IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 36514/2008

DATE: 8/10/09

DELETE WHICHEVER IS NOT APPLICABLE

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

15/10/09
DATE SIGNATURE

IN THE MATTER BETWEEN

MANITOBA INVESTMENT HOLDINGS LTD	APPLICANT
AND	
JUDD LIPCHIN	1ST RESPONDENT
PENELOPE VALERIE LATTER	2ND RESPONDENT
VERED ESTATES (PTY) LTD	3RD RESPONDENT
THE REGISTRAR OF COMPANIES	4TH RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This matter came before me as an opposed application. Mr Liversage appeared for the applicant and Mr Blou appeared for the first and second respondents. There was no appearance for the third respondent. The fourth respondent indicated, in writing, that he (or she) would abide by the decision of this court.

INTRODUCTION AND BACKGROUND

[2] The applicant is an international business company, incorporated, in May 2000, in the British Virgin Islands by the Registrar of Companies of those Islands pursuant to the International Business Companies Act, CAP. 291, with administrative address in St Peter Port, Guernsey, British Virgin Islands.

[3] On 27 September 2000, the South African Registrar of Companies (the fourth respondent) registered the applicant as an external company in terms of the provisions of section 322 of the Companies Act, no 61 of 1973 ("the Act").

[4] On or about 20 January 2008, the applicant, duly represented by a local agent, entered into a deed of sale ("the deed of sale") in terms of which the applicant purchased a property known as 42 13th Avenue, Parktown North, from the first and second respondents. The third respondent was the estate agent involved.

The purchase price was R5 400 000.00 of which a deposit of R400 000.00 had to be paid on conclusion of the agreement, or, in any event, by not later than 7 February 2008.

[5] The deposit was duly, and timeously, paid.

[6] A suspensive condition to the effect that the sale was subject to the applicant obtaining a loan of not less than R1 600 000,00 was waived on behalf of the applicant.

[7] It was arranged between the parties that the transfer documents, prepared by conveyancers on behalf of the sellers, would be furnished to the applicant's attorney so that signature thereof could be arranged.

[8] Shortly after receipt of the transfer documents drafted by the first and second respondents' attorney, the applicant's attorney conducted a company search and discovered that the external registration of the applicant, *supra*, had been de-registered by the fourth respondent with effect from 27 May 2005. This was done in terms of the provisions of section 332 of the Act. The *Government Gazette* of 27 May 2005, proclaiming this de-registration, forms part of the papers.

[9] It is common cause between the parties that the de-registration took place. The circumstances under which the fourth respondent brought about the de-registration were not disclosed or debated in the papers or during the proceedings before me. Nevertheless, it appears from the provisions of section 332 of the Act that such a de-registration would follow if the external company ceases to have a place of business in the Republic or fails, on demand by the fourth respondent, to supply details of the place of business, if any.

[10] The deponent on behalf of the applicant, which is the duly authorised local representative, *supra*, alleges that he was unaware of the de-registration aforesaid.

[11] It is obvious that the de-registration of the applicant as an external company took place many months before the deed of sale was entered into.

[12] On 4 April 2008 the attorneys of the sellers (first and second respondents) wrote to the applicant's attorney, placing on record that the transfer costs had not yet been paid, neither had bank guarantees been furnished in respect of the outstanding balance of R5 million on the purchase price. In terms of clause 9 of the deed of sale the applicant was placed on terms to remedy these breaches within ten days failing which the sellers would invoke their rights flowing from the deed of sale.

[13] On 9 April 2008 the applicant's attorney wrote to the respondents' attorney pointing out that the external company had been de-registered. The applicant's attorney continues with the letter along the following lines:

> "(c) it has also recently been established that the de-registration of the external company had been effected prior to the signature and execution of the relevant agreement of sale. We are instructed to confirm that the representative who signed the agreement on behalf of our client was unaware of the status of de-registration of the company at the time. Our instructions are consequently to apply to

the High Court for the registration of the company to be restored in terms of the provisions of section 73(6).

(d) Be that as it may, it follows that at the time the relevant agreement of sale was entered into, the purchaser being an external company having been de-registered had no legal or contractual capacity to conclude the particular agreement. As a consequence, it is submitted that the relevant agreement is therefore null and void *ab initio*.

