REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 7058/07

In the matter between:

MB BARTER AND TRADING (PTY) LTD Plaintiff

v

ASBURY,JOHN GREGORY Defendant

CORAM	:	The Hon Ms Acting Justice D M DAVIS
FOR THE PLAINTIFF	:	Adv. KJ Van Huyssteen - 011 023 8952
INSTRUCTED BY	:	Fairbridges Attorneys
FOR THE DEFENDANT	:	Adv. E Spamer - 0834491865
INSTRUCTED BY	:	Louw Coetzee & Malan INC
DATE OF HEARING	:	08 October 2012
DATE OF JUDGMENT	:	25 October 2012

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Case Number: 7058/07

In the matter between:

MB BARTER AND TRADING (PTY) LTD Plaintiff

and

ASBURY, JOHN GREGORY Defendant

JUDGMENT DELIVERED ON 25 OCTOBER 2012

DAVIS, AJ:

[1] The plaintiff in this action is a judgment creditor of a Close Corporation formerly registered under the name of HZHD Developments ("the Corporation"), which was purportedly deregistered by the Registrar of Close Corporations ("the Registrar") on 16 March 2007 in terms of the provisions of section of 26 of the Close Corporations Act 69 of 1984 ("the Act"), applicable at that time. [1]

[1] Section 26 of the Act was subsequently amended with effect from 1 May 2011 by section 224(2) of the Companies Act 71 of 2008 as read with item 9 of schedule 3 thereto.

[2] The defendant was the sole member of the Corporation at the time of the purported deregistration. At the time of deregistration the Corporation had an outstanding liability to the plaintiff in terms of a default judgement granted against the Corporation in favour of the plaintiff on 3 November 2005 for payment of the amount of R142 300.50, together with interest and costs ("the judgement debt").

[3] The plaintiff issued summons against the defendant in May 2007, claiming payment of the amount of R142 300.50, plus interest and costs, in terms of the applicable wording of section 26 (5) of the Act, which read 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."*

[4] The defendant in its plea raised the defence that the purported deregistration of the Corporation was invalid for want of compliance with the applicable provisions of section 26 (1) of the Act, with the result that the defendant did not incur liability to the plaintiff in terms of section 26 (5). The defendant filed a counterclaim in which it sought a declaration of invalidity, and the setting aside, of the purported deregistration.

[5] The parties agreed that the matter be disposed of as a special case for adjudication as contemplated in rule 33(1) of the Uniform Rules of Court. Two questions were posed for determination, based on certain agreed facts:

5.1 Whether or not the notice of intention to deregister the Corporation sent by the Registrar complied with the requirements of section 26(1).

5.2 If not, whether the deregistration was valid and whether the defendant could be found liable in terms of section 26(5).

[6] The agreed facts were as follows:

6.1 The Cape High Court granted default judgement against the Corporation in favour of the plaintiff on 3 November 2005 for payment of the sum of R142 300.50, plus interest thereon at the rate of 15.5 % per annum from 1 June 2005 to date of payment, and cost of suit.

6.2. The defendant was at all material times the sole member of the Corporation.

6.3. On or about 09 January 2007 the Registrar despatched three identically worded letters notifying the Corporation of intending deregistration, one of which was addressed to a physical address, and two of which were sent to a postal address.[2] The Corporation did in fact receive the letters.[3]

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[2] The parties did not specify whether these addresses represented the registered office and postal address of the Corporation as contemplated in section 25 of the Act. Nothing turns on this, however, as it is not disputed that the Corporation received the letters.

[3] The letters were not sent by the registered post as stipulated in section 26(1). The defendant originally contended that the failure to use registered post in accordance with section 26(1) rendered the notice invalid for want of compliance with section 26(1). This point was, however, abandoned.

6.4. The said notices sent by the Registrar to the Corporation read as follows:

"As I have reasonable cause to believe that the above named close corporation is not carrying on business or is not in operation, you are hereby informed that it is my intention to deregister the close corporation in terms of section 26(1) of the Close Corporation Act, 1984 (Act 69 of 1984), unless good cause to the contrary is shown within 60 days from the date of this letter.

If the corporation has ceased operations because it is unable to pay its debts and there is no reasonable prospect of meeting these obligations, it will be necessary to –

(a) make an application to a magistrate's or nay other competent court for the liquidation of the corporation in terms of section 68 of the aforementioned Act.

If the Corporation is not liquidated but deregistered, the persons who were members of the Corporation at the time of deregistration will become jointly and separately liable for these debts (section 26(5) of the said Act);

(b) inform me, within 60 days from the date of this letter, that application to a court for the said liquidation has been, or is to be made and furnish proof thereof; and,

(c) lodge with me a copy of the order of court, once granted."

