/SG

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

17/10/14

DATE: 17/10/

CASE NO: 44974/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

17/10/2014 .....
DATE SIGNATURE

In the matter between:

GAVIN CECIL GAINSOFRD N.O.	1ST APPLICANT
KAREN KEEVY N.O. [In their official capacities as joint liquidators of INTRODEALS 159 (PTY) LTD (in liquidation) – Masters Ref No. T2594/07]	2ND APPLICANT

And

INTRODEALS 159 (PTY) (in liquidation) REG NO: 2006/016941/07	1ST RESPONDENT
MINISTER OF FINANCE	2ND RESPONDENT
MINISTER OF REGIONAL & LAND AFFAIRS	3RD RESPONDENT
MASTER OF DEEDS	4TH RESPONDENT

REGISTRAR OF DEEDS	5TH RESPONDENT
COMMISSIONER OF COMPANIES	6TH RESPONDENT
SOUTH AFRICAN RECEIVER OF REVENUE	7TH RESPONDENT
FIRSTRAND BANK LTD	8TH RESPONDENT
JOHAN COETZEE	9TH RESPONDENT
MAUREEN COETZEE	10TH RESPONDENT
JOSEPH LESTER VALENTIN	11TH RESPONDENT
ANDRé FRANCOIS STEYN	12TH RESPONDENT

JUDGMENT

MAKGOBA, J

[1] The applicants in this matter are joint liquidators of the first respondent. They seek orders whereby the dissolution and deregistration of the first respondent be declared void and be set aside. In addition an order is sought whereby the pending eviction proceedings against the twelfth respondent, during the period of the first respondent deregistration, be validated. The relief sought by the applicants is premised on section 83 of the Companies Act No 71 of 2008.

[2] Only the twelfth respondent opposes the relief sought. The sixth respondent (the Commissioner of Companies) delivered a notice indicating that he/she abides the decision of the court.

[3] The twelfth respondent did not file an opposing affidavit. Instead he opposes the relief sought by raising points of law in terms of rule 6(5)(d)(ii). It is trite that by virtue of not having filed an answering affidavit and basing his opposition squarely upon points of law, the factual allegations contained in the founding affidavit stand uncontested and must be accepted as being true. See: ***Pearson v Magrep Investments (Pty) Ltd and Others*** **1975 1 SA 186 (D) at page 187.**

[4] The uncontested facts in this matter are the following:

4.1 The first respondent was duly registered and incorporated in terms of the Companies Act 61 of 1973 ("the Old Act") on 1 June 2006.

4.2 On 12 July 2006 the first respondent purchased an immovable property for the sum of R1.1 million comprising of Erf 269 Doornkloof, 919 square metres in extent and held under Deed of Transfer No T29203/2007. The street address is 83 Karin Avenue, Doornkloof ("the property"). Simultaneously with the transfer of the property to the first respondent, a mortgage bond was registered over the property in favour of the eighth respondent (First Rand Bank Ltd) to secure the sum of R1 100 000.00.

4.3 The first respondent was placed under provisional winding up on 20 November 2007 and the provisional order was confirmed and the first respondent was consequently placed under final winding up on 18 March 2008.

4.4 The first respondent was finally deregistered on 10 July 2010 for want of filing of its annual financial returns. The fact of deregistration was unknown to the applicants.

[5] The applicants contend that the twelfth respondent is in unlawful occupation of the property. On 14 December 2010 an eviction application was launched under case no: 76652/2010 for the eviction of the twelfth respondent from the property in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 1998 ("the PIE Act").

[6] As with this application, the twelfth respondent also opposes the application for his eviction. The court papers were filed and the eviction application was enrolled for hearing on the opposed roll on 6 November 2012. Because of the first respondent's deregistration it was argued that the applicants consequently lack the necessary *locus standi* to obtain an order for the eviction of the twelfth respondent. The other consideration was that by virtue of the deregistration of the first respondent on 16 July 2010, the property owned by the first respondent has become *bona vacantia*. The matter was consequently removed from the roll.

[7] Because the first respondent has been deregistered, it follows that the applicants (as the joint liquidators) cannot finalize the winding-up of the first respondent, nor can they proceed with the eviction application to finality. In order to finalize the winding-up of the first respondent by the eviction of the twelfth respondent from the property to ensure that the

property is then sold for the benefit of the *concursus creditorum*, the applicants launched the present application seeking relief premised upon section 83(4) of the Companies Act No 71 of 2008 ("the New Act").

[8] Section 82 of the new Companies Act provides for the dissolution of companies and the removal of the name from the register. This was also provided for in section 73 of the old Companies Act in terms of which the first respondent was deregistered on 16 July 2010. Section 83 of the new Companies Act regulates the effects of the removal of the company from the register.

