Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7405/2006

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

G. WALKER ENGINEERING CC

t/a ATLANTIC STEAM SERVICES **Plaintiff**

and

FIRST GARMENT RENTAL (PTY) LTD (CAPE) **Defendant**

JUDGMENT DELIVERED: 9 JUNE 2011

BINNS-WARD J:

[1] The trial in this matter was set down to be heard on 6 June 2011. When the matter was called there was no appearance on behalf of the plaintiff. This was no cause for surprise Ms *Robinson*, counsel for the defendant, informed me because the plaintiff close corporation had been deregistered as a consequence of its failure

to file its annual return. In this connection Ms *Robinson* relied on an extract from the CIPRO[1] records which had been attached to the defendant's practice note filed in the Judge President's chambers for allocation purposes.[2] It reflected that the plaintiff had been finally deregistered on 16 July 2010.

[2] The deregistration of close corporations is effected by the registrar of close corporations in terms of s 26 of the Close Corporations Act 69 of 1984. The provision is plainly modelled on s 73 of the old Companies Act, Act No. 61 of 1973 (the currently applicable provisions of ss 82 and 83 of the Companies Act 71 of 2008 provide for a somewhat different regime). The differences that do exist between s 73 of the 1973 Companies Act and s 26 of the Close Corporations Act are not material for present purposes. The effect of deregistration is that the corporation's existence as a legal person ceases.[3] Ms *Robinson* appeared to recognise, correctly I think, that the non-existence of the plaintiff precluded reliance by the defendant on rule 39(3) of the uniform rules of court.[4] In my view rule 39(3) finds application when there is a plaintiff in existence who is in default of appearance. A non-existent person cannot be in default of appearance, nor could the defendant in the circumstances seek judgment in terms of the second part of the sub-rule.

[3] I was inclined to consider that the appropriate course was to strike the matter from the roll. Ms *Robinson*, however, contended that such a course would be

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[1] Companies and Intellectual Property Registration Office.
[2] The trial was called in the Third Division on directions from the Judge President. The matter was not dealt with in the Fourth Division as would ordinarily happen; no doubt because the Judge President had been informed that the trial would not proceed as such, for the reasons apparent in this judgment.
[3] In *Miller and Others v NAFCOC Investment Holding Co Ltd and Others* 2010 (6) SA 390 (SCA) at para 11 it was remarked in this regard '*Deregistration.... puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist at death*'.
[4] Rule 39(3) provides:

> *If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment.*

prejudicial to the defendant. Counsel submitted that it was invidious that the defendant should be held indefinitely under a sword of Damocles constituted by the effect of the possible re-registration of the plaintiff corporation by the registrar in terms of s 26(6) of the Close Corporations Act. The effect of re-registration is that the corporation would from the date of the restoration of its registration continue to exist and 'be deemed to have continued in existence as from the date of deregistration as if it were not registered'.[5] The potential restoration of the registration of the corporation entails that the action might be resumed at any time in the future and the defendant would have to continue to provide for that eventuality. The effect of s 15 of the Prescription Act 68 of 1969 is that the running of prescription against the corporation was interrupted when it served summons claiming payment of the alleged debt on the defendant. If the registration of the corporation were to be restored at any time in the future the plaintiff could, by reason of the deeming effect of s 26(7) of the Close Corporation and notwithstanding the intervening passage of time, resume the prosecution of the action. Ms *Robinson* pointed out that the deregistration of the corporation had occurred as consequence of its member's neglect. It would therefore be fairer, she argued, if an order were made absolving the defendant from the instance. Relying on the decision of Greenfield J in the Rhodesian High Court in the matter of *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 (4) SA 458 (R), Ms *Robinson* submitted that the court could afford such a remedy in the exercise of its inherent power to regulate its own procedures. I shall address that submission presently.

[4] Ms *Robinson* also referred me to Snyman J's judgment in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W). The facts in that case

[5] Section 26(7) of the Close Corporations Act.

were starkly distinguishable. In *Silver Sands* the company cited as the plaintiff in the action had been deregistered even before its erstwhile directors purported to resolve on the institution of the proceedings. The fact was discovered by the plaintiff's counsel only on the morning that the trial was called before the learned judge. As a consequence, as the judge recognised, there was in fact no action before him when the matter was called for trial. The proceedings had been null and void from their very inception. In the circumstances Snyman J concluded, quite logically with respect, that it was not competent for him to grant the defendant an order of absolution from the instance. Such an order could only follow in proceedings effectively before the court. The judge therefore held, correctly in my view, that the appropriate order in the circumstances was to strike the matter from the roll.