6.5 The Registrar purported to deregister the Corporation on or about 16 March 2007 and published notice thereof in the Government Gazette of 20 April 2007.

6.6 The Corporation did not satisfy the judgement debt and at the time of the purported deregistration had an outstanding liability to the plaintiff in respect thereof.

Did the notice comply with section 26(1)?

[7] The issue is one of statutory compliance. In such cases the enquiry is whether or not the wording of the notice sent by the Registrar measures up against the statutory injunction contained in section 26(1), viewed in the light of the objects sought to be achieved by the section.[4]

[8] This approach received the *imprimatur* of the Constitutional Court in the matter of *African Christian Democratic Party v Electoral Commission and Others*[5], where O' Regan J stated as follows:

> *"The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in* Weenen Transitional Local Council v Van Dyk (2002 (4) SA 653 (SCA) at para [13]):

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[4] *Maharaj & Others v Rampersad* 1964 (4) SA 638 (A) at 646 C
[5] 2006 (3) SA 305 (CC)

'It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434 A – B*). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether "shall" should be read as "may"; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc. may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as "... a trend in interpretation away from the strict legalistic to the substantive" by Van Dijkhorst J in* Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138D-E, *seems to be the correct one and does away with debates of secondary importance only.' "* [6]

[9] Sections 26(1) to (3) of the Act, as it was worded at the relevant time, read as follows:

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[6] Para [25]

"(1) If a corporation has failed, for a period of more than six months, to lodge an annual return in compliance with section 15A or if the Registrar has reasonable cause to believe that a corporation is not carrying on business or is not in operation, the Registrar shall serve on the corporation at its postal address a letter by registered post in which the corporation is notified thereof and informed that if the Registrar is not within 60 days from the date of the 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.

(2) After the expiration of the period of 60 days mentioned in a letter referred to in subsection (1), or upon receipt from the corporation of a written statement signed by or on behalf of every member to the effect that the corporation has ceased to carry on business and has no assets or liabilities, the Registrar may, unless good cause to the contrary has been shown by the corporation, deregister that corporation.

(3) Where a corporation has been deregistered, the Registrar shall give notice of such deregistration and the date thereof in the prescribed manner."

[10] It is evident that Sections 26(1) to (3) circumscribes the power of the Registrar to deregister a corporation by laying down the specific grounds for deregistration and prescribing the procedure to be followed for deregistration.

[11] If, in response to a notice in terms of section 26(1), the Registrar is informed in writing that the corporation is carrying on business or is in operation, he may not deregister the corporation. His right to deregister only arises if:

11.1 he is not informed within 60 days that the corporation is carrying on business or is in operation (s 26 (1); or

11.2 he receives a written statement signed by every member that the corporation has ceased to carry on business and has no assets and liabilities (s 26(2)).[7]

[12] Where the Registrar is prompted to serve a notice in terms of section 26(1), the only ways in which the corporation can avoid deregistration, and thus its members personal liability for the unpaid debts of the corporation, are either to inform the Registrar within 60 days that the corporation is carrying on business or in operation, or to show good cause within 60 days why the corporation should not be deregistered.

[13] Deregistration has far-reaching consequences for members of a corporation since it carries with it the possibility of personal liability in terms of section 26(5). The Constitutional right to just administrative action requires that corporation members, whose rights are materially affected, be afforded a chance of being heard before such a decision is made.[8] To my mind a meaningful right to be

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[7] See Meskin *Henochsberg on the Close Corporations Act* at Com-54.
[8] See *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 (5) SA 306

heard in these circumstances, requires that the members be properly informed of the ambit of the Registrar's powers and the grounds for the exercise of the power to deregister. Without this information they are not in a position to answer the case for deregistration.

[14] Having regard to section 26 as a whole and sections 26(1) and (2) in particular, it seems to me that the letter referred to in section 26(1) is intended to serve a two-fold purpose, namely:

14.1 to inform the corporation and its members thereof a) of the possible impending deregistration and the consequences thereof (personal liability in terms of section 26(5)), and b) of the steps to be taken to avoid deregistration; and

14.2 to elicit a response from the members of the corporation regarding whether or not the corporation is trading or in operation, or has assets and liabilities, with a view to assisting the Registrar to make a proper decision whether or not to deregister a corporation.[9]

[15] If regard is had to the wording of the letter sent by the Registrar to the Corporation[10] (quoted at paragraph 6.5 above), it is clear that the Corporation and its members were not informed of the need to inform the Registrar within

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(W) at 314 H – J para [27]

[9] In *Boland Bank v Mouton* (1997) 4 All SA 67(C) Rose Innes J interpreted section 26(1) as casting a duty on members to inform the Registrar thereof if corporation is trading and has assets and liabilities.

