

SOUTH AFRICA / JUDGMENT

CA Focus CC v Village Freezer t/a Ashmel Spar (731/12) [2013] ZASCA 136; 2013 (6) SA 549 (SCA) (27 September 2013)

[2013] ZASCA 136

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Leach, Majiedt, Petse, Willis

CASE / FILE NUMBER

731/12

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 731/12

Reportable

In the matter between:

CA FOCUS CCAPPELLANT

and

VILLAGE FREEZER t/a ASHMEL SPARRESPONDENT

Neutral citation: CA Focus CC v Village Freezer t/a Ashmel Spar (731/12) [2013] ZASCA 136(27 September 2013)

Coram: Cachalia, Leach, Majiedt, Petse and Willis JJA

Heard: 16 September 2013

Delivered: 27 September 2013

Summary: Section 26(7) of the Close Corporation Act 69 of 1984, which has now been repealed, retrospectively validates legal proceedings instituted during the period of deregistration, and interrupts prescription.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Makaula and Griffiths JJ sitting as court of appeal):

The appeal is upheld with costs. The order of the high court is set aside and replaced with the following:

‘The appeal is dismissed with costs.’

CACHALIA JA (LEACH, MAJIEDT, PETSE AND WILLIS JJA CONCURRING):

[1] The Close Corporations Act 69 of 1984 (the Act) permits a deregistered close corporation to have its registration restored. When that occurs, s 26(7) of the Act says that the corporation ‘shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered’ (emphasis added). The issue in this appeal concerns whether or not this provision has the effect of retrospectively validating an invalid summons issued by a close corporation after deregistration so as to interrupt the running of prescription. A magistrate held that the provision had that effect, but the high court came to the contrary conclusion. With leave of the high court the appellant, a close corporation, now appeals to this court.

[2] It is convenient at the outset to quote s 26 in full:

‘(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 as its postal address a letter by registered post in which the corporation is notified therefore 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.

(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.

- (6) The Registrar may on application by any interested person, if he or she is satisfied that a corporation was at the time of its

deregistration carrying on business or was in operation, or that it is otherwise just that the registration of the corporation be restored, restore the said registration: Provided that if a corporation has been deregistered due to its failure to lodge an

annual return in compliance with section 15A, the Registrar may only so restore the registration of the corporation after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.

- (7) 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 be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.' (Emphasis added.)

- [3] The parties agreed that the matter was to be adjudicated on the basis of the following bare statement of facts: The appellant, a close corporation, had a claim for the recovery of monies due for services rendered to the respondent during the period April 2006 to September 2006. The 'debt' upon which the cause of action was founded therefore became due and payable in September

2006. The appellant was deregistered on 8 November 2007. On 12 March 2008 – after deregistration – the appellant issued summons claiming an amount of R60 000 from the respondent. If the summons did not interrupt prescription, the debt would have prescribed at the end of September 2009. The appellant applied for reregistration to the registrar of close corporations, who restored the appellant's registration on 11 March 2011.

- [4] There is no dispute that because the appellant had not been registered when it commenced litigation the summons was a nullity and had no legal effect. In its special plea, the respondent therefore pleaded that since the debt was due in September 2006 and that the issue of summons in March 2008 had had no legal effect, the summons did not interrupt prescription. So the claim became prescribed in September 2009.

- [5] The magistrate dismissed the special plea, holding that the deeming provision in s 26(7) had the effect of reviving the appellant's claim against the respondent retrospectively, and the summons had thus interrupted prescription. The high court, however, upheld the respondent's appeal. It held that the provision was not intended to revive a debt that had prescribed during the deregistration-period. In coming to this conclusion the court applied the approach of this court in *Mouton v Boland Bank Ltd*,¹ which also had to consider the ambit of s 26(7). There, the court said that because the deeming provision created a statutory fiction that a corporation had never ceased to exist when it in fact had, the provision had to be interpreted restrictively so as to achieve only its limited legislative purpose – to restore the deregistered corporation's assets and liabilities to it so that it may

