

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CC 69/2015**

**[2018] SCSC 802**

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**JAMES LESPERANCE**

Plaintiff

versus

**1. ALLAN ERNESTINE  
2. MARIE-ALICE ERNESTINE  
3. EDEN ENTERTAINMENT (REP BY ALLAN ERNESTINE AND MARIE-ALICE  
ERNESTINE IN CAPACITY AS DIRECTOR AND SHAREHOLDER)**

Defendant

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Heard:

Counsel: Elvis Chetty for plaintiff

Clifford Andre for defendant

Delivered: 5<sup>th</sup> September 2018

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**JUDGMENT**

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Pillay, J

[1] The Plaintiff prays the Court for an order as follows:

- i) order specific performance of the said share transfer agreement ordering the 3<sup>rd</sup> Defendant to comply with all of its obligations thereunder within 14 days of judgment.

ii) in the event that the 3<sup>rd</sup> Defendant is unable or unwilling to perform its legal obligations under the said share transfer agreement, to order the lifting of the corporate veil and to order the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to discharge the obligations of the 3<sup>rd</sup> Defendant to the Plaintiff under the said share transfer agreement.

iii) order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally to pay the Plaintiff damages in the sum of SCR 1, 500, 000.00 together with interest and costs.

[2] The Defendants denied the allegations made against them and filed a Defence averring that the Plaintiff substantially misrepresented the financial affairs of the 3<sup>rd</sup> Defendant. However neither of them nor counsel put up appearance at the hearing resulting in the case being heard ex-parte against them.

[3] The Plaintiff testified that he is in business and knows the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He further testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are shareholders and directors of the 3<sup>rd</sup> Defendant.

[4] He added that the 3<sup>rd</sup> Defendant was originally owned by him and Shana Victor which he sold to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants before the casino started.

[5] On 29<sup>th</sup> August 2013 the 3<sup>rd</sup> Defendant took out a loan of SCR10.2 million from Nouvobanq for which he provided one of his companies, Souvenir Apartments, as security.

[6] Again on or around 29<sup>th</sup> August 2013 the 3<sup>rd</sup> Defendant took another loan from Nouvobanq in the value of SCR3.2 million. In order to secure the loan the Plaintiff provided his property H6353 as collateral.

[7] On or around 10<sup>th</sup> December 2014 the Plaintiff sold the 1<sup>st</sup> and 2<sup>nd</sup> Defendants his shares in the 3<sup>rd</sup> Defendant for the value of SCR 3 million.

[8] He contends that his intention was to sell the company for SCR 3 million rupees and to have the mortgages on his property removed which has not been done.

- [9] It was his evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have paid him SCR 2 million already through Mr. Padiwalla. This I note is in line with clause 4 (i) of the Share Transfer Agreement.
- [10] The issue for the Court now is whether the 3<sup>rd</sup> Defendant is liable to pay the balance of SCR 1 million under the agreement and on the 3<sup>rd</sup> Defendant's failure to pay should the corporate veil be lifted and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be made personally liable for the debts of the 3<sup>rd</sup> Defendant.
- [11] The Shares Transfer Agreement, PE2, is dated 10<sup>th</sup> December 2014.
- [12] By virtue of the Agreement, PE2, the Plaintiff transferred 25 shares to the 1<sup>st</sup> Defendant and 26 shares to the 2<sup>nd</sup> Defendant, for the sum of SCR 3, 000, 000.00 of which SCR 2, 000, 000.00 was to be paid upon signing of the share transfer and SCR 1, 000, 000.00 by the 3<sup>rd</sup> Defendant within 6 months of signing of the Agreement.
- [13] It was further a term of the Agreement that the 3<sup>rd</sup> Defendant would cause all mortgages to be released from the Plaintiff's properties – Lesperance Complex by February 2015 and North East Point property by 30<sup>th</sup> April 2015.
- [14] It is important in my view to get a clear chronology of events:
- \* 14<sup>th</sup> November 2012 the 3<sup>rd</sup> Defendant was incorporated with 99 shares to the Plaintiff and 1 share to one Shana Victor (PE1)
  - \* 25<sup>th</sup> May 2013, 48 shares in the 3<sup>rd</sup> Defendant was transferred to Four Acres, represented by its Director Allan Ernestine, by the Plaintiff (PE3)
  - \* 23<sup>rd</sup> December 2015, 26 shares in the 3<sup>rd</sup> Defendant was transferred to the 2<sup>nd</sup> Defendant by Plaintiff
  - \* 23<sup>rd</sup> December 2015, 1 share in the 3<sup>rd</sup> Defendant was transferred to the 1<sup>st</sup> Defendant by one Shana Victor
  - \* 23<sup>rd</sup> December 2015, 25 shares in the 3<sup>rd</sup> Defendant was transferred to the 1<sup>st</sup> Defendant by the Plaintiff

