

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



Case number: 69125/2014

Date: 21/08/2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
<u>21/08/2015</u>	<u><i>Detorini</i></u>
DATE	SIGNATURE

In the matter between:

THE BODY CORPORATE GEORGIAN TERRACE

APPLICANT

And

SANANGA BUSINESS ENTERPRISE CC

Registration number 2004/020256/23

1ST RESPONDENT

STANDARD BANK OF SOUTH AFRICA LTD

2ND RESPONDENT

REGISTRAR OF DEEDS

3RD RESPONDENT

COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

4TH RESPONDENT

GALAL, AMIT

5TH RESPONDENT

GALAL, USHMA

6TH RESPONDENT

MTHOMBENI, ERIC

7TH RESPONDENT

NESANE, NDIVHUDZANNYI MICHAEL

8TH RESPONDENT

THE MINISTER OF FINANCE

9TH RESPONDENT

JUDGMENT

PRETORIUS J.

INTRODUCTION:

[1] This is in essence an application for the reinstatement of the registration of a formerly deregistered close corporation, in terms of section 82(4) of the **Companies Act, 71 of 2008**. The court has to decide whether the reinstatement operates retrospectively from the date of its deregistration, so as to validate actions performed on behalf of the close corporation during the period of deregistration.

[2] The second question this court has to deal with is whether the court has the power under section 83(4) of the Act to render the reinstatement of the close corporation retrospective to the extent that it is just and equitable and to proceed to exercise the power in favour of

the applicant. The 5th and 6th respondents launched a counter application requesting an order in the following terms:

"That it be declared that the sale in execution held on 14 February 2012 in terms whereof the 5th and 6th respondents purchased the property known as Section 2 as shown and more fully described on Sectional Plan No SS372/2005 in the scheme known as the Georgian Terrace, situate at Edenburg Township, The City of Johannesburg, Held by Deed of Transfer No: ST6882/200, is void ab initio"

Sananga Business Enterprise CC, a close corporation registered as such with registration number 2004/020256/23, the first respondent, was finally deregistered by the fourth respondent for failure to submit annual returns on 24 February 2011.

- [3] Prior to deregistration on 24 February 2011 the applicant obtained judgment against the first respondent, which ultimately lead to execution and the sale in execution of the first respondent's immovable property, a sectional title unit in the scheme known as Georgian Terrace, situated at Edenburg Township. The first respondent applied for rescission of judgment on two occasions, but was unsuccessful. The second respondent is Standard Bank of South Africa Ltd, as the mortgagee of the property; the third respondent is the Registrar of Deeds; the fourth respondent is the Companies and Intellectual Property Commission - the fourth respondent is required to restore the registration of the first respondent. The fifth and sixth respondents were the purchasers of the property at the sale in execution. The

seventh and eighth respondents are the only active members of the first respondent according to the CIPC report. The ninth respondent is the Minister of Finance and is cited as the property in issue is *bona vacantia* at present.

- [4] This application is only opposed by the fifth and sixth respondents.

BACKGROUND:

- [5] During June 2010 the applicant claimed in an action for arrear levies and related charges levied by the applicant due to the first respondent's ownership of the property. Default judgment was granted and warrants of execution against both the movable and immovable property were granted. The first respondent was renting out the property at the time.

- [6] The property was sold in execution to the fifth and sixth respondents for R960 000.00 on 14 February 2012. There is currently a case pending in the Gauteng Local Division of the High Court wherein the court has been requested by the fifth and sixth respondents to cancel the sale in execution.

- [7] The judgment against the first respondent was granted on 27 August 2010, prior to the deregistration of the first respondent on 24 February 2011, approximately a year prior to the sale in execution.

THE LAW:

- [8] Section 83(4) of the Companies Act provides:

“At any time after a 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 (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.”

- [9] The applicant submits that it will be just and equitable to grant an order as requested by the applicant as required in terms of section 83(4).
- [10] According to the applicant, should the first respondent remain in deregistration, it will prejudice the applicant severely as the property vests *bona vacantia* in the state and the applicant is unable to recover the mounting arrears and levies owing by the first respondent. The process of execution will be undone in the event that the deregistration remains in perpetuity. The applicant will also be unable to seek satisfaction of the judgment obtained against the first respondent.
- [11] The members of the applicant, who are individual owners of units of the sectional title complex are liable to the municipality for rates and taxes, as well as for all the other costs occasioned by the day to day operation of the complex.
- [12] The first time the applicant had knowledge of the deregistration of the first respondent was on 9 May 2014 when the fifth and sixth respondents informed the applicant by letter that the first respondent had been deregistered on 24 February 2011.
- [13] The applicant requests the court to grant the relief claimed retrospectively to prevent the sale in execution falling away, which

would result in further legal costs. The applicant is a section 21 company, which relies exclusively on the levies imposed on the members of the complex. The fifth and sixth respondents purchased the property at a public auction on 14 February 2012, which was approximately one year after the final deregistration of the first respondent.

