



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

REPUBLIC OF SOUTH AFRICA

CASE NO: 30469/2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO
- (4) DATE: 22 JUNE 2023
- (5) SIGNATURE: **ML-SENYATSI**

In the matter between:

**THE BODY CORPORATE OF LOS
ALAMOS NORTE**

APPLICANT

And

MASHILO SHADRACK SEBOLA

FIRST RESPONDENT

MS SEBOLA LABOUR

SECOND RESPONDENT

LAW PRACTITIONERS (In Final Deregistration)

ROYNATH PARBOO N.O.

THIRD RESPONDENT

THE MASTER OF THE HIGH COURT	FOURTH RESPONDENT
COMPANIES AND INTELLECTUAL	
PROPERTIES COMMISSION	FIFTH RESPONDENT
FIRST NATIONAL BANK LIMITED	SEVENTH RESPONDENT
THE REGISTRAR OF DEEDS	EIGHTH RESPONDENT
SOUTH AFRICAN REVENUE SERVICES	NINTH RESPONDENT
NATIONAL TREASURY	TENTH RESPONDENT
DEPARTMENT OF PUBLIC WORKS	
AND INFRASTRUCTURE	ELEVENTH RESPONDENT

JUDGMENT

SENYATSI J:

[1] This is an application to declare the dissolution of the second respondent void in terms of section 83(4) of the Companies Act 2008. The applicant also seeks an order that the second respondent be placed in final winding up. The application is opposed by the first respondent who is the erstwhile member of the second respondent. The rest of the respondents are not opposing the application.

[2] The second respondent was an owner of immovable property (“the property”) within the scheme managed and controlled by the applicant. Various legal proceedings were instituted against the second respondent

for non-payment of levies. The second respondent was placed in final deregistration on 16th July 2010. Subsequently, on the 5th of July 2011 this Court granted a final winding up order of the second respondent. Pursuant to the winding up order, the third and the fourth respondents were appointed as liquidators.

[3] The second respondent was granted leave to appeal against the winding up order and the appeal was noted. On the 25th of August 2014 the application for leave to appeal was granted to the full court following the winding up. There is no evidence in the papers as to what happened to the appeal. There are currently three individuals that reside within the property.

[4] It is critical at this stage to restate the relief sought by the applicant, which reads as follows:

- (a) that the dissolution of the second respondent be declared void under section 83(4) of the Companies Act, 2008;
- (b) an order directing that the registration of the second respondent in the registry of the CIPC be restored and reinstated;
- (c) an order declaring that the immovable property, known as Section 2 in the sectional title scheme of Los Alamos Norte, scheme number SS848/995, in respect of the land and buildings situated at Erven 30 and 31 Northgate ext 17, be revested back to the second respondent;
- (d) an order declaring that the second respondent is liable for all levies, electricity water and sewage costs accruing from the date of the registration;
- (e) an order declaring that the order issued under case number

18851/2011, placing the second respondent under final winding up, to be valid and enforceable;

- (f) an order declaring that any appointment and or steps taken pursuant to the winding up order, to be valid and enforceable; and
- (g) Costs of the application.

[5] The reliefs sought in (a) to (c) are not opposed by the first respondent. The first respondent opposes relief sought in (d) to (g) of the notice of motion. The grounds raised by the first and second respondents for opposing the relief set out above are as follows:

(a) the prayer that the second respondent is liable in respect of levies, electricity, water and sewerage costs is incompetent in law as the second respondent does not exist owing to its deregistration;

(b) the first and second respondent furthermore contend that there is no amount owed to the applicant for water and aver that same is paid monthly by Ms Nombeko Sebola based on the relevant monthly statement and that any amount outstanding is thumb-sucked and baseless;

(c) They furthermore contend that the relief sought in (e) and (f) cannot be granted or is not competent because given the history of the matters between the first and the second respondents and a non-existent body corporate which dates as far back as 2000, the respondents are not aware of the order that was issued under case number (18851/2011) placing the second respondent in final winding up.

(d) the first respondent also raises a point *in limine and* alleges that the deponent to the founding affidavit of the applicant is not authorised to act for the applicant in these proceedings.

(e) furthermore, the first and second respond raise another point *in limine* that the applicant cannot be allowed to stand in the shoes of the liquidators

[6] The first issue to be dealt with is whether a point *in limine* in respect of the alleged lack of authority of the deponent to the founding affidavit is sustainable in law. The lack of authority to either institute action or depose to an affidavit is a common feature that is raised as a defence in the motion proceedings.

[7] The lack of authority defence was dealt with in Ganes and Another v Telecom Namibia Limited¹, where Streicher JA said the following :

“[19] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent... It must, therefore, be accepted that the institution of the proceedings were duly authorised.”

