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

CASE NO: 16183/2012

In the matter between:

FIRSTRAND BANK t/a RMB PRIVATE BANK	**Applicant**
and	
MIKO NO. 166 (PTY) LTD	**Respondent**

CASE NO: 17089/2012

MIKO NO. 170 (PTY) LTD	**Applicant**
and	
FIRSTRAND BANK t/a RMB PRIVATE BANK	**Respondent**

CASE NO: 19033/12

FIRSTRAND BANK t/a RMB PRIVATE BANK	**Applicant**
and	
DONAL EZARD	**First Respondent**
MIKO NO 166 (PTY) LTD	**Second Respondent**
MIKO NO. 170 (PTY) LTD	**Third Respondent**

JUDGMENT : 7 NOVEMBER 2012

GAMBLE, J:

INTRODUCTION

[1] On 18 October 2012 this Court heard three applications involving Firstrand Bank Ltd t/a RMB Private Bank ("RMB"), Miko No. 166 (Pty) Limited (*"the property owning company"*), Miko No. 170 (Pty) Limited ("*the hotel business*") and Donal Ezard ("Ezard"), who is the director of the two companies and their so-called "*guiding mind*"

[2] The applications arose out of an order granted by Stelzner AJ on 21 August 2012 in which RMB was granted urgent *ex parte* relief to perfect a notarial bond over certain movable property owned by the property owning company. It was common cause that at least some of the movables belonged to the property owning company and, further, that all of the goods which were the subject of the notarial bond were items of furniture, appliances and similar effects which were being used by the hotel business in the running of its exclusive boutique hotel (known as "*Ezard House*") in the building owned by the property owning company in Theresa Avenue in Camps Bay.

[3] Three days after RMB had obtained the urgent *ex parte* order from Stelzner AJ, the Sheriff (accompanied by certain officials from RMB and its attorney Mr Brown and members of his staff) entered the hotel and began attaching the movable items which Stelzner AJ had authorised be attached but not removed from the premises. At the same time Ezard was told that he was no longer in control of the hotel business and that RMB would be installing its own managing management

team. Ezard was permitted to stay on in the premises and occupy his personal quarters as before.

[4] The *rule nisi* granted by Stelzner AJ was returnable on 19 September 2012 and on that day Traverso DJP made an order providing for the hearing on 18 October 2012 with a timetable for the filing of further papers.

[5] On 31 August 2012 the hotel business launched an urgent application for spoliatory relief against RMB, aimed at restoring to it control of the business. This application, too, was postponed by Traverso DJP to be heard on 18 October 2012.

[6] On 3 October 2012 RMB launched a further application against Ezard, the hotel business and the property owning company in which it sought an order directing them to account to it for certain monies allegedly received by them since 24 August 2012. This application (which the parties called "*the payment application*") was also before the Court on 18 October 2012.

[7] When the matter was called, counsel for Ezard and the companies, Mr Acton, applied for leave to intervene on behalf of the majority shareholder (a British Virgin Islands entity) of both companies. This was not opposed by RMB which was represented in these proceedings by Mr Smalberger and the intervention was granted.

THE STATUS OF MIKO NO. 166 (PTY) LTD

[8] It is common cause that the property owning company was deregistered by the Companies and Intellectual Properties Commission ("the CIPC") on 24

February 2011, pursuant to its failure to render its annual returns for two successive years. That deregistration took place in terms of Section 82(3)(a)(i) of the Companies Act No. 71 of 2008 ("the Companies Act").

[9] It was further common cause that the power to re-instate the registration of the property owning company vests in the CIPC in terms of Section 82(4) of the Companies Act. An applicant for such re-instatement must comply, *inter alia*, with the provisions of Regulation 40(7) of the Companies Regulations published under GNR 351 in Government Gazette 34239 dated 26 April 2011 ("the Regulations").

[10] On 19 June 2012 the CIPC confirmed in writing to the auditors of the property owning company that it had received the requisite documentation for the re-instatement of the company to the companies register and that it was therefore in the process of being re-instated. The CIPC pointed out, however, that this process could only be finalised once the outstanding returns had been filed at which stage the company's status would be changed to "*in business*".

[11] It was common cause too at the hearing that the annual returns have not yet been filed and that the company has not yet been reregistered. Its current status according to the CIPC is "*in deregistration process*" and the CIPC holds the view that "*the company's legal persona has been re-instated pending the filing of outstanding returns*". I shall revert to this point later.

[12] Whatever the current status of the property owning company may be, (and I pause to say that that is a legal question which does not depend on the say-so

of the CIPC), it is undisputed that during August 2011 and May 2012 the company was deregistered.