continue with its business – but no more.²

- [6] The court in *Mouton* thus held that where a member who procures the corporation's deregistration becomes personally liable for the corporation's

liabilities under s 26(5) of the Act, the restoration of the registration did not relieve him from liability to a creditor. Section 26(7) should therefore not be interpreted, the court concluded, to extend the bounds of the statutory fiction to relieve the member of his liability following the corporation's deregistration.³ Applying this reasoning to the instant case, the high court held that the section could not be interpreted in a manner that interfered with the existing rights of third parties, including the right by a defendant to raise prescription as a defence to a claim for payment of a debt. The court therefore upheld the respondent's appeal against the magistrate's decision.

- [7] Before us counsel for the appellant submitted that the language of the deeming provision in s 26(7) is unambiguous, which means that there is no room to interpret it so as not to affect the existing rights of third parties, as the high court had found. The provision therefore had to be given a literal meaning. In his written submission he contended that the judgment of this court in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering*,⁴ which analysed the retrospective effect of a similar provision in the Companies Act 61 of 1973, supported his interpretation. In that matter Brand JA said in an obiter dictum, and somewhat tentatively, that the relevant provision – s 73(6) – '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'.
- [8] In the view I take of the matter it is not necessary to deal with *Insamcor* for the simple reason that that case concerned the legal proceedings instituted by a company after reregistration, the effect of which appeared to reinstate the rights and obligations the parties had lost pursuant to deregistration. The statement of Brand JA must be considered against the background of those facts. Here we are concerned with proceedings instituted by a close corporation after deregistration.
- [9] It is useful to begin by considering the general effect of a deeming provision such as in the instant case. The use of the word 'deemed', said Innes J many years ago, is . . . 'not a very happy one, because that term may be employed to denote merely that the persons or things to which it relates are to be considered to be what really they are not . . .'.⁵ But usually it is a species of retrospective legislation which 'changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. . . . A retrospective statute operates as of a past time in a sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future'. (Emphasis added.)⁶ This means that it will almost always have the effect of changing the consequences of the transaction – also for third parties – unless there is some limitation in the statute itself.

[10] In *Ex parte Sengol Investments (Pty) Ltd*,⁷ which was quoted with approval in *Mouton, Van Dijkhorst J* described the general effect of the reregistration of a company, which would also apply to a close corporation, as follows:

‘The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become bona vacantia and as such accrued to the State. Likewise debtors and creditors of the company at time of deregistration may upon restoration find their obligations or rights resuscitated.’ (Emphasis added.)

Thus, the effect of reregistration is that a company or close corporation is to be regarded as having never been deregistered at all.⁸

[11] There is no limitation or qualification to s 26(7), and on the face of it, therefore, it would appear to place all parties, including third parties, in the same position as if there was no deregistration. But in *Mouton*, the court was not prepared to go that far, and rejected an assertion by a member of a close corporation that the operation of the section released him from his former liability to a creditor by reinstating the corporation’s liability.

[12] *Mouton*, as here, also concerned the institution of legal proceedings during the period of deregistration, but importantly by a creditor of the close corporation, and not by the close corporation itself. Mr Mouton was a member of a close corporation that owed money to a bank. The close corporation was deregistered with the money still owing. The bank sued Mouton personally in terms of s 26(5). After pleadings had closed, Mouton reregistered the close corporation. He then delivered an amended plea in which he asserted that he had been released from his former liability because of the operation of s 26(7). The court dismissed the plea holding that the deeming provision did not have the effect of extinguishing Mr Mouton’s personal liability that arose as a result of deregistration. Simply put, the court held that the consequences flowing from the institution of legal proceedings while the close corporation was deregistered could not be undone by simply reregistering it.

[13] During the course of his judgment Schutz JA said:

‘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.’⁹

[14] In coming to this conclusion he also said, with reference to the section, that:

‘The Legislature has created a statutory fiction that a corporation never ceased to exist, when it in fact did. But I do not think that we should attribute to the Legislature a belief that it can actually recall time passed.’