[5] The facts in *Broughton* were also materially quite different from those which obtain in the current case. In *Broughton* the court was confronted with an application by a defendant for the dismissal of an action on the grounds that the plaintiff company had been dissolved. It would seem from the references in the judgment to the possibility that the dissolved company might be restored to the register in terms of s 277(7) of the Rhodesian Companies Act that the statutory provisions that pertained (to which I have not been able to have reference) were equivalent, or closely analogous to those of s 26 of the Close Corporations Act. The relevant action in *Broughton* had not been set down for trial. The case therefore concerned pre-emptive proceedings by the defendant to dispose of the action. The reasons for the learned judge's conclusion that it would be appropriate in the exercise of the court's inherent powers to grant an order dismissing the action, which he observed would have the effect in the circumstances of an order for absolution from the instance, are, with respect, not altogether clear. The learned judge merely indicated

that the instances listed in the second edition of Herbstein and van Winsen *Superior Court Practice* in which a court is said to have an inherent jurisdiction to dismiss a claim did not represent a *numerus clausus*.

[6] It seems to me, with respect, that the learned judge in *Broughton* overlooked the effect of the proprietary consequences of a company's deregistration. The effect of the deregistration of a company is that all its property, including any claims (Afr. '*vorderingsregte*') it might have against third parties, thereupon vest in the state as *bona vacantia* (see *Rainbow Diamonds Edms Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1(A) at 10C-12G). Thus, without any need for an act of cession or anything of the like, the state has the right, should it so decide, to prosecute the action against the defendant.

[7] Needless to say, however, in the nature of things, the state is probably ignorant of its right in respect of the current action, or even of the existence of the proceedings. In my view rule 15 of the uniform rules has a role to play in the current circumstances. It provides, insofar as currently relevant, (i) that no proceedings shall terminate solely by reason of the death or other change of status of any party thereto unless the cause of such proceedings is thereby terminated and (ii) that whenever by reason of an event falling under (i) it is necessary or proper to introduce a further party, whether in addition to or in substitution for the party to whom such proceedings relate, any other party to the proceedings may add or substitute such person by notice to such party and any other persons who are already parties in the proceedings. The addition or substitution so effected is *ipso facto* effective, subject to the court's powers in terms of rule 15(4).

[8] When application for the restoration of the registration of a company was made under the 1973 Companies Act it was required as a matter of practice that notice of the application be given to the Minister of Finance and the head of any other department which might have any interest by virtue of the vesting of the company's assets in the state as *bona vacantia* upon the company's deregistration (see *Rainbow Diamonds* supra, at 14G). If a defendant in the position of the defendant in the current case wishes to bring matters to finality it seems to me that it would be proper to give notice in terms of rule 15 to the Minister of Finance and, if appropriate, any other Minister with sufficient interest. If in such a case the state fails to take action to prosecute the action when the matter is called for trial an order for absolution from the instance might properly be sought in terms of rule 39(3). The state would not incur liability for any costs in the proceedings unless it actively prosecuted them in place of the deregistered corporation.

[9] The course described in the preceding paragraph was not followed in this matter, which begs the question as to how the matter might appropriately be disposed of now that the trial of the action has been called at a stage when the plaintiff is not in existence and no party had been substituted for it. Ms *Robinson* - to whom I must express the court's appreciation for the full and helpful written argument handed up when the case was called - asked for an order that a rule *nisi* issue calling upon interested parties to show cause on the return date why the action should not be dismissed and that the rule should be published in a local newspaper and in the Government Gazette and served on the Minister of Finance and the Minister of Trade and Industry (the latter presumably as the Minister under whom CIPRO resorts). Had the provisions of rule 15 been availed of this course would not have been necessary. While the order proposed might indeed afford a practicable

solution, it seems to me, however, that the expense entailed in the service and publication of the rule as proposed would impose unduly onerously on the defendant. The intended effect could as effectively and more cheaply be achieved by postponing the trial to 1 August 2011 with a direction to the defendant, if it wishes in the event of a non-appearance by or on behalf of the plaintiff on that date to seek absolution from the instance, to give reasonable notice to the Minister of Finance before that date substituting him as the plaintiff in place of the deregistered close corporation. The notice should be served by the sheriff and accompanied by copies of the pleadings and any other relevant documents comprehended by rule 15(2). It would no doubt be helpful if a copy of this judgment were also served on the Minster at the same time. I therefore propose to postpone the matter for the trial to be called again in the Third Division on the understanding that if there is no appearance for the plaintiff at that time - as seems likely - an order for absolution from the instance may be taken; alternatively, if there is an appearance, the judge presiding in the Third Division can give directions for the further disposal of the action in the Fourth Division.

[10] The following order is made:

> The matter is postponed to 1 August 2011 for the trial of the action to be called in the Third Division, there to be disposed of as contemplated in paragraph [9] of this judgment.

A.G. BINNS-WARD
Judge of the High Court

Date of hearing: 6 June 2011
Date of judgment 9 June 2011

No appearance for plaintiff
Defendant's counsel: R.M. Robinson
Defendant's attorneys Cloete & Boyce Attorneys
c/o Bisset Boehmke McBlain
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