

SOUTH AFRICA / JUDGMENT

Hantisi and Others v Kgalagadi Investment Holdings (2535/07) [2016] ZANWHC 9 (3 March 2016)

[2016] ZANWHC 9

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

2535/07

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH WEST DIVISION,
MAHIKENG)

CASE NO.: 2535/07

DATE: 03 MARCH 2016

In the matter between:

HANTISI
NELSON.....1ST
APPLICANT
EZACHIUS SAKANYO
MABEJANE.....2ND
APPLICANT
ALFRED TONTOBANE
GAELEJWE.....3RD
APPLICANT
And
KGALAGADI INVESTMENT
HOLDINGS.....RESPONDENT

JUDGMENT

Landman J:

Introduction

- [1] This is an application to substitute the directors of a deregistered company for that company in an action brought by certain shareholders against the company.

The action

- [2] Nelson Hantsi, Ezachius Sakanyo Mabejane and Alfred Tontobane Gaelejwe (the plaintiffs) issued summons on 19 December 2007, against Kgalagadi Investment Holding Company (Pty) Ltd (the company) for the rendering of a full statement of account to be supported by vouchers showing all expenditure and receipts relating to the aforesaid affairs of the company, the debatement of such accounts and payment of what is found to be due to the first, second and third plaintiffs, as well as costs of suit.
- [3] It is common cause that at a general meeting of the company held on 29 September 2006, the company tendered cheques in the sum of R1.6 million to each of the plaintiffs for their “alleged respective proportionate shares arising from the sale of the company’s interest in the Tusk Resorts”. The plaintiffs go on to allege that it was subsequently discovered that they were entitled to more than what they received. They allege that it was an express or implied term of the shareholders’ agreement that the company would manage and from time to time render to them audited financial statements each and every financial year which the company has failed to do.
- [4] The company filed a plea to the effect that at the meeting when dividends were declared it was resolved that the company would cease to exist from 27 September 2006. The resolution also provided for the settlement of all liabilities, and it is recorded that the shareholders waived their rights against the company.
- [5] The pleadings closed and preparations for the trial commenced, but on 14 August 2013 the company’s attorneys delivered a notice confirming that the company had been finally deregistered “on or about November 2009”. The notice also stated that the plaintiffs were notified of such deregistration in November 2009.

The application for substitution

- [6] The notice prompted the plaintiffs to launch this application for an order that the company be substituted by the following persons, who were directors of the company at the time of deregistration, namely: Kaobitsa Maape, Constantinus Matome Matobo, Phineas Mmoloki Pheelwane, Cynthia Omphemenise Mogodi, and Aobakwe Sylvester Louw. Only Maape and Louw oppose this application.

- [7] The deponent to the founding affidavit does not set out the basis on which the application for substitution rests. However, the deponent to the replying affidavit says:

“... I was advised, which advi[c]e I accept that, that when the company is deregistered while there is still outstanding creditors that the Directors of such a company are liable in a personal capacity for such outstanding liabilities. A proper legal argument will be argued in this regard.”

- [8] Mr Kirsten, who appeared on behalf of the plaintiffs, relied on heads of argument drafted by JA van Aswegen, and submitted that:
- (a) Rule 15(1) provides, inter alia, that no proceedings shall terminate solely by reason of a change of status of any party thereto unless the cause of such proceedings is thereby extinguished;
 - (b) The court has the common law power to grant an application for substitution involving the introduction of a new persona on being satisfied that no prejudice will be caused to the opposing parties that cannot be remedied by an order for costs or some other suitable order, such as a postponement. See *O’Sullivan v Heads Model Agency CC* 1995 (4) SA 253 (W) and *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) at 41F-G;
 - (c) Only after granting of an order for substitution will the plaintiffs be able to amend the particulars of claim;
 - (d) “Section 40(4) of the 2007 Companies Act, imposes liability on the director responsible for the contravention to compensate not only the company but also in the shareholder for any loss, damages or costs that the shareholder may have sustained or incurred in relation to the transaction”;
 - (e) Section 20(6) provides that each shareholder of a company has a claim for damages against any person who causes the company to doing anything inconsistent with:
 - (a) this act: or
 - (b) the limitation, restriction or qualification contemplated in this section unless that action has been ratified by the shareholders in terms of subsection (2).