(e) The implication of the agreement being null and void *ab initio* is that the respective parties are to be restored in the position had the agreement not been entered into. As such, our instructions are therefore to demand from your client, as we hereby do, repayment of the deposit of R400 000,00 already paid by our client herein within 3 (three) days from date hereof, failing which our instructions are, on behalf of the overseas company, to apply to the High Court for the appropriate relief in the circumstances."

[14] On 11 April 2008, the third respondent, via electronic mail, in answer to the demand, informed the applicant's attorney that it considered the deed of sale to be "valid in all respects". The attitude of the third respondent was that the external company, despite its de-registration, remained a properly constituted legal entity incorporated abroad. On behalf of the third respondent reference was also made to

the breaches of contract with regard to the payment of the transfer costs and the furnishing of a guarantee for the balance of the purchase price.

[15] On behalf of the first and second respondents, their attorney also, on 11 April 2008, in response to the demand, recorded that they do not accept that the deed of sale was null and void *ab initio*. They were not prepared to refund the deposit. Pending restoration of the company's registration, the deed of sale remained "intact, valid and binding".

On behalf of the first and second respondents reference was also made in this instance to the earlier demand flowing from the breaches of contract on the part of the applicant.

[16] On 23 April 2008 the attorney of the first and second respondents, in writing, notified the applicant's attorney that his clients were cancelling the agreement of sale in view of the breaches aforesaid and in view of the fact that the breaches were not remedied in response to the earlier demand already referred to.

[17] On 31 July 2008 the applicant launched this application for the following declaratory and ancillary relief:

1. that the deed of sale be declared null and void *ab initio*;
2. that the third respondent be ordered to refund the deposit of R400 000.00 with interest;

3. costs in the event of opposition.

[18] The third respondent filed an opposing affidavit disputing the allegation that the deed of sale is null and void *ab initio*. Because the third respondent was not represented at the hearing, I do not propose dealing further with the submissions contained in the latter's opposing affidavit.

[19] Instead of filing an opposing affidavit, the first and second respondents filed a notice in terms of rule 6(5)(d)(iii) raising the questions of law which will be considered in the course of this judgment.

<u>THE APPLICANT'S MAIN ARGUMENT: ACQUISITION OF THE IMMOVABLE PROPERTY WAS PROHIBITED BY THE PROVISIONS OF SECTION 324(2) OF THE ACT</u>

[20] It is convenient to quote the provisions of section 324 of the Act:

> "324. Power of external company to own immovable property in Republic- (1) Save as may be expressly provided in any other law, an external company of which the memorandum has been registered under section 322 shall have the same power to own immovable property in the Republic as if it were a company incorporated in the Republic.
>
> (2) As from a date three months after the commencement of this Act, no external company shall be capable of acquiring <u>the ownership</u> of

immovable property in the Republic unless its memorandum has been or is deemed to be registered under section 322." (Emphasis added.)

[21] Section 322, under the heading "registration of memorandum of external company" prescribes the formalities to be complied with by the external company in order to obtain registration under this section. In essence, subsection (1) contains a list of documents, notices and other particulars that must be supplied to the Registrar in order to bring about the registration of the memorandum of the external company.

In abbreviated form, section 322(1) reads as follows:

"(1) . Every external company shall within twenty-one days after the establishment of a place of business in the Republic lodge with the Registrar, in the prescribed manner-

(a) a certified copy of the memorandum of the company ...

(b) a notice under section 170 in the prescribed form of the registered office and postal address of the company

(c) the consent of and the name and address of the auditor of the company ...

(d) a notice of the financial year of the company ...

(e) a list in the prescribed form containing particulars-

(i) in respect of each director ...

(ii) in respect of the local manager ...

(iii) the name and address of the auditor ...

(f) ...

(g) a notice in the prescribed form of the name and address of the person authorised by the company to accept service ...

(h) ..."

(Emphasis added.)

[22] In terms of section 323(1) the effect of the registration of the memorandum of the external company is that upon such registration the external company shall be a body corporate in the Republic subject to the applicable provisions of the Act.

[23] It is clear that the establishment of a place of business in the Republic by the external company plays a central role in the provisions of the Act (Chapter XIII) dealing with external companies: it is the event that sets in motion the process of bringing about registration of the memorandum of the external company (section 322) and if the external company ceases to have a place of business in the Republic, such event will also lead to the de-registration of the external company in the Republic (section 332, *supra*).

[24] Of importance, for purposes of the present enquiry, is the definition of "external company" to be found in section 1 of the Act. It "means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the registrar under the repealed Act, <u>or which, since the</u>

commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property" (emphasis added).

