

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION: PRETORIA)

CASE NO: 16954/2014

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

9/5/2014

20/05/2014

Ex parte RAMKOTANE J MOGALE

APPLICANT

and

MASHADI LEGAL AND FINANCIAL SERVICES

1ST RESPONDENT

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

2ND RESPONDENT

THE REGISTRAR OF DEEDS , PRETORIA

3RD RESPONDENT

JUDGMENT

KHUMALO J

[1] The Applicant has brought an *ex parte* application seeking the issuing of a rule nisi calling upon all interested persons to show cause why an order in the following terms should not be made:

- [1.1] the registration of Mashadi Legal and Financial Services CC (2003/010856/23- "the close corporation") is restored to the Close Corporation Register in terms of s 82 (3) and (4) of the Companies Act 71 of 2008 ("the Act");
- [1.2] the close corporation is ordered to submit all forms and annual returns of the close corporation, as is required by the Companies Act 71 of 2008 to the Registrar of Companies within 30 days of this order;

- [1.3] all and any assets of the close corporation, being the Farm 289, Portion 6 of the Farm Dwars-In-De-Weg, Registration Division LQ, Pretoria held under Title Deed Number T35552/2004, is declared to be no longer *bona vacantia*.
- [1.4] that the rule is to be served on the three (3) Respondents and the South African Revenue Services and be published in the Government Gazette in English and Afrikaans, Sunday Times, an English newspaper circulating throughout South Africa and in the Rapport an Afrikaans newspaper circulating throughout the Republic of South Africa.

FACTUAL BACKGROUND

[2] Mashadi Legal and Financial Services CC is the 1st Respondent, the close corporation that was deregistered on 31 August 2010 after being placed under provisional deregistration on 1 June 2010 and the Applicant is its only member.

[3] The Farm 289, Portion 6 of the Farm Dwars-In-De-Weg, Registration Division LQ, Pretoria held under Title Deed Number T35552/2004, ("the property") is registered under the name of the 1st Respondent hence it became *bona vacantia*. At the time it had only one asset.

[4] The 2nd Respondent, the Companies and Intellectual Property Commission, responsible for registration and deregistration of companies and the 3rd Respondent, the Registrar of Deeds whose function is to register immovable properties, are cited as interested parties. The Applicant seeks no specific relief from them.

[5] Applicant claims his explanation for seeking the relief from this court, to be that:

- [5.1] The 2nd Respondent is empowered to remove a company from the register in accordance with the provision of s 82 (3) of the Act.
- [5.2] Any interested person may apply, in the prescribed manner, in accordance with the provisions of regulation 40 of the Regulations published pursuant to the Act, to the 2nd Respondent to reinstate the registration of a company.
- [5.3] The aforesaid Application may, in accordance with the provisions of Section 82 (4), be launched only in respect of those instances where the companies were removed from the register as provided for in terms of s 82 (3). Such procedure is not available to the Applicant, because;
- [5.4] it appears from the CIPRO search that the First Respondent omitted to file annual returns, as a result whereof the deregistration process commenced on June 2010, with a final deregistration action recorded as 31 August 2010.
- [5.5] He cannot file the outstanding documents and statements required to enable the reinstatement of the 1st Respondent by the 2nd Respondent, **hence the Application to this court.**
- [5.6] It would be just that the registration of the first Respondent be restored, so as to enable the 1st Respondent to transfer ownership of the immovable property known as Farm Dwars-In-De-Weg, that it intends to sell.

- [5.7] Alternatively, at the time that it was deregistered the 1st Respondent was in business or operation as envisaged by s 73 (6) (a) of the Companies Act.
- [5.8] According to Applicant's investigation, the explanation for the de-registration is that:
- [5.8.1] 1st Respondent's auditors were MK Dube.
- [5.8.2] He performed various secretarial duties including the lodgment of 1st Respondent's annual returns.
- [5.8.3] He being also a sole member of the 1st Respondent, simply omitted to lodge the annual returns.
- [5.8.4] He has not been able to trace the letter that was sent to the 1st Respondent by the Registrar in terms of the provisions of s 73 (1) of the Companies Act, enquiring whether or not the company was carrying on business as well as the registered notice in terms of s 73 (3) to the effect that 1st Respondent would be deregistered. However does not dispute that the relevant provisions were complied with by the Registrar.
- [6] The Applicant has signed a sale agreement on 18 August 2013 selling the property for R1 700 000.00 and alleges that the 1st respondent intends passing transfer to the purchaser but due to de-registration of the 1st Respondent no effect can be given to the agreement.
- [7] Applicant alleges that 1st Respondent will proceed to trade after the intended sale and to invest the proceeds of the sale. Under the circumstances it would be just (as envisaged in s 73 (6) (a) of the Act that the registration of the 1st Respondent be restored.
- [8] It was through his own bona fide error, not ensuring that the annual returns were properly filed that the 1st respondent was deregistered.
- [9] The deregistration of the 1st Respondent was discovered when he approached and instructed his attorneys with specific instruction to transfer the property to the purchaser.

