IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

22/05/2015 SIGNATURE

22/5/15

Case number: 25388/2013

In the matter between:-

JULIANA AND ASSOCIATES CC	**PLAINTIFF**

And:

SAMADODA PATRICK MAYIBONGWE FIKENI N.O	**1ST DEFENDANT**
GCWALISILE CYNTHIA KABANYANE N.O	**2ND DEFENDANT**
MOROKA ISAAC BUTCHER MATUTLE N.O	**3RD DEFENDANT**
ZANDILE QUEENETTE LAVINIA MDHLADHLA N.O	**4TH DEFENDANT**
MZAMO MICHAEL MLENGANA N.O	**5TH DEFENDANT**
MATSHIPSANA MERIAM MOLALA N.O	**6TH DEFENDANT**
TLHOTSE ENOCH MOTSWALEDI N.O	**7TH DEFENDANT**
NANDISILE FLAVOUR THOKO MPUMLWANA N.O	**8TH DEFENDANT**

PHELISA NKOMO N.O 9TH DEFENDANT

RASHID AMOD SADECK PATEL N.O 10TH DEFENDANT

ZAKHEL ALEX TUMMY ZITHA N.O 11TH DEFENDANT

Heard on 12th May 2015

Delivered on 22nd May 2015

JUDGMENT

NCONGWANE AJ.

1.

In this matter the plaintiff is cited as Juliana and Associates CC, a close corporation with registration number CK 2002/056967/23. Summons against eleven trustees of Independent Development Trust ("the Trust") or ("the defendant") was issued on the 30th April 2013 for contractual damages in excess of R5 114 700.00 with interest.

2.

The defendant defended the claim and filed a plea o the 19th June 2013. Plaintiff filed its replication on the 30th July 2013 and *litis contestatio* was reached.

3.

It is common cause that on the 26th November 2013 defendant amended its plea by introducing a special plea to the plaintiff's claim. The special plea reads in the following:

> *"1. Plaintiff sues in his capacity as a legal or juristic person described as a close corporation incorporated in terms of the laws of the republic of South Africa, with registration number CK 2002/056967/23. This Honourable Court has jurisdiction to determine such disputes brought before it by inter alia legal juristic persons who are incorporated as such in terms of the relevant legislation. The plaintiff has since been deregistered by the Commission for Intellectual Property and Companies ("CIPC") as such juristic person in terms of the relevant legislation and it no longer exists." A copy of the print out from the CIPC confirming deregistration is attached marked* ***"IDT- A1.***

2. *The plaintiff does not, as a result, have **locus standi** to institute these proceedings describing itself as per close corporation incorporated in terms of the laws of the Republic of South Africa.* "[1]

4.

Annexure IDT- A1 reflects the status of the plaintiff to have been deregistered but the reasons for such deregistration do not appear from the annexure. I will deal with this aspect later on hereunder. At this juncture, it suffices to say that it is the status of the plaintiff that has caused disquiet from the defendant culminating to the issue being argued before me. Henceforth I shall refer to the purported plaintiff as the deregistered close corporation or deregistered entity.

APPEARANCES.

5.

5.1. Mr P W Makhambeni placed himself on record as counsel for the defendant. Mr G J Dobie appeared on behalf of the attorneys

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[1] It is evident that annexure IDT/ A1 is the company search from the records of the Companies and Intellectual Property Registration Office, which has been obtained through LexisNexis and the search was conducted o the 14/10/2013.

who issued the summons and acted in the proceedings on behalf of the deregistered close corporation but, withdrew from record three days before the date of trial. There was no appearance on behalf of the deregistered close corporation inevitably owing to reasons that the effect of deregistration as a close corporation renderers the entity non-existent as I expatiate elsewhere in this judgment.

