THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 452/2012

In the matter between:

KADOMA TRADING 15 (PTY) LTD **Appellant**

and

NOBLE CREST CC **Respondent**

Neutral citation: *Kadoma Trading (Pty) Ltd v Noble Crest CC* (452/12)[2013] ZASCA 52 (28 March 2013)

Coram: MAYA, SHONGWE, PILLAY JJA, ERASMUS and SWAIN AJJA

Heard: **1 March 2013**
Delivered: **28 March 2013**

Summary: **Close Corporations Act 69 of 1984 ─ interpretation of deeming provisions of section 26(7) – effect of restoration of the registration of a deregistered corporation that the corporation is deemed not to have been deregistered at all and acts performed between deregistration and restoration are validated retroactively.**

ORDER

On appeal from: Western Cape High Court (Cape Town) (Saba AJ sitting as court of first instance):

'The appeal is dismissed with costs on an attorney and own client scale.'

JUDGMENT

MAYA JA (SHONGWE, PILLAY JJA, ERASMUS AND SWAIN AJJA concurring)

[1] The central issue in this appeal concerns the interpretation of the deeming provisions of section 26(7) of the Close Corporations Act 69 of 1984, as amended (the Act), and more pertinently, whether they validate sale and franchise agreements concluded by the parties during the period of the respondent's deregistration.

[2] The respondent has its principal place of business in Cape Town and franchises an automotive paint and dent repair business and brand under the name 'Dents 'N All'. Consequent to the appellant's overtures to acquire the franchise, the parties concluded a sale agreement and a franchise agreement (the agreements) on 21 October 2010 and 13 January 2011, respectively. The purchase price of R1 750 000 was payable in five instalments in terms of a payment schedule which required the sum of R1 500 000 to be paid by the time trade commenced. The balance of R250

000 was to be paid within 14 days of the month end when the business achieved a benchmark of a R100 000 monthly net profit.

[3] The appellant duly paid the initial sum of R1 500 000 and business commenced in February 2011. However, the relationship between the parties soon soured because the appellant was dissatisfied with the quality of equipment and assistance rendered to it by the respondent under the agreements. On 9 March 2011, the appellant served the respondent with a notice in terms of which it cancelled the franchise agreement based on allegations that the respondent had failed to perform its contractual obligations properly. In response, in a letter dated 14 March 2011, the respondent denied the alleged breach and rejected the purported cancellation.

[4] The appellant then made an interesting discovery. Unbeknown to its representative when the agreements were concluded, the Registrar of Close Corporations had deregistered[1] the respondent on 16 July 2010 for 'annual return non-compliance'. Furthermore, according to Companies and Intellectual Property Registration Office records, the respondent did not own the Dents 'N All trademark as the appellant's representative believed. Relying on this information, the appellant delivered a notice to the respondent on 13 April 2011. It alleged that it had been induced to enter into the agreements by fraudulent misrepresentations and was cancelling them for that reason. In its written response dated 18 April 2011, the respondent's director denied the imputations of fraud. He claimed to have been unaware of the deregistration when the agreements were concluded. He stated that the respondent had, in any event, since

[1] In terms of section 1 of the Act, 'deregistration', in relation to a corporation, means the cancellation of the registration of a corporation and 'deregister' has a corresponding meaning.

been re-registered on 12 April 2011. In his view, the re-registration cured the invalidity of the agreements.

[5] The respondent accepted the appellant's cancellation of the agreements and demanded immediate compliance with clauses 16.4 and 16.5 of the franchise agreement. These provisions operate upon termination, 'for whatever reason', of the agreement. Among other things, they oblige the franchisee to return to the franchisor all materials provided under the franchise agreement and prohibit the franchisee from conducting itself in any manner that would give the impression that it has any connection to or relationship with the franchisor.[2]

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[2] The clauses provide:

'16.4 All provisions of this Agreement which in order to give effect to their meaning must survive its termination, shall remain in full force and effect thereafter.

16.4.1 Action on termination

The franchisee shall refrain from holding out in any manner whatsoever that there is any connection or relationship between the Franchisee and the Franchisor and without derogation from the generality of the aforegoing, shall refrain from making use of any get-up peculiar to the Franchisor or of any writing, symbols, logos, slogans, devices, advertising styles of an object whatsoever which may lead to a belief among the public that such relationship continues to exist;

Upon termination, the Franchisee shall forthwith deliver to the Franchisor:

16.4.1.1 all and any manuals or other written information relating to the systems, all advertising material and paper goods or other items bearing the Franchisor's marks subject however to the Franchisor paying the cost of any such items which may be capable of being used by any other Franchisee;

16.4.1.2 the computer software contemplated herein;

16.4.1.3 the client information of all clients served by the Franchisee is deemed to also be client information of the Franchisor and said client information will be provided to the Franchisor upon cancellation of this agreement for whatever reason.

16.5 Upon the termination or expiration of this Agreement, all rights granted to the Franchisee in this Agreement will terminate immediately. The Franchisee will immediately cease to use the intellectual property, the Marks and System and to sell or provide the Products or Services. The Franchisee shall immediately remove and return to the Franchisor all building and vehicle signage, displays, marketing materials, literature, business cards, stationery and any other materials which contain the Marks.'

