

DISPUTE RESOLUTION ALERT

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DEREGISTRATION NO LONGER OFFERS REFUGE FOR THE SCOUNDREL

On 24 March 2017, the Supreme Court of Appeal handed down judgment in the matter of *ZNK Investments CC v Luckytso Transport and Construction CC & 7 Others* (328/2016) [2017] ZASCA 20, which dealt with the validity of a sale in execution of a judgment debtor's property if the sale took place when the judgment debtor had been deregistered.

CERTIFICATION OF CLASS ACTIONS – A MATTER OF TIMING

Can a class action be certified after the action has already been instituted? This was one of the issues in a recent judgment of the Gauteng Local Division of the High Court, Johannesburg in *National Union of Metal Workers of South Africa (NUMSA) v Oosthuizen* 2017 JDR 0530 (GJ).

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The appellant in this case, ZNK Investments CC, purchased immovable property belonging to the judgment debtor, Luckytso Transport and Construction CC, through a sale in execution.

The High Court granted the order sought, thereby reinstating Luckytso and declaring the sale invalid and setting it aside.



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The appellant in this case, ZNK Investments CC, purchased immovable property belonging to the judgment debtor, Luckytso Transport and Construction CC, through a sale in execution. At the time of the sale, Luckytso had been deregistered due to a failure to file annual returns, but there was no evidence that the Sheriff of the High Court, ZNK and/or Absa (the mortgagee and judgment creditor) were aware of Luckytso's status. Subsequent to the sale, Luckytso and its sole member approached the High Court for an order reinstating Luckytso, and declaring the sale of the immovable property invalid and setting it aside.

The High Court reasoned that Luckytso's deregistration put an end to its existence which rendered Absa's claim against it unenforceable. In addition, the deregistration meant that ownership of Luckytso's property vested in the state and so the sale was invalid and fell to be set aside. The High Court granted the order sought, thereby reinstating Luckytso and declaring the sale invalid and setting it aside. ZNK's application for leave to appeal to the High Court was unsuccessful, but its application to the SCA was granted on very limited grounds – the appeal was constrained to whether the retrospective operation of the reinstatement of Luckytso had the effect that the sale in execution of its immovable property was valid.

In a unanimous judgment, Van der Merwe JA stated it is true that upon deregistration of a company or close corporation, that entity's property becomes bona vacantia and passes to the state without any form of delivery. However, the crucial issue for the SCA, in this case, was the legal effect of the reinstatement of a close corporation in terms of s82(4) of the Companies Act, 2008. This issue had not been considered by the High Court, but had been considered previously by the SCA in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 (SCA)*. In that judgment, Brand JA concluded that:

- i. reinstatement of registration by the CIPC in terms of s82(4) of the Companies Act, 2008 automatically and retrospectively revests a company (or close corporation) with its property and validates its corporate activities during the period of its deregistration; and
- ii. even after reinstatement in terms of s82(4), a party who is prejudiced by the automatic retrospective effect is given the opportunity to seek relief in terms of s83(4), in which event the court may grant the relief it considers just and equitable.

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The SCA found that the High Court should have refused to set aside the sale in execution and therefore upheld ZNK's appeal with costs.



Accordingly, the reinstatement of Luckytso by the High Court automatically and retrospectively re-vested the immovable property in Luckytso and validated its corporate activities during the period of deregistration. The attachment of its immovable property, and the subsequent sale in execution of that property constituted corporate activities of Luckytso during its deregistration. No case had been made out by Luckytso for relief in terms of s83(4), and the SCA also took note of the fact that Luckytso and its sole member did not deny knowledge of Luckytso's deregistration, nor did they

allege that they had a defence to Absa's claim. For these reasons, the SCA found that the High Court should have refused to set aside the sale in execution and therefore upheld ZNK's appeal with costs.

The position adopted by the SCA is encouraging for judgment creditors, as it clarifies that deregistration of a judgment debtor does not necessarily mean that a judgment creditor can never execute its judgment against the property of the judgment debtor.

Kerry Spies

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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2017 in Band 4 for dispute resolution.

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Joe Whittle ranked by CHAMBERS GLOBAL 2016–2017 in Band 4 for construction.



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CERTIFICATION OF CLASS ACTIONS – A MATTER OF TIMING

NUMSA, a trade union, applied for leave to continue, as class representative of all the beneficiaries of the Mogale Alloys Trust, an already pending action as a class action.