5.2. Prior to the commencement of the hearing and in chambers I was informed by Mr Makhambeni that the defendant had served the firm of attorneys, who acted for the deregistered entity, Leonard Singer Attorneys on the eve of the date of set down for trial, with an interlocutory application in terms whereof the defendant seeks an order that:

"1. *The firm of attorneys Leonard Singer Attorneys, attorneys who were acting on behalf of the plaintiff/ respondent be ordered to pay the costs of this action on an attorney and own client basis, from the date of commencement to the present day.*

2. *The costs of this application be paid by the firm of attorneys, Leonard Singer Attorneys on an attorney and own client basis."*

6.

6.1. On the morning of the 12th May 2015, being the date of trial, I was informed that the matter shall not proceed to trial. Both counsel agree that I was required only to deal with the interlocutory application and determine an appropriate course to follow regarding the main action.

6.2. I allowed the matter to stand down until 14h00 to afford Leonard Singer Attorneys an opportunity to consider the interlocutory application and answer as to why such an order should not be made. At approximately 11h00, the said attorneys filed an answering affidavit resisting an order of costs *de bronis propriis* against the attorneys as sought by the defendant.

6.3. During argument Mr Dobie concurs that the purported plaintiff is a deregistered close corporation and as such, concedes that there is no plaintiff before me. Mr Dobie further requested to make a submission on behalf of a certain Ms Moratwe Juliana Makapan ("Makapan"), an erstwhile member of the deregistered close corporation and I shall revert to the specific submission made on behalf of Makapan.

6.4. For comprehensive reasons that are set out hereunder, the effect of the deregistration of the deregistered entity principally rendered the matter incapable of proceeding on trial and attaining finality of the claim by the deregistered entity.

ISSUES TO BE DETERMINED BY THE COURT.

7.

The issues for determination are the following:

7.1. What is the effect of the deregistration of the close corporation by the companies office on its *locus standi?*

7.2. What is the appropriate course open at the trial, to the defendant who is embroiled in litigation with such a deregistered entity?

7.3. Whether costs *de bonis propriis* should be ordered against an attorney who acted for the deregistered entity.

8.

Mr Makhambeni submits that there is no plaintiff and the action against the defendant is non-existent and he moved for the dismissal of the action. I was not inclined to agree with Mr Makhambeni that the order dismissing the action against the deregistered entity is the apposite order to make and my view in that regard has remained unmoved. I was however inclined to consider an order striking out of the summons and the particulars of claim of the deregistered entity and I invited Mr Makhambeni during the course of his argument to address me on whether such a course will be legally tenable. Mr Makhambeni accepted the invitation with alacrity and submitted that it was an appropriate order to seek, thus proceeded to move for an order that the summons and the particulars of claim by the deregistered entity be strike out and judgment be entered in favour of the defendant as his first price. Alternatively, he sought for an order that the judgment be entered in favour of the defendant.

9.

9.1. During the course of argument, Counsel for the defendant submitted that there is no reply to a special plea, this amounts to a concession of the allegations as set out in the special plea.

9.2. Counsel indicated that he had authority for such proposition, which he would e-mail and make available to the court on the morning subsequent to the hearing.

9.3. On perusal of the authorities, I established that they do not support counsel's proposition and do not have any relevance to the issues before me.

10.

Mr Dobie relied on Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd 2011 (5) SA 14 (C) where in Bills- Ward J provides some incite as to how this procedural conundrum may be resolved.

11.

In that case the plaintiff's close corporation had been deregistered by the Registrar of Close Corporations in terms of Section 26 of the Close Corporations Act No 69 of 1984 as the consequence of its failure to file its annual return. In that case the plaintiff has been deregistered on the 16th July 2010 and the matter was set down for trial to be heard on the 26th June 2011.

12.

