

**BACK TO THE FUTURE: THE
REINSTATEMENT OF DEREGISTERED
COMPANIES AND CLOSE CORPORATIONS,
SECTION 82(4) OF THE COMPANIES ACT
71 OF 2008**

Missouri Trading CC v ABSA Bank Ltd
2014 (4) SA 55 (KZD)

1 Introduction

In terms of section 82 of the Companies Act 71 of 2008 (hereinafter “the Act”) a company or a close corporation may be deregistered by the Companies and Intellectual Property Commission (hereinafter “the Commission”) if it failed to timeously lodge its annual returns with the Commission or if it has been inactive for a number of years. An important issue in terms of the Act is with regard to the consequences of re-registering a deregistered company or close corporation. When a company or close corporation is deregistered, it ceases to exist as a separate juristic person and its assets and rights vest automatically in the State as *bona vacantia* (*Ex Parte Sprawson: in re Hebron Diamond Mining Syndicate Ltd* 1914 TPD 458; *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewens-assuransiematskappy* 1984 (3) SA 1 (A) par 10–11; and see also Wunsh “Are Assets of a Deregistered Company *Bona Vacantia*?” 1983 *De Rebus* 393). Sections 82 and 83 of the Act provide the ways in which re-registration may occur, that is by application to the Commission or to the High Court (s 82(4) of the Act). The previous Companies Act 61 of 1973 (hereinafter “the 1973 Act”) and the Close Corporations Act 69 of 1984 contained provisions that expressly provided that the reinstatement of companies and close corporations were fully retrospective, and the effect was as if the entity was not deregistered in the first place. The new Act, however, does not contain a similar express provision, whether this was simply an oversight by the legislature or intentional is debatable (Ebrahim and Asmal “De-registration isn’t Necessarily the End” 2013 13 *Without Prejudice* 18).

In *Missouri Trading CC v ABSA Bank Ltd* (2014 (4) SA 55 (KZD)) the court discussed the conflicting views with regard to whether section 82 of the Act has retrospective application.

2 Facts

Absa Bank Limited (the first respondent) (hereinafter "Absa Bank") launched an application on 2 August 2011 for the provisional winding up of Missouri Trading CC. The application was lodged with the registrar of the court on the same day (par 2; and see also *In Development Bank of South Africa Limited v Van Rensburg NNO* 2002 (5) SA 425 (SCA), where the court held that it is the date upon which an application is presented to the court for the purposes of s 348 of the Companies Act 1973, and from which the winding up of the company by the court shall be deemed to commence). The application was opposed (par 2). A final winding-up order was granted on 27 August 2012. The second and third respondents were appointed as liquidators of Missouri Trading CC (the first applicant) and have been involved in winding the estate of Missouri Trading CC. The final winding-up order was apparently granted and the estate of Missouri Trading CC administered, whilst unbeknown to it and its sole member, the second applicant and also Absa Bank (par 2). On 29 July 2011 Missouri Trading CC was deregistered by the Commission (the fourth respondent). The reason why Missouri Trading CC was deregistered was because of its failure to submit its annual returns as contemplated by section 82(3)(a)(i) and (ii) of the Act (par 2).

Missouri Trading CC applied to court for an order declaring that it had been deregistered as a close corporation with effect from 29 July 2011, and for an order which declared that the decision of the court for the provisional liquidation of Missouri Trading CC on 31 May 2012 and 27 August 2012 respectively, *void ab origine* and of no force and effect (par 3).

Absa Bank opposed the relief claimed by the applicants. Absa Bank's main counter claim was for an order which declared that the order of the court whereby Missouri Trading CC was placed under provisional winding up and final winding up on 31 May 2012 and 27 August respectively, be of full force and effect and binding on the affairs of the Missouri Trading CC and its estate; that the appointment of Colin Mark Poole (second respondent) and Nicola Cronje (third respondent) as liquidators in the insolvent estate of the Missouri Trading CC be confirmed and declared valid; and that all the actions taken by the said joint liquidators pursuant to their appointment be declared valid and enforceable (par 4).

The issue of the non-joinder of Internet Visionary Systems (Pty) Ltd was deemed to be academic because a notice was filed by that company's attorney waiving its right to be joined. The notice also indicated that Internet Visionary Systems (Pty) Ltd would abide by the decision of the court (par 5).

The issue as to whether the Minister of Rural Development and Land Reform (fifth respondent) was the correct party to be cited was not considered in great detail as a notice was filed by the State Attorney on behalf of the Minister of Finance, that stated that the Minister of Finance did not wish to participate in the proceedings, that the Minister of Finance would abide by the decision of the court, and further, that the Minister of Finance did not object to the declaration that will have the effect that the assets of Missouri Trading CC are no longer *bona vacantia*, provided that no costs order was sought against the Minister of Finance (par 7).

3 Issue

The central issue that was to be determined in *Missouri Trading CC v ABSA* (*supra*) was whether in terms of section 82(4) of the Act the reinstatement of the registration of a formerly deregistered close corporation, operates prospectively from the date it is reinstated, or retrospectively from the date of its deregistration (par 1).

