IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN

Case No. CA 17/2011

"REPORTABLE"

Heard on: 3 August 2011
Delivered on: 19 April 2012

In the matter between:

VILLAGE FREEZER t/a ASHMEL SPAR **Appellant**

and

C A FOCUS CC **Respondent**

JUDGMENT

Makaula J:

A. *Introduction:*

[1] This is an appeal from the Magistrate's Court against an order dismissing a special plea. I shall refer to the parties as they appeared in the court below.

[2] The plaintiff issued summons against the defendant for payment in respect of professional services rendered. In its special plea, the defendant raised two defences viz (a) that the plaintiff was not in existence at the time the summons was issued and (b) that the claim had prescribed.

B. ***Background:***

[3] At the time the special plea was argued, the plaintiff and the defendant agreed on what they termed *"common cause statement of facts"* which are also relevant for the purposes of this appeal. The facts agreed upon by the parties are the following;

> "1. The Plaintiff's claim against the Defendant is for recovery of monies due in respect of services allegedly rendered to the Defendant during the period April 2006 to September 2006, the time and the cause of action in this matter arose.
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> 2. The Plaintiff Close Corporation was deregistered on 8 November 2007.
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> 3. The Plaintiff issued summons on 12 March 2008 claiming monies due in respect of services rendered during April to September 2006 and accordingly summons was issued in this matter after the deregistration of the Plaintiff Close Corporation on 8 November 2007.
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> 4. In the absence of any interruption of prescription by the issue of summons in this matter, the Plaintiff's claim would have prescribed at the end of September 2009.
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> 5. Application was made for the re-registration and restoration of the Close Corporation which was granted by the registrar of Close Corporation on 11 March 2010." *(sic)*

The defendant was deregistered by the Registrar of Companies upon receipt of a statement by the defendant's sole member to the effect that it never traded and had no assets or liabilities.

[4] Once the special plea was dismissed, the defendant filed a notice of appeal relying on the following grounds;

> "1. The Magistrate erred in holding that a litigant, that did not have independent judicial existence at the time that Summons was issued, could issue a Summons that could effectively interrupt prescription.
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> 2. The Magistrate erred in finding that a Summons could be issued on behalf of an entity which does not exist, by virtue of the provisions of Section 2 (2) of the Close Corporations Act No. 69 of 1984.
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> 3. The Magistrate erred in failing to pay regard to the fact that the cause of action on which the Plaintiff sued arose in September 2006, and that such cause of action would have finally prescribed through efluxion of time by September 2009, at a time when the Plaintiff was deregistered and did not exist.
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> 4. The Magistrate erred by failing to have regard to the fact that, where the Plaintiff was only reregistered in March 2010, the cause of action upon which the Plaintiff ultimately relied had finally prescribed in September 2009, before the Plaintiff regained status as a legal entity.
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> 5. The Magistrate erred in failing to find that the purpose of Section 26 (7) of the Close Corporations Act of 1984 was to regulate the position of a Close Corporation in regard to its previous liabilities only, and does not cater for the creation of retrospective judicial personality and ***locus standi*** to perform judicial acts by members at a time when the Close Corporation did not exist, as a matter of fact.
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> 6. The Magistrate erred in failing to interpret the deeming provision in Section 26 of the Close Corporations Act as being necessary to achieve the legislative purpose of that section only, namely to be confined to the restoration of assets and liabilities to a Close Corporation so that such assets

and liabilities can be applied to the ends ordained by law – and accordingly further erred in not holding that the imaginary state of affairs created by the deeming provision, should not be extended further, as the Plaintiff has pursued in this matter.

7. The Magistrate erred in failing to find that the Plaintiff's claim had not prescribed, before the Plaintiff was reregistered, in that a non-existent entity cannot issue a Summons, and prescription intervened in September 2009 before the Plaintiff was reregistered."

C. ***Issues:***

[5] The main issue before us is the interpretation to be given to **Section 26,** especially **Section 26 (7) of the Close Corporation Act 69 of 1988** *(the Act)* as against the backdrop of the **Prescription Act 68 of 1969** *(the Prescription Act).*

D. ***Argument:***

[6] **Ms Watt,** counsel for the defendant, argued that the purpose of **Section 26 (7) of the Act** is to restore a corporation with its assets and liabilities which existed before deregistration. She argued further that the legislature did not envisage that **Section 26 (7) of the Act**, would create retrospective judicial personality to perform judicial acts and to validate or revive proceedings which were commenced during the period of deregistration. She submitted that the claim prescribed in September 2009 and therefore the subsequent restoration of the plaintiff could not have revived a claim which had already prescribed.

