

SOUTH AFRICA / JUDGMENT

Sage Wise 24 CC t/a Steel Doors and Frames v Chothia, Vulcania Reinforcing Company (Pty) Ltd v Chothia (1067/12, 1234/12) [2012] ZAECPHC 41 (26 June 2012)

[2012] ZAECPHC 41

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

B C Hartle

CASE / FILE NUMBER

1067/12, 1234/12

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matters between:

Case No. 1067/12

SAGE WISE 24 CC t/a STEEL

DOORS AND FRAMES(Plaintiff/Applicant)

and

Case No. 1234/12

VULCANIA REINFORCING

COMPANY (PTY) LIMITED(Plaintiff/Applicant)

CASSIM CHOTHIA(Defendant/Respondent)

JUDGMENT (In separate applications for summary judgment)

HARTLE J,

In two separate actions the plaintiffs seek summary judgment against a common defendant in his capacity as sole member of Allbuild Distributors CC (“Allbuild”).¹

In both matters Allbuild is alleged to have become indebted to the plaintiffs for goods sold and delivered pursuant to credit agreements entered into with the close corporation in 2007. In 2009 the plaintiffs separately obtained default judgments against it in the Free State High Court, Bloemfontein, arising from such indebtedness. The plaintiffs allege that despite endeavours to execute the judgments they remain unsatisfied.

They further plead that subsequent to obtaining the judgments Allbuild was “placed in final deregistration”. An identical “certificate of disclosure” issued by the Registrar of Companies & Close Corporations is annexed to the respective particulars of claim, purportedly in substantiation of this fact. They are dated as at 9 November 2011 and reflect an enterprise status of “Deregistration Final”.²

A separate annexure common to each statement of claim reflects that the defendant was appointed sole member of Allbuild on 12 March 2008.

The plaintiffs rely for their claims upon the now defunct provisions of section 26 (5) of the Close Corporations Act, no 69 of 1984 (“The Act”). Until its amendment by section 224 (2) of the Companies Act no 71 of 2008, which came into effect on 11 May 2011, the original section 26 provided as follows:

“Section 26

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26. Deregistration.—(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 at its postal address a letter by registered post in which the corporation is notified thereof 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.”

The jurisdictional facts necessary for liability in terms of the original section 26 (5) of the Act are: the deregistration of the close corporation;

at the time of deregistration the close corporation must have outstanding liabilities; and

the person sought to be held liable must be a member(s) of the close corporation at the time of its deregistration.³

The sub-section imposes a civil liability upon members for debts of the corporation at the time of deregistration, thus seeking to avoid potential prejudice to creditors, as well as penalizing members where the Registrar would in all probability have refused to deregister the corporation had its members apprised him of its true state of affairs. It is a liability which has been described as “a civil penalty.”⁴

The new section 26, post amendment by section 224 (2) of the Companies Act 2008, reads as follows:

“26. Deregistration.—Sections 81 (1) (f), 81 (3), 82 (3) to (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act”.

Nowhere in any of the aforementioned sections of the Companies Act is there any reference to the liability of members for the debts of a corporation post deregistration such as was specifically provided for in section 26 (5).

When the matter was argued before me the parties accepted, correctly so in my view, that the effect of the amendment to section 26 of the Act is that where personal liability of members has accrued before the effective date of the coming into operation

of the Companies Act, this is not impacted by the amendment and, conversely, where deregistration takes effect after the effective date of the repeal, the civil penalty of personal liability no longer pertains.⁵

This background is significant in the context of the defences which the defendant raises to the plaintiff's claims for summary judgment. The primary defence relied upon at the outset

- and which he alleges in his affidavits filed in opposition to the application constitutes a "complete defence" in each case, is that the plaintiffs' causes of action arose in 2007 when the goods were supplied on credit to Allbuild, more than three before the issue of summons, hence the claims have become prescribed.

What this argument overlooks, however, is that the date of deregistration - and not the date on which the liability of the close corporation arose, is the more significant. This is because deregistration is the "trigger" for the personal liability of a member to be fixed in terms of the original section 26 (5) of the Act. Until deregistration, no liability accrues with the concomitant result that no "debt" as envisaged in terms of section 12 of the Prescription Act, no 68 of 1969, is due.⁶ The prescription period of the liability under section 26 (5) of the Act accordingly begins to run in terms of section 11(d) of that act only on deregistration of the corporation and not when the original debts became due.⁷

When the matter was argued before me Ms. Ayerst who appeared for the defendant conceded that the defence of prescription did not avail him in the circumstances.

The second defence raised by the defendant (also alleged by him to constitute "a complete defence" to the plaintiffs' claims) is that since the new Companies Act has substituted section 26 (5) of the Act, their respective claims are no longer valid and are therefore bad in law. Accordingly - so the defendant alleges in his answering affidavit - the plaintiffs' particulars of claim are excipiable since they fail to set out a valid claim in law in each case. In the latter regard it was submitted that since the certificate of confirmation referred to in par 3 above postdates the date of the repeal of section 26 (5), the subsection can no longer be relied upon as providing the basis for the plaintiffs' respective claims.

Mr. Gajjar who appeared for the plaintiffs argued conversely that since the defendant had conceded in his answering affidavits that Allbuild was deregistered as a close corporation "during January 2011", this brought the plaintiffs' claims within the purview of section 26 (5) of the Act. Their failure to plead when as a fact this took place was, in his view, not critical. However - so the argument went

- the concession aforesaid had the effect of perfecting the respective particulars of claim inasmuch as the essential jurisdictional fact had not been pleaded in all its necessary detail.