- [15] It is clear that on 10<sup>th</sup> December 2014 when the Shares Transfer Agreement, PE2, was signed, the 1<sup>st</sup> Defendant, at least, was not a new investor but was in fact consolidating his and his wife's ownership of the 3<sup>rd</sup> Defendant by buying out the Plaintiff.
- [16] The agreement PE1 the Memorandum of Incorporation shows that the Plaintiff and Shana Victor are the original directors. However other than PE3 which shows that on 25<sup>th</sup> May 2013 the 1<sup>st</sup> Defendant purchased 48 shares in the 3<sup>rd</sup> Defendant, as a Director of Four Acres, from the Plaintiff, there are no other documents showing who were appointed the Directors of the 3<sup>rd</sup> Defendant subsequently.
- [17] To my mind the agreement the Plaintiff signed with the 1<sup>st</sup> Defendant was a Share Transfer Agreement as is indicated, which is a private agreement between two shareholders. The 1<sup>st</sup> Defendant on signing the agreement signed in his personal name and not as a Director of the 3<sup>rd</sup> Defendant and in so doing could not bind the 3<sup>rd</sup> Defendant.
- [18] I am strengthened in this view by the Plaintiff's averment in paragraph 9 of his Plaint – "The Plaintiff avers that it was a further implied term of the said agreement that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant will provide his own assets as security for the loan from the 4<sup>th</sup> Defendant and release the Plaintiff's assets by the end of February 2015 and 30<sup>th</sup> April 2015 respectively."
- [19] In the circumstances it cannot be said that the 3<sup>rd</sup> Defendant is liable for the balance of SCR 1 million.
- [20] I note that Counsel for the Plaintiff asked the Plaintiff in examination in chief if it was his intention to sell the company for two or three million rupees, to which the Plaintiff answered three million.
- [21] To my mind, on a perusal of the evidence, the Plaintiff was not selling the company to the Defendants, but was selling them his shares in the company and that is the purpose of PE2, the Share Transfer Agreement.
- [22] The Plaintiff's witness Mr. Elizabeth deponed that the case was a fit one for the Court to consider lifting the corporate veil because the 3<sup>rd</sup> Defendant has undergone bankruptcy

proceedings and he believes that this is the main reason that the 1<sup>st</sup> Defendant has not complied with his obligation. It was his evidence that the 1<sup>st</sup> Defendant is relying on the liquidator to inform the Plaintiff that the company has no assets in the event that the Plaintiff gets a judgment in his favour.

[23] In the case of **State Assurance Corporation of Seychelles v First International Company Ltd CS 409/1998 delivered 14<sup>th</sup> June 2006** lifting the corporate veil was explained as being a concept that “describes a legal decision where a shareholder of a corporation is held personally liable for the debts of the corporation despite the general principle that those persons are immune from suits in contract or tort, that otherwise would only hold the corporation liable”.

[24] In the above case the Plaintiff was a statutory corporation carrying business of insurance in Seychelles and the Defendant was a company registered in Seychelles carrying on the business of insurance broker. One Paul Chow was the director and majority shareholder in the Defendant company along with his wife. The Plaintiff and Defendant had an agreement whereby the Defendant was acting as agent of policy holders and authorised to transact insurance business with the Plaintiff. In a nutshell judgment was entered against the Defendant which was not honoured resulting in the Plaintiff then Judgment Creditor asking the Court to order that Paul Chow was personally liable to pay the debt of the company.

[25] The difference between the above case and the case at hand is that in the absence of proof that the 1<sup>st</sup> Defendant was a Director of the 3<sup>rd</sup> Defendant at the time he signed PE2, the Share Transfer Agreement, there was effectively no agreement between the Plaintiff and the 3<sup>rd</sup> Defendant.

[26] In the absence of evidence that the 3<sup>rd</sup> Defendant was liable for the balance of SCR 1 million as well as the promise to release the mortgages on the Plaintiff’s properties, the Court cannot consider lifting the corporate veil.

[27] On the basis of the above I find that none of the claims can be sustained and I accordingly dismiss the Plaintiff.

Signed, dated and delivered at Ile du Port on 5<sup>th</sup> September 2018

L. Pillay, J  
Judge of the Supreme Court