IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

30/01/2015

CASE NUMBER: 15438/2014

(1)	**REPORTABLE: ~~YES~~ / NO**
(2)	**OF INTEREST TO OTHER JUDGES: ~~YES~~/NO**
(3)	**REVISED.**

30 /01 /__2015
DATE **SIGNATURE**

In the matter between:

LUCKYTSO TRANSPORT AND CONSTRUCTION CC	FIRST APPLICANT
LUCKYTSO KGOMOTSO MOKWENA	SECOND APPLICANT

And

ABSA BANK LIMITED	FIRST RESPONDENT
ZKN INVESTMENT CC	SECOND RESPONDENT
SHERIFF PRETORIA EAST	THIRD RESPONDENT
DEEDS OFFICE PRETORIA	FOURTH RESPONDENT
THE DEPARTMENT OF FINANCE	FIFTH RESPONDENT
THE COMPANIES AND INTELECTUAL PROPERTY COMMISSION	SIXTH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicants seek an order directing the sixth respondent to have the first respondent re-instated in terms of the Companies Act 71 of 2008 and to have the sale in execution which was conducted on the 29th of January 2014 by the Third respondent on instructions of the first respondent declared invalid.

[2] The following aspects are common cause, namely that:

2.1 On the 19 October 2011 the first respondent obtained default judgment against the first applicant wherein the immovable property known as portion 2 of Erf 1704 Silver Lakes Extension 4 ('the property") was declared executable. It is also common cause that the summons upon which default judgment was obtained, was served by the sheriff by way of affixing at the main entrance of the aforesaid mentioned property;

2.2 On 29 January 2012, a sale in execution was conducted by the third respondent on instructions of the first respondent, at portion 2 of Erf 1704 Silver Lakes, Extension 4 Pretoria, Gauteng, hereinafter referred to as "the property"

2.3 The property was sold to the second respondent on 29 January 2014.

2.4 The first applicant is a close Corporation duly registered and incorporated in terms of the Act, with primary place of business: 14051 Malema Street, Mamelodi-East, Gauteng;

2.5 The property as purchased by the first respondent during 2006 and a mortgage bond was duly registered by the first respondent to the amount of R2 700 000. 00, and R540 000. 00

2.6 The second applicant was bound as surety and co-principal, jointly and severally together with the first applicant regarding the bond mentioned herein above;

2.7 On the 1st August 2012 the first respondent obtained a warrant of execution against the aforesaid property;

2.8 The first applicant was deregistered on 1 March 2013 by the registrar of Companies and Intellectual Properties due to the fact that it had failed to file annual returns;

2.9 The aforesaid property was sold in execution on the 29 January 2014.

[3] It was submitted on behalf of the applicants that the re-instatement of the first applicant is requested in order to enable an application for rescission of the judgment which was taken by the first respondent on the 19 October 2011. It was further contended by the second applicant that the first and second applicants were not aware of the application that was brought on the 1st of August 2012 by the first respondent, and granted by this court. Furthered the first and second applicant were not aware of the sale in execution which was held on the 29 February 2014 by the third respondent. This was only brought to their attention on 28 February 2014, when the second applicant was contacted by the tenant regarding the fact that unknown people were visiting the premises in order to view the property.

[4] It is further submitted on behalf of the applicants that the second applicant has *locus standi* to bring this application, in lieu of the fact that he was the sole member and interested party to the first applicant, in terms of s83(4)(a) of the Companies Act 71 of 2008.

[5] It was further submitted that the re-instalment of the first applicant will be to the benefit of the creditors and further it will allow the first applicant the opportunity to enter into a settlement agreement with the first respondent wherein the arrears will be paid and the first applicant will be able to retain the aforesaid property.

[6] The second respondent is opposing the application contending, *inter alia*, that this court in terms of s82 and specifically 82(4) of the Companies Act 71 of 2008 has no power to reinstate the first applicant and only the sixth respondent has such power.