- [14] The fifth and sixth respondents raised as a point *in limine* that reinstatement would re-establish the first respondent's corporate personality and ownership of property, but would not validate its acts during the period of deregistration. According to the fifth and sixth respondent, reinstatement has prospective effect only and no retrospective effect.
- [15] The second point *in limine* is a complaint that the applicant failed to join the Minister of Rural Development and Land Reform as this department controls all immovable property owned by the state. Furthermore the fifth and sixth respondents contend that the sheriff of the Magistrate's Court Sandton – Midrand should have been joined as the sheriff presided over the sale in execution of the property.
- [16] The third point *in limine* dealt with the order to declare the sale in execution of the property lawful. The complaint by the fifth and sixth respondents is that there is no proof that the correct process prior to the sale in execution was followed.
- [17] It is clear that the fifth and sixth respondents only oppose prayers 7, 8 and 9 of the notice of motion. The 5th and 6th respondents have another application pending between them and the first respondent in

the Gauteng Local Division. The respondents, as purchasers at a sale in execution, seek the setting aside of the sale under case number 41044/2012 in the Gauteng Local Division. In the present application, the fifth and sixth respondents seek, in substance, the same relief as that claimed in the main application in the Gauteng Local Division. In the present counter-application they seek that the sale in execution concluded on 14 February 2012 be declared void, whilst in the application instituted in the Gauteng Local Division they seek cancellation of the sale based on the deregistration of the closed corporation. Therefore the deregistration defence is *lis alibi pendens* in the Gauteng Local Division and if I deal with the counter-application as there is a pending application in the Gauteng Local Division, the pending application in the Gauteng Local Division will be of academic value only.

[18] The applicant submits that the relief claimed in relation to the execution process post deregistration is aimed exclusively at negating the deregistration and its effect in terms of section 83(4) of the Companies Act. There is no reason for this court to come to the decision that the execution process was flawed, as alleged by the fifth and sixth respondents as there is no such evidence. In any event the court has not been requested to decide on the process leading to the execution or the execution process as such. This point *in limine* must thus be dismissed.

[19] The further point *in limine* relates to the non-joinder of the Minister of Rural Development and Land Reform. The Minister of Finance had

been cited as the ninth respondent. In **Newlands Surgical Clinic (Pty) Ltd and Peninsula Eye Clinic (Pty) Ltd and Others 2014(1) SA 381 (WCC)** the court found at para 12:

“The Minister of Finance was joined because it is a well-established principle in our law that the property of a dissolved company goes as bona vacantia to the state; see Rainbow Diamonds (Edms) Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiematskappy 1984(3) SA 1 (A) at 10 – 12. In consequence it became a standard requirement that the Minister of Finance, as the Minister responsible for the Treasury, be joined in any application to a court for reversal of the dissolution of a company by re-registration (see Rainbow Diamonds (Edms) Bpk at 14F-H).” (Court’s emphasis)

- [20] This decision was overturned by the Supreme Court of Appeal, but the above *dicta* was not changed and confirmed the decision of **Rainbow Diamonds (Edms) Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiematskappy 1984(3) SA 1 (A)**.
- [21] The ninth respondent did not file a notice of intention to oppose. The question of non-joinder of the sheriff is a non-issue, as the sheriff has no legal interest in the outcome of this application. The sheriff had received the deposit for the sale in execution and his rights will not be affected in any manner whatsoever. This point *in limine* is similarly dismissed. I find that the Minister of Finance was correctly cited in this matter.

[22] The fifth and sixth respondent's counsel argued that there is a distinction between the word "dissolved" and the word "deregistered".

[23] Section 83(1) of the **Companies Act** provides:

"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 section 82(5)."

