

14/11/17 ✓



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 22007/2014

In the matter between:

O J SITHOLE

1st Applicant

D BASSON N.O.

2nd Applicant

and

CROSS POINT TRADING 65 CC

Respondent

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
14/11/17	
DATE	SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] The applicants apply in terms of section 21(1)(c) of the Superior Courts Act, No 10 of 2013 for an order declaring the respondent to be liquidated as from 14 March 2014. The application is opposed by the respondent and a notice was filed in terms of Rule 6(5)(d)(iii) indicating that the respondent intends to raise a question of law only. The notice is formulated very clumsy, but the real

issue appears to be the following: whether it is competent in law to declare the respondent, which was converted from a company, to be liquidated after a final winding-up order was granted against the company.

BACKGROUND

[2] During 2006 a private company known as Cross Point Trading 65 (Pty) Ltd was incorporated. On 4 May 2010 this company was converted in terms of section 27 of the Close Corporations Act, No 69 of 1984 to a close corporation. About four years later, on 14 March 2014, EG van der Walt (trading as H D Transport) filed an application for liquidation against Cross Point Trading 65 (Pty) Ltd on the ground that this company “is unable to pay its debts” in terms of an agreement entered into during July 2013 for services rendered in the amount of R352 345.50.

[3] On 6 November 2014 a rule *nisi* was granted against the said company and on 12 December 2014 a final winding-up order was issued. On the second day of an insolvency inquiry into the affairs of Cross Point Trading 65 CC, following upon the winding-up of Cross Point Trading 65 (Pty) Ltd, a point *in limine* was raised to the effect that an incorrect entity was cited in the liquidation application and therefore liquidation proceedings against Cross Point Trading 65 CC are void *ab initio*. The result was that the liquidators of Cross Point Trading 65 (Pty) Ltd have decided to apply for an order declaring Cross Point Trading 65 CC “liquidated as from 14 March 2014”.

[4] It was contended on behalf of the applicants that the issue of conversion does not make any difference and it cannot be said that a wrong party has been cited. The Court has a discretion to condone any defect in a citation if one takes into account, so it was submitted, that these are not two separate juristic entities. Counsel for the respondent argued that the company ceased to exist as at the date of conversion and therefore the application for liquidation was brought against an entity which, on that date, no longer existed.

[5] Section 27 of the Close Corporations Act has since been repealed, but at the time of the conversion (during 2010) the relevant part thereof provided (in subsection (1)) that any company having ten or fewer members all of whom qualify for membership of a corporation, may be converted into a corporation, provided that every member of the company becomes a member of the corporation. Subsection (2) provided for, *inter alia*, the filing of a founding statement whereas subsection (4) provided for the registration of the founding statement and, simultaneously with such registration, that the registration of the memorandum and the articles of association of the company concerned, be cancelled.

[6] Subsection (5) provided that on the registration of a corporation converted from a company, the assets, rights, liabilities and obligations of the company shall vest in the corporation. It also stipulated that any legal proceedings instituted by or against the company before the registration may be continued by or against the corporation, and any other thing done by or in respect of the company "*shall be deemed to have been done by or in respect of the corporation*".

[7] Subsection (5) also provided (in terms of an amendment deemed to have come into operation on 1 January 1985) as follows:

“(d) The juristic person which prior to the conversion of a company into a corporation existed as a company, shall notwithstanding the conversion continue to exist as a juristic person but in the form of a corporation.”

[8] With regard to the cancellation of the memorandum and articles of association of the company (as referred to in section 27(4) of the Close Corporation Act), section 29B of the Companies Act, 1973, provides as follows:

“When a company is converted into a close corporation in terms of the Close Corporations Act, 1984, the Registrar shall, simultaneously with the registration of the founding statement of the close corporation by the Registrar of Close Corporations in terms of the said Act, cancel the registration of the memorandum and articles of association of the company concerned.”

[9] In *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd* 2017 (4) SA 610 (SCA) an estate agent company was converted to a close corporation in terms of section 27 of the Close Corporations Act. The Estate Agency Affairs Board was not advised of this conversion as a result whereof the fidelity fund certificate was issued to the former company and not the close corporation. The appellant then instituted action for the recovery of estate agent's commission against the first respondent. One of the issues for

determination was whether the appellant had complied with section 26 of the Estate Agency Affairs Act No 112 of 1976.

[10] The Supreme Court of Appeal considered, *inter alia*, the application of section 27 of the Close Corporations Act, more particularly subsection (5) thereof as well as section 29B of the Companies Act of 1973. The learned Judge of Appeal then concluded (in par 12 and 13) as follows:

"It is, however, vital to recognise that although the juristic person that existed before the conversion, in the form of a company, continues to exist in the form of a close corporation, the company ceased to exist as at the date of conversion. ...

For a right to be transferred from the company to the close corporation, it must have been held by the company at the time of the conversion. Likewise 'any other thing done by or in respect of the company' would have to be done at a time when the company was in existence for it to be deemed to have been done in respect of the corporation. On 20 March 2006, being the date of conversion, the company, however, was not in possession of a valid certificate that could be transferred to the corporation. In addition, nothing had been done by, or in respect of the company before its conversion, with regard to an application for a certificate in terms of s 16 of the Act, which could be transferred to the appellant."

[11] Section 27(5)(a) of the Close Corporations Act, which provided for the vesting of assets, rights, liabilities and obligations of the company in the corporation, appears to have been a statutory cession and delegation of rights, liabilities and obligations. In the matter before me it is common cause that the outstanding debt or liability forming part of the underlying cause of action in the liquidation application, only arose during 2013, long after the date of conversion during 2010. Notwithstanding the fact that the company ceased to exist as at the date of conversion, the company was not a debtor of the applicant in the liquidation application, neither was there a liability or obligation of the former company that could vest in the corporation as far as the outstanding debt is concerned. Furthermore, nothing had been done by, or in respect of the company before its conversion, with regard to the cause of action relied upon in the liquidation application. In short, there is no link between the former company and the close corporation as far as the underlying cause of action in the liquidation application is concerned.

[12] In the result it appears to me that the liquidation application was brought against an entity, i.e. the former company, which was no longer in existence and therefore the winding-up order should be regarded as a nullity and may be disregarded (*cf The Master of the High Court v Motala* NO 2012 (3) SA 325 (SCA) par 11 - 14). The order applied for can therefore not be granted and it follows that this application falls to be dismissed.

[13] This brings me finally to the question of costs. Following the usual rule, costs should be awarded to the successful party. In this instance the applicants are the duly appointed liquidators of the former company, acting in

their official capacity. Nothing was put before me to indicate that any of the applicants acted unreasonably or in such a way that would justify a costs order *de bonis propriis*. Costs against the former company would be nonsensical as this entity no longer exists. It therefore appears to me that, under the circumstances, no order for costs should be made.

ORDER In the result I grant the following order:

- 1) The application is dismissed;
- 2) There shall be no order for costs.



D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 14th November 2017