalf of the appellants. No attempt was made to deal with the respondent's cause of action. Instead the deponent, who was the appellants' attorney, contested the existence of a *ratio jurisdictionis*

necessary to establish jurisdiction and raised certain other legal issues. The argument that the respondent had failed to establish a *prima facie* case was accordingly advanced solely on the basis of the respondent's own papers. It was common cause that unless the respondent had succeeded in doing so, the appeal had to be upheld.

[4] The respondent was one of Harksen's creditors. In February 1995 he entered into a written agreement with the third appellant ("Goldleaf") in terms of which he was to cede to Goldleaf his claims against Harksen in return for payment of the sum of DM 4 million (four million Deutsche Marks). In view of the importance of the agreement to the respondent's cause of action, it is necessary to refer briefly to some of its more significant provisions. In entering into the agreement the respondent acted both on his own behalf and on behalf of others, including Eva and Uwe Graul, all of whom were creditors of Harksen. The other parties to the agreement were

Siegfried Greve and a company he controlled, Tercur iL, which was likewise a substantial creditor of Harksen. Tercur was to be paid DM 12 million for the cession of its claim. Greve, Tercur and the respondent were referred to as the "sellers". The term was defined as meaning the three of them "jointly and severally". Detailed provisions were made for the cession of the claims to Goldleaf and for payment to the sellers. The latter undertook upon signing the agreement to deliver the documents evincing or embodying their claims to their own attorney who was to keep them in trust pending payment by Goldleaf. (The last of the sellers to sign was the respondent who did so on 13 February 1995 at Heinsberg, Germany.) The sellers' attorney was required to deliver a list of such documents to Goldleaf's attorney on or before 22 February 1995 and the documents themselves upon payment by Goldleaf which was to be made on or before 10 March 1995. In the case of the respondent the DM 4 million was to be paid into a bank account in

Switzerland. In terms of clause 3.3 of the agreement it was agreed that if Goldleaf failed to pay the sellers by or on 10 March 1995 "this agreement will become null and void". Clause 6.6 recorded that the parties waived any defence "of whatsoever nature that may be raised against any party wishing to enforce this agreement."

[5] The respondent's cause of action, briefly stated, was the following. He contended that notwithstanding Goldleaf's failure to pay on or before 10 March 1995 the agreement remained in full force and effect; the reason for this, he said, was that clause 3.3 had been inserted solely for the benefit of the sellers and that by reason of clause 6.6 Goldleaf was precluded from relying on clause 3.3 as a defence. He furthermore pointed out that Goldleaf itself had sought to enforce the agreement against Greve subsequent to 10 March 1995 and clearly regarded the agreement as binding. The respondent's claim for payment of the DM 4 million was, however, not

directed at Goldleaf but at the first and second appellants ("the appellants") who are husband and wife and the beneficial shareholders and in control of Goldleaf. He alleged that the appellants were personally liable to perform Goldleaf's obligations under the agreement by reason of their conduct in causing the company, acting in collusion with Harksen, to enter into the agreement for fraudulent purposes and in particular for the purpose of obtaining a respite for Harksen from his creditors with no intention of the company ever honouring its obligations. Initially, reliance was placed on s 424 of the Companies Act 61 of 1973. When, however, it was drawn to the respondent's attention that Goldleaf was a foreign company and not a company within the meaning of the Act (see s 2 (2)), the respondent sought to rely on the so-called common law doctrine of "piercing the corporate veil." It was common cause in this Court that s 424 was inapplicable.

[6] The respondent appended to his founding affidavit various extracts from pleadings and affidavits in litigation which followed the conclusion of the Goldleaf agreement, as well as certain other documents, in an attempt to show that the appellants' conduct was such as to justify the relief which was to be sought against them in the main action. From these documents one is able to establish the principal events which preceded and followed the conclusion of the agreement and which serve to throw some light on what motivated the parties in entering into it. The contents of certain of the affidavits and other documents are also instructive. It is convenient therefore to set out these events as briefly as the circumstances permit and where appropriate to comment upon them.

