IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 4418/2011

In the matter between:

UDUMO TRADING 147 CC	Applicant
and	
DIHLABENG MUNICIPALITY	Respondent

CORAM:	LEKALE, J
HEARD ON:	22 MAY 2014
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	5 JUNE 2014

INTRODUCTION AND BACKGROUND:

[1] On 14 October 2011 applicant, Udumo Trading 147 CC, issued summons against the respondent local municipality for recovery of the balance of the contract price for services rendered. The respondent entered appearance to defend the action, whereupon, the applicant applied for summary judgment which the respondent also opposed. In opposing such application,

the respondent, *inter alia*, disputed applicant's *locus standi* and pointed out that the applicant was, in law, non-existent because it was finally deregistered by the registrar of companies on 24 February 2011 for annual return non-compliance. The applicant, thereupon, took necessary steps to protect its interests and on 10 January 2012 its registration was reinstated.

[2] The respondent, however, persisted in its view that the applicant lacked *locus standi* when it issued summons and filed a special plea to that effect. Pleadings were, eventually, closed and the matter was set down for trial commencing on 28 January 2014. Following failure by the parties to agree on how best to deal with, *inter alia*, the issue of applicant's legal handicap as at the date of summons the applicant launched the instant application on 22 January 2014 essentially moving for an order:

> "**2. Declaring the summons issued by the applicant in Case No 4418/2011 and all subsequent steps taken in pursuance of the action during the period of its deregistration, to be valid and of full force and effect;**
>
> **3. That the costs of the application be costs in the cause;**"

[3] The respondent, on its part, filed an answering affidavit on 7 February 2014 opposing the motion on the grounds that it is not just and equitable to grant the validation order sought. The

applicant filed a reply on 1 April 2014 which was clearly late and, as such, necessitated the filing of a condonation application by the applicant on 14 May 2014.

[4] At the commencement of the hearing the parties correctly agreed that in order to obviate duplication in arguments it was convenient and appropriate for the court to hear the merits of the validation application before it could determine the condonation application.

ISSUES IN DISPUTE

[5] The parties are *ante omnia* in dispute over whether or not the applicant's ratification application enjoys prospects of success so as to render condonation of the late filing of replying affidavit a worthy exercise.

[6] In the ratification application parties are effectively at variance on whether or not it is just and equitable to grant the desired relief regard being had to defences raised by the respondent as well as the fact that the applicant's claims have essentially prescribed and the order sought would, if granted, serve to revive the same.

CONTENTIONS BY THE PARTIES

[7] Mr Van Aswegen for the applicant submits that the ratification application has good prospects of success in that the court has inherent jurisdiction to grant the same and, in terms of section 83(4)(a) of Companies Act No 71 of 2008 (the Act), it has the power to grant the relief sought if it is just and equitable to do so. In his view good cause exists for condonation of late filing of replying affidavit because it was necessary for the applicant to trace and collate all relevant information relating to its claims so as to reply to the respondent's contentions. According to him the applicant has good prospects of success in its claim because it is common cause that the applicant concluded a service contract with the respondent and it is, further, patent from available correspondence between the parties that the applicant tendered for the relevant job as an external service provider. The question as to whether or not the tender process complied with the respondent's supply chain management policy and, *a fortiori*, with the Constitution of the Republic of South Africa (the Constitution) falls to be dealt with properly at the trial of the matter. The contract in question has not been reviewed or declared unlawful by a court although it has been irretrievably lost in the hands of the respondent.

[8] It is the applicant's case that the apparent delay in bringing the present application is simply attributable to the unfortunate mistake on the part of its present attorney who was under the impression that the reinstatement of applicant's registration had retrospective effect as the position was under the earlier

Companies Act of 1973. Mr Van Aswegen points out that, although it is true that the reinstatement of the applicant's juristic personality did not interrupt prescription and, as such, the claims have effectively prescribed, the reality of the situation is that when the action was purportedly instituted the claims had not yet prescribed.

[9] Mr Van der Walt eloquently reminds the court that the intention underlying the Prescription Act is to compel creditors to assert and enforce their debts timeously so as to promote legal certainty and that a defendant, in the position of the respondent municipality, is entitled as of right to raise prescription as a defence. In his view, it is not just and equitable to validate the summons in the instant matter for same would effectively deprive the respondent of its right to rely on prescription. The applicant does not have any prospects of success in its claims because the contract it seeks to enforce was unlawful for failure to comply with the respondent's supply chain management policy. The respondent is, in law, entitled to assail the legality of the relevant contract by raising the issue in a manner which allows proper and full ventilation of the same as it has done in its plea and answering affidavit. The applicant had ample opportunity to launch the present application or issue fresh summons immediately after it regained its juristic personality and before its claim prescribed but it failed to do so. The negligence of the applicant's attorney did not interrupt prescription. Mr Van der Walt implores the court to issue an

order which is just and equitable to both the applicant and the respondent.