THE REGISTRATION OF THE NOTARIAL BOND

[13] The affidavits reveal that during the second half of 2011 the property owning company was in financial difficulty. An earlier loan, which had been advanced in 2003 and secured by a mortgage bond in favour of RMB, was in arrears, as was a further loan advanced by RMB thereafter.

[14] In August 2011 the parties concluded a settlement agreement which purported to consolidate the debt of the property owning company and to map out a way forward to liquidate that liability and to sell the property if necessary. Ezard stood surety for the property owning company's obligations to RMB under this agreement of settlement.

[15] On 9 May 2012 a "*General and Special Notarial Collateral Bond*" ("the notarial bond") was passed by the property owning company in favour of RMB over a substantial number of its movable assets at the hotel as security to RMB to whom the company was then indebted in an amount in excess of R16m. The notarial bond records in great detail the encumbered assets in every room in the hotel and includes items in the kitchen, the garden and the garage. In essence, the notarial bond covers all of the movables on the premises necessary to run the hotel business.

[16] In terms of Clause 11 of the notarial bond and in the event of default by the property owning company, RMB was -

> *"entitled forthwith and without notice or recourse to law, to claim payment of all amounts owing to ... [it] ... and, in any such event ... [RMB] ... shall be entitled to take immediate possession of the business bonded in order to protect the security hereby given."*

[17] The same clause also provides that the property owning company –

> *"binds itself to allow ... [RMB] ... peaceable and speedy possession, and at option to continue the business for its own account and benefit until such time as the capital and all other amounts due to it shall be finally paid off or until such time previous to payment as it may desire to withdraw..."*

THE APPLICATION BEFORE STELZNER, AJ

[18] Subsequent to argument in this matter I have perused a transcript of the proceedings before Stelzner AJ who was the fast track Judge on the day that RMB sought to perfect its possession under the notarial bond. The urgent *ex parte* application was called in open Court and the proceedings were mechanically recorded. At this hearing RMB was represented by Mr Brown, an attorney who presumably holds the requisite certificate entitling him to appear in the High Court. Counsel were furnished with an electronic copy of this transcript and were invited to make further written submissions in relation thereto if so desired. Only Mr Acton responded to this invitation.

[19] In the interchanges between the Court and Mr Brown, Stelzner AJ was

at pains to establish that the extent of the order sought was perfection of the notarial bond and that RMB was not requesting that the Sheriff be authorised to remove any of the items which formed the subject of the notarial bond. Mr Brown confirmed this on several occasions.

[20] It was clear, too, from these exchanges that RMB realised that liquidation proceedings against the property owning company were imminent and that it wished to ensure that its rights under the notarial bond were preserved and confirmed as real rights through the taking of possession so as to afford it preference in insolvency [1].

EVENTS SUBSEQUENT TO THE GRANT OF THE *RULE NISI*

[21] On Friday 24 August 2012, a large contingent of persons including Brown and the Sheriff descended on the hotel premises and took control of the business despite the protestations of Ezard and later his attorney telephonically. A new manager known as "*Barry*" was installed there and then. The Sheriff also threatened to evict Ezard from the premises and was actively supported in this endeavour by Brown.

[22] It will be observed that despite the pressing urgency with which the application was brought before Stelzner AJ without notice, RMB took no further steps between Tuesday 21 August and Friday 24 August 2012 to approach the Court for an order evicting Ezard from the premises or authorising it to take over the business as it

[1] Development Bank of Southern Africa Limited v Van Rensburg and Others NNO 2002 (5) SA 425 (SCA) at 436 C; 443C.

would have been entitled to do under clause 11 of the notarial bond.. Yet, when RMB's agents arrived at the hotel on the Friday it was clearly a well-planned exercise and even included representatives of the Pam Golding estate agency who were clearly considering the marketing of the property even though judgment on the mortgage bond had not yet been taken.

[23] RMB then immediately took over the running of the hotel business and Ezard was excluded from any further involvement in the enterprise although he was ultimately permitted by the Sheriff to continue to occupy his living quarters in the hotel. In his founding affidavit in the spoliation application Ezard complains bitterly about the incompetence of "*Barry*" and the others who are now running the hotel business and says that the reputation of the hotel has suffered a serious dent. Ezard's claim that his hotel business has effectively been hi-jacked by RMB is not without substance.

