CASE NO.401/99

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

Johann Mouton Appellant

and

Boland Bank Beperk Respondent

BEFORE: SCHUTZ, SCOTT and ZULMAN JJA

HEARD: 7 May 2001

DELIVERED: 10 May 2001

Close corporations - s 26(5) and (7) of Act 69 of 1984 - deregistration and reregistration - reregistration of corporation does not release member who became personally liable upon deregistration.

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J U D G M E N T

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SCHUTZ JA

[1] Section 26 of the Close Corporations Act 69 of 1984 ("the Act") regulates the deregistration and reregistration of close corporations. The issue in the appeal, one of law, is whether s 26(7) operates upon reregistration to release from personal liability a member who became liable for a corporation's debts in terms of s 26(5), upon its prior deregistration. The appeal is preceded by an extended application for condonation, but I shall deal with the appeal first.

[2] The appellant ("Mouton") was a member of JNJ Vloerdienste CC ("the corporation") which owed money on overdraft to the respondent, Boland Bank Ltd

("the bank"). On 26 March 1993 the corporation was deregistered in terms of s 26, while Mouton was a member and money was owed to the bank. Relying upon s 26(5) the bank sued Mouton personally, instituting action on 31 August 1993. In his plea Mouton admitted liability under s 26(5) (subject to a defence which may be ignored) but put the bank to the proof of the amount owed. Pleadings were closed when the bank filed a replication on 24 May 1994. Shortly afterwards Mouton applied to the Registrar of Close Corporations for the reregistration of the corporation, supporting his application with an affidavit. Reregistration was granted on 7 April 1995, after which he delivered an amended plea, stating that there had been a change of circumstances since he had last pleaded, which entitled him to assert his release from his former liability, because of the operation of s 26(7).

[3] At the trial the parties agreed to argue the legal question already defined *in limine.* Rose Innes J gave judgment for the bank. His judgment is reported as *Boland Bank Ltd v Mouton and another* [1997] 4 All SA 67(C). Leave to appeal

to this court was given by him.

[4] Section 26 needs to be quoted in full:

> "26. Deregistration. - (1) If the Registrar has reasonable cause to believe that a corporation is not carrying on business or is not in operation, he shall serve on the corporation at its postal address a letter by certified post in which the corporation is notified thereof and informed that if he is not within 60 days from the date of his 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 to that effect in the *Gazette*, and the date of the publication of such notice shall be deemed to be the date of deregistration.
>
> (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 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.

(7) The Registrar shall give notice of the restoration of the registration of a corporation in the *Gazette*, and as from the date of such notice *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 supplied.)

"Deregistration" is defined in s 1 as meaning the cancellation of the registration of the corporation's founding statement.

[5] Section 26 has a counterpart in s 73 of the Companies Act 61 of 1973 ("the Companies Act") but there are important differences. Whereas the provision in s 26(4) for the continuation of any existing liability of a member is echoed in s 73(5), s 26(5) which imposes personal liability on members after deregistration, finds no counterpart in s 73. Moreover, s 73(6)(b) contains a provision not found in s 26, to the effect that the court ordering a restoration to the register of companies, may

give such directions as seem just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered. This is the nearest equivalent there is to s 26(7). These difference being as they are, there are no company law cases which might give direct guidance in the interpretation of subsections 26(5) and (7). Nor were we referred to any (other than the judgment *a quo*) dealing with these very subsections. However, *Ex Parte Sengol Investments (Pty) Ltd* 1982(3) SA 474 (T) at 477 C - D is deserving of mention, as to the general effect of the restoration of a company (and, no doubt, also a corporation) to the roll.:

> "The effect of a 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."

[6] Accordingly, upon reregistration the bank's claim against the corporation was revived. But that does not answer the question, which is the question before us, whether its claim against Mouton was extinguished.

[7] As is usually, but not always the case in modern corporate law, members of a close corporation for the most part enjoy the benefits of limited liability, because s 2(3) lays down that they shall not, merely by reason of their membership, be liable for the debts of the corporation. Section 26(5) provides one of the exceptions where personal liability may attach to a member for his corporation's debts. As mentioned earlier there is no counterpart in the Companies Act, and, as stated by Rose Innes J (at 74 c), the subsection was a new provision in corporate law when it was introduced in 1984.