12.1. Section 26 of the Close Corporation Act 69 of 1984 is similar to the provisions of Section 73 of the Old Companies Act, Act No 61 of 1973 and currently, the provisions applicable for deregistration of a registered company is Section 82 and Section 83 of the Companies Act No 71 of 2008, which provisions, however make provision for a different regime. The differences governing deregistration by both the Close Corporation Act and the Companies Act, are with regards to the process and reasons for deregistration, of no relevance for purposes of this judgment.[2]

12.2. It is trite that the effect of deregistration puts an end to the existence of the close corporation or company. Its legal personality seizes to exist. [3]

12.3. In ***Miller and Others v Nafcoc Investment Holdings Company Ltd and Others 2010 (6) SA 390 (SCA) at 395 para 11*** *it was remarked as follows:*

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[2] See Walker Engineering CC t/a Atlantic Steam Services v Fits Garment Rental (Pty) ltd 2011 (5) SA 14 (C)

[3] In Walker Engineering's case, the court held that the effect of deregistration company is that all its property, including any claims it might have against third parties, thereupon vest in the state as *bona vacantil*, page 80 para C-E of the judgment.

"deregistration… puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person seizes to exist at death."

12.4. Rule 39 (3) provides:

"If, when the trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs. But may lead evidence with a view to satisfying the court that final judgment should be granted in his favor and the court, if so satisfied, may grant such judgment."

12.5. Relying on the Walker Engineering judgment, Mr Dobie submitted that the order sought by the defendants cannot be sustained unless the state is joined as a party to the action since the state has sufficient interest after the property of the deregistered entity has vested to the state as *bona vacantia* upon deregistration. [4] On behalf of Ms Makapan, he requested that the matter be postponed and Ms Makapan tenders wasted costs in her personal capacity. I am unable to accede to this request as Ms Makapan is not a party before me. The

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[4] This contention has its roots in the Rainbow Diamond (EDMS PBK en Andere v Suid Afrikaanse Nationale Lewensassuransie Maatskapy 1984 Vol 3 SA 1 (A))

appropriate cause in my view may be located in the *ipsissima verba* of Bills-Ward J in the Walker Engineering decision, would be, at first impression, postpone the trial with a directive to the defendant, that if it wishes, in the event of non-appearance on behalf of the plaintiff on that date, to seek absolution from the instance, to give reasonable notice to the Minister of Finance before that date, substituting him as the plaintiff in place of the deregistered close corporation. It was necessary to resort to this course due to the difficulty that the non-existence of the plaintiff precluded the operation of Rule 39 (3) of the Uniform Rules of Court.[5]

12.6. If there is no plaintiff in the proceedings who can be said to be in default of appearance, Rule 39 (3) of the Uniform Rules has no relevance and cannot find application.

"A non-existence person cannot be in default of the appearance, nor could the defendant in the circumstances seek judgment in terms of the second part of the sub-rule"[6]

[5] The Provisions of Rule 39 (3) are referred to in para 12.4 above.

[6] Walker Engineering case page 16, para B.

12.7. I therefore conclude that the order sought by the defendant in that final judgment be granted in its favour against the non-existent plaintiff to be inappropriate.

13.

The facts in the Walker Engineering case are slightly distinguishable from the facts put before this court. I do not for instance, have evidence before me on the reasons for the deregistration of the close corporation. In addition to deregistration occurring out of failure to file annual return, it can also occur where the close corporation or company having being dissolved or being inactive from business. It is not in all of those instances that the property of the deregistered entity will vest with the state as *bona vacantia*. I do not also for instance, have evidence before me as to whether the deregistration of the plaintiff occurred prior to the commencement of the action or after the claim has been instituted.

14.

In the circumstances, I conclude that there was in fact no action before me when the matter came for trial as the summons by the deregistered close corporation (the purported plaintiff) is *nul and void ab initio.* Consequently, there are no effective proceedings before court. The appropriate order in the circumstances is to strike the matter from the roll.

15.

COSTS.

The attorneys acting on behalf of the deregistered entity set the action down for trial on the 22nd August 2014 for the 12th May 2015. This set down was implemented by the attorney (Ms Monique Anne Shlagman) for the deregistered entity notwithstanding the knowledge by her that the purported client does not effectively exist, contrary to what is pleaded in the particulars of claims.

16.