[9] The relevant provisions of section 82 of the new Companies Act provides as follows:

> "*82(3)* *In addition to the duty to deregister a company contemplated in subsection 2(b) the Commission may otherwise remove a company from the company's register only if –*
>
> *(a)* *The company has –*
>
> *(i)* *Failed to file an annual return in terms of section 33 for two or more years in succession; and*

(ii) On demand by the Commission has failed to

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

(bb) show satisfactory cause for the compay to remain registered.

82(4) If the commission deregister a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company."

[10] The relevant provisions of section 83 of the new Companies Act are as follows:

"83(1) A company is dissolved as of the date its name is removed from the company's register ...;

(2) ...

(3) ...

(4) 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 whether the company had not been dissolved."

[11] In the present case the applicants are faced with a situation where, by virtue of the deregistration and consequent dissolution of the first respondent on 16 July 2010, the property of the company became *bona vacantia* and same consequently vests in the State. For this reason an order is sought in terms of section 83(4) of the Companies Act 71 of 2008. The relief is premised thereon that it is just and equitable to grant the relief sought as the first respondent was deregistered and consequently dissolved after it was placed under liquidation by an order of court on 18 March 2008.

[12] Section 83(4) applies to a company which has been deregistered. It is irrelevant whether the deregistration occurred in terms of section 73 of the Old Act (as in the present case) or in terms of section 82 of the New Act. Unlike previously, an important modification brought about by the

new Companies Act is that the court is not only confined to only declaring the dissolution void. The court may also make any other order that is just and equitable in the circumstances. In the context of the present application such other order that is just and equitable sought by the applicants is an order validating the legal proceedings instituted by the applicants for the eviction of the twelfth respondent from the property.

[13] The legal position for the order sought finds its basis in the decision of the Full Court in ***ABSA Bank Ltd v Companies & Intellectual Property Commission & Others*** **2013 4 SA 194 (WCC).** In this case the Full Court dealt with the ambit of authority given to a court in terms of section 83(4) of the New Act.

[14] Upon an order declaring the dissolution void, the natural consequences thereof will be that all the assets of the company prior to its dissolution will no longer be *bona vacantia* and so too its liabilities. However, declaring a dissolution void has never had the effect that other acts or conduct and legal proceedings would then become valid. It is in this connection where section 83(4) gives the court the power to make any other order that it considers just and equitable. The court is therefore at liberty to validate any particular act or conduct or thing that happened during the period of dissolution if it is just and equitable – **ABSA case** *supra*, at paragraph [62], [63] and [64].

[15] In opposing the orders sought by the applicants, counsel for the twelfth respondent referred to and relied heavily on the case of ***Fintech (Pty) Ltd***

v Awake Solutions (Pty) Ltd **(218/13 (2014) ZASCA 63 (15 May 2014)** and made the following submissions:

15.1 The final deregistration of a company subsequent to it being placed under winding up was incompetent.

15.2 The continued existence of such a company, in liquidation, resulting from an order of court, could not be trumped by deregistration.

15.3 The deregistration of a company under circumstances where it was already in liquidation, comprised an administrative act performed by an official in CIPRO (now CIPC).

15.4 To the extent that the deregistration of a company would be unlawful and invalid it would be susceptible to being set aside on review, thus the only order that would issue would be to declare the deregistration invalid.

[16] In my view, the reliance by counsel on the **Fintech case** is misplaced. The relied upon case concerns the **validity** of a company's deregistration, in terms of the provisions of section 73 of the now repealed Companies Act 61 of 1973 (the Old Act), when the deregistration occurred whilst the company was under provisional or final liquidation. It has nothing to do with the **effect** of dissolution of a company by its removal from the register in terms of section 83(4) of the New Act.

[17] Still relying on the **Fintech case** *supra*, counsel for the twelfth respondent argued that the administrative deregistration of a company by an official does in fact constitute administrative action. Consequently, it follows that the exercise of section 83(4) power is not needed since the court's ordinary power of review is still available. That the applicants brought this application in terms of section 83(4) when it should have brought the application in terms of the provisions of PAJA or Rule 53 of the Uniform Rules of Court. Counsel therefore submitted that the present application is consequently fatally flawed.

[18] There is no merit in counsel's aforesaid argument and submission because the power to declare a dissolution void in terms of section 83(4) is not a review power. In fact, where the company's dissolution is the result of a reviewable irregularity the application of section 83(4) is not needed since the court's ordinary power of review is available. *In casu* the applicants do not base their application on any irregularity but simply on the provisions of section 83(4). Section 83(4) of the New Act is not limited to any particular ground. The issue before this court is whether it is just and equitable in the circumstances of the facts *in casu* to order a revival in terms of section 83(4) of the New Act.

