REPORTABLE
CASE NO.: SA 23/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between

NATIONWIDE DETECTIVES AND

PROFESSIONAL PRACTITIONERS CC **FIRST APPELLANT**

And

ONDANGWA TOWN COUNCIL **FIRST RESPONDENT**

CORAM: Chomba AJA, Mtambanengwe, AJA *et* Damaseb, AJA

HEARD ON: 2009/03/12

DELIVERED ON: 2009/06/17

APPEAL JUDGMENT

MTAMBANENGWE, A.J.A.:

[1] This appeal is against the dismissal with costs by the High Court (Hoff J) of an application for the rescission of an order granted by the High Court (Silungwe AJ) dismissing appellant's application for summary judgment.

[2] In brief the background to the appeal is the following. The appellant, represented by Mr Kamwi, acting as its *alter ergo*, issued summons against respondent claiming the sum of N$72, 913.46 apparently for services rendered. When appearance to defend was entered appellant applied for summary judgment. That application was set down by appellant for hearing at 9h30 on 30th September 2006. It is common cause, or not disputed, that the matter was enrolled on the Motion Court roll for that day, starting at 10h00, as well as in Court F. The result was that Mr Kamwi, having seen the matter on the Motion Court roll, did not attend Court F as he did not bother to make enquiries until he saw the legal representatives of respondent walking out through the motion Court where he was waiting for the matter to be called. Meanwhile the matter had been called in Court F, and, in Mr Kamwi's absence, Silungwe AJ, at respondent's legal practitioners' request, dismissed the application for summary Judgment with costs including costs of a Rule 30 application that respondent's legal practitioners had lodged for hearing on the same date.

The application for the rescission of Silungwe AJ's order took various forms, including two notices of motion to that effect dated 08 September 2006 and 21 February 2007. These were withdrawn and replaced by a new application on notice of motion filed on

29 March 2007. Suffice to say the final application for rescission was made in terms of Rule 44(1)(a) of the High Court Rules.

[3] Summons against respondent in the main action was issued by Mr Kamwi as representative of appellant acting under the authority of a resolution which reads as follows:

> "In terms of Rule 7 of the High Court the close corporation hereby nominates its sole member in terms of section 42 and 54 of the close corporation act to act and represent it in all its dealings including proceedings in the court of law".

[4] In his heads of argument Mr Dicks, appearing for respondent, raised two points *in limine*; either of which, if sustained by this Court, would, independently, sound the death knell to this appeal. Before turning to consider these points I should, however, record that both the points *in limine* and the merits of the appeal were addressed in both heads of argument submitted on behalf of the parties and in oral argument before this Court. I now turn to consider the first point *in limine*.

[5] The first point is based on the provisions of section 26 of the Close Corporation Act, 26 of 1988 (the Act), which provides:

> "(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 sixty 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 sixty 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 Official Gazette, and the date of the publication of such notice shall be deemed to be the date of deregistration."

Notice in terms of the Act, listing in the schedule thereof appellant as one of the close corporations deregistered thereby, appeared in Government Gazette No. 4037 of 29 April 2008. Section 1 of the Act defines "Deregistration" as "the cancellation of the registration of the corporation's founding statement". Mr Kamwi admitted all this and went further to state that the deregistration of appellant in fact took place on his request.

[6] Mr Dicks submitted that the effect of deregistration of a corporation is that its existence as a legal person ceases and that upon such deregistration "all its property, movable and immovable, corporeal and incorporeal, passes automatically (i.e. without any necessity for delivery or any order of Court) into the ownership of the State as

bona vacantia." For this submission Mr. Dicks relied on authorities cited in General Note on s 73 of the Companies Act and submitted that this applied a fortiori in the case of a close corporation. In one of the cases he listed, *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984(2) SA 372 (D) Goldstone J noted at 374D-

> "There is a long line of authority to the effect that where a company is deregistered any property which it may have owned on the date of deregistration becomes *bona vacantia* and vests in the State."