[7] It appears that Harksen's estate had been provisionally sequestrated at some stage prior to the conclusion of the Goldleaf agreement. The order was, however, discharged on 22 February 1995. In the meantime

and on 13 February 1995, being the date upon which the respondent signed the Goldleaf agreement, Tercur, one of the other sellers in terms of the agreement, was placed in compulsory liquidation in Germany. In due course Reinhard Titz was appointed as liquidator. On 17 March 1995 Goldleaf brought an application in the High Court, Cape Town, against Greve, Titz (in his capacity as liquidator of Tercur) and Greve's attorney for an order for the attachment of property to confirm jurisdiction in an action to be instituted for an order declaring the Goldleaf agreement to be of full force and effect. In the supporting affidavit Siegwart (the same person who had signed the Goldleaf agreement on behalf of Goldleaf) alleged that Greve had breached the Goldleaf agreement by ceding one of the claims forming the subject matter of the agreement to a third party. He alleged further that Goldleaf had tendered full performance of its obligations under the agreement on two occasions. The application for the attachment of property was presumably

granted and on 21 June 1995 Goldleaf issued summons for the declaratory order in question. The respondent was joined as a party but no relief was sought against him. In its particulars of claim Goldleaf alleged that it had tendered payment against proper performance by Greve and Tercur both prior and subsequent to 10 March 1995.

[8] In the meantime, on 29 March 1995 Harksen's estate was again provisionally sequestrated, this time at the instance of Greve. On 22 April 1995 Goldleaf applied for leave to intervene in order to resist the granting of a final sequestration order. The application was supported by an affidavit made by the first appellant who averred that initially Goldleaf had been precluded from making payment by reason of Tercur's liquidation and that, by the time payment could be made, Greve and Tercur had breached the agreement in respect of one of the claims acquired by Goldleaf. He affirmed Goldleaf's willingness to perform its obligations against proper performance by Greve

and Tercur and reiterated Goldleaf's tender to do so. He also stated that Goldleaf had cash and other readily realisable assets which in value exceeded the purchase consideration payable under the agreement. He explained, too, that Siegwart had signed the agreement on behalf of Goldleaf as he and his wife did not want their involvement to be disclosed at that stage.

[9] On 23 August 1995 the second sequestration order against Harksen was discharged, apparently on the strength of an undertaking made by him to pay all his creditors within 14 days. No payment was forthcoming and he was provisionally sequestrated for a third time on 21 September 1995.

[10] On 5 October 1995 Uwe and Ive (spelt "Eva" in the agreement) Graul gave notice of their intention to apply for leave to intervene in the application for a final order of sequestration of Harksen's estate. The supporting affidavit to the application to intervene was made by the respondent on behalf of the Grauls. He stated that he carries on business as

an agent for the collection of debts and confirmed that he had entered into the Goldleaf agreement on his own behalf and on behalf of others, including the Grauls. In support of his averment that the Grauls had claims against Harksen he contended that when payment had not been received by or on 10 March 1995 the Goldleaf agreement had in terms of clause 3.3 become null and void and of no force or effect. This contention is of course the very opposite of what the respondent contends in the present proceedings. The only feasible explanation he could offer for the discrepancy is that he was wrongly advised by the Grauls' legal representatives.

[11] Against this background I return to the issue of whether the respondent succeeded in discharging the burden of establishing a *prima facie* case in respect of his claim against the appellants. The respondent's founding papers abound with assertions of fraud and reckless conduct on the part of the appellants. In particular, a variety of fraudulent or improper motives are

attributed to them by the respondent for causing Goldleaf to enter into what I have called the Goldleaf agreement. It becomes necessary therefore to consider what weight, if any, is to be given to assertions of this kind when determining whether a *prima facie* case has been established.

[12] The requirement of a *prima facie* case in relation to attachments to found or confirm jurisdictions has over the years been said to be satisfied if an applicant shows that there is evidence which, if accepted, will establish a cause of action and that the mere fact that such evidence is contradicted will not disentitle the applicant to relief – not even if the probabilities are against him; it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused. This formulation of the test by Steyn J in *Bradbury Gretorex Co (Colonial) Ltd v Standard Trading Co (Pty) Ltd* 1953 (3) SA 529 (W) at 533 C – D has been applied both by this Court and the Provincial Divisions. (See *eg Cargo Laden and Lately Laden on*

Board the MV Thalassini Avgi v MV Dimitris 1989 (3) SA 820 (A) at 831 F – 832 B; *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 936 E – H.) One of the considerations justifying what has been described as generally speaking a low-level test (*MT Tigr : Owners of the MT Tigr and Another v Transnet Ltd t/a Portnet (Bouygues Offshore SA and Another Intervening)* 1998 (3) SA 861 (SCA) at 868 I) is that the primary object of an attachment is to establish jurisdiction; once that is done the cause of action will in due course have to be established in accordance with the ordinary standard of proof in subsequent proceedings. (See the *Bradbury Gretorex* case, *supra*, at 531 H – 532 A.) No doubt for this reason Nestadt JA, in the *Weissglass* case, *supra*, at 938 H, warned that a court "must be careful not to enter into the merits of the case or at this stage to attempt to adjudicate on credibility, probabilities or the prospects of success."