APPLICABLE LAW

- [10] Section 82 (3) of the Act provides for a situation whereby the Commission may remove a company from the companies register only if, inter alia, -

(a) the company ..., or-

- (i) has failed to file an annual return in terms of s 33 for two or more years in succession;
- (ii) on demand by the Commission, has failed to-

(aa) to give satisfactory reasons for the failure to file the required annual returns; or

(bb) show satisfactory cause for the company to remain registered;

Whilst s 82 (4) provides that if the Commission de-registers a company as contemplated in the above subsection (3) any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company.

[11] The manner prescribed for the reinstatement of companies that have been de-registered is provided for under Regulation 40 as referred to by the Applicant in subsection (6) and (7) and clearly reads as follows:

“(6) The Commission may reinstate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fees in respect thereof.

(7) An Application to re-instate a de-registered company or external company must be made in a Form CoR 40. 5, and must comply with such conditions as the Commission may determine.”

[12] The regulations are to be read with the Practice Note 6 of 2012 that was issued in terms of Regulation 4 of the Regulations of the Commission that sets out:

Requirements for reinstatement in terms of the Companies Act , 2008 (Act 71 of 2008)

...

In order to reinstate a company or close corporation from 1 November 2012, the reinstatement application on an original signed form CoR 40.5 must comply with the following requirements regardless of the cause or date of deregistration:

- . Certified ID copy of the Applicant (director/member);
- . Certified ID copy of the customer filing the application;
- . Deeds search (reflecting ownership of immovable property or not);
- . Letters from National Treasury and Department of Public Works, indicating that such Departments have no objection to the reinstatement, if it has immovable property;
- . Advertising in the local newspaper giving 21 days’ notice of proposed application for reinstatement;
- . Affidavit indicating the reasons for the non-filing of annual returns, if deregistration was due to non-compliance in relation to annual returns;
- . Affidavit indicating the reasons for the original request for deregistration, if the company or close corporation itself applied for deregistration; and

Sufficient documentary proof indicating that the company or close corporation was in business or that it has any outstanding assets or liabilities (eg. Property, intellectual property rights) at the time of deregistration.

[13] The challenge imposed by the Applicant's Application is that notwithstanding his indication that he cannot file the outstanding documents and statements required to enable the reinstatement of the 1st Respondent by the 2nd Respondent, which documents are the relevant annual returns, further that the de-registration indeed followed the failure to file the 1st Respondent's annual statements and admitting that he was the person responsible and he omitted to do so, Applicant seeks as per prayer in his notice of motion

[13.1] the registration of the 1st Respondent to be restored to the Close Corporation Register in terms of s 82 (3) and (4) of the Companies Act 71 of 2008;

[13.2] the close corporation to be ordered to submit all forms and annual returns of the close corporation, as is required by the Companies Act 71 of 2008 to the Registrar of Companies within 30 days of this order;

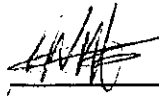
[14] Applicant has not cited all the interested parties. The Treasury and Public Works Departments whose interest the Commission is supposed to look after are omitted. Alternatively a letter from the Departments indicating their approval to the reinstatement of the property should have been filed.

[15] Furthermore, the proceedings contemplated by regulation 40 that are brought as a result of s 82 (3) and (4) of the Act are to be brought before the Commission. The recent deliberations brought about probably by the misunderstanding of the Court's involvement in the reinstatement of de-registered companies under this new Act that transpired in the decisions of *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at para [6], at p488; *Newlands v Minister of Finance* 2013 (5) SA (KZP) at p74 and *Absa Bank v CIPC* 2013 (4) SA 194 (WCC) (full bench) which deliberations ended up with the decision of the Kwazulu – Natal High Court, Pietermaritzburg, *Nulandis v Minister of Finance* 2013 (5) SA 294 (KZP) at 74 seeking to differentiate between dissolution and de-registration, are not necessary for the consideration of this matter. The Application is not premised on the provisions of s 83 (4).

[16] Other provisions in terms of s 73 of the Act that have been referred to in the Application have got no bearing to the relief sought by the Applicant. However if the intention was to refer to s 73 (6) of the old Act 61 of 1973, it has been repealed.

[17] The Applicant has as a result failed to make a proper case for the provisional relief that he is seeking. Under the circumstances, I make the following order:

[[17.1] The Application for the order as per prayer 1 to 3 of the Notice of motion is refused.



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA**

Applicant's Counsel: Adv Schoeman
Instructed by: Hahn Hahn Attorneys
Pretoria