[24] In argument Mr Smalberger was hard-pressed to justify the seizure of the business by RMB. He suggested that the running of the hotel by RMB was necessary to effect control of the movables after the perfection order had been granted. In my view, there is little substance in this argument. Once a creditor has been given permission to take possession of the goods but not to remove them (as Stelzer AJ expressly stated was the purpose of his order, and as the order itself in any event states) the Sheriff will ordinarily go to the premises, present the order to the person in control of the movables, complete a detailed inventory of each item and then subject them to attachment on behalf of the applicant for perfection, thereby taking possession of those movables on behalf of the creditor.

[25] In this case the Sheriff was specifically directed by the Court not to remove the items attached and so the Sheriff would have been entitled to take reasonable steps to affect control over the movement of the assets so as to continue to retain possession. This could have included the posting of a security guard outside the hotel or even changing the locks to the premises so as to effect possession in terms of the common law. In the result, the Sheriff chose to remove the keys to the premises from Ezard and to hand them to a representative of RMB. That, in my view, was sufficient to maintain continued possession of the movables in terms of the common law principle of *clavium traditio* [2] , and thereby give effect to RMB's real right in terms of the notarial bond.

[26] In the absence of a Court order, the high-handed and unauthorised manner in which RMB and its cohorts set about seizing control and then running the hotel business was, in the circumstances, undoubtedly an act of spoliation. Miko No. 170 (Pty) Ltd is therefore entitled to immediate return of its hotel business in terms of the relief sought in case no. 17089/2012.

[27] In light of this finding, there is no basis for the relief sought in the so-called "*payment application*" brought under case no. 19033/2012 which similarly falls to be dismissed.

THE CONSEQUENCES OF THE DEREGISTRATION OF MIKO NO. 166 (PTY) LTD

[28] As I have already stated, it is common cause that the property owning company was deregistered in February 2011. The effect of that administrative act on

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[2] CG Van der Merwe Sakereg (2de uitgawe) p315; Wille's Principles of South African Law (9th Ed) p525

the part of CIPRO (the forerunner of the CIPC under the old 1973 Companies Act) was described thus by Cloete JA in the Nafcoc Investment case [3]:

> *"Deregistration, on the other hand, puts an end to the existence of the company. It's corporate personality ends in the same way that a natural person ceases to exist at death."*

I have no reason to believe that the position is any different under the current companies legislation. Indeed, Mr Smalberger accepted this as a given.

[29] One of the consequences of the statutory demise of a company is that its assets accrue to the State as *bona vacantia* [4]. Further under the former companies regime it was an established principle that the Minister of Finance, as the minister responsible for the Treasury, had to be joined in any subsequent application to Court for the reversal of a company's deregistration [5].

[30] A further provision under the old regime was that the dissolution of a deregistered company could be set aside by a subsequent order of Court. But in those circumstances, the affairs of the company were revived only from the date of the Court's order. In Ebrahim v Evans N.O.[6], Broome J, following an Appellate Division judgment of Holmes JA [7], summed up the position as follows:

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[3] Miller and Others v NAFCOC Investment Holding Co Ltd and Others 2010 (6) SA 390 (SCA) at 395 D
[4] Rainbow Diamonds (Edms) Bpk en Andere v SANLAM 1984 (3) SA 1 (A) at pp11-12
[5] Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) at 487C
[6] 1990 (4) SA 424 (D and C)
[7] Pieterse v Kramer N.O. 1977 (1) SA 589 (A)

> *"In my view 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, or bring it back to life."*[8]

[31] Consequently, any purported actions taken by or on behalf of the deregistered company during the period between deregistration and reregistration are void [9]. A question which has troubled our Courts repeatedly was whether an order for restoration of the registration of a company under Section 73(6) of the 1973 Companies Act (and its predecessor under the 1926 Act) necessarily validated all of the acts of the company taken during its state of dissolution in circumstances where the company had continued to carry on business after (and usually oblivious of) deregistration[10].

[32] The matter came up for consideration before the Supreme Court of Appeal in 2007[11]. Brand JA was asked to find that an order under Section 73(6) of the old Companies Act had the effect of the company returning to an "*as you were*" position in terms whereof all parties are placed in the same position that they were at the time of deregistration. His Lordship was reluctant to grasp the nettle and remarked in an *obiter dictum* that the matter was not that simple:

> *"[22] With regard to the effect of S73(6) the basic premise of the*

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[8] p427G
[9] Pieterse v Kramer N.O. *supra* at 601H
[10] See for example Ex Parte Varvarian 1965 (4) SA 306 (W); Ex Parte Sengol Investments (Pty) Ltd 1982 (3) SA 474 (T); Ex Parte Jacobsen 1984 (2) SA 372 (W)
[11] Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA)

judgment in Varvarian supra...appears to be that an order under the section is no more than a return to 'as you were' whereby all parties involved are retrospectively placed in the same position as they were prior to deregistration. Proceeding from that premise the accepted notion seems to be that the rights and obligations of all parties remain the same as prior to deregistration. Since all parties have the same defences available against each other as prior to deregistration, no one can be prejudiced by the restoration order.