APPLICABLE LEGAL PRINCIPLES

[10] In condonation proceedings the question is whether or not it is in the interest of justice to condone the delay involved regard being had to a balanced *conspectus* of factors such as the degree of lateness, the reasons for the delay and prospects of success. The test for prospects of success is a *bona fide* case which, *prima facie*, carries some prospects of success.

(See: **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC) and **Chetty v Law Society Transvaal** 1985 (2) SA 756 (A) at 765 against B – D.)

[11] The parties are correctly in agreement that the Act does not explicitly provide for retrospective reinstatement of registration of a company *ipso facto* in the same manner as its predecessor did but, effectively, gives the court the power to make

> "**any other order that is just and equitable in the circumstances**"

as well as an order declaring the dissolution of a company to have been void.

(See: Section 83(4)(a) of the Act.)

[12] A municipality, as an organ of state, is constitutionally obliged to engage in a system which is fair, equitable, transparent, competitive and cost-effective when it contracts for goods and services. Failure by an organ of state to comply with such constitutional requirement renders the ensuing contract void for illegality despite prejudice to the service provider involved. The organ of state is obliged to resist the enforcement of such contract and may, in an appropriate case, do so by raising the question of legality of such a contract by way of a counter application seeking a declaratory order.

(See: Section 217 of the Constitution and **Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC** 2010 (1) SA 356 (SCA)

[13] The High Court, as do the Constitutional Court and the Supreme Court of Appeal, has inherent power to protect and regulate its own process and to develop the common law taking into account the interests of justice. Such power, being special and extraordinary in nature, gets exercised sparingly and only in clear cases. In exercising such inherent jurisdiction, the High Court is not empowered to make orders which are in conflict with clear intention of the legislator. The High Court can do anything which the law does not prohibit and only to the extent necessary.

(See: Section 175 of the Constitution and **<u>Phillips and Others v National Director of Public Prosecutions</u>** 2006 (1) SA 505 (CC).)

<u>APPLICATION OF LEGAL PRINCIPLES AND FINDINGS</u>

[14] In the summons the applicant relies on a contract in its claim against the respondent. The respondent, on its part, inter alia disputes the validity of such a contract. The summons, as it presently stands, discloses a cause of action to the extent that if the averments contained therein are eventually proved at the trial of the matter, the claim would be sustained. To the aforegoing extent the applicant has disclosed a *bona fide* case which *prima facie* carries some prospect of success. As Mr Van Aswegen correctly points out, for the purposes of the present proceedings the applicant is not enjoined to prove its case on a balance of probabilities.

[15] The application for validation moves the court to either exercise its inherent jurisdiction or to invoke the provisions of section 83(4) of the Act to validate summons and all subsequent steps taken in pursuance of the action by the applicant. I am, however, not persuaded that the present is an appropriate and clear case for the court to exercise its inherent power, regard being had to the provisions of section 83(4)(a) of the Act which expressly and effectively empower a court to make

> "**any other order which is just and equitable in the circumstances**"

on application by the liquidator or other person with interest in the company. In my view the aforegoing provisions cater adequately for, *inter alia*, the making of an order for retrospective consequences of reinstatement of registration of a company. In this regard it is worth reiterating that the section in question effectively makes it possible, in wide terms, for the court to *inter alia* make such an order in circumstances where it is just and equitable to do so.

[16] It is, in my opinion, clear that the obvious possible gripe about the present regime is that a court order is necessary for such a relief to be realised even in a case of deregistration as a result of annual return non-compliance as opposed to the position which obtained under section 73A of the 1973 Companies Act and section 26(7) of Close Corporations Act 69 of 1984, which effectively provided for retrospective restoration of corporate personality *ipso facto.* The result is that after administrative reinstatement of registration has been effected in terms of section 82(4) of the Act, any interested party desirous of retrospective restoration of consequences of corporate registration needs to approach the court for appropriate relief with attendant costs. In enacting section 83(4) (a) of the Act as opposed to replicating section 73A of the old Companies Act and retaining the old regime the legislature appears to have

acknowledged that it is not always possible, fair and appropriate to turn the hands of time back and to have confirmed the sentiments expressed in decided cases in relation to sections 73 of the 1973 Act and 26 of Close Corporations Act such as **Mouton v Boland Bank Ltd** 2001(3) SA 877 (SCA) where it was, inter alia, pointed out that