[13] Nonetheless, the remedy is of an exceptional nature and may have far-reaching consequences for the owner of the property attached. It has accordingly been stressed that the remedy is one that should be applied with care and caution. (See *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 302 C – D; *Simon NO v Air Operations of Europe AB and Others* 1999(1) SA 217 (SCA) at 228 E – F.) More recently, in *Dabelstein and Others v Lane and Fey NNO* 2001 (1) SA 1222 (SCA) at 1227 H – 1228 A, it was suggested that the time may come to reconsider the approach adopted in the past and to have regard also, in the assessment of the evidence, to the allegations in the respondent's answering affidavit which the applicant cannot contradict. In the present case, however, the affidavits filed on behalf of the appellants are such that the issue does not arise and it is unnecessary to consider whether the test should be refined in the manner suggested.

[14] What is clear is that the "evidence" on which an applicant relies, save in exceptional cases, must consist of allegations of fact as opposed to mere assertions. It is only when the assertion amounts to an inference which may reasonably be drawn from the facts alleged that it can have any relevance. In other words, although some latitude may be allowed, the ordinary principles involved in reasoning by inference cannot simply be ignored. The inquiry in civil cases is, of course, whether the inference sought to be drawn from the facts proved is one which by balancing probabilities is the one which seems to be the more natural or acceptable from several conceivable ones. (See *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 B – D as explained by Holmes JA in *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159 B – D.) While there need not be rigid compliance with this standard, the inference sought to be drawn, as I have said, must at least be one which may reasonably be drawn from the facts

alleged. If the position were otherwise the requirement of a *prima facie* case would be rendered all but nugatory. As previously indicated, there are exceptional cases where the requirement may be relaxed, such as for example where a defendant seeks to attach the property of a peregrine alleged by the defendant, in the alternative to a denial of liability, to be a joint wrongdoer (*cf* the *MT Tigr* case, *supra,* at 868 I – 871 B). But nothing like that arises in the present case and the ordinary principles must apply.

[15] Reverting to the facts, it was common cause in this Court that the evidence justified the inference that the appellants caused Goldleaf to enter into the Goldleaf agreement with the sole object of affording Harksen a respite from his creditors. It was also common cause that they chose to act through the medium of Goldleaf in order to conceal their identity as Harksen's benefactors. Their conduct in so doing was clearly insufficient to justify the relief sought. Notwithstanding the wide range of allegations of

fraud in the papers the only ground upon which counsel for the respondent ultimately relied for contending that the appellants' conduct had been improper or fraudulent entitling the Court to pierce the corporate veil was that they had caused Goldleaf to enter into the agreement with no intention of Goldleaf ever honouring its obligations in terms of the agreement. The question that arises is whether, applying the principles set out above, this inference is justified.

[16] In support of the inference, counsel placed much emphasis on the fact that although having the means to pay in terms of the agreement, Goldleaf had failed to do so. He relied, too, on the appellants' use of Goldleaf to conceal their identity as well as a letter written by Harksen to his counsel which the respondent had somehow acquired and in which Harksen explained why he had not paid Greve's claim. As far as the letter is concerned, the context is such that it does not assist, nor does the concealment

of the appellants' identity support the inference sought to be drawn. That leaves the non-payment.

[17] What immediately strikes one is that the Goldleaf agreement was so structured that Goldleaf would not acquire the claims until it had paid the sellers and that unless it paid on or before 10 March 1995 the agreement would be null and void. If indeed it had been Goldleaf's intention never to pay, all it could have hoped to achieve was a moratorium for Harksen of a month. That would hardly have served the latter's purpose. There was certainly nothing in the papers to suggest that it would have.

