

SOUTH AFRICA / JUDGMENT

Bothma Financial Services (Pty) Ltd t/a The Interface Financial Group v Thaba Swart (Pty) Ltd and Others (556/2018) [2018] ZAGPPHC 582 (29 June 2018)

[2018] ZAGPPHC 582

COURT

North Gauteng High Court, Pretoria

BEFORE

DT Skosana

CASE / FILE NUMBER

556/2018

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IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: 556/2018

In the matter between;

BTHMA FINANCIAL SERVICES (PTY)LTD

t/a THE INTERFACE FININCIAL GROUP

Plaintiff

and

THABA SWART (PTY) LTD

First Defendant

DANIEL DIEDERICK SWART

Second Defendant

LOUIS DE WET

Third Defendant

HERMAN TIMOTHY RAMMILO MOEKETSI

Fourth defendant

JUDGMENT

SKOSANAAJ

- [1] This matter concerns an application for summary judgment based on the plaintiffs claim against the defendant. The plaintiffs claim in turn is based on an agreement in terms of which the plaintiff purchased accounts receivable from the first defendant. As for the rest of the defendants, the claim against them is based on personal guarantees and indemnity that they signed in favour of the plaintiff in terms of which they bound themselves as primary and principal debtors in respect of all amounts owed by the first defendant in terms of the main agreement.
- [2] After the defendants had entered appearance, the plaintiff brought this application for summary judgment in terms of which it claims the total amount of R2 067 825-00 plus the applicable interest thereon as well as the costs against the defendants.
- [3] In opposition of the application, the defendants filed an opposing affidavit in which it raises two defences namely that the action by the plaintiff is a nullity in that the plaintiff was deregistered as a company at the time of the issuance of the summons and had been also dissolved as on 15 November 2017. Second, the defendant alleged that the plaintiffs particulars of claim were excipiable in that the disapproval of the receivables was not based on one of the grounds set out in clause 6(1)(a) to (g) of the main agreement and that its receivables had to be claimed separately and grounds set out for each such claim.
- [4] It was argued by counsel for the plaintiff in respect of the first ground of opposition that the company registration authority (CIPC) recognizes two different processes namely, deregistration-in-process and deregistration-final. The deregistration-in-process simply meant that certain formal requirements for the continued registration of the company were not complied with and there is a process underway or an intention to deregister the company. On the other hand, counsel for the defendants contended that what is crucial is the status of the plaintiff at the time of the institution of the action which was in January 2018. Having annexed a wrong document to its opposing affidavit, the defendants handed up another document which shows that the plaintiff was in deregistration as on 15 November 2017 and that such status was only rectified 2 days before the hearing of this matter, being 12 June 2018.
- [5] Defendants' submission was based on the judgment of the full court of this Division delivered by Mavunda J under case no. A893/14 on 13 May 2016 where the decision of *Newlands Surgical Clinic v Peninsula Eye Clinic* 2015 (4) SA 34 (SCA) at 41 G-1 was followed to the effect that all subsequent actions purportedly taken on behalf of a deregistered company are void and of no effect. I agree with this submission.
- [6] Counsel for the plaintiff further relied on the document which is not part of the papers to support his contention that a company in deregistration-in process cannot be regarded as dissolved and/or deregistered but such process simply signifies an intention to deregister the company in the future. His submission is not supported by the provisions of the

Companies Act. Section 82(3) of the Companies Act no. 71 of 2008, grants the CIPC power to remove a company from the Companies register if, among other things, it has failed to file annual returns for 2 or more years in succession and, upon demand by the CIPC has failed to give satisfactory reasons for such failure or to show satisfactory cause for the company to remain registered.

- [7] The reason for deregistration of the plaintiff as appears on the document handed up to me is that the plaintiff has failed to comply with the requirements of filing annual returns and/or payment of the prescribed fees. The above named section of the Companies Act empowers the registration authority to remove such company from the register. Section 83 of the same Act on the other hand provides that the effect of removal of a company from a register is that such company is regarded as having been dissolved with an exception which is not relevant for the purposes of this case. However, such removal and/or dissolution does not affect the liability of the directors or former directors or shareholders of the company in respect of any act or omission that took place before the company was removed from the register.
- [8] In my view therefore, the status of the plaintiff as at the time of the institution of the action, may have rendered it incapable of issuing the summons and therefore such summons may have been a nullity. It follows therefore that summary judgment may not be based on summons that are a nullity. It does not help the plaintiff to argue that the first defendant is similarly affected by its status by virtue of the document that was mistakenly attached to its opposing affidavit. The plaintiff is the dominus litis and if it was non-existent as a company at the time of the issuance of the summons, all subsequent processes based thereon are of no consequence.
- [9] The view I have taken above is not final, this being summary judgment proceedings as it may be affected by the further ventilation of the issues at the trial. I am however convinced that the issue raised by the defendants is a triable one, It follows that, in view of the approach I have taken, it is not necessary to deal with the second issue or defence raised on behalf of the defendants.

[10] Consequently, I make the following order:

[10.1] The application for summary judgment is dismissed.

[10.2] The defendants are granted leave to defend the plaintiffs claim.

[10.3] The costs of this application are costs in the cause.

DT SKOSANA

Acting Judge of the High Court

Pretoria

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Prepared on 11 October 2026 · Esheria