[23] But, with respect to De Vos J, the reality is not that simple...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, a 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.

[24] In light in all of this, it is an oversimplification to regard a restoration order as no more than an 'as you were'. It can clearly cause severe prejudice to third parties. In Sengol (supra at 477 C) Van Dijkhorst J gave the example of those who, upon deregistration, acquired rights to company property, who will lose those rights when the registration of the company is restored. Examples of such prejudice have also been recognised in other jurisdictions (see E.G. Smith v White Knight Laundry Ltd [2001] EWCA Civ 660, [2001] 3 All ER 862); Tymans Ltd v Craven [1952] 2 QB 100, [1952] 1 All ER 613)."

[33] In conclusion Brand JA observed that under the 1973 Companies Act restoration of a company was a discretional remedy in the hands of the Court:

> *"[26] According to S73(6)(a) the Court's power to grant a restoration order is introduced by the word 'may'. It follows that the Court has a discretion to grant the order. It is not bound to do so, even if all the prerequisites imposed by the section are satisfied…One of the considerations the Court will inevitably have regard to in the exercise of that discretion, is the potential prejudice the restoration may cause to third parties.*

[34] In the Peninsula Eye Clinic case *supra* [12] Binns-Ward J observed that the process of restoration of a company to commercial life under the 2008 Companies Act is now in the hands of the CIPC. And, as His Lordship went on to demonstrate in a detailed examination of the statute and the regulations, the impact of Section 82(4) of the Companies Act was possibly that "*restoration [of a company] to the register is meant to be with retrospective effect*"[13].

[35] However, as Binns-Ward J pointed out, a condition precedent to such restoration was the filing of the outstanding returns. The ratio of the judgment on the issue of retrospectivity is clearly an *obiter dictum* and the Court was reluctant to make any firm pronouncement on the point without the benefit of full argument.

[36] In the instant case, as in Peninsula Eye Clinic, the outstanding returns

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[12] See p488C
[13] P495F-G

have not been filed even though Ezard has expressly declared that it is his intention to ensure that the reregistration of the property owning company takes place. The condition precedent for reregistration has therefore not been established and clearly the CIPC cannot express a final view on the application. Its classification of the company's status as "*in deregistration*" is a fiction of its own making and is not provided for in either the Companies Act or the Regulations [14].

[37] To be sure, in circumstances where the annual returns have not yet been filed, it is premature to begin considering whether reinstatement of the property holding company has any retrospective effect. Moreover, as Insamcor and Peninsula Eye Clinic show, there are third parties, including the State, who have an interest in the granting of any declaration of retrospectivity, and who have the right to be heard before consideration is given to any such declaration. Not all of those parties are presently before the Court and for that reason too, it would not be appropriate to consider the question of retrospectivity now.

[38] The position then is that at the time that the parties concluded the settlement agreement and pursuant thereto, the notarial bond was granted and subsequently registered, the property owning company was deregistered and in a state of corporate demise. It could not take the steps necessary to conclude the settlement or pass the notarial bond over its movable assets and so, at this stage, the notarial bond is enforceable at the behest of RMB.

[39] Presently there is no ruling (whether by way of administrative direction,

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[14] Peninsula Eye Clinic case, *supra* at 493 D-F

Court order or otherwise) which has rendered those void acts by the company enforceable. I should not be taken to be saying that this is either possible or not possible at some stage in the future. It is only once all the conditions precedent for the restoration to corporate existence have been met that that issue falls to be determined.

THE URGENT EX PARTE APPLICATION

[40] A party that approaches a Court *ex parte* on an urgent basis has a number of hurdles to clear before it is entitled to its order. Firstly, under Rule 6(12)(b) it must establish compelling urgency and demonstrate why it cannot be afforded substantial redress at a hearing in due course.

[41] Stelzner AJ was clearly persuaded as to the urgency of the matter on the papers presented to him, yet the delay of three days in executing the order gives the lie to RMB's professed concerns about the potential dissipation of the assets at the hands of Ezard. Moreover, the fact that Ezard continued to conduct the hotel business at the property which had various advance reservations show that the prospects of him removing the very assets necessary to run a luxury boutique hotel, were remote.

[42] With the benefit of hindsight (always an exact science) it is now clear that the matter was not as urgent as RMB claimed before Stelzner AJ. On the return day, however, it was manifestly urgent given the consequences of the unlawful spoliation of the hotel business by RMB.

