

COMPANY DEREGISTERED: WHO GETS THE PROPERTY?

Matjhabeng Local Municipality v McDonald and Others (4075/2020; 4077/2020; 4078/2020) [2021] ZAFSHC 34 (19 February 2021)

Deregistration of companies failing to comply with statutory requirements has become the order of the day, and the consequences of bona vacantia (ownerless property devolving to the State) is real. In this judgment, a municipality sought an order that those properties owned by the deregistered companies that also owed large sums in outstanding rates, be declared to belong to it. Not so, said the Court, as the decision remains with Treasury.

The Judgment can be viewed [here](#).

FACTS

This matter deals with a local authority's application to court to declare the immovable properties of three companies that had been deregistered by the CIPC, *bona vacantia* to the Matjhabeng Local Municipality (the Municipality) itself.

Together, these companies owed the Municipality in excess of R2,6 million in outstanding rates and taxes. The first company was deregistered in 2011 and owned two properties over which mortgage bonds were registered. The second company was deregistered in 2016 and was the registered owner of one unbonded property. The third company was deregistered in 2010. It owned one immovable property, which was also encumbered by a mortgage bond.

HELD

Bona vacantia: Established legal principles

- The legal *maxim*, *bona vacantia*, deriving from Roman law, is an established legal principle since time memorial. In English law the same principle was adopted, i.e. ownerless property, whether in the case of an owner dying without a will and intestate heirs, or upon dissolution of a company, accrued to the Crown. This legal *maxim* has been applied in South Africa for at least a century.
- The common law position is clear: ownerless property automatically passes to the State without any form of delivery (including registration in a deeds office in the case of immovable property). Treasury is the organ of State that exercises the right to decide whether the State will lay claim to any undistributed money or claims upon the dissolution of a company. This prerogative of the State has never been abolished by legislation.
- Our courts have also constantly confirmed the principle that deregistration puts an end to the existence of a company at which stage its corporate personality ends in the same way that a natural person ceases to exist at death. The effect of deregistration of a company is that all its property, including any claims it might have against third parties, thereupon vest in the State as *bona vacantia*.

Did the Municipality (as opposed to the State) become owner of the immovable properties registered in the names of the three deregistered companies?

- The Municipality argued that the common law was not relevant anymore in light of our Constitution. The question in these three cases was therefore whether our Constitution has changed the common law.

- The common law did not support such a claim of ownership. The Municipality wanted the Court to overrule the common law (and a long line of authorities) to develop the common law to make provision for such vesting in itself of the ownerless properties.
- Where a rule of the common law is incompatible with constitutional values, courts have a constitutional duty to develop the common law to accord with those values. However, in exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Nonetheless there are significant constraints on the power of the judiciary to change the law and in a constitutional democracy, it is the legislature and not the courts which has the major responsibility for law reform.
- The Public Finance Management Act (PFMA), enacted during our present constitutional dispensation, regulates financial management in the national and provincial governments to *inter alia* ensure that the assets of those governments are mentioned efficiently and effectively. Section 76(1)(k) of the PFMA provides that the National Treasury must make regulations or issue instructions applicable to departments concerning “the alienation, letting or other disposal of state assets.” Section 76(2)(i) of this Act provides that the National Treasury may make regulations or issue instructions applicable to departments concerning “assets which accrue to the state by operation of any law.” The Schedules to the PFMA deal with constitutional institutions, major public entities and other public entities without any reference to local authorities.

- Regulation 10.2.1 of the Treasury Regulations provides as follows:

“10.2 Assets accruing to the state by operation of any law (section 76(2)(i) of the PFMA)

10.2.1 Where any money, property or right accrues to the state by operation of law (bona vacantia), the relevant treasury may exercise all powers, authority and prerogatives, and fulfil any obligation on behalf of the state.”

- The Municipality submitted that this regulation was not peremptory. The fact was though that it was always accepted that National Treasury should be cited in applications for the reinstatement of a deregistered company or close corporation. The prescribed manner and form for such an application are contained in the regulations issued in terms of the Companies Act. A number of requirements must be met by an applicant, one which was the requirement to obtain written confirmation from National Treasury and the Department of Public Works indicating that such departments have no objection to the reinstatement of the company if it has immovable property. This requirement does not mention a local authority such as a municipality at all. The Local Government: Municipal Finance Management Act deals with the management of the financial affairs of municipalities. This Act does not contain similar provisions as the PFMA pertaining to *bona vacantia* for obvious reasons: local authorities such as municipalities do not acquire ownership of ownerless property, this being the entitlement of the State.
- In the circumstances, the application to amend the common law must fail. It would not be a case of adapting “the common law to reflect the changing social, moral or economic fabric of the country,” but a dramatic departure from existing legal principles. Such a major change in order to reform our law is the prerogative of the legislature and not the judiciary. In fact, the PFMA, its regulations and schedules are indicative of the legislature’s intention not to change the common law principles in respect of *bona vacantia*.
- The position is therefore that properties automatically became vested in the State upon deregistration of the three companies. Nothing prohibits National Treasury to decide on how the properties should be liquidated

and what to do with the proceeds thereof. The liabilities of the deregistered companies have not been extinguished upon deregistration, but only rendered unenforceable as long as deregistration subsists. No doubt, the municipality's claims in respect of rates and taxes need to be paid as a first charge against the properties. The bondholders remain preferent and secured creditors.

CONCLUSION

The Municipality's application failed.