[8] The learned judge reasoned that the policy behind s 26(5) is to impose a civil penalty upon a member who allows the Registrar to deregister a corporation which does have liabilities. If a corporation is carrying on business and it is intended to

bring its existence to an end, so continued the judge, the proper procedures are either winding-up by the court (s 68) or voluntary winding-up (s 67). Creditors will then be entitled to share in the proceeds of the corporation's assets in accordance with the rights which the law accords them. Misusing deregistration when one of these alternative procedures is appropriate brings down the penalty upon the head of an errant member. The Act makes relatively little use of criminal sanctions, preferring the civil penalty of personal liability. Another example is afforded by s 63, which utilises that weapon in a variety of circumstances. I agree with Rose Innes J's foregoing exposition of the background against which subsections 26(5) and (7) are to be construed, save in one respect. A member who procures deregistration while stating that the corporation has no assets is not necessarily at fault and as such deserving of a civil penalty. For instance, the corporation may own a mineral right which even a careful member may overlook. But generally a member of a relatively small business should know what it owns, and there is

reason in policy for attaching personal liability for ignorance and, even more, deliberate falsehood. Moreover, looking at the Act as a whole, the corporate veil of a corporation is made of gossamer when contrasted with the strong thread of a company veil.

[9] A further policy consideration is this. Frequently, if a corporation is deregistered, its premises and goods will be abandoned or neglected, a prey to all, and its records destroyed or lost. No liquidator is appointed. Under such circumstances it is not to be expected that upon a subsequent reregistration, creditors will find as relatively favourable a situation as they might have found upon a winding-up followed by the immediate appointment of a liquidator. This is an additional reason why a member who is responsible for this state of affairs should not merely be made personally liable, but be held to his liability upon restoration.

[10] Turning then to the plain meaning of these subsections, the learned judge was of the opinion that there was no basis for reading them otherwise than as meaning

that s 26(7) does not extinguish a liability imposed under s 26(5). I agree. There is no provision in s 26(5) limiting its operation or making its operation subject to s 26(7). Nor is there any provision in s 26(7) to reverse the one-time operation of s 26(5) in respect of a member. On the contrary, the subsection is directed towards the state of the company. It may be, as the quotation from *Sengol's* case shows, that the relationship between the company on the one hand, and its members, creditors and debtors on the other, is affected. But this does not imply, even less necessarily imply, that the relationship between the corporation's creditor (in this case the bank) and a co-debtor of the corporation (in this case Mouton) is affected. What the appellant is seeking to do is to read in words such as "and the members referred to in subsection (5) shall be deemed not to have incurred the liability therein referred" after the words in s 26(7) "the corporation shall . . . be deemed to have continued in existence as from the date of deregistration as if it were not deregistered." The appellant's argument also flouts the canon of construction, that

rights (in this case a right obtained under s 26(5)) are not lightly presumed to have been taken away by mere implication.

[11] Indeed a contrary view would lead to consequences at least verging on the absurd. Take the cases where the member has already paid the corporation's debt; or where judgment has been taken against a member and his goods have been attached and sold in execution; or where, consequent upon a judgment against a member, a *nulla bona* return has been given, followed by his sequestration. In each of these cases, is the whole process to be thrown into reverse so that the debt should be brought home only to the now restored, but possibly plundered corporation?

[12] Or take this very case. If Mouton is to succeed, are the proceedings legitimately taken by the bank to be set at nought? What is to happen to the costs? Are any amounts that Mouton may have paid to be returned? The legislature has created a statutory fiction that a corporation never ceased to exist, when in fact it

did. But I do not think that we should attribute to the legislature a belief that it can actually recall time passed, for, as the poet has said:

> "The Moving Finger writes; and, having writ,
> Moves on: nor all thy Piety or Wit
> Shall lure it back to cancel half a Line."

[13] More prosaically, I agree with Bennion *Statutory Interpretation* 3 ed section 304 p 736 where the learned author says:

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

[14] 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.

[15] In short, the appeal should fail because s 26 contains no provision for Mouton's being relieved of personal liability, because no reason has been given why such a provision should be implied, and because there are good reasons of policy why it should not be implied.

[16] As I have mentioned Mouton seeks condonation over an extended field, nearly the whole field. The notice of appeal was filed late, the power of attorney was filed late, the record was filed late, security was provided late, unnecessary volumes were included in the record and the condonation application was not brought promptly. So bad were these shortcomings that condonation might have been refused because of them alone. But it is unnecessary to dwell on these aspects further, as I am of the view that Mouton has no prospects of success on appeal.

[17] The parties have agreed *quantum* and Mr Potgieter asks that in the event of the appeal failing judgment be given in favour of the bank. Mr Möller, for Mouton, accepts that this accords with the agreement between the parties.

[18] The appellant's condonation application and the appeal are dismissed with costs.

[19] The judgment of the court *a quo* is supplemented by the addition of the following:

> "7. The defendant is ordered to pay the plaintiff the sum of R200 841,61 plus interest at 20.375% p a from 31 May 1995 to date of payment."

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
SCOTT JA
ZULMAN JA