[24] In **ABSA Bank Ltd v Companies and Intellectual Property Commission and Others 2013(4) SA 194 (WCC)** the court held at para 52:

"In my opinion, s 83(4) applies in all cases where a company or corporation's name has been removed from the register in terms of part G of ch 2 and where the company or corporation has as a result been dissolved. This includes deregistration on any of the grounds set out in s 82(3). Where a company or corporation has been deregistered by the CIPC in terms of s 82(3) rather than in terms of s 82(2)(b), an interested party may either apply to the CIPC for restoration in terms of s 82(4) or to the court in terms of s 83(4). Particularly where the interested party finds it impossible or practically difficult to comply with the prescribed requirements relating to restoration in terms of s 82(4), an application to court in terms of s 83(4) is available as an alternative."

[25] In **Missouri Trading CC and Another v ABSA Bank Ltd and Others 2014(4) SA 55 (KZD)** Koen J held at para 33:

“The position in our law regarding reversing the dissolution of a close corporation appears to be as follows:

(a) When a corporation is deregistered by its name being removed from the register for whatever reason, it is ‘dissolved’ for the purpose of section 83(1).”

[26] I fully agree with the principles enunciated in these *dicta* and this so-called distinction does not exist. This point by the fifth and sixth respondents is dismissed.

[27] In **Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015(4) SA 34 (SCA)** the court dealt extensively with the question relating to the retrospective effect of the reinstatement of a company or a closed corporation. The court held that at the deregistration an end is put to the existence of a company and all subsequent actions are void and of no effect. In this matter of **Newlands Surgical Clinic** (*supra*) the court found that the respondent would be severely prejudiced at reinstatement if it was concluded that non-retrospectivity existed.

[28] The main fact which should be considered is whether retrospectivity will prejudice third parties as recognised in **Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd, Dorbyl Light and General Engineering (Pty) Ltd v Insamcor (Pty) Ltd 2007(4) SA 467 (SCA)**; **CA Focus CC v Villange 2013(6) SA 549** and **Kadoman Trading 15 (Pty) Ltd v Noble Crest CC 2013(3) SA 338 (SCA)**.

[29] Brand JA held in **Newlands Surgical Clinic** (*supra*) at para 26:

“But, more significantly in my view, is the consideration that

*refusal to validate the corporate activities of a company during its period of demise can be equally devastating to the interests of bona fide third parties who were unaware of the deregistration. That much is well-illustrated by the facts of this case and by Absa Bank Ltd v Companies and Intellectual Property Commission and others 2013(4) SA 194 (WCC). The truth is that deregistration of a company bears that inherent risk. It results from the fact that a comparison between the deregistration of a company, on the one hand, and the death of a person, on the other, is not entirely correct. Unlike a deceased person, a deregistered company often, as in this case, carries on with its business as if the deregistration never occurred and with third parties having no knowledge of its disability. Indiscriminate validation of corporate activities, on the one hand, and the indiscriminate refusal to validate these activities, on the other, therefore cut both ways. **Potential prejudice to third parties therefore affords no reason to interpret s 82(4) so as to exclude retrospective validation in principle.**" (Court's emphasis)*

[30] And in para 29:

"The only meaning available on that wording, as I see it, is that s 82(4) has automatic retrospective effect, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration. In short, there is no textual basis to distinguish

between re-vesting of property and re-vesting the company with the capacity to continue operating.” (Court’s emphasis)

[31] Counsel for the fifth and sixth respondents argued that selling a property in execution cannot be regarded as “*corporate activities*”. The sale in execution took place as result of a court order. I find that “corporate activities” do include the process of launching an application to claim arrear levies and the subsequent court order leading to the sale in execution.

[32] I find in the present instance that should the first respondent not be reinstated in terms of section 83(4) of the Act, it will not be “*just and equitable in the circumstances*” as provided for in section 83(4) of the Act. This applies even more so in this instance where none of the other respondents are opposing this application.

[33] I cannot find that the fifth and sixth respondents will be prejudiced, as they had bought the property and for some unknown reason is no longer satisfied with their purchase. In the **ABSA case** (*supra*) at para 57, the position as to the deregistration of close corporations in terms of the Act was dealt with as follows:

“In order to avoid absurd and unjust results, it is necessary to interpret s 83(4) as applying, inter alia, to any company whose existence came to an end by deregistration or dissolution under the 1973 Companies Act (other, of course, than a company wound up as insolvent, in which case s 420 of the old Act continues to apply). A company so deregistered or dissolved under the old Act can properly be described as one which was

*'dissolved' for purposes of s 83(4). In particular, removal from the register in terms of s 73 brought the company's existence to an end (Miller and Others v Nafcoc Investment Holding Co Ltd and Others 2010(6) SA 390 (SCA) para 11). **The word 'dissolution' as applied to a company conveys in its ordinary meaning the termination of the company's existence. The same is true for a corporation by virtue of s 26 of the amended CC Act read with s 83(4).***" (Court's emphasis)