This means that a shareholder has a claim for damages against a director who causes the company to provide financial assistance in a manner inconsistent with the provisions of section 44;

- (f) Section 218(2) provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. This constitutes grounds for a claim against the director for a section 44 contravention and action by the shareholder based on a drop in the value of its shares brought about by the contravention;

- (9) The claim, should the application be granted, would not become prescribed against the substituted parties as the proceedings continue in respect of the person added or substituted as if he had been a party from the commencement date. All steps validly taken before such addition or substitution shall continue of full force and effect. Prescription was stayed by service on the defendant. The respondents step into the shoes of the defendant and prescription was also stayed against them at the date of service of the summons.

Evaluation

- [9] Rule 15(1) clearly provides, inter alia, that no proceedings shall terminate solely by reason of a change of status of any party thereto unless the cause of such proceedings is thereby extinguished. This being so, there is no cause to substitute the respondents for the company although it would be necessary to reverse the deregistration of the company. As Meskin Henochsberg on the Companies Act observes (Vol 1 at page 140 looseleaf, service issue 32) the liabilities of a company are not extinguished by its deregistration: they are merely rendered unenforceable while the deregistration subsists. See *Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 295. The reversal of the deregistration would be governed by the new Companies Act 11 of

2008. See *Gainsford and Another v Introdeals 159 (Pty) and Others* (44974/2013) [2014] ZAGPPHC 869 (17 October 2014) at para 12 where it is said:

“Section 83(4) applies to a company which has been deregistered. It is irrelevant whether the deregistration occurred in terms of section 73 of the Old Act (as in the present case) or in terms of section 82 of the New Act.”

- [10] What the plaintiffs wish to do is to substitute the respondents for the company and then amend their cause of action. The founding affidavit does not specify the contemplated amendment. It is essential for a court and the respondents to know what amendments are intended in order to determine whether the proposed substitution is permissible and whether it would cause prejudice to the respondents.
- [11] Directors of a company are not, except in very limited circumstances, liable for the debts of a company.
- [12] As far as section 40(4) of the 2007 Companies Act is concerned it is sufficient to note that there is no such Act. The draftsman probably had the 2007 Companies Bill in mind.
- [13] Sections 20, 44 and 218 are provisions of the new Companies Act 71 of 2008. These sections do not apply retrospectively. And so, cannot found a cause of action against the respondents. There is no suggestion that the cause of action arose after the commencement of the new Act.

[14] This is not a case where the respondents simply step into the shoes of the company. If I assume that the plaintiffs' case is that they wish to hold the respondents personally liable for the alleged inadequate dividend, the respondents may be able to invoke the Prescription Act 68 of 1969 depending on when that debt arose. In the absence of any detail regarding this date I am not prepared to find that the respondents

would not be prejudiced by the substitution.

[15] I mean no disrespect to Mr Silver, who appeared for the respondents, by not traversing his heads or dealing with the point of jurisdiction. There was simply no need to do so.

[16] The respondents seek costs on an attorney and client basis. They rely on the dictum Gardiner JP in re Alluvial Creek Ltd 1929 CPD 532 at 535.

[17] This application was unnecessary, misguided and is wholly without merit. I am of the view that it would be fair to order the plaintiffs to pay costs on an attorney and client scale.

Order

[18] I make the following order:

The application is dismissed and the applicants are ordered to pay the respondent costs on an attorney and client scale, the one paying the others to be absolved.

A A Landman

Judge of the high Court

Appearances

Date of hearing: 26 February 2016

Date of Judgment: 3 March 2016

For the Applicant: Adv kirsten

Instructed by Maree & Maree Attorneys

For the Respondent: Adv Silver

Instructed by D C Kruger Attorneys

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Prepared on 11 October 2026 · Esheria