At p 376 H to 377 C the learned judge amplified his comments as follows:

> 'In terms of s 1 of the Act deregistration – 'in relation to a company, means the cancellation by the Registrar of the registration of the memorandum and articles of the company…'
>
> And, in terms of ss 64 and 65 of the Act it is that registration of the memorandum and articles of a company which results in the incorporation of the company. From the date of such incorporation life is breathed into the association and it –
>
> 'becomes capable of exercising all the functions of an incorporated company, and having perpetual succession…'
>
> (s 65 (1)).
> In my opinion the cancellation of the registration of the memorandum and articles of the company must have the opposite effect, i.e. its corporate personality comes to an end. In the passage from Cilliers, Benade and De Villiers *Company Law* cited by MELAMET J *supra* recognition is given to the fact that deregistration 'deprives the company of its legal personality'. In my opinion that means no more and no less than that the company ceases to exist: see Joubert *The*

Law of South Africa vol 4 para 361. If any further authority is required it may be found in the provisions of s 73 (6) itself. It is there provided that upon restoration of the registration of a company –

'the company shall be deemed to have continued in existence as if the registration of its memorandum and articles had not been cancelled'.

In other words, upon deregistration a company ceases to exist and this deeming provision is necessary to create a state of affairs which did not in fact obtain, ie the continued *existence* of the company after the deregistration thereof."

[7] In *Bowman NO v Sacks and Others* 1986 (4) SA 459 (W) at 463 G – H Fleming J stated:

"Upon dissolution of a company it disappears as a legal entity. A similar result may arise for other reasons, eg by deregistration, where legal personality falls away from the association of persons perhaps without any liquidation of company affairs. Such other possibilities do not detract therefrom that dissolution of a company is a manner in which the legal personality of a company is destroyed. Cf Pennington's Company Law 4th ed (1979) at 784. With cessation of existence, there is also an end to any corporate activity; acts thereafter done on behalf of the company would be 'acts of mere usurpation." (My emphasis)

Mr Dicks lastly submitted that as there was no proof that appellant had been restored the applicant had lost its legal personality, and that the current appeal was an act of mere usurpation.

[8] In his written reply to this point *in limine* Mr Kamwi agreed that "the deregistration of a close corporation indeed results in the cancellation of the founding statement and loss by the association of members forming the corporation of legal personality and corporate status." He however, argued that deregistration "does not terminate the existence of the corporation." To put it in his own words:

> "Upon deregistration only the association of persons sustaining the corporation merely loses its corporate personality and further deregistration does not affect any liability of any person to the corporation and such liability must be enforced as if the corporation were not deregistered (see section 26(4) of Act 26 of 1988."

He further relied on Rule 15(1) of the High Court Rules, (which he said applied to the Supreme Court a *fortiori*) where it provides that

> "No proceedings shall terminate solely by reason of death, marriage or other changes of status of any party there to unless the cause of such proceedings is thereby extinguished."

[9] Mr Kamwi's reply reveals a number of misconceptions which I shall deal with shortly hereunder. Before I do so, however, it is necessary to repeat in greater detail certain aspects of the matter so as to put the proceedings in question in a proper perspective. The main action against respondent commenced with the issue of summons on 23 June 2006. Then followed steps taken by either party in connection

with the pleadings, culminating in appellant's application for summary judgment which was heard and dismissed by the High Court on 30 September 2006. An application for the rescission of the order dismissing the application for summary judgment was initially launched by notice on 8 November 2006, followed on 21 February 2007 by an amended notice to rescind the order; both these notices were withdrawn on 29 March 2007 and on the same day a fresh notice was filed to apply on 13 April 2007 for rescission of the order in terms of Rule 44(1)(a) of the High Court Rules. After several postponements the application was heard on 2 May 2007. The appeal against Hoff J's order dismissing with costs the application in terms of Rule 44(1)(a) was then noted on 7 June 2007 and was on 13 October 2008 enrolled for hearing.