16.1. The parties continued to prepare for trial scheduled for the 12th May 2015 but, four days before trial, defendants' attorneys were served with a notice of withdrawal of attorneys from record. The reasons furnished by the attorney for deregistered entity for the withdrawal is that "*... the plaintiff is deregistered and as such the attorneys cannot act on its behalf*".

(my own underlining)

16.2. It is this notice of withdrawal that caused consternation on the part of the defendant resulting in the interlocutory application referred to above.

17.

Mr Makhambeni's submission is that the attorney's firm that represented the deregistered entity acted dishonorably by continuing to litigate in this matter when they knew that there was no basis for them to litigate the way they did when they, in fact should have withdrawn much earlier. They made, so the argument went, the defendant to incur unnecessary costs and the litigation pursued by them, was nothing else but the vexatious abuse of the court's process, which justifies a court visiting such "bad behavior" with a punitive order against the erstwhile attorney and not the lay client who cannot be said to know anything about the effects of the position of the "plaintiff".

18.

That conduct remained unchanged even after the attorneys for the defendant again brought it to her attention that there is no plaintiff in the action and this they did by dispatching two (2) letters to the attorney acting for the deregistered entity, being a letter dated the 29th April 2015, annexure "SMS 6" and the letter dated 28th April 2015 annexed as "SMS 10" to the interlocutory application. It is this conduct that should be frowned upon by the court and indeed the court expresses its displeasure in the manner in which the attorney acted under the prevailing circumstances. It is indeed so that the legal profession expects the gentleman and ladies of the legal profession to treat each other collegially with integrity and desist any conduct that may be construed as amounting to misleading a colleague. The attorney for the deregistered entity is found wanting of these essential characteristics.

LEGAL PRINCIPLES ON COSTS.

19.

19.1. The basic rule is undoubtedly the one that an award of costs is in the discretion of the court. The court's discretion must be exercised judicially after considering all the applicable facts and circumstances.[7]

19.2. The general rule is that costs follow the event, that is, the successful party is awarded his/her costs. In this matter, there is no successful party in the action.

[7] Kruger Bros and Wasserman v Raskin 1918 AD 63 Act 69.

19.3. The court will in appropriate circumstances award costs *de bonis propriis* against an attorney. The usual approach is that, courts are reluctant to order costs against the legal representatives personally as attorneys and counsel are called upon to present their cases fearlessly and vigorously but within the content of the normal professional and ethically acceptable rules.[8] It is the attorney and not the lay client who must have anticipated that litigation will not reach finality due to the status of the deregistered close corporation. It needs to be emphasized that litigation is the not a game where a party may seek tactical advantages by concealing facts from his opponent and thereby occasioning unnecessary costs.[9]

19.3. I do not agree with counsel for the defendant that the attorney for the deregistered entity has conducted the proceedings vexatiously. I do not accept, from the facts, that she had the intention to be vexatious. I am however troubled by her conduct of pursuing the claim on behalf of the purported plaintiff whilst she knew and accepted that her client will in due course be proved to have no basis to sue due to lack of legal standing and

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[8] In Multi Links Telecommunication v Africa Pre-paid 2014 (4) SA 265 at 288 para J Fabricius J states that legal practitioners must present their case fearlessly and vigorously, but always within the context of said ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and professions demand absolute personal integrity and scrupulous honesty of each practitioner

[9] See Kekana v Society of Advocates of South Africa 1998 (4) SA 698 (SCA) [1998] (3) All SA 577 at 655I-656B

See Niewoudt v Joubert 1988 (3) SA 84 (SE) 88 para H.

when the shoe started to pinch, she will remove her name from record. At least she should have communicated her plan of the conduct of the proceedings to the defendant's attorneys, more so, that it was doomed not to bear any fruits for her client, as a matter of high probability. The defendant was simply kept second guessing the plaintiff's attorney on the issue of the legal standing of the deregistered entity, hence the decry by the defendant that she unabatedly dragged the matter deliberately in the hope that the defendant would *"commit a misstep"* and delivers a gainful situation to her client from the litigation.