[10] See para 6.4 above.

60 days that the corporation is carrying on business or is in operation. I agree with Mr Spamer, who appeared for the defendant, that the letter omitted to convey that deregistration would not occur if the Registrar was informed within 60 days that the corporation was in business or in operation.

[16] Nor, I might add, does the letter provide any guidance regarding the meaning of good cause. The recipients are left in the dark as to what might constitute good cause. The letter fails to ask pertinently whether or not the corporation has any assets or liabilities. The letter is, further, misleading in that the Registrar purports to impose an obligation on the members of the corporation to make application to court for the winding-up of a corporation if it has ceased operations due to an inability to pay its debts, where no such obligation exists and the Registrar lacks any power to dictate the conduct of the members in this regard.

[17] In my view the letter sent by the Registrar is inadequate because it fails to convey accurately and properly the information required to place the members in a position to ward off impending deregistration. I consider that the letter despatched to the Corporation failed to achieve the object of sections 26(1) and (2), inasmuch as it failed:

17.1 properly to inform the recipients that deregistration could be avoided by informing the Registrar in writing that the corporation was carrying on business or in operation,

17.2 to pose clear and unambiguous questions designed to elicit a response

containing the information pertinently required by Registrar to assist him in making his decision.

[18] Mr van Huyssteen, who appeared for the plaintiff, argued that because the letter informed the recipient of the Registrar's belief that the Corporation was not carrying on business or was not in operation, and of the Registrar's intention to deregister the Corporation in terms of section 26(1) of the Act unless good cause to the contrary were shown within 60 days, every element of section 26(1) was dealt with in the letter, or that there was at least substantial compliance with the requirements of section 26(1).

[19] I do not agree. In my view it was not sufficient for the Registrar merely to refer to the nebulous concept of good cause, and to ignore the express injunction in the section to inform the recipient of the fact that the Registrar would deregister the Corporation if not informed in writing within 60 days that the Corporation was carrying on business or in operation or unless good cause was shown.

[20] The section draws a clear distinction between good cause as a ground for avoiding deregistration and the situation where the Registrar is informed in writing that the Corporation is carrying on business or is in operation. In the case of the former, the Registrar has a discretion; in the latter he has none: he has no power to deregister once he has been so informed. The different grounds and powers of the Registar should have been clearly discernible from the section 26(1) notice, but instead the notice only referred to good cause.

[21] Mr van Huyssteen contended further that the letter send by the Registrar was

sufficient to put the defendant on his guard he Registrar intended to deregister the corporation if he received no response, and that this was all that subsection 26(1) required. He argued that it would be unduly burdensome to expect the Registrar, to provide the level of information contended for by the defendant. I disagree on both scores.

[22] Given the view I take of the purpose of subsection 26(1) and (2), and having regard to the express wording of the section, I consider that subsection 26(1) goes further than merely requiring the recipient to be put on guard. It requires that the recipient be notified and informed. I do not think that it is too much to ask to expect the Registrar to refer accurately to the wording of the section, to convey the correct information and to ask the correct questions to enable him to perform his function. I agree with the following statement by Maxwell:[11]

> *"Where powers, rights or immunities are granted with the direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature."* [12]

[23] Furthermore, the proper construction of a statute cannot be influenced by administrative difficulties - real or imagined - which might be encountered in

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[11] Interpretation of Statutes 11ed, p 364

[12] Quoted with approval in *Springs Town Council v Macdonald* 1968 (2) SA 114 (T) at 120 E – F (referring to *Rex v Noorbhai* 1945 AD 58 and *Nochomowitz v Bellvile Liquor Licensing Board and Another* 1956 (2) SA 228 (A) at p 235)

carrying it out the obligations imposed by the section.[13]

[24] I therefore find that the letter despatched by the Registrar to the Corporation did not comply with the requirements of section 26(1) because it was not sufficient to achieve the objects of the section.

The effect of non-compliance with section 26(1) on the subsequent deregistration

[25] The Full Bench of the South Gauteng High Court had occasion to consider this question in the case of *Boseme and Others v Rogers* ("Boseme"),[14] where the personal liability of the members under section 26 (5) was challenged on the basis that neither the corporation nor the members had received any notification from the Registrar in terms of section 26(1) informing them of his intention to deregister the corporation.

[26] Dealing with the effect of non-compliance with section 26(1), Claasen J stated as follows:

> *"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) and/or (7) 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*

[13] *Amalgamated Packaging Industries Ltd v Hutt and Another* 1975 (4) SA 943 (A) at 951 C
[14] Unreported decision in case number A5029/2011, handed down on 23 November 2011 in an appeal against an order granting summary judgment.

