

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

12/3/2015

CASE NO: 65849/2013

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

12/03/15
Date

AMELIA MORGENROOD

APPLICANT

and

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

1ST RESPONDENT

JOSEPH STEPHANUS FRANS DAUTH

2ND RESPONDENT

WELIE GRONUM

3RD RESPONDENT

MINISTER OF TRADE & INDUSTRY N.O.

4TH RESPONDENT

MINISTER OF FINANCE N.O.

5TH RESPONDENT.

THE REGISTRAR OF DEEDS , PRETORIA

6TH RESPONDENT

JUDGMENT

KHUMALO J

- [1] The Applicant seeks an order in terms of the provisions of s 83 (4) (a) of the Companies Act, 71 of 2008 ("The Companies Act"), declaring the Companies and Intellectual Property Commission's ("the Commission") ("1st Respondent"), deregistration of a company known as Enchanted Investments Developments (Pty) Ltd ("Enchanted") void, and or an alternative or further relief that the reinstatement of Enchanted just and equitable, restoring its registration with the 1st Respondent and re-vesting its assets and liabilities prior to deregistration.

[2] The 1st Respondent is said to be cited as such due to its responsibility for the registration and deregistration of companies whilst the Minister of Trade and Industry and that of Finance, 4th and 5th Respondents respectively due to their responsibility for the financial issues and management of the *bona vacantia* assets that fall under the state after deregistration. J S F Dauth and Welie Gronum, the 2nd and 3rd Respondents respectively, are the erstwhile directors of the deregistered Enchanted who were active at the time of deregistration (together referred to as "the directors" and individually as "Dauth" and "Gronum") and 6th Respondent is the Registrar of Deeds whose function is to register real rights over immovable properties. No specific relief is sought from any of these Respondents. They are said to have been cited only as interested parties.

Factual background

[3] In November 2007 Applicant and Enchanted concluded a written building agreement in terms of which Enchanted was to build a house for the Applicant on a piece of land that Applicant purchased from the 2nd Respondent. Enchanted was to start the construction after the registration of the land to Applicant's name. The registration took place on 4 December 2008 and the building commenced. Applicant also paid the building price of R1 850 000 to Enchanted as *per* contract. On completion of the house in March 2010 Applicant instituted an action against Enchanted for defective work claiming repayment of the contract price alternatively of certain amounts she alleged are payable as a result of Enchanted's failure to comply with the contract. A notice of intention to defend was delivered on behalf of Enchanted in September 2010 followed by the customary Plea. The parties proceeded to exchange notices and correspondence and to set the matter down for trial on 20 November 2013.

[4] In the meantime, Enchanted was deregistered on 16 July 2010 due to 2nd and 3rd Respondent's failure to file its annual returns for two or more years in succession as contemplated in s 82 (3) (a) of the Act. Applicant became aware of the fact only on 16 August 2013, when Enchanted's new attorneys appointed by its directors on 13 August 2013 informed Applicant's attorneys that due to Enchanted's deregistration they cannot act and the matter cannot proceed.

[5] Enchanted therefore legally ceased to exist from 16 July 2010 and all actions taken on its behalf since then were null and void. Its assets became *bona vacantia* with ownership thereof passing to the state and liabilities rendered unenforceable.

[6] Furthermore, due to the requirements set out by the provisions of s 82 (4) of the Act, and Regulation 40 (6) of the regulations promulgated in terms of s 223 of the Act that regulates the process to be followed and the terms upon which an application for reinstatement of a deregistered company can be brought, requiring *inter alia*, the annual returns which the deregistered company should have lodged to be brought up to date and payment of the prescribed fees before the deregistered company could be reinstated, Applicant launched this Application in the above honorable court as an alternative to an Application to the Commission, seeking deregistration of Enchanted to be voided or it to be restored to the register on the basis that:

[6.1] as an outsider, she is neither in a position to compile and or to lodge Enchanted's annual returns together with the payment of the prescribed fees nor to

compel 2nd and 3rd Respondents as former directors to do what is required of them in terms of s 82 (4) to facilitate Enchanted to be reinstated, that is to bring its affairs up to date.

