



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 328/2016

In the matter between:

ZNK INVESTMENTS CC

APPELLANT

and

**LUCKYTSO TRANSPORT AND
CONSTRUCTION CC**

FIRST RESPONDENT

LUCKY KGOMOTSO MOKWENA

SECOND RESPONDENT

ABSA BANK LIMITED

THIRD RESPONDENT

SHERIFF PRETORIA EAST

FOURTH RESPONDENT

DEEDS OFFICE PRETORIA

FIFTH RESPONDENT

THE DEPARTMENT OF FINANCE

SIXTH RESPONDENT

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

SEVENTH RESPONDENT

Neutral citation: *ZNK Investments CC v Luckytso Transport and Construction CC* (328/2016) [2017] ZASCA 20 (24 March 2017)

Coram: Maya AP, Theron and Van der Merwe JJA and Gorven and Coppin AJJA

Heard: 2 March 2017

Delivered: 24 March 2017

Summary: Company law: sale in execution of property of close corporation whilst deregistered: reinstatement in terms of s 82(4) of the Companies Act 71 of 2008: automatic retrospective validation of the sale in execution.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (N M Mavundla J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with the following:
'2 The applicants are directed to pay the costs of the application.'

JUDGMENT

Van der Merwe JA (Maya AP and Theron JA and Gorven and Coppin AJJA concurring):

[1] This appeal concerns the effect of the retrospective reinstatement of the registration of a close corporation on a sale in execution of its property that took place whilst it was deregistered. The issue has to be determined in light of the circumstances set out below.

[2] In 2006, the first respondent, Luckytso Transport and Construction CC, became the registered owner of the immovable property known as portion 2 of erf 1704, Silver Lakes Extension 4, Gauteng (the property). At the same time a mortgage bond in favour of the third respondent, Absa Bank Ltd (Absa), was registered over the property. At all relevant times the second respondent, Mr Lucky Kgomotso Mokwena, was the sole member of the first respondent. He bound himself to Absa as surety and co-principal debtor in respect of the obligations of the first respondent arising from the mortgage bond.

[3] On 19 October 2011, Absa obtained default judgment against the first respondent and the property was declared executable. On 1 March 2013, the first respondent was deregistered for failure to submit annual returns, in terms of s 82(3)(a) of the Companies Act 71 of 2008. In terms of s 26 of the Close

Corporations Act 69 of 1984, the provisions of, inter alia, s 82(3) to (4) and s 83 of the Companies Act apply to a close corporation.

[4] The fourth respondent, the Sheriff of Pretoria East (the sheriff), attached the property for purposes of the sale thereof in execution. It does not appear from the evidence whether the attachment took place before or after 1 March 2013, but as I will show, nothing turns on this. The sale in execution was to take place on 30 October 2013, but due to the intervention of the second respondent it did not proceed on that date. However, on 29 January 2014, the sheriff sold the property in execution to the appellant, ZNK Investments CC, for the amount of R2 520 000. There is no evidence that at the time of the sale in execution Absa, the sheriff or the appellant was aware of the deregistration of the first respondent.

[5] On 21 February 2014, the first and second respondents brought an application in the Gauteng Division, Pretoria. The respondents cited Absa, the appellant, the sheriff and the Companies and Intellectual Property Commission (CIPC) as respondents in the application, amongst others, who are not necessary to mention. Both the first and second respondents (the respondents) sought an order, inter alia, that the CIPC be authorised to reinstate the first respondent and that the sale in execution of the property to the appellant be declared invalid and set aside. Only the appellant opposed the application.

[6] The court a quo (Mavundla J) granted the relief sought. Paragraph 1 of its order directed the CIPC to reinstate the first respondent. The CIPC does so in terms of s 82(4) of the Companies Act. In terms of paragraph 2 of the order, the sale in execution of the property which took place on 29 January 2014, was declared invalid and set aside. The court a quo also ordered the appellant to pay the costs of the application (para 3). The court a quo reasoned that the deregistration had put an end to the existence of the first respondent and rendered Absa's claim against the first respondent unenforceable. It also held that the property became *bona vacantia* and vested in the State. The court a quo held that on both these grounds, the

deregistration of the first respondent rendered the sale in execution of the property invalid and that it fell to be set aside. In respect of the latter ground, reliance was placed on *ABSA Bank Ltd v Companies and Intellectual Property Commission & others* 2013 (4) SA 194 (WCC). In that case, an attachment and sale in execution of property of a close corporation took place after its deregistration and the court held that the sale was invalid.