26(5) which provides for personal liability of the members if the corporation is deregistered while having outstanding liabilities, only comes into operation if the mechanisms provided for in section 26(1) was complied with. It therefore follows that the defence described in the affidavit opposing summary judgement is a valid defence to the alleged deregistration of the corporation. 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 then similarly the members would be unable to defend themselves against the serious consequences of deregistration." [15] (Underlining added)

[27] Although Boseme's case concerned a situation where the complaint was that the section 26(1) notice had not been received at all, his reasoning applies equally to a case such as the present where the complaint is that the section 26 (1) notice is defective because it fails to inform the members of crucial information which they require to be in able to defend themselves against the serious consequences of deregistration.

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[15] At para (8) and (9)

[28] It is also apposite to refer to the decision in *Firstrand Bank Ltd v Davis and Others* ("Davis")[16] in which Hurt J found that section 26(1) had not been complied with[17] and consequently held that there had been no effective deregistration of the corporation and no resultant liability for the members in terms of section 26(5).[18]

[29] I am of the view that the decisions in Boseme and Davis are clearly correct and ought to be followed. I therefore hold that by virtue of the non-compliance of the notice of deregistration with the requirements of section 26(1), for the reasons stated above, the Registrar's purported deregistration of the corporation is invalid and ineffective.

[30] Mr van Huyssteen argued, with reference to *Mouton v Boland Bank* ("Mouton"),[19] that restoration of the registration of a close corporation does not expunge the personal liability of a member which arises on deregistration. That is indeed correct. Mouton's case, however, was concerned with the proper interpretation of section 26(7) and not with section 26(1). It dealt with the personal liability of members in the situation where there had been a *valid* deregistration, but the registration of the corporation was subsequently restored in terms of section 26 (7). The Court in Mouton's case found that in such instances, the personal liability which attached to a member in terms of section 26(5) was not removed by the subsequent restoration of registration in terms of section 26(7).

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[16] 2004 (1) SA 31 (NPD)

[17] The letter had been sent by ordinary instead of certified post as required by the Section at that time.

[18] At 34H

[19] 2001 (3) SA 877 (SCA)

[31] The present case, by contrast, like that of Davis and Boseme, deals with the situation where the very validity of the act of deregistration is impugned, and hence also the resultant liability in terms of section 26(5).[20]

[32] Given that the act of deregistration of the Corporation was invalid for lack of compliance with section 26 (1), it follows that no personal liability could attach to the defendant in terms of section 26(5) of the Act.

Conclusion

[33] It therefore follows that the plaintiff's claim falls to be dismissed and that the defendant is entitled to the relief sought in its counterclaim.

[34] There remains the question of costs, in particular the issue of the reserved costs of the defendant's successful application for leave to amend its plea and to introduce a belated counterclaim for a declaration of invalidity, and the setting aside of, the purported deregistration of the Corporation,[21] which application was opposed by the plaintiff.

[35] It is well established that a party who seeks an indulgence should pay all the wasted costs arising as a result, including the costs of reasonable opposition

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[20] The distinction was recognised by Claasen J in Boseme's case, *supra* n 10, at para 5

[21] Erasmus J granted an Order on 23 April 2009 which gave leave such leave to the defendant, including leave to proceed against the Registrar as the second defendant in reconvention. There is no appearance for the Registrar, who has been duly served with copies the Court's order and all pleadings in the action.

thereto.[22] The counterclaim which defendant sought to introduce was way out of the prescribed time limits[23] and defendant was therefore seeking a significant indulgence. In my view it cannot be said that the plaintiff's opposition was unreasonable, and I see no reason why the defendant should not be ordered to pay all the wasted costs occasioned by the application for leave to amend, such costs to include the plaintiff's costs of opposition thereto. In all other respects the costs are to follow the event.

[36] In the result I make the following order:

1. The plaintiff's claim is dismissed.

2. It is declared that the purported deregistration of the close corporation HZHD Developments CC (Registration Number CK 2004/040378/23) was invalid for want of compliance with section 26(1) of the Close Corporations Act 69 of 1984.

3. The purported deregistration of HZHD Developments CC by notice published in the Government Gazette on 20 April 2007 is set aside.

4. The plaintiff is ordered to pay the defendant's costs in the action, with the exception of the wasted costs occasioned by the defendant's application for leave to amend his plea and to introduce a belated counterclaim. The latter costs are to be borne by the defendant and shall include the plaintiff's costs of opposition to the said application.

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[22] See AC Cilliers *Law of Costs* para 2.34, and authorities cited there
[23] Summons was served in June 2007 and defendant sought to amend its plea and introduce a counterclaim for the first time in September 2008

DAVIS AJ