And he continued, quoting Bennion Statutory Interpretation 3ed at 706, with approval:

‘The intention of the deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose but no further.’

[15] At first blush these passages seem to indicate that the court considered reregistration to have the consequence only of restoring assets and liabilities so that the entity could continue as before, but no more. Put another way it did not have the effect of validating acts performed after deregistration. This is the respondent’s contention, which the high court upheld.

[16] But it is apparent that in Mouton the court was dealing with a member who was attempting to avoid personal liability arising as a consequence of s 26(5) of the Act, which makes a member personally liable for a deregistered close corporation’s outstanding liabilities. And, the court concluded, s 26(7) did not have the effect of extinguishing the member’s liability upon reregistration. I do not think that these statements go any further, or suggest that the provision was not intended to affect the rights of third parties. The dicta in Sengol to which Schutz JA referred with approval makes that clear.¹⁰

[17] Recently in Kadoma Trading 15 (Pty) Ltd v Noble Crest CC¹¹ this court was again called upon to consider the effect of s 26(7) on a sale and franchise agreement concluded between the parties during the period of a close corporation’s deregistration. Maya JA concluded the section had the effect that restoration retrospectively validated the agreement. The respondent however contends that in that case the close corporation’s member was unaware of deregistration when the agreement was concluded, whereas here there is no such suggestion.

[18] But even if I assume in favour of the respondent that the appellant’s member was aware of the deregistration, the submission must founder because statutory interpretation is an objective process by which the words of the statute are given a meaning by having regard to their language, the context in which they are used and the purpose to which they are directed. The subjective views of the parties, their state of mind, or the facts of a particular case have no bearing on this analysis.¹²

[19] Moreover the respondent has no cause to complain in this case. Proceedings were instituted against it within the three year period allowed for prescription. It therefore became aware of the claim in good time, pleaded on the merits and has also brought a counter-claim against the appellant. It can hardly assert that its rights have been adversely affected by the appellant’s reregistration.

- [20] I accept though that some apparent anomalies may arise in applying the provision literally. There is no time limit, for example, for reregistration of a close corporation; it could notionally be restored a decade after it has been deregistered. Can it then seriously be suggested that all that has happened during this period can be undone. And what of proceedings that commence and are concluded before reregistration; can these be reversed?
- [21] But these anomalies arise inevitably as an incident of the purpose of the section. And I don't think that we can decline to give effect to this purpose only because it appears to give rise to anomalies. In the absence of any ambiguity, and I do not think there is, the appellant is correct in its submission that there is no room to give the provision a meaning that does not accord with its plain language.
- [22] In conclusion it is interesting to note that ss 26(7) of the Act and 73(6) of the 1973 Companies Act were repealed by s 224 of the Companies Act 71 of 2008, which came into operation on 1 May 2011. Section 82(4) of the 2008 Act now allows the registration of deregistered company or close corporation to be reinstated, but the provision permitting the restoration to operate retrospectively was omitted, perhaps because the lawmaker is now aware of potential anomalies.
- [23] The following order is made:

A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant: T J M Paterson SC

Instructed by:

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1 *Mouton v Boland Bank* 2001 (3) SA 877 (SCA). The section was amended twice after *Mouton* was decided, by s 1 of Act 25 of 2005 and by s 62(c) of Act 24 of 2006. The amendments have no bearing on this case.

2 *Ibid* paras 12-14.

3 *Ibid* para 14.

4 2007

(4) SA 467 (SCA) para 23.

5Chotabhai v Union Government & another 1911 AD at p 33.

6Driedger, Construction of Statutes (1983) at 185-6 referred to in Devenish op cit at 188.

7Ex parte Sengol Investments (Pty) Ltd 1982 (3) SA 474(T) at 477C-D.

8MeskinHenochsberg on the Companies Act5edvol 1 at 144(1).

9Moutonfn 1 para 14.

10See above para 10.

11 2013

(3) SA 388 (SCA) para 14.

12Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

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