[7] The Court in Eskom v Soweto City Council² had an opportunity to consider a defence that a person lacked authority to bring an application to court and Flemming DJP stated as follows on the approach to be adopted:

“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to the litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of

¹ [2004] 2 All SA 609 (SCA);(608/202) [2003] ZASCA 123 (25 November 2003)

² 1992(2) SA 703 at 705E-I

authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare *Viljoen v Federated Trust Ltd* 1971(1) SA750 (O) 752D-F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions."

- [8] In the present case, Mr. Sebola contends that Mr Fletcher has no authority to bring the application on behalf of the applicant because the applicant does not exist. He provides no basis for his contention. I find no basis to hold that Mr. Fletcher has no authority to bring the application because of the alleged non-existence of the applicant- the applicant exists in fact and in law and that is the reason its application is being adjudicated on. Mr

Fletcher is a witness and permitted to provide evidence before the Court. The lack of authority contention is, in my view, a red herring and stands to be dismissed.

[9] My view is fortified by Regulation 6 read with clause 10 of Annexure I issued under Government Gazette No. 40335 in terms of the Sectional Title Schemes Management Act, 2011. The regulation provides as follows:

“(1) No document signed on behalf of the body cooperate is valid and binding unless it is signed on the authority of a trustee resolution by-

(a) two trustees or the managing agent, in the case of a clearance certificate issued by the body corporate in terms of section 15B(3)(i)(aa) of the Sectional Titles Act; and

(b) two trustees or one trustee and the managing agent, in case of any other document.”

[10] In the instant case, the applicant adopted a resolution on the 1st of August 2020, authorising the deponent to institute in the present litigation all documents and affidavits on behalf of the applicant. The deponent and Mr. Clark were lawfully appointed trustees when signing the resolution and it must follow therefore that the resolution is valid and binding.

[11] The first respondent, Mr Sebola, in his opposing affidavit in the present case, also argues that Mr Fletcher, purported to have been authorised by the applicant and cannot in law be allowed to stand in the shoes of the liquidators, namely the third and the fourth respondents as well as the Master of the High Court namely the fifth respondent to bring this

application. This argument misses the provisions of section 83(4) of Companies Act, 2008 (“the Act”) which states as follows:

“(4) At any time after a company has been dissolved—

(a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and

(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.”

[13] Once the company has been removed from the companies’ register in terms of section 83 of the Companies Act, 71 of 2008 by the Commissioner of the Companies and Intellectual Property Commission (“the CIPC”) its assets become *bona vacantia*, that is, they belong to the State. It for that reason that even the liquidators cannot access such property. This principle was developed in the Roman Law times and adopted in the English Law and of course has been adopted as part of our common law.

[14] The broad principle of *bona vacantia*, has its origins in Roman law, specifically in the context of interstate succession where no intestate heirs exist. This principle also found application in English law, where assets of a person that dies intestate in the sense of not having heirs, passes to the Crown. The principle advanced in the English law has been captured the respective English Companies legislation, for instance section 296 of the Companies Act ,1929; section 345 of the Companies Act 1948; section 654 of the Companies Act 1985 and section 1012 of the

Companies Act 2006. In South Africa, neither the Companies Act 61 of 1973, nor the Companies Act of 2008, contain any provision that are similar to that contained in the English legislation.

[15] The concept of *bona vacantia*, in South Africa was imported from the English law and firmly established in our laws through a string of court cases throughout the years. For instance in *Ex Parte Marchini*³ the Court held, in dismissing the application by the land owner that the mineral rights conferred to a liquidated company where the liquidators choose to abandon the mineral rights, should revert to the land owner, that there is ample authority that the mineral rights in this instance should be regarded as *bona vacantia*, which should go to the State.

[16] In the case of *Ex parte Sprawson: In re Hebron Diamond Mining Syndicate Limited*⁴ in affirming the principle of *bona vacantia*, Bristowe J states as follows:

“The general rule is that as soon as a corporation ceases to exist, all its movable property goes to the Crown. The only distinction between this and other movable property is that it is a right of action, as distinguished from the actual chattels; but I do not think that makes any difference.”

[17] In *Rainbow Diamonds (Edms) (Bpk) en Ander v Suid-Afrikaanse Nasionale Lewensassuransiematskappy*⁵ the Court held that where the assets of a company had not transferred prior to its final dissolution, such assets accrue to the State as *bona vacantia* without further ado and it is untenable to contend that the State merely acquires a claim which can only be converted to a right of ownership by a court order. Ownership is

³ 1964(1) SA 147(T) at 150H-J

⁴ 1914 TPD458 at 461

⁵ 1984(3) SA 1(A) at

not transferred by court orders, court orders can only declare who the owner is.

