



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J388/14

MOTOR INDUSTRY BARGAINING COUNCIL

Applicant

and

NIHAL KHAN

First Respondent

SAWINTRA DEVI KHAN

Second Respondent

Heard: 01 September 2015

Delivered: 02 September 2015

Summary: Application to declare members of a deregistered close corporation personally liable for its debts; Application launched in terms of the now defunct s 26(5) of the Close Corporations Act, Close corporation deregistered prior to the repeal of s 26(5); Application competent and granted with costs.

JUDGMENT

VOYI AJ.

[1] The Applicant is the Motor Industry Bargaining Council, a bargaining council registered in terms of s 29(15) of the Labour Relations Act,¹ and whose registered scope is the Motor Industry. It seeks an Order holding members of the now deregistered close corporation, being Nihals Autofit and Parts Centre CC, personally liable for the debts of the said close corporation as well as for proper compliance with arbitration awards issued by its Dispute Resolution Council.

[2] The cause of action is founded on the provisions of s 26(5) of the Close Corporations Act,² which have since been repealed. The said s 26(5) read thus:

“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.”

[3] The aforesaid s 26(5) was repealed by s 224(2) of the Companies Act.³ In effect, the whole of s 26 of the CC Act is now substituted by a new s 26,⁴ which reads thus:

“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.”

[4] The Companies Act of 2008 came into operation on 1 May 2011.⁵ On this date, the substitution of s 26 of the CC Act, as more fully described above, took effect.

¹ Act 66 of 1995 (“the LRA”).

² Act 69 of 1984 (“the CC Act”).

³ Act 71 of 2008 (“the Companies Act of 2008”).

⁴ See: s 224(2) of the Companies Act of 2008, which states that “[...]the laws referred to in Schedule 3 are hereby amended in the manner set out in that Schedule.”

⁵ See: Proc. No. R32, Gazette No. 34239, dated 26 April 2011.

- [5] As matters stand, there is no longer a provision which brings to bear personal liability of any member of a close corporation purely on the basis of its deregistration. The question that was into mind when this matter came before this Court for hearing was how the repeal of s 26(5), in particular, affects the relief sought by the Applicant in the present application.
- [6] In this matter, the close corporation was deregistered on 24 February 2011. This occurred while the now defunct provisions of s 26(5) of the CC Act were still operative. As indicated above, that section became no more after 1 May 2011.
- [7] I am, accordingly, satisfied that the foundation of the present application is in no way affected by the removal of s 26(5) of the CC Act from our statute books.⁶ under s 12(2)(c) of the Interpretation Act,⁷ it is stipulated that where a law repeals any other law, then unless the contrary intention appears, “...*the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed...*”.
- [8] The question of prescription also does not arise in this matter as the application was launched, and served⁸, prior to the expiry of a period of three (3) years after the close corporation in question was deregistered. In any event, it is not within my province to, out of my own motion, take any notice of prescription.⁹ That much is clear from the provisions of section 17(1) of the Prescription Act.
- [9] In the circumstances, I come to the conclusion that a case has been made out for the relief sought by the Applicant in the present application and that it is competent to grant the relief sought. On the strength of the affidavit of service handed up at the hearing of the matter, I am satisfied that the application was served on the Respondents.

⁶ See: *Sage Wise 24 CC v Vulcania Reinforcing Company (Pty) Limited* 2012 JDR 1113 (ECP) at para 10; *Zurcher's Electrical and Electronics CC v Kennedy* 2012 JDR 0062 (ECP).

⁷ Act 33 of 1957 (“the Interpretation Act”).

⁸ In terms of s 15(1) of the Prescription Act No. 68 of 1969 (“the Prescription Act”); it is the service of a process whereby the creditor claims payment of a debt that interrupts the running of prescription.

⁹ *Minister of Justice and Constitutional Development v Mathobela and others* [2007] ZANWHC 5 (25 January 2007) at para 11.

Order

[10] I, accordingly, grant the Orders sought in prayers 1 and 2 of the notice of motion dated 18 February 2015, to wit:

10.1 The First and Second Respondents are declared to be personally liable, jointly and severally the one paying the other to be absolved, as members of the deregistered close corporation, being Nihals Autofit and Parts Centre CC, for the debts of the said close corporation as well as the proper compliance with the arbitration awards issued by the Dispute Resolution Council of the Applicant under case numbers MINT11094, MINT18586, MINT18398 and MINT20625.

10.2 The First and Second Respondents are ordered to pay the costs of the application on an attorney and client scale, jointly and severally the one paying the other to be absolved.

VOYI AJ.

Acting Judge of the Labour Court of South Africa

Appearances:

On behalf of the Applicant: Mr C Lingenfelder
of Lingenfelder & Baloyi Attorneys

On behalf of the Respondents: No appearance

LABOUR COURT