[25] The term "acquisition" or, for that matter, "acquire" is not defined in the Act.

[26] From a general reading of these provisions, it seems to me, the following picture emerges for present purposes: the external company (the applicant in this case) establishes a place of business in the Republic through the acquisition of immovable property (the Parktown property in this case). Within twenty one days after establishing the place of business in this fashion, the external company (applicant) lodges the required documentation with the Registrar (fourth respondent) in terms of the requirements of section 322(1), *supra*. The memorandum of the external company is then registered by the Registrar in terms of section 322(2). This opens the door for the applicant to acquire the ownership of the immovable property in the Republic without acting in contravention of the prohibition to be found in section 324(2) of the Act, *supra*.

[27] The only reasonable conclusion to be drawn from this analysis, in my view, is that the applicant, when entering into the agreement of purchase and sale of the Parktown property, was not prohibited from doing so by the provisions of section 324(2) of the Act: it was perfectly entitled to do so in order to establish a place of business in the republic whereafter it had the opportunity to set the section 322

process in motion in order to obtain registration of its memorandum which would enable it to acquire the ownership of the property by taking transfer thereof in its name.

[28] This conclusion, in my view, also puts paid to a further argument offered by Mr Liversage, although it was not pleaded in the founding affidavit, to the effect that the agreement of sale was void because of initial impossibility of performance. On the construction which I have preferred, there was no initial impossibility of performance.

[29] In order to fully ventilate this question, it seems to me that one should also consider the meaning of the term "acquisition" in the context of the definition of "external company", *supra*, as well as the provisions of section 324(2) of the Act.

The first observation to be made, which is in my view not insignificant, is the fact that the definition only requires "the acquisition of immovable property" whereas section 324(2) deals with "acquiring the ownership of immovable property" (emphasis added).

[30] Apart from the striking difference, as emphasised, between the two provisions, it seems that another construction, namely that "acquisition of immovable property" as it appears in the definition, means "acquisition of ownership" (including, as it must, the registration of transfer) as it appears in section 324(2), would lead to

absurd results: as Mr Blou argued, it would mean that the prohibition of section 324(2) would effectively prevent an external company from establishing a place of business. It would also ignore the opportunity, created by section 322(1), for the external company to bring about the registration of the memorandum by setting the process in motion within twenty one days after establishing the place of business.

31 Consequently, the only reasonable conclusion is that "acquisition" as it is found in the definition, must be construed as the acquiring of a right to obtain ownership rather than the obtaining of ownership itself.

These are the exact sentiments expressed by the learned author Meskin, *Henochsberg on the Companies Act* volume 1 p647:

> "Regard must be had to the definition of an external company in section 1(1). Since the commencement of this Act, the acquisition of a place of business in South Africa by a company incorporated elsewhere makes such company an external company as defined and for the purposes of such definition, the establishment of a place of business in the Republic includes the 'acquisition of immovable property': accordingly, such acquisition obliges such company to register under section 322. To avoid an irreconcilable conflict between the said definition and section 324, it is submitted that, in the definition of external company, 'acquisition' must be construed as the acquiring of a right to obtain ownership (eg the

conclusion of a deed of sale), rather than the obtaining of ownership itself (which would ensue on registration of the transfer in the deeds office)."

Exactly the same argument is offered by the authors Blackman, Jooste and Everingham, *Commentary on the Companies Act*, Volume 2 p13-14.

[32] It seems that our courts have recognised that the word "acquire" can be interpreted as connoting ownership or merely the right to obtain ownership. In *Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337, INNES, CJ said the following at 341:

> "Now, juristically, the word 'acquire' connotes ownership; the ordinary legal meaning implies the acquisition of *dominium*. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the *dominium*; but the narrower meaning is the accurate and more obvious one."

In that particular case the learned Chief Justice held that the wording of the legislation afforded strong evidence of an intention on the part of the legislature to use the word in the former sense. In a concurring judgment, SOLOMON, JA said the following at 347:

> "Now although the primary and natural meaning of the words 'to acquire property' is to become the owner thereof, nevertheless the word 'acquire'

may be rightly used in respect of property which has been purchased even though it has not been registered."

[33] For all the reasons mentioned, it seems to me that, in the particular case under discussion, the correct approach would be to opt for the last-mentioned, or wider definition.

[34] I add that no real assistance is gained from consulting the dictionaries. The *Concise Oxford Dictionary*, 7th edition p9 defines "acquire" as "gain by and for oneself; come into possession".