[7] The plaintiff argued, on the other hand, that **Section 26 (7) of the Act** provides for similar provisions as **Section 73 of the Companies Act 61 of 1973** *(the*

Companies Act). Plaintiff submitted that both **Section 26 (7) of the Act and Section 73 of the Companies Act** make *'it apparent that a restoration to the register of companies (by court order, with or without conditions) or the register of Close Corporations by the Registrar has as a matter of substantive law, retrospective effect, i.e. it exists as if it had never been deregistered.'* Plaintiff argued that the only difference is in the procedures prescribed by the relevant sections.

[8] Plaintiff further submitted that once the process of restoration is completed, the status *quo ante* is restored with the ultimate effect that for all intents and purposes in law, the plaintiff is deemed to have existed from 21 September 2007 until the date of its restoration i.e., during the period when the summons was issued on 12 March 2008. He further submitted that as at the time of the issue of summons, the plaintiff had an enforceable right and the service of the summons interrupted the running of prescription as contemplated by **Section 15 of the Prescription Act**.

[9] In a nutshell, plaintiff argued that (a) whatever shortcomings the summons had at the commencement of the action by virtue of the plaintiff's deregistration at the time were retrospectively cured by the restoration of registration of the plaintiff during March 2010, (b) that the plaintiff's claim against the defendant had been revived and resuscitated and (c) that the defendant's failure to challenge the plaintiff's claim for want of *locus standi* or on the basis of prescription prior to the restoration and the defendant's failure to challenge the restoration application, precluded the defendant from raising prescription as a defence.

E. ***<u>Analysis</u>:***

[10] **Section 26 of the Act** regulates the deregistration and re-registration of corporations. Relevant to the issue herein is **Section 26 (7)** which provides that:

> "The Registrar shall give notice of the restoration of the registration of a corporation and the date thereof in the prescribed manner and as from such date the corporation shall continue to exist and <u>shall be deemed to have continued in existence as from the date of deregistration as if it were not deregistered</u>." (My emphasis)

[11] A similar provision is found in **Section 73 (6) (a) of the Companies Act** which provides as follows:

> "(a) The court may, on application by an interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered;
>
> (b) Any such order may contain such directions and make such provision as the Court seems just for placing the company and all other persons in the position as nearly as may be, as if the company had not been deregistered."

[12] I fully agree with the argument by **Ms Watt** that the provisions of **Section 26 (7) of the Act** and **Section 73 of the Companies Act** are distinguishable in that the latter Act provides for more stringent and strict process for restoration. **Section 73 of the Companies Act** requires that an application for restoration be made in court. It further provides that notice be given to third parties who may be prejudiced by the restoration order and the issuing of a *rule nisi*. **Section 26 (7) of the Act**, on the

other hand, empowers the Registrar to restore a corporation on application by an interested person if he is satisfied that the corporation was carrying on business or was in operation when it was deregistered or that restoration is just.

[13] It is undoubtedly so, that there would be a conflict between the provisions of **Section 26 (7) of the Act** and those of the **Prescription Act** if the interpretation of **Section 26 (7)** by the plaintiff were to be found to be correct.

[14] It is common cause between the parties that the debt due to the plaintiff would have prescribed at the expiry of 3 years,[1] that is, at the end of September 2009 but for the argument by the plaintiff and the finding of the magistrate which is the subject of this appeal. It is common cause further that the plaintiff was not in existence at the time the summons was issued due to deregistration.

[15] **Sections 10-16 of the Prescription Act** deal with circumstances under which a claim to a debt becomes prescribed. **Section 10 (1)** provides that:

> "subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

[16] It is trite that prescription is interrupted by the issue of summons before the expiry of the three year period. **Section 15 (1) of the Prescription Act** provides:

[1]Section 11 (a) of the Prescription Act

> "The running of prescription shall, subject to the provisions of subsection (2) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."[2]

[17] It has to be borne in mind that extinctive prescription under **Section 10 (1) of the Prescription Act** is what is referred to as *'strong prescription'* as opposed to *'weak prescription'.* What it means is that the debt is extinguished as much as the corresponding right of action vested in the debtor.[3] **Goldstone AJA,** as he then was said the following:[4]

> "There are two kinds of statutes of limitations. In the one, the debt, action or remedy is merely barred. This is generally known as 'weak' prescription. In the other, the debt, action or remedy is extinguished. This is generally known as 'strong' prescription. see De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 256- 8."

[18] If I am correct in holding that the **Prescription Act** applies, then **Section 10 (1) read with Section 11 (d)** extinguished the debt resulting in the plaintiff's claim prescribing at the end of September 2009.