[7] The second respondent further contended that the summons were correctly served on the first applicant in terms of Rule 4(1)(a)(iv). It further conceded that the de-registration of the first applicant has the effect that the first applicant ceased to exists and its assets became automatically owned by the State as *bona vacatia.* However, this did not affect the sale in execution of the immovable property of the first applicant which took place on the 29 January 2014, so it was submitted. The sale remains valid notwithstanding the de-registration of the first applicant. I do not agree with this submission for the reasons set out herein below.

[8] It is trite that upon deregistration, the assets of a deregistered legal entity, as the first applicant *in casu,* become *bona vacantia* and falls automatically to the State; *vide Sanlam v Rainbow Diamonds (Edms) en Andere* 1982 (4) SA 633 at 638B. In *Miller v Nafcoc Investment Holding* 2010 (6) SA 390 (SCA) at 395D-E it was held that "Deregistration...puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceased to exists at death."

[9] Although the deregistration of the first applicant, in effect dissolved it[1], this however, did not extinguish its liabilities, but merely rendered them unenforceable; *vide Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 295. The first applicant was deregistered on 1 March 2013 and its assets therefore became bona vacantia. In such circumstances, the sale in execution of the 29 January 2014 was invalid because the first respondent's right to execute were unenforceable at that stage. In my view, the sale in execution stands to be set aside.

[10] *In casu,* the second applicant was the sole member of the first applicant, and is therefore an interested person who qualifies to bring the application for the relief sought; *vide Dorbyl Light and General Engineering (Pty) Ltd* 2006 (5) 306 (W) at 312-314 and section 83(4) of the Companies Act 71 of 2008, which also to closed corporations. I am therefore, of the view that the second applicant has *locus standi* to bring this application on behalf of the first applicant.

[11] In my view, the Court has a discretion to declare the deregistration of the first applicant to be void and order its reinstatement on the register, *vide ABSA Bank*

[1] Vide s83 (1) of the Companies Act, No 71 of 2008. In terms of s1 of Act 71 of 2008 "company" means, inter alia, a closed corporation a as per Close Corporations Act 1984.

Limited v Companies and Intellectual Property Commission of South Africa and Others 2013 (4) SA 194 (WCC) at para[43].

[12] In the matter of *Boland Bank Limited v Mouton and Another* 1997 (4) ALL SA 67 (C) at 75 c it was held that the provisions of s26 the Act does not contemplate that the corporation should be deregistered in circumstances where it has assets and liabilities, if such deregistration would be prejudicial to creditors.

[13] In the matter of *ABSA Bank Limited v Companies and Intellectual Property Commission of South Africa and Others*[2] Yekiso J held that a purported sale in execution of the property belonging to the State as *bona vacantia* is void and granted an order restoring such property and set aside the sale in execution. I am also of the view that at the time when the sale in execution took place, the property already vested with the State and the sale thereof by the sheriff was accordingly void and stands to be set aside for this reason as well.

[14] The court was requested to grant costs on attorney and client scale against the second applicant. The question of awarding costs is a matter of the discretion of the Court. I take note of the fact that the applicants are still to bring an application for the rescission of the order which triggered the entire process that culminated in this application. Having regard to the nature of this application, I do not think that the opposition was frivolous. I am therefore reluctant to grant a punitive costs order.

[15] In the result I make the following order:

1. That the sixth respondent is hereby directed to have the first applicant re-instated;
2. That the sale in execution which was conducted on the 29 January 2014 by the third respondent is declared invalid and set aside;
3. That the second respondent to pay the costs on opposed party and party scale

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[2] 2013 (4) SA 194 (WCC).

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF HEARING	: 05 / 12 / 2014
DATE OF JUDGMENT	: 30 / 01/ 2015
APPLICANT'S ATT	: SHUBNAM SINGH ATT
APPLICANT'S ADV	: ADV J C PRINSLOO
RESPONDENT'S ATT	: BRUNO SIMãO ATT
RESPONDANT" ADV	: ADV A A LUBBE (2ND RESPONDENT)