[18] In the instant case, the second respondent was deregistered by the CIPC and after the deregistration, a winding up application was brought by the applicant in terms of which delegators were appointed by the Master of the High Court. It is evident therefore that the property that belonged to the second respondent was by that stage, already a *bona vacantia*. Consequently, the immovable property could not be handled by the liquidators. It is therefore permissible to bring an application in terms of section 83 of the Companies Act to set aside the winding up provisions.

[19] It is of no moment that the application is brought by the same applicant in the winding up application because the applicant is clearly any party referred to in the section that is allowed to bring the application to set aside the winding up. The applicant is owed money and presumably there are other creditors who are also owed money by the second respondent. Accordingly, there is no basis to contend that the second applicant should not be allowed to institute the instant application which, according to Mr Sebola, should only be brought by the liquidators. This argument loses sight of the fact that the second applicant has ceased to exist and that creditors are recognised as persons having interest in the deregistered company.⁶

[20] The liabilities of a deregistered company are not extinguished by its deregistration, they are merely rendered unenforceable while the deregistration subsists.⁷ Being unenforceable, it should follow that liquidation, as the ultimate form of execution, would not be competent

⁶ See *Nulandis (Pty) Ltd v Minister of Finance and Another* 2013(5) SA 294(KZP); *Missouri Trading CC and Another v ABSA Bank Ltd and Others* 2014(4) SA 55(KZD) at 73B-C; *Ex Parte Stubbs NO; In re Wit Extensions Ltd* 1982(1) SA 526 (W) at 528H and 529A-B.

⁷ See *Barclays National Bank Ltd v Traub*; *Barclays National Bank v Kalk* 1981(4) SA 291(W) at 295; *ABSA Bank Ltd v Hlathini Safaris CC* [2012] ZAGPJHC 176.

during is the period a corporation is deregistered. Accordingly, the application is competent and once the reregistration is ordered, the *status quo ante* will be restored with the result that the *bona vacantia ex lege* reverts in the company.

[21] I now deal with the argument that the applicant is not owed any money as contended by Mr Sebola. In his opposing papers, Mr Sebola claims that payments of all levies, water and electricity are up to date because water and electricity are on pre-paid meters. He is silent on the charges regarding the levy and contributions to sewerage and lights in the common property. The inspection of the annexures to the opposing affidavit reveals that the invoices attached thereto, relate to Nombeko Sebola and Mpho Mafube. The amounts stated therein are not significant. There is no evidence from Mr Sebola that the levies and other related charges were paid in full. In any event, this point is irrelevant at this stage as Mr. Sebola may still provide the liquidators with proof that the levies and other related charges were fully and diligently paid on behalf of the second respondent.

[22] The applicant in its founding affidavit attached the copy of various charges which are basically historical. They reveal as at 30 June 2020, an amount of R1 090 829.38 made up of *inter alia*, levies, lights, water, sewerage contributions. I have no basis to reject the contention by the applicant that it is owed money for the services in respect of the property forming the subject of this application. It follows that the applicant does indeed have a claim against the second respondent for at least the levies, lights in the common property, contributions on sewerage and interest thereon. I am satisfied that the statement attached to the founding affidavit of the applicant was prepared on its behalf by a duly appointed and authorised management agent.

[21] It follows, based on the law and the authorities quoted above that it is in the interest of justice that the reregistration of the second respondent be ordered.

ORDER

[22] The following order is made:

(a) The dissolution of the second respondent is hereby declared void in terms of section 26 of the Close Corporations Act, 1984 read with section 83(4) of the Companies Act, 2008;

(b) The CIPC is hereby ordered to restore and reinstate the registration status of the second respondent in its registry;

(c) The immovable property, known as Section 2 in the sectional scheme of Los Alamos Norte, Scheme Number SS848/1995 (“the Scheme”) in respect of land and buildings situated at erven 30 & 31 Northgate Ext 7 Township, is re-vested back to the Second Respondent;

(d) The second respondent is liable for all levies, electricity, water and sewerage costs occurring as from the date of deregistration;

(e) The order issued under case number 18851/2001, placing the second respondent in final winding up is hereby declared valid and enforceable;

(f) appointment and/or steps taken pursuant to the winding up order, is hereby declared valid and enforceable;

(g) the respondents are ordered to pay the costs of the application.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 22 June 2023

DATE APPLICATION HEARD: 24 April 2023

DATE JUDGMENT HANDED DOWN: 22 June 2023

APPEARANCES

Counsel for the Applicant: Adv SJ Mushet

Instructed by: AJ Van Rensburg Incorporated

First Respondent

In Person:

Mr M.S. Sebola