The *Bilingual Dictionary* of Bosman, Van der Merwe and Hiemstra on p677 offers the following Afrikaans alternatives for "acquire": "verwerf, verkry, erlang, aanskaf". The question of ownership is not mentioned.

[35] In view of the aforegoing, I have come to the conclusion that the main argument advanced by the applicant, namely that the prohibition contained in section 324(2) renders the deed of sale null and void *ab initio*, must fail.

THE SECOND ARGUMENT OFFERED BY THE APPLICANT: THE DE-REGISTRATION RESULTED IN THE APPLICANT LOSING ITS CAPACITY TO CONCLUDE ANY FORM OF AGREEMENT, WHICH RESULTED IN THE DEED OF SALE BEING NULL AND VOID

[36] The respondents argued that an external company does not lose its legal *persona* once it is de-registered within the Republic. Mr Liversage, if I understood him correctly, initially conceded that this proposition is good in law. He referred to the case of *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 4 SA 171 (W) where CLAASSEN, AJ (as he then was) said the following at 176F when discussing the provisions of section 322 of the Act:

> "It seems to me that this particular section is procedural by nature. It lays down the mechanism for registering an external company under the South African Companies Act. It does not purport to create substantive law by giving legal personality to a body which previously did not have such legal personality. In fact, to the contrary, it recognises that an external company is in fact 'a company' or 'a body corporate' prior to its registration under section 322. It merely lays down a peremptory procedure to ensure that an external company after complying with such procedures will be on equal par with a South African incorporated company. It is noteworthy that neither chapter XIII (which deals with external companies) nor the Act in general declares an external company which has not registered illegal. The Act does not declare an unregistered external company illegal as it does, for example, in section 30 a company with more than twenty members, doing business for gain, which has not registered under the Act."

[37] I was also referred to *Sackstein NO v Proudfoot SA (Pty) Ltd* 2003 4 SA 348 (SCA) where the following is stated at 357F-H:

> "Thirdly, it must be accepted that the registration in the Republic of South Africa of an external company does not result in there being two separate legal *personae*, registered respectively in two countries [See *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 4 SA 171 (W) at 173E; *Ward v Smit and Others: in re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA); C F Forsythe *Private International Law* (1996) 3rd edition at 182 note 280.] There is only one legal *persona*, registered in two countries."

[38] Against this background, I fail to see how the de-registration of the external company, in terms of section 332, could have any effect on the legal capacity of the applicant which was still a duly registered foreign company and legal *persona* at the time when the deed of sale was entered into.

[39] In support of his argument that legal capacity was lost through de-registration, Mr Liversage relied on a more recent decision of *B & P Group Financial Services (Pty) Ltd: Pather v Kaltecha and Others* [2007] JOL 19260 (T) where it was held that as long as an external company remains registered as such under the Companies Act, legal effect and recognition must be given to such registration regardless of the fact that the company was de-registered in its country of origin. For purposes of its economic activity an "external company" registered as such

does not derive its legal capacity from its registration in its country of origin but from its registration as an external company under the Act.

In that case the converse situation applied: the foreign company had been de-registered in its country of origin but not de-registered as an external company in South Africa. The question for decision was whether or not the company continued to have legal capacity under South African company law. The court answered that question in the affirmative. I agree with the submission made by Mr Blou that this case is not authority for the proposition that in the converse situation, ie where the company has not been de-registered in its country of origin but has been de-registered in South Africa, it thereby loses legal capacity to contract in South Africa.

I also agree with the argument advanced on behalf of the respondents that the definition of "external company", *supra*, puts paid to the applicant's argument. In terms of that definition, already analysed, the foreign company, not yet registered locally in terms of the Act, can acquire immovable property in order to establish a place of business. This is exactly what happened in the present instance because, when the applicant entered into the agreement of sale, it was not registered locally, having been de-registered in 2005.

[40] In the result, I am of the view that there is no merit in the argument that legal capacity was lost through the de-registration.

THE ORDER

[41] For all the reasons mentioned, I have come to the conclusion that the application must fail.

[42] I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 11 AUGUST 2009
FOR THE APPLICANT: A LIVERSAGE
INSTRUCTED BY: POTGIETER, PRINSLOO, BEKKER
FOR THE 1ST AND 2ND RESPONDENTS: J BLOU
INSTRUCTED BY: WERKSMANS INC