But even assuming that the plaintiffs' particulars of claim can be amplified by a concession on the part of the defendant, I am not satisfied that his averment that some time during January 2011 the close corporation was deregistered is an adequate allegation to establish the necessary jurisdictional fact in this regard.

"Deregistration" has its own technical definition in terms of the Act which means "the cancellation of the registration of the corporation's founding statement."8 Section 26 (3) provides that where a corporation has been deregistered the Registrar shall "give notice of such deregistration and the date thereof in the prescribed manner". The date of a corporation's deregistration is therefore the date specified in the notice published by the Registrar envisaged in subsection 3. Such publication must be effected in the prescribed manner, i.e. in the manner prescribed by regulation.9 Regulation 2A10 provides in this regard that whenever a notice must be given under section 26 it shall be given by the publication of a notice on the CIPRO portal.11

Prior to its amendment by section 62 of the Corporate Laws Amendment Act no 24 of 2006,¹² subsection 3 provided that where a corporation had been deregistered the Registrar was obliged to give notice to that effect in the Gazette and that the date of publication of such notice was deemed to be the date of deregistration. Seemingly the amendment to inter alia subsection 313 was focused on the ushering in of the electronic record system, and now requires publication in that portal.

Given that the date of deregistration envisaged by the Act is specific, therefore, a vague reference to the month in which the defendant alleges this occurred can hardly perfect an incomplete cause of action which relies on this date, and in my view the fact of the Registrar's notice of publication of this date on the internet portal, as an essential jurisdictional fact. The CIPRO records which the plaintiffs have made available do not reflect the date of deregistration which the Registrar has specified pursuant to the provisions of subsection 3. On the contrary, the certificate put up by the plaintiffs creates the impression that deregistration may possibly have been effected on 9 November 2011, a date well after the date of the substitution of section 26 (5). Further, since deregistration is preceded by a process requiring notice (by registered post) and the lapse of a prescribed period of 60 days, the defendant may have been alluding to the beginning of the formal process by the Registrar pursuant to which notice in terms of section 26 (1) of the Act was served on Allbuild rather than the final end thereof when he said it was deregistered as a close corporation.

It is trite that in applications for summary judgment, if the pleadings lack an essential averment to sustain a cause of action – in this instance the date of which Allbuild was "deregistered" within the meaning referred to in the Act, it follows that there will also be a failure to verify under oath the existence of a good cause of action.¹⁴ Further, given the confusion created by the absence of the specified date, I am not persuaded that the plaintiffs' case in each instance is "unanswerable." The possibility that the specified date may be anywhere in between January and November 2011 may well provide "a complete defence" to the plaintiffs' claims as contended for by the defendant in the circumstances.

The defendant raised a further defence that the Plaintiffs and Allbuild were in agreement when the credit was extended to it that the facility would attract neither the personal suretyship of the members of the corporation nor interest, but I need not consider the effect of these conditions given the view I have taken in the matters.

I am satisfied that the defendant has raised a sustainable defence in each of the two matters under consideration and that I am bound to refuse summary judgment.

In the result the defendant is granted leave in both applications to defend the actions, costs in both matters to be costs in the cause.

B C HARTLE

JUDGE OF THE HIGH COURT

Date of application: 29 May 2012

Date of judgment: 26 June 2012

Appearances:

For Plaintiffs: Adv H Ayerst, instructed by Marianne Scholtz Attorneys c/o Rushmere Noach Attorneys, Port Elizabeth

For Defendant: Adv G J Gajjar, instructed by Wayne Mac Gear, Aneesah Campbell Attorneys, Port Elizabeth

1Since the issues were identical and the parties' representatives common to both matters, the applications were heard together.

2Evidently the certificate is the product of a CIPC search to ascertain the status of the corporation with reference to its Founding Statement.

3Lynn & Main Incorporated v Kruger & Others WLD Case No. 2000/23938 , unreported judgment of Bliden J dated 11 October 2007

4Lynn & Main Incorporated v Kruger & Other, Supra at pg 5; See also Mouton v Boland Bank Ltd 2001 (3) SA 877 (SCA) at 881 D - H

5Zurcher's Electrical and Electronics CC v Peter Lister and Phillipa Susan Kennedy 2012 JDR 0062 (ECP) – (Case No 2842/2011)

6Zurcher's Electrical and Electronics CC v Peter Lister and Phillipa Susan Kennedy, Supra at par[13]; Lynn & Main Incorporated v Kruger & Other, Supra at pgs 6 – 7.

7See the article by Jopie Pretorius entitled "An unpleasant surprise", 2001 JBL 118 in which the concern is raised that members may incur liability in terms of section 26 (5) of the Act long after the original debt owed by the corporation may have become due or even have become prescribed.

8Section 1 (1) of the Act.

9See the definition of “prescribe” in section 1 (1) of the Act.

10These are the “Administrative regulations” dated 16 November 1984 (as amended) promulgated under the Act by GNR 2487.

11This is the internet website or other portal forming part of the CIPRO system which gives electronic content to the record retention

system. CIPRO means the Companies and Intellectual Property Registration Office that constitutes a combined administrative

office for inter alia the registered office of the Close Corporations Act. The Plaintiffs have not alleged when, according to these records, notice was published by the Registrar

12Effective since 14 December 2007.

13Regulation 2A was inserted by GNR 292 of 13 March 2009.

14Dowson and Dobson Industrial Ltd v Van der Werf 1981 (4) SA 417 (CPD) at 430- H

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