[6] The appellant also recognized that the agreements were cancelled, although it denied repudiating them. But it refused to comply with the respondent's demand. Instead, it tendered to return the movable property it had acquired from the respondent against the refund of the sum of R1 500 000 which it had already paid towards the purchase price. It further indicated that it had referred the Operations Manual supplied to it by the respondent to another franchisor for the investigation of possible misuse of the latter's intellectual property or copyright. The respondent considered this act a breach of clauses 11.2.40 and 11.2.41 of the franchise agreement.[3]

[7] The appellant's stance prompted the respondent to launch an urgent application in the Western Cape High Court for the attachment and removal from the appellant's premises of items it alleged to have supplied under the agreements. It also sought to interdict the appellant from using the Dents 'N All trademark pending the finalisation of an action it intended to institute against the appellant. The appellant opposed the application on the ground that the agreements were null and void *ab initio*. It brought a counter-application based on the *condictio indebiti* for the return of the sum of R1 500 00 it had paid as the purchase price, against delivery to the appellant of all the movable property it received under the agreements.

[8] The court below (Saba AJ) decided the matter in the respondent's favour and dismissed the counter-application. The court held that the

[3] According to these clauses, the franchisee may
'11.2.40 not do anything which may adversely affect the Franchisor's rights in the intellectual property or which infringes on the reputation and corporate image of the Franchisor or other Franchisees,
11.2.41 not do anything which may bring the system or the business into disrepute or which may damage the interests of the Franchisor or other Franchisees.'

invalidity of the agreements was retroactively cured by the respondent's re-registration and that they remained valid and binding on the parties as the appellant had not validly cancelled them in light of its failure to give the respondent notice to remedy any breach it may have committed. The appellant challenges that decision with the leave of the court below.

[9] The nub of the appellant's submissions before us was that it had contracted with an entity which had no legal capacity. The resultant agreements were thus void and could not be resuscitated by the subsequent re-registration under section 26(7) of the Act. This was so, continued the argument, because 'the purpose of re-registration is to re-vest the entity with legal personality to enable it to own its assets and to become liable to its creditors as at date of deregistration'. Re-registration therefore 'wipes out the unregistered past' and only an agreement validly entered into before deregistration, in terms of which reciprocal enforceable rights and duties already exist upon deregistration, will revive upon re-registration under the deeming provisions.

[10] Section 26 of the Act governs the process of a corporation's deregistration and re-registration. According to section 26(1) and (2) '[i]f a corporation has failed, for a period of more than six months, to lodge an annual return in compliance with s 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 may, unless good cause to the contrary has been shown by the corporation, deregister that corporation.' Once this

happens, a corporation loses its legal personality and ceases to exist.[4] It is trite that an entity with no legal personality cannot perform a juristic act such as entering into a contract.[5] And, as correctly pointed out on the appellant's behalf, the agreements concluded during the respondent's state of deregistration were entirely void.

[11] But of real importance is the effect, if any, which the respondent's subsequent restoration to the register had on its legal status and the validity or otherwise of the agreements concluded during its 'death'. Section 26(7) reads:

'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.'

[12] There is no direct precedent from which to draw guidance regarding the construction of section 26(7). It is therefore instructive to consider the manner in which our courts have dealt with its counterparts dealing with the resuscitation of corporate entities, albeit bearing some differences. These are couched in sections 73(6)(a) and 73(6A) of the Companies Act 61 of 1973 (the Companies Act), from which the provisions of section 26(7) originate.[6] In terms of these sections, upon

4 *Miller v NAFCOC Investment Holding Co Ltd* 2010 (6) SA 390 (SCA) para 11; *Ex Part Jacobson: In re Alex Jacobson Holdings* 1984 (2) SA 372 (W) at 377A-D. In the latter matter the court dealt with the effect of a company's deregistration and restoration under the provisions of s 73(6) of the Companies Act 61 of 1973 (the Companies Act). But the principle there enunciated applies equally to close corporations as s 26(7) of the Act which has the same objectives and is similarly structured.

5 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 51.

6 The Companies Act has since been repealed by the Companies Act 71 of 2008 but the amendments brought about by the new legislation bear no relevance for present purposes as it came into effect only on 1 May 2011.

restoration a company was deemed to have continued in existence as if it had not been deregistered.[7]

[13] Dealing with the meaning of s 73(6), the court in *Ex Parte Sengol Investments (Pty) Ltd*[8] said:

'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 obligation or rights resuscitated. It follows that the restoration of registration of a company in terms of s 73(6) may have wide-ranging effects.'

[14] This court had occasion to consider the issue thereafter in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*.[9] Approving the *dictum* in *Ex Parte Sengol* and related decisions, the court commented as follows:[10]

'As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company – precisely because

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[7] They read:
'73 Cancellation of registration of memorandum of articles
…
(6) (a) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

(b) Any such order may contain such directions and make such provision as to the Court seems 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.

(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.'

[8] 1982 (3) SA 474 (T) at 477 C-D.