19.4. It does not assist the attorney to contend that she proceeded with litigation on instructions from client. She knew better than the lay client. She was frivolous in her approach towards the issue of the special plea. I find the attorney to have committed a grave misconduct which has caused grave effect in the proceedings. She acted unreasonably and her conduct in turn has mulcted the defendant with unnecessary costs and this is a ground upon which I should exercise my discretion to award costs (*de bonis propriis*) against the attorneys who soldiered, on behalf of the deregistered entity.

20.

20.1. Our courts have penalized dishonest, improper or fraudulent conduct, or conduct where cases are presented with false evidence, and where there has been a concocted case.[10]

20.2. The court expects attorneys acting on behalf of their client, as professional officers of this court to display objectivity and sound common sense in assisting clients. [11]

21.

21.1. From the affidavit filed by Shlagman, it is clear that the aspect of withdrawal of the attorneys has not been discussed with Makapan at any other stage prior to the time of the withdrawal, on or about the 4th May 2015. It therefore could not have been on Makapan's instructions that the attorneys must remain on records for the deregistered entity if she could have been

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[10] See Friedirich Klingmbh v Continental Jewellers Manufactures 1995 (4) SA 966 (C) at 975 (C-F); and Spieth v Nagel (1997) (3) All SA 316W at 325 (B-D).

[11] See Clemson v Clemson (2000) All SA 622 (W)

advised by her attorneys that there was no other option but to withdraw.

21.2. A situation where an attorney continues unabatedly to act on behalf of a deregistered close corporation or company can be likened to a scenario where an attorney acts on behalf of a natural person lying in a hospital bed in a coma but the attorney claims to act on direct instructions from such a person or even a deceased person. What is even more concerning is that in her answering affidavit she deposes to the fact that she obtained Senior Counsel's opinion about the legal personality of the deregistered entity and Counsel's opinion was that the plaintiff had to be re-registered to have any success in the matter. Notwithstanding having received the opinion from Senior Counsel the attorney for the purported plaintiff simply continued with litigation to seek success for the plaintiff as if the *locus standi* of the plaintiff was not in issue.

22.

22.1. With regard to cases where an award of costs *de bonis propriis* against any attorney would be appropriate, according to the learned author Cilliers, in Cilliers Law of costs (LexisNexis Butterworth's Durban 2000, at para 1025), after referring to **Rautenbach v Symington 1995 (4) SA 583 (O),** says:

"The court made it clear, however, that its discretion to award costs ***de bonis propriis*** *is not restricted to cases of dishonest, improper or fraudulent conduct and that no exhaustively existed: it includes all cases where special circumstances or considerations justify an order."*

22.2. It seems to me that what must be done in this case, is to mark the court's disapproval of Ms Shlagman's conduct and to ensure that such abuse of court process is discouraged.

23.

Ms Shlagman was in court during the hearing, edged me through her counsel, not to make an order of costs against her firm, but, if I do grant the application I should make an order against her personally rather than against her firm.

24.

In respect of the main action and in the exercise of the courts inherent powers, I therefore make the following order:

24.1. That the action by the deregistered close corporation (the purported plaintiff) is *nul and void ab initio;*

24.2. The main action is strike from the roll with no order as to costs.

24.3. That Ms Shlagman is ordered to pay costs *de bonis propriis* on a party and party scale, from the date of the 26th November 2010 to the 4th May 2015, including costs of the interlocutory application.

NCONGWANE AJ

ACTING JUDGE OF THE HIGH COURT

Advocate for Plaintiff:	Adv G J Dobie
Attorney:	Leonard Singer Attorneys
	C/O Helen Karsas Attorneys
	194 Pienaar Street
	Brooklyn, Pretoria

Advocate for Defendant:	Adv P W Makhambeni
Attorney:	Mokuena Attorneys
	C/O Matshego Ramagaga Attorneys
	515 Protea Towers Building
	246 Paul Kruger Street
	Pretoria