[18] Counsel's response was to contend that Goldleaf's subsequent attempts to enforce the agreement and to tender payment were all part of a fraudulent scheme to keep Harksen's creditors at bay without paying their claims. But this far-reaching assertion has no basis. From the appellants' point of view, the object of the exercise was for Goldleaf to acquire *all* the

claims of the sellers. If any claim was not acquired, it could have been enforced against Harksen and in that event the Goldleaf agreement would have served no purpose. There was nothing in the papers to suggest that Goldleaf's contention that Greve and Tercur were in breach was without substance. If it is accepted that they were in breach, as Goldleaf alleged, there really can be no basis for contending that the tender to pay and the attempt to enforce the agreement were not genuine. It follows too that the assertion that the appellants never intended Goldleaf to honour its obligations under the agreement similarly lacks allegations of fact necessary to support it.

[19] In any event, even if the appellants had intended Goldleaf not to honour its obligations and in this way perpetrate a fraud on the respondent, it would not follow, in my view, that the respondent would be entitled to the relief he seeks. It is important to note that the respondent does not claim damages for fraud; nor do the facts support such a claim. (There is no

evidence of the respondent having suffered a loss; in other words, there is no evidence that Goldleaf would be unable to pay if sued. The respondent says no more than that he has been advised that if he were to obtain judgment against Goldleaf the appellants would most likely strip the company of its assets.) Instead, what the respondent seeks to do is to enforce his contractual rights arising under the Goldleaf agreement against the appellants rather than the party with whom he actually contracted, namely Goldleaf. The justification for this is said to be that because the appellants used the company as a vehicle to perpetrate a fraud, therefore the distinction between the corporate entity and those who control it should be ignored and the latter held liable on the contract. I cannot agree.

[20] There can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances. A court has no general discretion simply to disregard the

existence of a separate corporate identity whenever it considers it just or convenient to do so. (See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 803 A – H.) The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.

[21] On the facts appearing from the papers I can see neither the abuse nor the advantage. The respondent entered into an agreement with a foreign corporation in terms of which he acquired contractual rights against that corporation. At the time he was unaware of the identity of the persons

behind it and their identity could not have played a role in persuading him to enter into the agreement. There is no evidence that the corporation would be unable to pay if sued; there is nothing to suggest that the respondent was unfairly prejudiced by the distinction which exists between the company and those who control it. The truth of the matter is simply that the respondent seeks to ignore the party with whom he contracted and to enforce his rights against a more convenient defendant.

[22] Counsel for the respondent sought to rely on the *Cape Pacific Ltd* case, *supra*, and in particular on a *dictum* of Smalberger JA at 805 G to the effect that there was "no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists". Counsel contended that the existence of a remedy against Goldleaf did not preclude the respondent from proceeding against the appellant on account of the latter's fraud.

[23] I do not understand the learned judge as having suggested that the existence of another remedy is an irrelevant consideration nor, I think, should the *dictum* be read out of context. The facts of the case were very different from the present one. There, the plaintiff sued company A for the delivery of shares in company B which entitled the holder to occupy a particular flat. The plaintiff obtained judgment but in the meantime the shares in question had been transferred from company A to company C at the instance of an individual who controlled both and who had effected the transfer with the object of thwarting the plaintiff's rights. It was in these circumstances that it was held on appeal in subsequent proceedings that the veil of corporate personality should be pierced in relation to company A's and C's fraudulent dealings with the shares. In coming to this conclusion the Court rejected the contention that the plaintiff was not entitled to succeed as it could have recovered the shares from company C had it timeously joined that

company in the original action on the basis of the so-called "doctrine of notice". In the present case the respondent's contractual rights are enforceable in the first instance against Goldleaf. The very exceptional nature of the relief which the respondent seeks against the appellants requires, in the circumstances of the present case, that he should have no other remedy. Quite apart from the other considerations mentioned above, the failure to show that Goldleaf would be unable to pay if sued is therefore fatal to the respondent's case.

[24] It follows that in my view the respondent failed to discharge the burden of establishing a *prima facie* case in respect of his claim against the appellants. It is accordingly unnecessary to consider the issue of the existence or otherwise of a *ratio jurisdictionis.*

[25] The appeal is upheld with costs, including the costs occasioned by the employment of two counsel. The order of the Court *a quo* is set aside and replaced with the following:

> "The rule *nisi* is discharged. The applicant is to pay the costs of first, second and third respondents, including those occasioned by the employment of two counsel."

D G SCOTT
JUDGE OF APPEAL

CONCUR:

HEFER ACJ
HARMS JA
MTHIYANE JA
FRONEMAN AJA