[10] On 29 April 2008 appellant was deregistered. It took nearly a year from June 2007 to 14 May 2008 for appellant to serve the record of proceedings in the Court *a quo* on respondent. In a letter to the Registrar of the High Court dated 4 June 2008 respondent's legal practitioner complained of the delay to apply for a date of hearing of the appeal and to furnish the said record. In reply appellant purported to file a notice of motion asking for condonation of "the late filing of the records" and the striking of respondent's said letter: in the affidavit in support Mr Kamwi still calls himself the '*alter ergo'* of appellant "duly authorized to depose to this affidavit" and explains that

> "The only reason for the late filing is that appellant did not have funds to pay for the records at CompuNeeds Namibia CC at the High Court of Namibia".

The affidavit was sworn to and filed on 29 September 2008. What happened thereafter does not appear from the records except that on 13 October 2008, the Registrar of the Supreme Court gave notice to the parties that the matter had been set down for hearing on 12 March 2009.

[11] The position, therefore, is that from the date of the Registrar's notice in the Gazette appellant as a legal person ceased to exist. Section 26(4) of the Act on which Mr Kamwi relies provides:

> "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".

The subsection clearly does not empower a member of the corporation to enforce any person's liability to the corporation. If, as Mr. Kamwi accepts, the appellant ceased to exist as a legal personality on 29 April 2008, it follows that from that date the resolution under which Mr. Kamwi had been acting hitherto had ceased to have any effect. Another way of putting it is that Mr. Kamwi's acts after the deregistration of appellant, which acts he claims to do as appellant's alter ergo, cannot be the acts of the appellant as appellant no longer existed. (*Bowman N.O v Sacks and Others supra*; *Lees Import and Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd* 1999

(4) SA 1119 (ZS) at 1130 H, Silver Sands Transport (Pty) Ltd v S.A Linde (Pty) Ltd. 1973 (3) SA 548 (W) at 549.

[12] Mr Kamwi's reliance on Rule 15 (1) of the High Court Rules is equally misconceived. That where a corporation has ceased to exist, as in this case, its property vests in the State as *bona vacantia* has not been denied by Mr Kamwi. All it means in this case is that the right of action which is an incorporeal asset of appellant had also vested in the State (*Rainbow Diamonds (EDMS) BPK en Andere v Suid – Afrikaanse Nationale Lewns Assuransie Maats Kappy* 1984 (3) SA 1 (A) at 10 – 12). To put it more plainly, the proceedings have not been terminated, but the right of action has been lost with the deregistration of the appellant. In the words of *Fleming J in Bowman N.O v Sacks and Others supra* Mr Kamwi, in continuing to act for appellant after 29 April 2006 was thus committing an act of usurpation.

[13] The above conclusion on the first point *in limine* makes it unnecessary to consider the second point *in limine* raised by Mr Dicks. It also becomes unnecessary to go into the merits of the appeal.

The Costs

[14] In *Silver Sands Transport* case *supra* the Court was faced with a situation similar to what obtains in this case, i.e. someone acting on behalf of a non-existent company. Snyman J remarked at 549 G

> "In regard to Mr. Rall's act of signing a minute of a meeting of this non-existent company and thereafter signing a power of attorney authorising the appointment of attorneys and counsel to act for this non-existent company, it seems to me that he may well have some responsibility for the costs which the defendant has incurred. The defendant has been put to considerable costs preparing for trial and in appearing through counsel this morning here, and if the fault lies with Mr. Rall, then it is only fair that he should be ordered to pay the defendant's costs."

[15] I adopt the same approach as regards costs in this matter which Mr Kamwi must pay personally for continuing to act for a non-existent corporation.

[16] In the result I make the following order:

1. The appeal is dismissed with costs.
2. Mr Kamwi is ordered to pay respondent's costs in his personal capacity.

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MTAMBANENGWE, AJA

I concur.

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CHOMBA, AJA

I concur.

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DAMASEB, AJA

COUNSEL ON BEHALF OF THE APPELLANT: In person

COUNSEL ON BEHALF OF THE RESPONDENT: Mr. G. Dicks

INSTRUCTED BY: Dr. Weder, Kauta & Hoveka