

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**[REPUBLIC OF SOUTH AFRICA]**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>13 / 05 / 2016</u>	
DATE	SIGNATURE

APPEAL CASE No: A893 / 14

CASE NO. 2016 / 02

In the matter between:

HJT ELLOF & R RAMONETHA, C/o (JZH MULLER)

EQUITRUST INSOLVENCY PRACTITIONERS B.O.

LIQUIDATORS OF ZISCONSTEEL DISTRIBUTION

CENTRE (PTY) LTD (in liquidation)

APPELLANT

(Second respondent a quo)

And

AGGREY MANYIKA

FIRST RESPONDENT

(Applicant a quo)

FERROCLIFF STEEL (PTY) LTD

SECOND RESPONDENT

(First respondent *a quo*)

REGISTRAR OF COMPANIES

THIRD RESPONDENT

(Third respondent *a quo*)

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**JUDGMENT**

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MAVUNDLA, J.

[1] On the 27 March 2013 Makgoba J, as he then was, granted the following order under case no.54251/ 2012:

- "1 That the Registrar of Companies is to effect re-registration of the first and second respondent;
- 2 That the second respondent is jointly and severally liable for the obligations of the first respondent;
- 3 That the second respondent is liable for the debt of the first respondent in terms of an order granted by the above Court under the above case number on the 29 of October 2009; [AR-P48]
- 4 That the applicant is permitted to effect execution of the above order on the second respondent, by attachment of the property situated at No 3 Wicht Street Middelburg Mpumalanga, belonging to the second respondent."

[2] Leave to appeal was refused by the Court *a quo*. However, on petition to the Supreme Court of Appeal, leave to appeal to this Court against the whole of the judgment granted by Makgoba J (as he then was) on 27 March 2013, was granted on 15 September 2014 by Wallis JA and Mathopo AJA on limited issues, namely:

'Whether the relief granted in paragraphs 2,3,4 and 5 was competent in the light of the *Pieters v Kramer* N.O. 1977 (1) SA 589 where it was held that the summons claiming substantive relief issued against a dissolved company was a nullity.'

[3] The import of the *Pieters v Kramer N.O. (supra)* judgment is contained in pages 599H-601H of the judgment and can be summarised as follows:

3.1 The Appeal Court considered what the effect was of an order declaring the dissolution of the company "to have been void". The question was asked whether the order had the effect of validating a pre-issued summons that had specifically been issued at a time when the company had already been dissolved by the Court. The question was therefore whether the declaration declaring the dissolution of the company to have been void, had the effect of a retrospective revival of acts on behalf of or against the company during the period of its dissolution.

3.2 The Court found specifically that the order avoiding the dissolution cannot be said to have had the effect of reviving proceedings which had been commenced during the period of dissolution<sup>1</sup>.

[4] In the matter of *Ebrahim v Evans*<sup>2</sup> Broome J held that: "the effect of an order declaring the dissolution to have been void is that any action may be taken thereafter or thereupon, any action that is by or against the company. That is as far as it goes. The order does no more than to revive the company... the effect of the order declaring the dissolution to have been void is that thereafter action can be taken against or by the company, and that actions which came to an end upon dissolution are not revived."<sup>3</sup>

[5] For purposes of clarity, I shall refer to the parties in their respective names to avoid any confusion.

### BACKGROUND FACTS

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<sup>1</sup> *Vide also Ebrahim v Evans* 1990 (4) SA 424 (D & CLD) at 425E-G.

<sup>2</sup> *Supra* at At 427G-H.

<sup>3</sup> *Supra* at 428A-B.

- [6] Ferrocliff Steel and Zisco Steel Distribution are both companies wholly owned subsidiaries of the Zimbabwe Iron & Steel Company Limited (Zisco Steel) a company based in Zimbabwe. The directors of the Ferrocliff as well as Mr Manyika, a citizen of Zimbabwe who was appointed as manager of Ferrocliff were appointed by Zisco Steel. Manyika was also appointed to be the Public Officer of Ferrocliff Steel by Zisco Steel. Zisco was wholly owned by the Government of Zimbabwe. However, the present owners of the company are (i) the Government of Zimbabwe; (ii) Essar Africa Holding Ltd; and (iii) a small group of private investors.
- [7] During approximately 2006/2007 Manyika was told by the shareholders of Ferrocliff Steel, which was conducting its business on the premises owned by Zisco Steel Distribution Centre to wind down the business of Ferrocliff Steel, pay all the creditors and close down the company. When asked where the funds would be coming from, the shareholders instructed Zisco Steel Distribution Centre to provide the necessary funding to pay all the relevant debtors, salaries, severance packages, etc.
- [8] This was in fact done and from the record it is abundantly clear that Manyika provided for a number of months for expenses such as travelling etc. from his own pocket, was not paid a salary and some of the amounts were never paid over by the Zisco Steel Distribution Centre to Ferrocliff Steel to make payment in respect of all the debtors.
- [9] The foregoing resulted therein that Manyika issued summons under case number 10942/2007 during 2007 against Ferrocliff Steel for payment of his unpaid salary. After the matter was originally defended Manyika obtained judgment on the 29 October 2009 against Ferrocliff Steel (Pty) Limited in an amount of R1 098 178, 31,

together with interest thereon at the rate of 15. 5% from 1 April 2007 to date of judgment.

