



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

RELATIVE JURISDICTION IS NOT APPLICABLE

(1) REPORTABLE, YES/NO.

(2) OF INTEREST TO OTHER JUDGES, YES/NO.

(3) REVISED.

2009. 11. 20

SIGNATURE

20/11/2009
CASE NO:2008/07

In the matter between:

SEKUNJALO PIPING SYSTEMS (PTY) LTD

Applicant

and

MMOLAWA, SETSHEDI MOLEFE SAMUEL

First Respondent

MMOLAWA, LORRAINE MPHO

Second Respondent

J U D G M E N T

MAKGOKA, J:

[1] This is an opposed application wherein the applicant seeks an order declaring the members of a close corporation personally liable for the debts of the close corporation as at the time of deregistration.

[2] The applicant bases its application on section 26(5) of the Close Corporation Act, 69 of 1984, which provides the following:

"If a corporation is deregistered while having outstanding liabilities, the persons who are members of such a corporation at the time of deregistration shall be jointly and severally liable for such liabilities"

[3] It is common cause that at all material times, the respondents were members of Seako Civil and Building Construction CC, with registration number CK 2001/037235/23. ("the corporation")

[4] The close corporation is indebted to the applicant in various amounts pursuant to orders of this court, which debts remain unsatisfied, despite attempted execution.

[5] On 23 May 2007, the Registration of Close Corporation ("the Registra") gave the corporation notice in terms of section 26 (1) of the Act to de-register the close corporation on the basis that there was reasonable cause to believe that the corporation was not carrying on business or was not operation.

[6] On 4 June 2007, on the instructions of the corporation, the corporation's attorneys objected to the intended de-registration of the corporation, on the basis that the close corporation was in fact carrying on business.

[7] On 14 November 2008 the Registrar caused to be published, Government Notice 31568 whereby the de-registration of the close corporation was advertised.

[8] On 13 February 2009 an application was made in the prescribed manner, for the restoration of the registration of the close corporation.

[9] The registration of the corporation was restored with effect from 1 April 2009, as published in the Government Gazette 32076 of 17 April 2009.

[10] The present application was launched on 14 May 2009.

[11] Mr. *Weigemoed*, on behalf of the respondents, contended that section 26 (5) of the Act was not applicable in the present application, as at the time the application was launched the close corporation's registration had already been restored.

[12] Mr. *Roux*, on behalf of the applicant, on the other hand, argued that it did not matter that the registration of the close corporation had been restored. It suffices that the close corporation was de-registered for section 26 (5) of the Act to kick in. In support of this proposition, Mr. *Roux* referred to *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA).

[13] To my mind, *Mouton* is distinguishable from the present application, on the facts. In that case a close corporation was de-registered, while owing money to a bank, upon which the bank sued the sole member of the close corporation for the debt. After close of pleadings, the member applied for the restoration of registration of the close corporation, which was granted. Thereafter the member delivered an amended plea stating that there had been a change of circumstances since he had last pleaded, which entitled him to assert his release from his former liability terms of section 26(7) of the Act.

[14] Section 26(6) deals with the power of the Registrar to restore registration, while 26(7) deals with the effect of restoration of registration.

[15] Section 26(7) of the Act provides as follows:

"The Registrar shall give notice of the restoration of the registration of the registration of a corporation in the Gazette, and as from the date of such notice the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered."

[16] In *Mouton*, two policy considerations were explored at 881E-J. First, that the policy behind Section 26(5) is to impose a civil penalty upon a member who allows the Registrar to deregister a corporation which does have liabilities. Misusing the deregistration when alternative and proper procedure for winding up in terms of

section 67 or section 68 are appropriate, brings the errant member right within the purview of section 26(5).

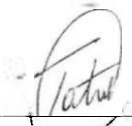
[17] Second policy consideration was that, if a corporation is deregistered, its premises and goods will be abandoned or neglected, a prey to all, and its records destroyed or lost. No liquidator is appointed. Under such circumstances it is not expected that upon subsequent re-registration creditors will find relatively favourable a situation as they might have found upon a winding-up followed by the immediate appointment of a liquidator. The court found that, under these circumstances, a member who is responsible for the state of affairs should not merely be made personally liable, but be held to his liability upon restoration.

[18] In the present application, the de-registration was at the instance of the Registrar, and once it came to the knowledge of the members of corporation that the Registrar intended to de-register the corporation, there was objection thereto. Once the corporation was de-registered and it came to their attention, the members of the corporation immediately applied for restoration of its registration. In *Mouton*, on the other hand, the member manipulated both the de-registration and restoration in a contrived manner. The facts and policy considerations in *Mouton* distinguishes it from the present application.

[19] I also agree with Mr. *Welgemoed's* argument that section 26(6) does not find application in the present matter, simply because that close corporation was in existence at the institution of the application. On a consideration of all the facts in this application, I am satisfied that the application has to be dismissed.

I make the following order:

1. The application is dismissed with costs.


T M MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	:	16 NOVEMBER 2009
JUDGMENT DELIVERED:		20 NOVEMBER 2009
FOR THE PLAINTIFF	:	ADV C D ROUX
INSTRUCTED BY	:	R C CHRISTIE INC, EDENVALE AND PRETORIA
FOR THE DEFENDANT	:	ADV C J WELGEMOED
INSTRUCTED BY	:	TP MAGORO ATTORNEYS, HATFIELD, PRETORIA