[6.2] the requirement is a pure administrative act that prejudices her in the prosecution of her ongoing action against Enchanted whilst it affords Enchanted a convenient excuse and means to escape liability, having ignored the situation.

[6.3] the deregistration was not caused by her fault and could never have been intended to deprive her of her claim against the company.

[6.4] Enchanted continued to conduct business after deregistration and was not wound up.

[6.5] As a result its dissolution should be declared void in terms of s 83 (4) (a) of the Act.

[7] Applicant further alleges that after the deregistration of Enchanted, its erstwhile directors (2nd and 3rd respondents) and attorneys actively pursued the litigation process requesting annexures to her notice of amendment delivered on July 2011, continuing to serve the relevant Notices and seeking compliance by February 2012. They also insisted on the matter being re enrolled and the holding of a pre-trial conference post deregistration.

[8] The 2nd and 3rd Respondents ('the Respondents') are opposing the Application raising only a question of law. They allege that Applicant's application to court is flawed and incorrect in that:

[8.1] there is no provision in the Act for the restoration of a company by way of an Order of Court.

[8.2] The Companies Act of 1973 in terms of which reinstatement of a company can be by way of a Court Order has been repealed by the 2008 Companies Act that came into effect on 1 May 2011.

[8.3] s 82 (4) of the Act provides for the reinstatement of a deregistered company by way of an administrative procedure that has not been followed by the Applicant.

[9] Their Notice on the question of law was preceded by an Application for condonation for the late filing of their Notice. At the hearing of the matter Applicant did not oppose the Application and condonation was thereby granted. I however have to mention that in the founding affidavit supporting the Application, Gronum confirmed that Enchanted has not filed its annual returns and stated that it also has not carried any business since 2008 as a result the reinstatement would be to Enchanted's prejudice and will not serve any purpose.

Applicable law

[10] Section 82 (3) of the Act provides for a situation whereby the Commission may remove a company from the companies register only if, inter alia, -

(a) the company ..., or-

- (i) has failed to file an annual return in terms of s 33 for two or more years in succession;
- (ii) on demand by the Commission, has failed to-
 - (aa) give satisfactory reasons for the failure to file the required annual returns; or
 - (bb) show satisfactory cause for the company to remain registered;

[11] Then s 82 (4) provides that if the Commission de-registers a company as contemplated in the above subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company.

[12] The manner and form prescribed for the reinstatement of companies that have been de-registered is provided for under Regulation 40 of the Companies Regulations published in terms of the Act that reads:

- “(6) The Commission may reinstate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fees in respect thereof.
- (7) An Application to re-instate a de-registered company or external company must be made in a Form CoR 40. 5, and must comply with such conditions as the Commission may determine.”

[13] The regulations are in terms of Regulation 4 of the Regulations of the Commission to be read with the Practice Note 7 of 2012 that is now applicable and sets out the requirements for reinstatement in terms of the Companies Act , 2008 (Act 71 of 2008)

[14] S 83 deals with the effect of removal of a company from the register and reads:

- (1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company’s registration has been transferred to a foreign jurisdiction as contemplated in s 82 (5).
- (2) The removal of a company’s name from the companies’ register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.
- (3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.
- (4) At any time after the company has been dissolved-

(a) the liquidator of the company, or other person with an interest in the company, **may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and** (my emphasis)

(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.(my emphasis)

[15] Removal of a company from the register of companies can take place in terms of, inter alia, s 82 (3) (a) (ii) due to a company failing to file the annual returns for two or more years in terms of s 33 as in this case. In subsection 4, the removal in subsection 3 above is referred to as a deregistration. Also, the removal of a company's name from the companies register by the Commission mentioned in subsection 2 (b) is referred to in subsection 3 as the duty to deregister a company. Therefore the words removal and deregistration in the Act are used interchangeably to mean one and the same thing.

[16] The Act also seems to seek to do away with any distinction between the concepts of dissolution and deregistration that differentiated between a company's loss of its legal persona due to winding up from those that lost it as a result of deregistration, by providing a provision that recognizes the end result of the two processes to be the same (the removal from the companies register = dissolution) hence both being considered to have been dissolved. The attempt to differentiate between dissolution and de-registration, for the purpose of s 83 (4) that took place in *Nulandis v Minister of Finance* 2013 (5) SA 294 (KZP) at 74 was uncalled for since the subsection does not mention dissolution as a separate occurrence from deregistration but as an all-encompassing term for companies whose names have been removed from the register.