> "**[12] … The Legislature has created a statutory fiction that a corporation never ceased to exist, when in fact it did. But I do not think that we should attribute to the Legislature a belief that it can actually recall time passed, for, as the poet has said:**
>
> > **'The Moving Finger writes; and, having writ, Moves on: nor all thy Piety or Wit Shall lure it back to cancel half a Line'.**"

(Compare: **Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others** 2012 (4) SA 484 (WCC) and **Fintech(Pty) Ltd v Awake Solutions (Pty) Ltd and Others** 2013 (1) SA 570 (GSJ) at par [14].)

[17] It is correct, as submitted by Mr Van der Walt, that the concept just and equitable in the context of the Act and the present matter extends to both the applicant and the respondent and, as such, an appropriate order should be just and equitable to both the parties. It is true, as pointed out for the respondent, that a validation order would deprive the respondent of

prescription as a sword and shield in its hands. It is, however, equally correct that as at the date of summons the claims involved had not prescribed. But for the fact of the applicant's deregistered status as at the date of summons, prescription would not have set in and been available to the respondent as a special defence. In determining whether or not it is just and equitable to validate summons and subsequent associated steps in the circumstances of the present matter, the effect of such an order should, in my view, not give the applicant undue advantage and benefit over the respondent. Such an order should simply purge the applicant of adverse direct consequences of its deregistration by placing it, as far as the action is concerned, in the position it would have been had it not been deregistered.

(Compare the position under Section 73 of the old Companies Act and the repealed section 26 of the Close Corporations Act.)

[18] It is, further, correct as emphasised for the respondent that none of the ineptitude and remissness that led to the applicant's deregistration is attributable to the respondent. The position is, however, that the applicant's registration has now been reinstated after it took necessary steps to purge itself of the relevant defect. Validation of the action, in my judgment, would simply level the playfield to enable full, fair and proper ventilation of the issues between the parties. On the other hand, refusal of such a relief would give the respondent undue

advantage over the applicant in that it would be able to raise prescription as a special plea when, had the applicant not been deregistered as at the date of summons, such a defence would not be available to it. The position would be different had the claims been extinguished by prescription as at the date of summons. The fact that the applicant's registration has been reinstated is, in my opinion, significant in that the applicant retains its original registration number as opposed to being registered afresh and being issued with a new registration number. In my view reinstatement of registration *prima facie* entitles an entity, in the position of the applicant, to retrospective restoration of consequences of incorporation where it is possible, appropriate and fair for such *status quo ante* to be restored.

[19] There, further, appears to be no unreasonable prejudice to the respondent if the desired order is granted insofar as it cannot be said that the written contract disappeared during the period of the delay on the part of the applicant to apply for validation of the action. The aforegoing prevails despite the fact that the respondent raises the issue of the legality of the contract sought to be enforced in its plea. That question does not arise for determination in the present proceedings. It is, thus, in my view just and equitable to purge the applicant of the consequences of deregistration insofar as they relate to the institution and prosecution of its action against the respondent.

To this extent good cause exists for condonation of late filing of a replying affidavit.

COSTS

[20] The applicant effectively seeks an indulgence in the application for condonation. The practice with regard to costs in such circumstances is that the party seeking indulgence carries the costs. There exists no cause or request before me to deviate from such practice.

[21] In the validation application the applicant prays for an order directing costs to be in the cause. The respondent, on its part, asks for dismissal of the application with costs. Although the applicant has obtained success in the application I am persuaded that the instant is an appropriate case for costs to be in the cause regard being had to the fact that summons was purportedly issued timeously as well as the fact that the applicant was solely responsible for its own deregistration. The respondent was, further, aware of the reinstated registration of the applicant at all times material to the validation application.

ORDER

[22] In consequence the following orders are made:

1. Condonation of the late filing of replying affidavit is granted.

2. Applicant shall pay the costs in the condonation application.
3. The summons issued by the applicant in case no 4418/2011 and all subsequent steps taken in pursuance of the action during the period of the applicant's deregistration are declared to be valid and of full force and effect.
4. Costs of the validation application shall be costs in the cause.

L. J. LEKALE, J

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On behalf of respondent: Adv D.J. van der Walt SC
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