[19] Assuming that I am wrong in the contention that the **Prescription Act** is applicable, the argument by the plaintiff that **Section 26 (7)** restores the status *quo* to an extent that the plaintiff should be deemed to have been in existence as at 12 March 2008 when the summons was issued against the defendant does not, with respect, hold water. There is a presumption that a statute will not remove existing rights – or if not a presumption, it is a canon of construction that rights are not lightly presumed to have been taken away by mere implication.[5]

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[2] Subsection (2) has no relevance in this matter
[3] *Standard General Insurance Company Ltd v Verdun (Pty) Ltd* 1990 (2) SA 693 SCA
[4] *Standard General Insurance Company, supra* at p 698 para I
[5] *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA) at pg 882 para 10

[20] A right was created in favour of the defendant as at the time when the debt was extinguished by prescription. Thus it was an existing right at the time of re-registration. Certainly, the debt cannot be revived, once so extinguished, by some fiction in that **Section 26 (7) of the Act** deems the plaintiff to have been in existence at the time of issue of summons.

[21] I am of the view that **Section 26 (7) of the Act** should be read and interpreted within the context of **Section 26** which appears to protect and preserve the rights of creditors amongst others. **Section 26 (4) and 26 (5)** respectively read as follows:

> "**26 Deregistration**
>
> (4) The deregistration of a corporation shall not affect any liability of a member of the corporation to the corporation or to any other person, and such liability may be enforced as if the corporation were not deregistered.
>
> (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."

[22] **Schultz JA** said the following in **Mouton** *supra,* at para 13.

> "[13] More prosaically, I agree with Bennion *Statutory Interpretation* 3rd ed sec 304 at 736, where the learned author says:
>
> > 'The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.'"

[23] I find the following passage by **Schultz JA** apposite in this matter;

> "[14] The broad purpose of s 26(7) is that a corporation which has been dissolved because of a misrepresentation by its members shall have its assets and liabilities restored to it, so that they may be applied to the ends ordained by law, whether in the course of continued carrying on of business, or in the course of liquidation. Nowhere is there any indication of a purpose to relieve from liability a member responsible for presenting creditors with a vacuum in place of a corporation. Accordingly there is no need to extend the bounds of an imaginary state of affairs, nor any justification for doing so."[6]

[24] The respondents relied largely on ***Insamcor (Pty) Ltd v Dorbyl Light & General Engineering***[7] where **Brand JA** stated that a restoration order validates the institution of legal proceedings on behalf of a company that did not exist. As I read the judgment, it certainly does not go so far as to say that where debts owed to the company have been extinguished by prescription such debts will be revived. The same sentiments were echoed by **Theron J** in ***Berrange NO & Others v Registrar of Companies & Others***[8], where she stated;

> ". . . In *Insamcor,* the court did not have to deal in detail with the effect of a restoration order on acts of a company during the period of its deregistration. The court accepted that third parties, as a result of deregistration, may have acquired or lost rights or may have decided not to exercise their rights against the company in view of the deregistration of the company. The court in *Insamcor* referred with approval to *Ex parte Sengol Investments (Pty) Ltd9* and *Ex parte Jocobson In re Jacobson Holdings (Pty) Ltd,*10 where this principle was laid down that third parties who might be prejudiced by the grant of a restoration order must be given notice thereof. In *Insamcor* an appeal against the setting aside of an order restoring the company to the register failed because third parties who might have been prejudiced by the restoration order were not given the opportunity to persuade the court to exercise its discretion in favour of restoration"

[6] *Mouton, supra* pg 882-883 para 14
[7] 2007 (4) SA 467 SCA para 23
[8] 2008 JOL 21225 (N) para 14

[25] **Theron J,** correctly in my view, refused to allow prescription which was occasioned by deregistration to be raised as a defence because it came about as a result of an administrative error by the Registrar of Companies.

[26] In the instant matter, deregistration occurred as a result of an application by the defendant. It is trite that a summons issued by a company after deregistration is a nullity.[9]

[27] It is accepted that the legislature is presumed to know the laws and acts which it has passed.[10] Therefore, when **Section 26 (7) of the Act** was passed, surely the legislature never intended it to affect the rights bestowed by the **Prescription Act**.

[28] It is therefore my finding that when the legislature enacted **Section 26 (7) of the Act**, it never intended thereby to revive a debt due to the Close Corporation which had prescribed during the course of the deregistration period.

In the result, I make the following order:

1. The appeal succeeds with costs.

[9] *Broughton v Manicaland and Air Service (Pty) Limited* 1972 (4) SA 458 (R) at 459E; *Silver Sands Transport SA (Pty) Limited vs SA Linde (Pty) Limited* 1973 (3) SA 548 (W) at 549C-E; *Pieterse v Kramer NO* 1977 (1) SA 589 (AD) at 597H read with 601H

[10] *Rex v Detody* 1926 AD 198 at 222

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M MAKAULA

JUDGE OF THE HIGH COURT

I agree:

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R GRIFFITHS

JUDGE OF THE HIGH COURT

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