[34] In the **Peninsula case** (*supra*) the court held at para 50:

*"The ambit of s 83(4) is wide enough to empower a court to deal not only with the validation, conditionally or otherwise, of corporate activity purportedly conducted on behalf of the company during its period of deregistration, but also, if it is just and equitable to do so, with any prejudicial consequences of the ordinarily retrospective effects of reinstatement, viz the re-establishment of reconstitution of the company's board of directors and general body of members. **The wide breadth of the court's power in terms of the second category of remedy affords the ability to make the effect of any restoration of the company retrospective, whether generally or selectively.***" (Court's emphasis)

[35] I have carefully considered all the facts, arguments and authorities. I come to the conclusion that the appellant has shown on a balance of probabilities that the reinstatement of the first respondent should be

granted with retrospective effect and the first respondent is restored in terms of section 83(4) of the Companies Act, 71 of 2008. Therefor the actions and corporate activities by the close corporation during deregistration are validated. This includes the sale in execution to the fifth and sixth respondents.

[36] In the result I make the following order:

1. The registration of the first respondent known as Sananga Business Enterprise CC with Registration No: 2004/020256/23, is restored in terms of section 26 of the Close Corporations Act as amended, read with section 83(4) of the Companies Act 71 of 2008;
2. The fourth respondent is to restore/re-enter the first respondent's name to the Register of Close Corporations;
3. The order granted in paragraph 1 and 2 above is not subject to compliance with Regulation 40(6) of the Regulations promulgated under the Companies Act 71 of 2008.
4. All the assets of the first respondent immediately prior to its dissolution/deregistration on 24 February 2011, and in particular the first respondent's immovable property as described hereunder, is declared to be no longer *bona vacantia* and is declared to re-vest in the first respondent, the immovable property in question being:

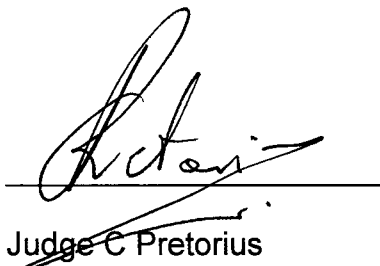
Section 2 as shown and more fully described on Sectional Plan no SS372/2005, in the scheme known as Edenburg Township, City of Johannesburg, of which section the floor area according to the said sectional title plan is 100 square metres in extent, together with an undivided share in the common property in the

scheme apportioned to the said section in accordance with the participation quota as endorsed in the said sectional plan, held by deed of transfer ST6882/2008, and an exclusive use area described as garden G2 measuring 51 square metres, being such portion of the common property comprising the land and scheme known as Georgian Terrace in respect of the land and building or buildings situated at Edenburg Township, City of Johannesburg, as shown and more fully described on Sectional Plan no SS372/2005 held by Notarial Deed of Cession no SK 5832/2008S ("the property").

5. The liabilities of the first respondent immediately prior to its dissolution/deregistration on 24 February 2011 is declared to re-vest in the first respondent;
6. The sale in execution of the property, held on 14 February 2012, and all steps taken pursuant thereto, is declared valid and enforceable, insofar as, and to the extent that such sale and steps taken pursuant thereto, was concluded/taken during the period of the first respondent's period of dissolution;
7. It is declared that the reinstatement of the first respondent as a close corporation in terms of section 83(4) of the Companies Act has retrospective effect from the date of deregistration which includes the retrospective validation of its corporate activities during that period. All acts done by or against the first respondent from the date of this dissolution/deregistration until the date of its restoration were validly done and that those acts are of full force

and effect.

8. Insofar as the first respondent's corporate personality and title to its property is concerned, this order has retrospective effect from the date upon which the first respondent was dissolved/deregistered, so that the property that was vested in it at the date of its dissolution/deregistration is deemed to have remained as its property as if it had not been dissolved/deregistered.
9. The fifth and sixth respondents are ordered to pay the costs of the application.
10. The counter-application is dismissed with costs.



Judge C Pretorius

Case number : 69125/2014

Matter heard on : 5 August 2015

For the Applicant : Adv C van der Merwe

Instructed by : Witz, Calicchio, Isakow and Shapiro
Attorneys

For the Respondents : Adv AP Ellis

Instructed by : Rahman & Rahman Incorporated

Date of Judgment : 21/08/2015