IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: 2010/40447
Appeal Number: A5029/2011
Date of Appeal: 21 November 2011
DATE:23 November 2011
REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

_____ _____
DATE SIGNATURE

In the matter between:

EMERY BOSEME	1st Appellant
MICHAEL DAVID HINES	2nd Appellant
GERALD IVAN MATTHEWS	3rd Appellant
MERVIN NAIDOO	4th Appellant
GAVIN MARK RUSSEL	5th Appellant

And

GRAHAM VINCENT ROGERS	Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] This matter comes before us on appeal with leave from the court *a quo* against a judgment handed down by S. J. Bekker AJ. The latter granted summary judgment in favour of the respondent against all the appellants

jointly and severally for the payment of the amount of R825 000.00 plus interest and costs. Only the second, third and fifth appellants are before court today.

[2] The respondent instituted action against the appellants based on an allegation that the close corporation, L'Orac Placement Enterprises CC, of which they were members had been finally deregistered.[1] As such and pursuant to the provisions of section 26 of the Close Corporation Act 69 of 1984, the appellants became liable jointly and severally for the outstanding liabilities of the corporation. The appellants filed an affidavit opposing summary judgment wherein, in short, it was alleged that neither the close corporation nor themselves received any notification from the registrar of companies declaring the close corporation deregistered.

[3] The court *a quo,* relying on **Mouton v Boland Bank Ltd** 2001 (3) SA 877 (SCA), held that the personal liabilities of the appellants remained intact even though the close corporation may later become reregistered. The court *a quo* found that the matter of **Firstrand Bank Ltd v Davis and Others** 2004 (1) SA 31 (NPD) was not applicable to the facts of the present case.

[4] The simple question is therefore whether or not the allegations in the affidavit resisting summary judgment were sufficient for purposes of disclosing a defence which would have entitled the court to refuse summary judgment. That would necessarily require an evaluation as to whether the **Mouton** case or the **Davis** case applied to the facts.

[5] In my view the **Mouton** case does not apply to the facts of the present case. In the **Mouton** case it was accepted that a notification by the

[1] See Annexure "POC2", p 14 of the record

registrar was duly sent in terms of section 26(1) and received by the corporation and its members. That case was mainly concerned with the proper interpretation of section 26(7). In the present matter the defence is addressed to the very question whether or not a proper notification was sent by the registrar in terms of section 26(1) of the Close Corporation Act. The facts in this matter are therefore more attuned to those in the **Davis** matter than in the **Mouton** matter.

[6] Section 26(1) reads as follows:

> "(1) If the Registrar has reasonable cause to believe that a corporation is not carrying on business or is not in operation, he shall serve on the corporation at its postal address a letter by certified post in which the corporation is notified thereof and informed that if he is not within 60 days from the date of his letter informed in writing that the corporation is carrying on business or is in operation, the corporation will, unless good cause is shown to the contrary, be deregistered."

[7] The defence relied upon in the affidavit resisting summary judgment was directed at the non-compliance with the provisions of section 26(1). In paragraph 3 thereof the following is stated:

> "3.
>
> 3.1 We had no knowledge thereof that the corporation had been de-registered and, to this day, have no knowledge as to the identity of the entity who de-registered the corporation.
>
> 3.2 In terms of Section 26 of the Close Corporation's Act 69 of 1984 ('the Act') and particularly the clauses referred to hereunder, we intend to either join the Registrar of Close Corporations to this action, or, to launch an application for a declaratory order to the effect that the purported de-registration of the corporation was irregular and, will pray for an order that the purported de-registration be set aside.
>
> 3.3 …
>
> 3.4 The provisions of the Act are peremptory as, the Registrar of Close Corporations is obliged to serve on the corporation at its postal address a letter by certified post wherein the corporation is notified of the Registrar' intention.
>
> 3.5 Neither the corporation nor any of its members received notice either by certified post or by registered post of the Registrar's intention and,

> for that reason it was impossible for us to address notices to the Registrar advising the Registrar that the corporation was trading."

[8] It seems quite apparent that for a corporation to be deregistered, section 26(1) has to be complied with. It is only when the hurdle of section 26(1) is crossed that the provisions of section 26(5)[2] and/or (7)[3] come into operation. Without proper notice to a corporation served by the registrar in terms of section 26(1), the rest of the section cannot apply. Section 26(5) which provides for personal liability of the members if the corporation is deregistered while still having outstanding liabilities, only comes into operation if the mechanism provided for in section 26(1) was complied with.

[9] It therefore follows that the defence disclosed in the affidavit opposing summary judgment is a valid defence to the alleged deregistration of the corporation as it appears from the CIPRO document attached to the particulars of claim as annexure "POC2". In my view, that defence, if successful, would restore the corporation with its limited liability and thus protect the members from personal liability. Personal liability cannot occur if section 26(1) had not been complied with. It goes without saying that should the registrar for whatever reason deregister a company without complying with section 26(1) at all, that such purported deregistration would constitute a nullity. This must be so because it is only upon receipt of a section 26(1) notification that the members of a corporation can defend themselves against deregistration. If no such notification was issued or not received by the corporation,

---

[2] Section 26(5) reads as follows:

> "(5) If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities."

[3] Section 26(7) reads as follows:

> "(7) The Registrar shall give notice of the restoration 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."

then similarly the members would be unable to defend themselves against the serious consequences of deregistration.

[10] It was submitted by counsel for the respondent that the affidavit should have elucidated what attempts the appellants had made to establish how and why their corporation was deregistered. I cannot agree with this submission. Such attempts constitute evidence which may subsequently be relevant at the trial.

[11] It was also submitted that no details were supplied as to whether and to what extent the corporation was indeed trading. At the stage of a summary judgment application full details of the corporation are unnecessary in light of the affirmative allegation "that the corporation was trading."[4]

[12] Finally, it was argued on behalf of the respondent that the deregistration as an administrative act, rightly or wrongly issued, remained in place until reviewed and set aside. Since the appellants have not yet successfully applied for its review, they did not disclose a defence sufficient to resist summary judgment. In my view, this argument falls to be rejected in view of the allegations contained in paragraph 3.2 of the appellants' affidavit. It records the appellants' intention to do just that.

[13] For the aforesaid reasons I am of the view that the court *a quo* misdirected itself in regard to the proper interpretation and application of section 26(1) and that the appeal should therefore succeed.

[14] I make the following order:

1. The appeal is upheld with costs.

[4] See para 3.5 of the affidavit resisting summary judgment

2. The order made by the court *a quo* is set aside and substituted with the following:

"1. Summary judgment is refused.

2. Leave is granted to the respondents to defend the action.

3. Costs will be costs in the cause."

DATED AND SIGNED THE 23RD DAY OF NOVEMBER 2011 AT JOHANNESBURG

_____
C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

_____
R. E. MONAMA
JUDGE OF THE HIGH COURT

I agree

_____
M. BASSLIAN
ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellants: Adv G. H. Meyer

Counsel for the Respondent: Adv K. Ioulianou

Attorney for the Appellants: Fluxmans Attorneys

Attorney for the Respondent: Ramsay Webber Attorneys

Appeal argued on: 21 November 2011