In Children's Resource Centre the court has expressly laid it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so.



Can a class action be certified after the action has already been instituted? This was one of the issues in a recent judgment of the Gauteng Local Division of the High Court, Johannesburg in *National Union of Metal Workers of South Africa (NUMSA) v Oosthuizen* 2017 JDR 0530 (GJ).

NUMSA, a trade union, applied for leave to continue, as class representative of all the beneficiaries of the Mogale Alloys Trust, an already pending action as a class action. The action was instituted against the trustees of the trust for their alleged malfeasance. The respondents in the application, and in the pending action, were the three trustees.

Van der Linde, J set out the background to class actions in our law. He referred to four conclusions arrived at by the Supreme Court of Appeal in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), the third and fourth of which are particularly relevant for purposes hereof. The third of such conclusions was that a prospective class representative ought first to apply to court for class certification before she/he would have the right to litigate on behalf of a class. The fourth was the Supreme Court of Appeal's laying down (per Wallis, JA) of seven requirements for certification of a class action.

Van der Linde, J also referred to the judgment of the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) where Jafta, J stressed that class certification must be constrained and guided by the interests of justice and that the requirements laid down in *Children's Resource Trust* were in truth relevant factors, not requirements, and none in itself decisive.

In his judgment Van der Linde, J pointed out that, since *Children's Resource Centre and Mukaddam*, a full court of the Gauteng Local Division has in *Nkala and Others v Harmony Gold Mining Co and Others* 2016 (5) SA 240 (GJ) issued a comprehensive certification order "in a mammoth class action concerning gold mines' alleged liability for silicosis and tuberculosis of their employees over a substantial period of time".

In *Children's Resource Centre* the court has therefore expressly laid it down as a requirement for a class action that the party seeking to represent the class should first apply to court for authority to do so. That requirement was endorsed by the Constitutional Court in *Mukaddam*.



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CERTIFICATION OF CLASS ACTIONS – A MATTER OF TIMING

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In National Union of Metal Workers Van der Linde, J held that an application for class certification has to be brought before institution of the class action.



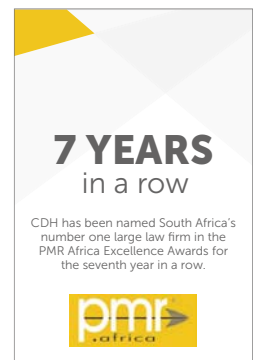
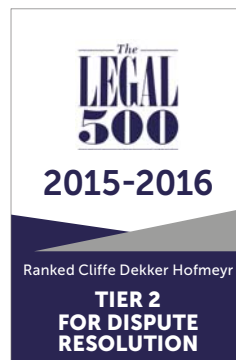
NUMSA nevertheless challenged the submission that prior application for certification was a requirement. It submitted that *Nkala* did not interpret *Children's Resource Centre* in this way. It contended that the court had a discretion and, since the respondents could not have suffered any prejudice, the court should in the exercise of that discretion "ratify the summons". And it submitted that, in any event, even if prior certification was a requirement, it has not "calcified" into a hard rule, but that the ultimate criterion for certification was whether the interests of justice justified it.

Van der Linde, J said that, as he saw it, *Children's Resource Centre* did not intend to lay down the requirement of prior certification as a substantive component of class certification. The seven *Children's Resource Centre* requirements go to the substantive content of the certification application. And it was in regard to the latter, not the timing of the application, that the Constitutional Court in *Mukaddam* held that they should be considered as factors that assist in determining

whether the interests of justice require certification. But on the requirement that the application should precede the summons, so Van der Linde, J concluded, the Constitutional Court clearly approved *Children's Resource Centre*. Mukaddam explained that the very *raison d'être* for prior certification was that courts should retain control over class actions. The only way in which potential class actions that hinder the interests of justice can be kept out of the justice system, is to preclude them from getting there in the first place. A court confronted with a *fait accompli* would find itself in an invidious position when having to assess whether the interests of justice require certification.

In *National Union of Metal Workers Van der Linde*, J therefore held that an application for class certification has to be brought before institution of the class action. Van der Linde, J further held that, even if the court had the power to permit *ex post facto* certification, it was not to be granted in this case.

Marius Potgieter



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