- [10] Upon seeking to execute the judgment, Manyika's attorneys became aware of the fact that the property, from which the business of Ferrocliff Steel was previously conducted, was registered in the name of the appellant.
- [11] Both Ferrocliff Steel and Zisconsteel Distribution were de-registered due to the Annual Return Non- Compliance on the 16 July 2010. Zisconsteel Distribution owned property situated at Stand No 3 Wicht Street Middleburg (Stand 2771 Extension 7 Mpumalanga. It was submitted that Zisconsteel Distribution was the interest which was used by Zisco Steel to purchase the property on which the business was being conducted from.
- [12] The holding company Zisco Steel failed to support Ferrocliff Steel, as a result the latter ran into financial woes. Zisco Steel stopped funding Ferrocliff Steel on the 20 November 2006.
- [13] Ferrocliff Steel and Zisconsteel Distribution were de-registered due to the Annual Return Non- Compliance on the 16 July 2010. *Ex lege* , the deregistration of these two companies was in terms of s73 (6A) of the Companies Act.
- [14] On 18 September 2012 Manyika launched an application under case number 54251/2012, in the Court *a quo* seeking an order to have Ferrocliff Steel and Zisconsteel Distribution centre (Pty Ltd) re-registered and that Zisconsteel Distribution centre (Pty Ltd) is jointly and severally liable for the obligations of

Ferrocliff Steel; declaring Zisconsteel Distribution Centre (Pty Ltd liable for the debt of Ferrocliff Steel in terms of the order granted by the Court on the 29 October 2009, permitting Manyika to effect execution of the order on the Zisconsteel Distribution Centre (Pty Ltd by attachment of the property situated at 3 Wicht Street, Middleburg, Mpumalanga.

- [15] Notice of intention to oppose was prepared by Zisconsteel Distribution Centre (PTY) Ltd (in liquidation) and Ferrocliff Steel, who instructed attorneys in Bloemfontein. The matter on the unopposed roll became postponed as a result and on a further occasion specific orders were granted when the answering affidavits had to be filed. Zisconsteel Distribution Centre (Pty) Ltd (in liquidation) failed to comply with the court order in filing any affidavits and eventually the application for postponement was refused. The order granted as quoted above by Makgoba J, as he then was, was then handed down, ordering, inter *alia*, the re-registration of the respondents and declaring appellant liable for the debt of second respondent to Manyika.
- [16] Upon attachment of the property and arrangement for the sale in execution an urgent application was launched to stay the sale in execution pending an application for leave to appeal against the order.
- [17] Thereafter leave to appeal was dismissed by Makgoka J, as he then was, and an application for leave to appeal the order was made to the President of the Supreme Court of Appeal, who granted the order as quoted hereinbefore.
- [18] The crisp issue to be decided is, as per order of the Supreme Court of Appeal, whether the re-registration of Ferrocliff Steel and Zisconsteel Distribution (in liquidation) has retrospective effect not only in restoring its property but also

validating the corporate activity during the period of deregistration of Ferrocliff and Steel Zisconsteel Distribution.

- [19] It is trite that upon deregistration, the assets of a deregistered legal entity, *in casu*, Zisconsteel Distribution (in liquidation), become *bona vacantia* and falls automatically to the State; *vide Sanlam v Rainbow Diamonds (Edms) en Andere*;<sup>4</sup> *Barclays National Bank Ltd v Kalk*<sup>5</sup>. In *Miller v Nafcoc Investment Holding*<sup>6</sup> the Court held that: "Deregistration...puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceased to exist at death." *vide also Newlands Surgical Clinic v Peninsula Eye Clinic*.<sup>7</sup>
- [20] *In casu*, Ferrocliff Steel and Zisconsteel Distribution were de-registered on the 16 July 2010. *Ex lege* the effect of de-registration dissolved both entities, however, this did not extinguish their respective liabilities, but merely rendered them unenforceable; *vide Barclays National Bank Ltd v Kalk*.<sup>8</sup> The Supreme Court of Appeal, per Brand AJ in the matter of *Newlands Surgical Clinic v Peninsula Eye Clinic*<sup>9</sup> held that: "All subsequent actions purportedly taken on behalf of the deregistered company are consequently void and of no effect...unless the reinstatement has, or is afforded retrospective effect." Consequently the order obtained on the 29 October 2009 could not be executed against the property of the aforesaid de-registered entities.
- [21] In an effort to circumvent the impediment presented by the deregistration, Manyika issued the proceedings under case number 54251/2012 on the 18

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<sup>4</sup> 1982 (4) SA 633 at 638B.