[17] S 83 (4) deals with voidance of a dissolution that came about as a result of a removal of a company from the companies' register. It could be due to either winding up or failure to comply with administrative requirements set out in s 82 (3). In *Absa Bank Limited v Companies and Intellectual Property Commission of South Africa and Others* [2013] JOL 30290 (WCC) on p205E-F, the court reasoned that:

"If s 83 (1) applies to all companies dissolved by the removal of their names from the register there is no reason that s 83 (4), which forms part of the same section and applies 'at any time after a company has been dissolved', should not apply to a company dissolved by the removal of its name from the register pursuant to s 82 (3)."

The court confirmed that a dissolution pursuant to liquidation and one pursuant to administrative deregistration are now dealt with together; and that there is now a single judicial remedy. The section also provides for an order just and equitable under the circumstances therefore not ruling out declaring an order reinstating a deregistered company just and equitable. In *Absa* at p 207 it was confirmed that the section is broad enough to include an order directing the restoration of a company to the register.

[18] The full bench's overturning of the decision of the court a quo in *Absa* should be commended. Henney J's decision was premised on a wrong assumption that only a process described in s 82 (4) is applicable to deregistration effected in terms of s 82 (3). The full bench correctly concluded in [43] that s 83 (4) applies as much to a company or corporation dissolved pursuant to administrative deregistration as to one dissolved pursuant to its liquidation as a solvent company. Dissolution in both instances meaning the same thing, that the company as a legal persona ceased to exist, and that it is now capable in either instances, of restoration of its legal persona by a court order in terms of s 84 (3), that includes voiding the dissolution (its removal from the register). The dicta of Binns-Ward J found in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at par [6], p488 that:

"the deregistration of a company in terms of s 82 (3) of the Act falls exclusively within the province of CIPC. There is no provision in the 2008 Act for the restoration of the registration of a company by order or application to a court."

Relied upon by the 2nd and 3rd Respondents is completely off the mark.

[19] In the case of avoidance, the administrative deregistration process is nullified or rendered ineffectual for the purpose of enforcement of a debt. I am not certain if it can be done for any other claim or reason. The provision makes it possible for a creditor or any person with an interest to be able to approach the court even if it is incapable of fulfilling the requirements of the Commission, to obtain an order nullifying the removal and or alternatively restoring the deregistered companies to the companies register. An Applicant does not have to conform to the requirements that are prescribed under s 82 (4) and regulation 40. In that instance the court will make an order as it deems appropriate in respect of the requirements by the Commission overseeing the practicality of the reinstatement; see Henochsberg on Company Law.

[20] On the other hand *if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved*. As a matter of caution its important to point out that in an application for an order declaring the dissolution due to an administrative deregistration void, the Applicant has to establish a good reason for the court to render a validly effected process ineffectual. There has to be a legal basis for the relief. The reasons might range from the process lacking definiteness or specificity or challenging its validity, or wanting access to its assets to satisfy a debt or to be able to prosecute a claim that was already instituted at the time of deregistration and execute against the assets that were divested. The question that arises is whether it is competent to void a deregistration for the purpose of practicality or convenience as it is in this case? **for the purpose of or circumventing a denial of meaningful access to court**. This position was not cleared in *Absa*, where as a creditor, the bank was also not in a position to be able to comply with the requirements to furnish the outstanding annual returns and the prescribed fees as *in casu*, approached the court instead of the Commission, as the bank applied for an order for restoration not one that declares the dissolution void.

[21] The court in the *Absa*'s full bench decision although applying a broadminded approach seemed not to have dealt with the issue of s 83 (4) decisively as it failed to pronounce on the measures to be applied by the courts in the exercise of their discretion

whether or not to grant an order declaring the deregistration void. It seems the court has to probe the reasons for and the conditions prevailing at the time when the deregistration took place to determine if nullification thereof defensible. In that regard a proposition was made in *Firststrand Bank Limited v Companies and Intellectual Property Commission of South Africa and Others* [2013] JOL 30290 (WCC) that the power granted under the subsection to void the dissolution is somewhat analogous to a review believing that **at least some irregularity in the process must be alleged**. I support Henochsberg's disagreement with that proposition but differ with his notion of a dissolution being voided at the whim of an application by a creditor without any proper legal basis being laid for the voidance. The promulgation of the subsection was not intended to create a fictitious or a fallacious situation for any creditor to be able to nullify the process with an order ensuing just on an application. The mere existence of a debt or a claim cannot be the sole ground that justifies the nullification of deregistration.