[7] The appellant sought leave to appeal only against paragraphs 2 and 3 of the order of the court a quo. Leave to appeal was refused by the court a quo but granted by this court on limited grounds. The order of this court provided:

‘4. The leave to appeal is limited to the following issue: Whether the retrospective operation of the order in paragraph 1 had the effect that the sale in execution of the first respondent’s property was valid.

5. The leave to appeal is limited to paragraphs 2 and 3 of the order of the court a quo.’

[8] It is true that upon the deregistration of a company or close corporation, its property becomes *bona vacantia* (ownerless property). Such property passes to the State without any form of delivery. See *Rainbow Diamonds (Edms) Bpk & Andere v Suid-Afrikaanse Nasionale Lewensassuransiematskappy* 1984 (3) SA 1 (AD) at p 10-12. Thus, at the time of the sale in execution the ownership of the property vested in the State.

[9] The crucial issue, however, is the legal effect of the reinstatement of a close corporation in terms of s 82(4) of the Companies Act. This question was not considered by the court a quo, but it was subsequently decided by this court in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA). After a thorough analysis of the provisions of ss 82 and 83 of the Companies Act, Brand JA, in a unanimous judgment, concluded (i) that reinstatement of registration by the CIPC in terms of s 82(4) automatically and retrospectively revests a company (or close corporation) with its property and validates its corporate activities during the period of its deregistration (para 29); and

(ii) that even after administrative reinstatement in terms of s 82(4), a party who is prejudiced by the automatic retrospective effect thereof, is afforded the opportunity to seek amelioration under s 83(4), in which event the court may grant the relief it considers just and equitable (para 30).

In the result, *ABSA v CIPC* is no longer good law on this point.

[10] Reinstatement of the first respondent pursuant to para 1 of the order of the court a quo, would automatically and retrospectively reconstitute the property in the first respondent and validate its corporate activities during the period of deregistration. The attachment of the property (if it took place after deregistration) and the sale in execution were corporate activities of the first respondent during its deregistration. They would be retrospectively validated in the same manner as the arbitration proceedings in *Newlands Surgical* and the winding up of a close corporation in *Reddy v Absa Bank Ltd & others* [2015] ZASCA 83 (28 May 2015).

[11] The next question is whether the respondents made a case for amelioration of this position in terms of s 83(4). Counsel for the respondents correctly conceded that no such case had been made in the papers. The respondents claimed relief only on the ground that the first respondent had been deregistered when the sale in execution took place. It is noteworthy that it was not alleged that the respondents were unaware of the deregistration. It is significant, moreover, that the respondents did not state that they have a defence against Absa's claim.

[12] For these reasons the court a quo ought to have refused to set aside the sale in execution. It is clear that the main purpose of the application was to nullify the sale of the property to the appellant. The refusal of this relief should have resulted in substantial success for the appellant in the court a quo. In my judgment the respondents must bear the costs in the court below. Costs of the appeal should follow the result. Counsel were in agreement that the employment of two counsel was justified.

[13] In the result the following order is issued:

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraphs 2 and 3 of the order of the court a quo are set aside and replaced with the following:

‘2 The applicants are directed to pay the costs of the application.’

C H G van der Merwe
Judge of Appeal

Appearances

For the Appellant:

C Whitcutt SC (with him T Lipshitz)

Instructed by:

Boqwana Burns Attorneys, Pretoria

Claude Reid Attorneys, Bloemfontein

For the First and Second Respondent: J Vorster (with him J C Prinsloo)

Instructed by:

Shubnam Singh Attorneys, Pretoria

Bezuidenhout Attorneys, Bloemfontein