[43] There is, however, a more fundamental concern about RMB's conduct in this matter. It was clearly enunciated by Nugent AJA in National Director of Public Prosecutions v Basson [15]:

> *"[21] Where an order is sought ex parte it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a Court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a Court to set aside an order, even if the non-disclosure or suppression was not wilful or male fide (Schlesinger v Schlesinger 1979 (4) SA 342 (W) at 348E-349B)."*

[44] As the transcript of the proceedings show, Mr Brown failed to inform the Court of the following material issues, all of which were then known to him and his client, or could have been established by them through the exercise of reasonable care:

44.1 that the company had been deregistered in February 2011;

44.2 that the notarial bond had been passed at a time when the company was legally "*dead*";

44.3 that there was a strong argument to suggest that the passing of the notarial bond was a void act on the part of

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[15] 2002 (1) SA 419 (SCA) at 428H-J

the company;

44.4 that no steps had been taken to address such void act;

44.5 that the company had not yet been restored to life by the subsequent intervention on the part of the CIPC;

44.6 that RMB intended taking over the running of the hotel business;

44.7 that RMB did not intend taking immediate possession of the movables once the perfection order had been granted; and

44.8 that Ezard continued to run the hotel business as before and intended to do so for the foreseeable future.

[45] In addition, Mr Brown did not draw Stelzner AJ's attention to the decision in Peninsula Eye Clinic [16], nor did he expressly refer the Court to the so-called "*Windeed*" report annexed to RMB's founding affidavit in which the status of the property owning company is categorised as "*Deregistration Final*".

[46] Finally, in the founding affidavit presented by RMB in the perfection

[16] The judgment was handed down on 2 May 2012, was reported on the SAFLI website in May 2012 and in the SA Law report for August 2012.

application no mention is made whatsoever of the fact that the property owning company had either been deregistered or that it was in the process of being restored to the company's register. That this information was available to RMB is apparent from the documentation subsequently annexed to its replying affidavit in that matter.

[47] I consider that the failure of RMB and its attorneys to draw these facts and circumstances to the attention of Stelzner AJ constitutes a gross breach of the duty of good faith expected by a party bringing an urgent *ex parte* application. I have little doubt that had Stelzner AJ been alerted thereto, he would not have granted the order sought by RMB without at least hearing Ezard's side of the story.

[48] And, as I have demonstrated, there was no real risk of dissipation of the movables which warranted an approach to the Court without notice. In my view, this is not the sort of case contemplated by the Court in Phillips and Others v National Director of Public Prosecutions [17] in which the non-closure of facts was found not to be material.

COSTS

[49] Mr Acton asked for an order of punitive costs against RMB in both the perfection and the spoliation applications. In light of what I have said above, particularly in regard to the breach of the duty of good faith, I am satisfied that such an order is warranted.

[50] In regard to the payment application, Mr Smalberger submitted in reply

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[17] 2003 (6) SA 447 (SCA) at 456A-D

that the application should be postponed *sine die*. In light of my finding in the spoliation application there is no purpose in keeping the matter alive. I am not persuaded, however, that a punitive costs order is warranted in that matter, particularly given that the Respondents therein have not yet taken any steps to respond thereto and so incurred unnecessary legal costs.

ORDER

[51] In the circumstances I make the following orders:

A. **Case no. 16183/2012 (The Perfection Application)**

1. The *rule nise* granted on 21 August 2012 is discharged.

2. The Applicant is to pay the Respondent's costs on the scale as between attorney and own client.

B. **Case no. 17089/2012 (The Spoliation Application)**

1. The Respondent is directed to immediately restore control of the business of the hotel run from the premises situated at 20 Theresa Avenue, Camps Bay, Western Cape, to the Applicant, including ensuring that the person named "*Barry*" who is currently residing there and any of its agents immediately vacate the premises;

2. Respondent is interdicted and restrained from, in any manner, preventing the Applicant from operating its hotel business from the premises situated at 20 Theresa Avenue, Camps Bay,

Western Cape.

3. It is declared that:

3.1 the Applicant is entitled to control and management of the hotel business conducted from 20 Theresa Avenue, Camps Bay, Western Cape; and

3.2 the Respondent is not entitled to interfere with or hamper the Applicant's ability to control and manage the hotel business conducted from 20 Theresa Avenue, Camps Bay, Western Cape.

4. The Respondent is to pay the Applicant's costs on the scale as between attorney and own client.

C. **Case no. 19033/2012 (The Payment Application)**

The Application is dismissed with costs.

GAMBLE, J