

SOUTH AFRICA / JUDGMENT

Carstens v Millennium Clutch Manufacturing (Pty) Ltd (29777/2015) [2016] ZAGPJHC 253 (12 September 2016) [2016] ZAGPJHC 253

COURT

South Gauteng High Court, Johannesburg

BEFORE

WHG van der Linde

CASE / FILE NUMBER

29777/2015

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 29777/2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHERS
In

the matter between:	CARSTENS, CHRISTOFF Applicant and MILLENNIUM CLUTCH MANUFACTURING (PTY) LTD (Reg
No:	1998/019341/07) Respondent

JUDGMENT

Van der Linde, J

- [1] This is an application for the winding up of a private company by an ex-director but still shareholder, who seeks to have his loan account repaid. In limine the respondent disputes jurisdiction, on the basis that both its main place of business and its registered address are in the jurisdiction of the Western Cape Division of the High Court. Although these are concepts dating from the previous Companies Act 61 of 1973, they are necessarily preserved for applications such as the present, submits Mr Manca, SC for the respondent, by dint of paragraph 9(1) of schedule 5 of the Companies Act 71 of 2008.
- [2] Mr Manca relies amongst others on the judgment of Gamble, J in *Van der Merwe v Duraline (Pty) Ltd* (7344/2013) [2013] ZAWCHC 213, in which the learned judge came to this conclusion, declining to follow Binns-Ward, J in *Sibakhulu Construction v Wedgewood Village Golf Country Estate (Pty) Ltd*, 2013
- (1) SA 191 (WCC) on the basis that he was clearly wrong.
- [3] With respect, I agree with Gamble, J. His reasoning in [15] to [30] is thorough, pervasive, and persuasive. Particularly, the saving of chapter 14 of the old Act must be understood to include all other sections outside of chapter 14 that are necessarily incorporated into the sections within chapter 14. The legislature intended, it is suggested, that the process of the winding-up of companies would continue unchanged as it was under the previous statutory regime. However, for the reason mentioned in the next but one paragraph, this consideration is really of academic value only in this case.
- [4] Mr van der Merwe for the applicant was content to submit that s.12 of the old Act was repealed, and so the notions of registered office and main place of business too disappeared. He submitted that the concept of an “office” or “principal office” under s.23(3)(b) of the 2008 Act now supplants the dual office regime of old, also for purposes of chapter 14 of the old Act.
- [5] Even if this submission were correct, it seems irrelevant, for this reason. If the new Act were to be applied, the respondent will have lost, in a juridical sense, its main place of business. But it would not have lost its registered office, since that is something it must have. On the applicant’s argument, what was before the registered office will remain its registered office, which is and has always been in the jurisdiction of the Western Cape High Court. In other words, if the applicant is correct the only basis for which it contends this court has jurisdiction, namely that its main place of business is within the jurisdiction of this court, will evaporate.

- [6] In the alternative, Mr Van der Merwe submitted that the respondent's financial statements described its "business address" as being within the jurisdiction of this court, and that that was sufficient to establish that the respondent's main place of business was here.
- [7] However, the respondent's answering affidavit convincingly proves that the main place of business was in the Western Cape, amongst other things because that was where the members' and directors' meetings were held; where the bank accounts were administered; where the resolutions were taken; and where the computer file server was located.
- [8] Those allegations were not capable of being swept away in the replying affidavit, and the conclusion must be that the main place of business, as the registered address, is within the jurisdiction of the Western Cape High Court, and that this court therefore has no jurisdiction to entertain the present application. The point taken by the respondent must therefore be upheld.
- [9] Mr van der Merwe applied, conditional upon the result just reached, for an order under s.27(1)(a) of the Superior Courts Act 10 of 2013, removing the winding-up application to the High Court, Western Cape Division. The power there granted is to order such a removal, "... if it appears ... that such proceedings ... should have been instituted in another division."
- [10] In *Road Accident Fund v Rampukar; Road Accident Fund v Gumede*, 2008
- (2) SA 534 (SCA) Brand, JA considered s.3(1)(a) of the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001. This legislation is comparable with s.27 of the Superior Courts Act. His lordship specifically considered the submission that before a court could order such a removal, the matter must be subject to the court's jurisdiction to start off with.
- [11] The learned judge rejected that argument, holding that the two types of prerequisites for the exercise of the court's power were deliberately juxtaposed: convenience (s.27(1)(b)) presupposes the prior existence of jurisdiction, but normativeness (s.27(1)(a)) just the opposite. His lordship thus held, in a word, that even a matter mistakenly launched within the jurisdiction of a court which has no jurisdiction, may validly be removed to another court which does have the jurisdiction.
- [12] These considerations apply, with respect, equally here. It is true, as Mr Manca submitted, that the applicant as past director knew the true state of affairs, and that the mistake is thus his; but of course the mistake may have been of his legal advisors.
- [13] The principal factor that sways me to grant a removal is this. The application has been prepared, and the matter is ripe for hearing; now to have it start up afresh seems a complete waste of past effort and resources. If anyone is to pay a price for the mistake, that can be achieved by an appropriate costs order.

[14] Coming then to costs, the blame for the day's hearing in this court without the advantage of the case being progressed forward, must be laid at the door of the applicant. He should pay those costs. The other costs must follow the fortunes or otherwise of the merits of the winding up application.

[15] In the result I make the following order:

- (a) This application is hereby removed, under s.27(1)(a) of the Superior Courts Act 10 of 2003, to the High Court, Western Cape Division.
- (b) The applicant is directed to pay the costs of today on an opposed scale.
- (c) The remainder of the costs of the application are costs in the cause.

WHG van der Linde

Judge, High Court

Johannesburg

For the applicant: Adv. C. van der Merwe

Instructed by: MC Kruger Attorneys

5th Floor, Mentone Centre

1 Park Road, Richmond

Tel: 011 482 6235

Ref: M C Kruger/mck/C048

For the first respondent: Adv. B.J. Manca, SC

Instructed by: Edward Nathan Sonnenbergs Inc.

1 North Wharf Square

Loop Street, Foreshore

Cape Town

Tel: 021 410 2500

Ref: A Cowlin/ K Abrahams)

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