<sup>5</sup> 1981 (4) SA 291 (W) at 295.

<sup>6</sup> 2010 (6) SA 390 (SCA) at 395D-E.

<sup>7</sup> 2015 (4) SA 34 (SCA) at 41G-H.

<sup>8</sup> 1981 (4) SA 291 (W) at 295.

<sup>9</sup> *Supra* at 41G-H.

September 2012.<sup>10</sup> In my view, these proceedings, on the strength of the pronouncement of Brand AJ *supra* are a nullity. This has to be so because of the Pieters v Kramer N.O. (*supra*) judgment. In the commentary on ss419 and 420 of the Companies Act of 1973, the learned authors of Henochberg quite correctly, with respect, opined that *Pieters v Kramer N.O. (supra)* is still applicable and that legal proceedings instituted against a company become *null and void* upon its dissolution.

[22] At the time of institution of the proceedings under case number 54251/2012 the Ferrocliff Steel and Ziscosteel Distribution Centre were non-existent, had no directors and the action was instituted against non-existent entities and those proceedings are *ipso facto* a nullity. The property these two entities owned at the time of de-registration became *bona vacantia* and vested with the State and it could not be attached.

[23] In the matter of *Absa Bank v Companies and Intellectual Property Commission and Others*<sup>11</sup> the Court held that: "...in terms of S 73(6) (a) and 73(6A) of the 1973 Act the Court had the power to re-instate a deregistered company, it never had the power on application to validate anything done by or against a company between deregistration and reinstatement and by operation of law the effect of the order of restoration was that the company was to be registered as never having been deregistered (Bright Bay Property Services case *supra* para 30)."

[24] The deregistration of Ferrocliff and Zisconsteel Distribution Centre was on the 16 July 2010 in terms of s73 (6A) of the Companies Act 71 of 1973. This particular Act was repealed by the Companies Act of 2008 which latter Act inured on the 1 May

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<sup>10</sup> Vide paragraph [14] *supra*.

<sup>11</sup> 2013 (4) SA 194 (WCC).



2011. Prior to the last-mentioned date the *Pieters v Kramer N.O. (supra)* judgment prevailed.

[25] In the matter of *Kadoma Trading 15 v Noble Crest*<sup>12</sup> the Supreme Court of Appeal held that:

“Dealing with the meaning of s73 (6), the court in *Ex Parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474C-D said:

‘The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become *bona vacantia* and as such accrued to the State. Likewise debtors and creditors of the company at the time of deregistration may upon restoration find their obligation and rights resuscitated. It follows that the effect of restoration of the company in terms of s73 (6) may have wide-ranging effects.’

[14] This court had occasion to consider the issue thereafter in *Insamcor (Pty) Ltd b Dorbyl Light & General Engineering (Pty)* 2007 (4) SA 467 (SCA). Approving the dictum in *Ex Parte Sengol* and related decisions, the court commented as follows:

‘As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company--- precisely because the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, restoration order seems to validate, retrospectively, all acts done since deregistration--- including for example, the institution of legal proceedings—on behalf of a company that did not exist.’

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<sup>12</sup> 2013 (3) SA 338 (SCA) at 343E-344D.

This has been the line of thinking in Commonwealth jurisdictions too, notably well before the promulgation of the Companies Act. There, substantially similar provisions have consistently been interpreted to mean that acts concluded during the deregistration period are retrospectively validated upon the company's re-registration."<sup>13</sup>

- [26] The re-registration of the aforesaid mentioned companies, after the repeal of the 1973 Act, could only be done through the Companies Act 71 of 2008 which inured on the 1 November 2011. It does not seem, in my view that the Companies Act of 2008, as couched, can operate retrospectively beyond its date of operation. Had that been the intention, the legislature would have specifically stated so. In my view, the new Companies Act does not offset the *Pieters v Kramer N.O.* *status quo* which prevailed prior to the inception of the Act.
- [27] Section 82 provides for administrative dissolution of companies and administrative reinstatement; vide s82 (4) of the 2008 Companies Act. Manyika, in my view, should first have sought reinstatement, and only thereafter sought an order to hold the said companies liable for the debts of Ferrocliff.
- [28] The effect of the order of Makgoba J (as he then was) has the effect of going against the *Pieters v Kramer N.O.* decision as well as the law as it existed at the time the default judgment was obtained and is therefore, with respect incorrect. In my view, Manyika brought the application in terms of the notice of motion dated 18 September 2012, seeking the relief which was subsequently granted by the Court *a quo* on the 27 March 2013. In the matter of *Newlands Surgical Clinic v Peninsula*