[19] Whereas the twelfth respondent raised six points of law in terms of rule 6(5)(d)(iii), during the hearing of this matter he abandoned the first, second and sixth points of law. The remaining points of law are:

"3. *That the Court does not have the authority to validate anything done by the First Respondent between its deregistration and reinstatement.*

4. *That there is no legal basis upon which a Court can breathe life into the pending eviction proceedings.*

5. *That the relief sought by the Applicants is vague and embarrassing as it is unclear from the Notice of Motion as read with the founding affidavit which relief is sought against which party and upon what grounds.*"

[20] I need not deal with each of the aforementioned points of law as they have been covered and dealt with within the context of this judgment. Suffice it to say all these points of law have no merit.

[21] Mr Meintjes, counsel for the applicant, made the following submissions in order to establish that it is just and equitable in the circumstances of this case for the granting of an order sought, in particular, an order that the legal proceedings instituted by the applicants for the eviction of the twelfth respondent be validated:

21.1 The first respondent still owns an immovable property as at the date of its dissolution;

21.2 The first respondent was placed in liquidation prior to its dissolution and the applicants were appointed joint liquidators;

21.3 The joint liquidators have statutory duties to fulfil in order to wind-up the first respondent. The dissolution caused by the first respondent's deregistration obviously makes this task impossible. In fact, due to the "non-existence" of the first respondent it is consequently impossible for the trustees to obtain an eviction order against the twelfth respondent in order that the property may be sold and the insolvent estate be properly wound-up to the advantage of the *concursus creditorum*;

21.4 The first respondent still has unpaid creditors. In particular FNB (eighth respondent) who holds a mortgage bond over the property as at the date of the first respondent's dissolution;

21.5 The dissolution was not caused by the trustees or the bond holder. In fact the trustees were unaware of the deregistration until it appeared that such point was belatedly raised in the eviction application; and

21.6 The trustees are therefore not able to proceed with the winding-up of the first respondent nor to proceed with the eviction application against the twelfth respondent. This occurs to the detriment of the *concursus creditorum*. In order to avoid duplication and concomitant unnecessary costs it is therefore crucial that the

dissolution of the first respondent be declared void and the eviction proceedings validated.

[22] I agree with the submissions made by counsel. It is noteworthy that some of the aforementioned factors, in particular those in 21.1, 21.4 and 21.5 above prevailed and were taken into consideration by the Full Court in ***ABSA V CIPC & Others supra*, at paragraph [58]** of the judgment. I accordingly make a finding that the applicants have made out a proper case for the relief they seek.

[23] The applicants pray for a punitive costs order against the twelfth respondent and for the following reasons: The opposition of the twelfth respondent is clearly vexatious in view of the pending eviction application. In those proceedings the twelfth respondent is the unlawful occupier of the property and by opposing this application to declare the dissolution void, the twelfth respondent hopes that the first respondent will never come into existence. The effect thereof is that the twelfth respondent will continue to remain an unlawful occupier with no possibility of ever having him evicted.

[24] The twelfth respondent was neither a director, shareholder or employee of the first respondent. He took the law into his own hands and took occupation if the property. His conduct amounts to the expropriation of property which surely cannot be countenanced. This court is implored to look askance to the conduct and technical orientated approach adopted by the twelfth respondent in opposing this application. Moreover, the opportunism of the twelfth respondent is further demonstrated by him

seeking a cost order against the applicants on the attorney and client scale without any facts or evidence in support of such order.

[25] I am inclined to accede to the applicant's prayer for a punitive costs order. In ***Re Alluvial Creek Ltd*** **1929 CPD 532 at page 535** it was said:

> "*An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.*"

[26] I agree with the sentiments expressed in the aforementioned decision. In my view the applicants have made out a proper case for a punitive costs order against the twelfth respondent.

[27] In the result I grant the following order:

1. The twelfth respondent's points of law in its notice in terms of Rule 6(5)(d)(iii) are dismissed with costs;

2. The twelfth respondent's points of law raised during argument on 6 October 2014 is dismissed with costs;

3. The dissolution of the first respondent, which dissolution occurred upon the first respondent's deregistration on 16 July 2010 in terms of section 73 of the Companies Act, No 61 of 1973, is declared void in terms of section 83(4) of the Companies Act, No 71 of 2008;

4. The sixth respondent is directed to restore the first respondent's name to the register of Companies;

5. The legal proceedings instituted by the applicants for the eviction of the twelfth respondent under case no. 76652/2010 [Gauteng Division (Pretoria)] is hereby validated; and

6. The twelfth respondent is ordered to pay the costs of this application on the attorney and client scale.

E M MAKGOBA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

44974/2013/sg

Heard on:	6 October 2014
For the Applicants:	Adv L Meintjes
Instructed by:	Rorich, Wolmarans & Luderitz Inc, Pretoria
For the 12th Respondent:	Adv P Lourens
Instructed by:	Cavanah Inc Attorneys, Pretoria
Date of Judgment:	17 October 2014