[9] 2007 (4) SA 467 (SCA).

[10] Ibid, para 23.

the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order 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.'

This has been the line of thinking in other Commonwealth jurisdictions too, notably well before the promulgation of the Companies Act. There, substantially similar provisions have consistently been interpreted to mean that acts conducted during the deregistration period are retrospectively validated upon the company's re-registration.[11]

[15] This reasoning applies equally to section 26(7). It should, however, be mentioned that the cases which pronounced on the retroactive effect of section 73(6), including those of foreign jurisdictions in relation to similar provisions, did not only recognise the potential prejudice posed by a restoration order against the rights of third parties. They also endorsed the need to issue all restoration orders in a judicially guided context, in the form of a rule nisi, to give interested parties an opportunity to show cause why the company's registration should not be restored. Much was made on the appellant's behalf of this seeming lacuna in section 26. It was contended that the absence in section 26 of a provision invoking judicial assistance for the regulation of the re-vesting of assets and liabilities by means of a rule nisi to protect the rights of third parties, such as that found in section 73(6), does not mean that the court's role has been supplanted by a functionary in the form of the Registrar. It was argued that the legislature would have expressly said so if its intention was to vest the power to reverse common law rights and create

[11] For example, in *Tyman's Ltd v Craven* [1952] 2 QB 100 ([1952] 1 All ER 613 (CA)), the court held that the effect of broadly similar provisions was not only that the corporate existence of the company that had been struck off the register was preserved but was also retroactive. See also *Top Creative Ltd v St Albans District Council* [2000] 2 BCLC 379 (CA) at 385e-387f; *Royal Bank of Canada v Cressler Hotels* 1980 CanLll 1072 (ABQB).

obligations, which could not exist under common law, in the Registrar.

[16] I do not agree. Section 26 unambiguously makes provision for an administrative procedure which is entirely controlled by the Registrar and requires no court intervention. The provisions of section 26(6) are significant. They empower the Registrar to re-register a corporation by the same administrative process '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'. These provisions make clear that the legislature was not oblivious to the possibility of a deregistration not coming to a corporation's attention or the Registrar wrongly assuming that a corporation was not in operation or carrying on business. And it is telling that the legislature contemplated restoration precisely in a situation where the corporation was deregistered despite the fact that it was in operation or carrying on business. To my mind, this signifies an objective to save a corporation's acts, performed in good faith during a period of deregistration, from invalidity.

[17] For its submission that 'a deeming provision should not be taken any further than is necessary to achieve its legislative purpose as it creates a fiction' and that re-registration merely 'wipes out the unregistered past', the appellant relied on this court's judgment in *Mouton v Boland Bank Ltd*.[12] There, the court dealt with the liability of the deregistered corporation's members for its debts and held that section 26(7) did not have the effect that personal liability of such members imposed in terms of section 26(5) of the Act upon deregistration is extinguished. That, in my view, has no bearing on the issue at hand as it is only a question

[12] 2001 (3) SA 877 (SCA).

arising between a third party and a corporation's member. The judgment said nothing about the effect of the deeming provision as between a third party and the corporation itself and I do not see how it assists the appellant's cause.

[18] Examples were postulated on the appellant's behalf to illustrate the absurdity of the interpretation which the court below ascribed to the deeming provisions and the prejudice that would potentially be suffered by a counter-party to an agreement concluded with a deregistered entity which wished to enforce or extricate itself from the agreement. Without detailing them, those problems seem to me more perceived than real. They could very well occur where a corporation is deregistered after an agreement has been validly concluded but has not been fully executed; an act which the appellant agreed would be revived by re-registration. Nothing would preclude the disadvantaged counter-party from invoking the provisions of section 26(6) to its advantage by itself initiating re-registration or enlisting the Registrar's assistance to compel the deregistered corporation's agents to seek restoration without delay, depending on what it wanted. And there is also the remedy of review available to an aggrieved party to set aside the restoration if it is prejudicial.

[19] I see no reason to depart from the plain meaning of the words used in section 26(7) in the circumstances. They simply mean what they say – that a corporation is deemed to have continued in existence as from the date of its deregistration as if it were not deregistered, is deemed to have been in existence with legal personality and is capable of performing juristic acts including entering into valid contracts. The interpretation which the court below gave to the deeming provisions was therefore

correct.

[20] The appellant's counsel properly conceded that the counterclaim's success was contingent on the success of appellant's interpretation of section 26(7). It must therefore fail in light of the above finding in this regard.

[21] The court below granted the respondents costs on an attorney and own client scale on the basis of clauses 16.9 and 25.10 of the franchise agreement which entitle the franchisor to costs on that scale 'should it succeed in any proceedings (whether in a court of law or arbitration)'. Clearly, the award was properly made and should not be disturbed.

[22] In the result, the appeal fails. The following order is made:
'The appeal is dismissed with costs on an attorney and own client scale.'

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MML Maya
Judge of Appeal

APPEARANCES

APPELLANT:	JI DuToit SC (with him PS De Waal) Instructed by Cronje De Waal Skhosana Inc, Secunda Rosendorff Reitz Barry, Bloemfontein
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