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<sup>13</sup> For example, in *Tyman's Ltd v Craven* [1952] 2 QB 100 [1952] 1 ALL ER 613 (CA)), the court held that the effect of broadly similar provisions was not only that the corporate existence of the company that had been struck off the register was preserved but was also retrospective. See also *Top Creative Ltd v St ALBANS District Council* [2002] 2 BCLC 379 (CA0 at 385e-387f; *Royal Bank of Canada v Cressler Hotels* 1980 Can L 11 1072 (ABQB).

*Eye Clinic* 2015 (4) SA 34 (SCA) at 41G-I Brand JA held that: "All subsequent actions purportedly taken on behalf of the deregistered company are consequently void and of no effect... unless the reinstatement has, or is afforded retrospective effect". Even so, such retrospectivity can only be of force so long as it is within the tenant of the law. The Court itself cannot breathe life to what is not imbued by the law.

- [29] It further needs to be borne in mind that Zisco Steel, which is the true owner of the property sought to be executed against, was never joined in the initial litigation between Manyika and Ferrocliff. It is instructive that according to Manyika, Zisco Steel was wholly owned by the Government of Zimbabwe. However, the present ownership of the company has since changed and no longer consists solely of The Government of Zimbabwe.<sup>14</sup>
- [30] The order of Makgoba J (as he then was) would, in my view, have far negative result in depriving shareholders of assets belong to a company, which was not involved in the litigation which resulted in the deprivation. Besides Manyika, who originates from Zimbabwe, employed by Ferrocliff must have been privy to the relationship between all three companies, i.e. Ferrocliff, Zisconsteel Distribution Centre (Pty) Ltd (in the liquidation) and Zisco Steel. There is no reason why he did not join all three entities in the same proceedings right from the onset. Further, it does not seem that the consent from the liquidators of both Ferrocliff in liquidation and Zisconsteel Distribution Centre (Pty) Ltd in liquidation was obtained prior to bringing these proceeding which culminated in the order appealed against.
- [31] Consequently, in my view, the appeal should succeed and the order of Makgoba J, as he then was, with respect stands to be set aside for the reasons stated herein above. Needless to state that costs follow the event.

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<sup>14</sup> *Vide* para [6] *supra*.

[32] In the premises I am of the view that the following order should be made:

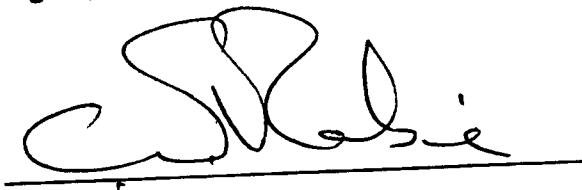
1. That the appeal is upheld with costs.
2. That the order of Makgoba J (as he then was), dated 27 March 2013 is set aside and substituted with the following order:

"That the application is dismissed with costs"

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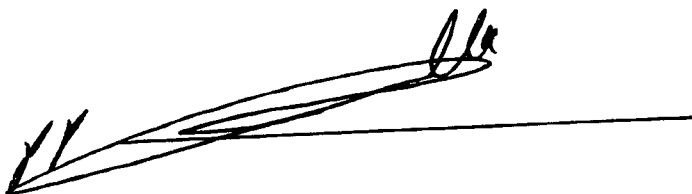
**N.M. MAVUNDLA**  
**JUDGE OF THE HIGH COURT**

I agree, and it is so ordered

A handwritten signature in black ink, featuring a large, stylized 'R' and 'B' followed by a horizontal line, positioned above a horizontal line.

**RABIE**  
**JUDGE OF THE HIGH COURT**

I agree and it is so ordered

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a horizontal line.

**M. ISMAIL**  
**JUDGE OF THE HIGH COURT**

DATE OF HEARING : 28 / 01/ 2015

DATE OF JUDGMENT : 13 / 05/ 2016

APPELLANT'S ADV : ADV. J.R. MINNAAR

INSTRUCTED BY : PEDZISAI-PION ATTORNEYS

1<sup>ST</sup> RESPONDENT'S' ADV : ADV. M. SNYMAN

INSTRUCTED BY : BRANDMULLER ATTORNEYS