[22] All the same in this matter the Applicant argued that:

[22.1] Gronum and Dauth defended the action that she instituted and served upon Enchanted on March 2010 by filing a notice of intention to defend notwithstanding Enchanted's final deregistration in July 2010.

[22.2] The directors had not ceased to carry on business as contemplated in terms of s 82 (3) (a) and the company was not wound up.

[22.3] The company through the representation of its attorney filed a Plea and further documents in the matter without any indication of their status quo. They also on behalf of Enchanted issued or instituted an action against the Applicant in the Magistrate Court in 2010.

[23] The directors of the company indeed continued with the abovementioned conduct in 2010 even though according to Gronum they were not filing their returns and not operating since 2008. The statement will not exonerate the directors, since that indicates that they were fully aware of the status of the company which renders their actions illegal when they instituted and defended Applicant's action.

[24] In such instance Applicant may have a claim against the directors of the company personally due to their engagement in commercial transactions and in litigation in breach of their onerous duty to make sure that the company is registered at all times when they engage in commercial transactions and litigation.

[25] For the purpose of this Application since practicality, convenience and effectiveness are also factors to be taken into account in exercising the discretion whether or not to grant the order, the following requirements must be satisfied prior to the granting of an order sought;

[25.1] there must be prove that the company was in business at the time of deregistration, having outstanding assets and liabilities which must be transferred or liquidated. Whether or not the company was in business can be determined by proving that the company has been conducting business related activities at the time of deregistration. The examples given by the Commissioner CIPC are selling and buying of goods and services, leasing or

renting property or equipment, marketing goods and services and or an active bank account.

[26] Applicant alleges that Enchanted was conducting business at the time of deregistration and there were no proceedings during that time of winding it up, whilst Gronum denies that fact.

[27] From the documents that have been referred to and attached in support of the Application it is evident that Enchanted concluded a contract to start building Applicant's house after the land she bought was registered in her name in December 2008. The construction of the house took place thereafter from 2009 and her claim was launched in March 2010 on completion of the house. Gronum can therefore not be right that Enchanted was not conducting any business since 2008. From the above facts it is obvious that Enchanted was conducting business at the time of its deregistration.

[28] Applicant's allegation that there were no winding up proceedings at the time of Enchanted's deregistration has not been refuted or challenged by the erstwhile directors.

[29] The non-filing of the financial statements has been shown to have been deliberate. Gronum confirmed that they knowingly did not adhere to their responsibilities as directors since 2008, breaching their fiduciary duties whilst continuing to carry on business to the prejudice of the Applicant and others.

[30] The restoration would therefore be just and equitable under the circumstances. Also the deliberate causing of Enchanted's deregistration by its erstwhile directors justifies the nullification of the dissolution (its removal from the register).

[31] The Applicant has as a result made a proper case for the relief that he is seeking. The granting of the relief will not validate the actions that were taken after deregistration of Enchanted, which remain invalid.

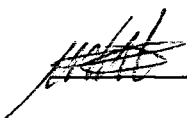
[32] Under the circumstances, I make the following order:

[31.1] The dissolution (deregistration) of a company known as Enchanted Investments Developments (Pty) Ltd ("Enchanted") on 10 July 2010 is declared void,

[31.2] The 1st Respondent is directed to restore Enchanted's name in the register of companies with immediate effect.

[31.3] Enchanted's assets and liabilities prior to deregistration are declared re-vested in it.

[31.4] Enchanted upon its revival to pay the costs of the Application.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA**

Applicant's Counsel: Adv D B DU PREES SC
Instructed by: Hattingh & Ndzabandzaba Attorneys
Pretoria

Respondent's Counsel: Adv L G F PUTTER
Van Zyl Le Roux Inc
Pretoria