4 Judgment

The court held that Missouri Trading CC was administratively deregistered for failing to file its returns and according to the court, if a factual basis existed for deregistration it would be difficult to argue that such a dissolution had been void or unlawful. In these instances, according to the court, section 83 does not have application (par 41).

The judge was of the view that Missouri Trading CC died upon its deregistration on 29 July 2011 and revived on its reinstatement on 18 April 2013. Upon its reinstatement it was re-vested with all its assets and liabilities (par 42). The court held that all corporate activities and actions taken by the close corporation during that period (29 July 2011 to 18 April 2013) lacked any legal efficacy. The judge held that the *bona fide* acts of the corporation during its period of deregistration will upon the corporation's restoration on the register after its deregistration is declared void and will operate from the date they occurred (par 39). The court held that the absence of an express provision relating to retrospectivity in section 82 of the Act was significant and decisive and that the reinstatement of the close corporation operates prospectively from the date it is reinstated (par 35).

Koen J stated that the order claimed by the respondents may be granted if it was just and equitable in the circumstances. According to the judge that relief was not only just and equitable in the circumstances but also necessary. The court was satisfied that all the interested parties had been cited, that the liquidation orders were granted *bona fide* and that all the relevant issues were fully ventilated (par 42).

The judge held that the orders dated 31 May 2012 and 27 August 2012 that placed Missouri Trading CC under provisional winding up and final winding up should be declared of full force and effect and binding on the affairs of the Missouri Trading CC and its estate. The court held further that the second respondent and the third respondent as liquidators in the insolvent estate of the Missouri Trading CC be confirmed and declared valid, and all actions taken by them pursuant to the appointment, be declared valid and enforceable (par 42).

Accordingly the court held that the assets which were previously owned by Missouri Trading CC which in the ordinary course became *bona vacantia* when it was deregistered and would have re-vested in Missouri Trading CC when it was reinstated on 18 April 2013, re-vest *ex lege* in the second and third respondents on behalf of the insolvent estate (see par 2 of the counter-

application). The application made by applicants was therefore dismissed with costs (par 43–44).

5 Discussion

It is important for purposes of clarity to distinguish between the concepts of deregistration and dissolution. Deregistration takes place either after the winding up of a company or when the court provides for the dissolution of the transferor company after a reconstruction or amalgamation. Both deregistration and dissolution put an end to the corporate existence of the company, but the purposes and certain of their consequences are different (*Re M Belmont & Co Ltd* [1951] 2 All ER 898 901; [1952] Ch 10 15; and Blackman Commentary on the Companies Act (2009) 4-171).

In terms of the 1973 Act when a company was deregistered the liability of every director, officer and member of the company continues and may be enforced as if the company had not been deregistered (s 73 (5) of the 173 Act). In terms of section 73(5) and (6) of the 1973 Act the effect of an order restoring the registration of a deregistered company is retrospective and the courts were empowered to give such directions and make such provisions as seen just, placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been registered. In cases where a company was dissolved, section 420 of the 1973 Act provided that the liability of its directors, officers and members cannot continue, and the effect of an order declaring the dissolution void is not retrospective (Cassim *et al Contemporary Company Law* 2ed (2012) 922). The purpose of setting aside a dissolution is to enable some uncompleted business to be completed, usually a distribution of an asset which belonged to the company which may have been overlooked at an earlier stage (Blackman Commentary on the Companies Act 4-172). When the court declared a dissolution void under the 1973 Act the court was empowered to make such an order “on such terms as it thinks fit in order to deal with issues regarding the voiding of the order” (*Tyman’s Ltd v Craven* [1952] 2 QBD 100 107; [1952] 1 All ER 613 616 (CA); and *Re Test Holdings (Clifton) Ltd, Re General Issue and Investment Co Ltd* [1969] 3 All ER 517).

Section 82 and 83 of the Act deal with the concepts of dissolution and deregistration. Although the distinction between these two concepts may not always be clear they are not the same. Both of these concepts have the effect of terminating the legal existence of the corporate entity, but as seen above their purposes and the consequences are different (Cassim *et al Contemporary Company Law* 922).

5.1 Meaning of “deregistration”

Deregistration is the process whereby a formal end is put to a company which has become defunct (*Tyman’s Ltd v Craven supra*; and see also Blackman Commentary on the Companies Act 4-173). In *Miller v NAFCO Investment Holding Co Ltd* (2010) (6) SA 390 (SCA)), the court found (par

11) that, “Deregistration ... puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist at death” (see also *Ex Parte Jacobson: In re Alex Jacobson Holdings* 1984 (2) SA 372 (W) 377A–D). In the latter matter the court dealt with the effect of a company’s deregistration and restoration under the provisions of section 73(6) of the 1973 Act. But the principle there enunciated applies equally to close corporations due to the fact that section 26(7) of the Close Corporations Act has the same objectives and is similarly structured to the 1973 Act. Unlike a natural person, however, a deregistered company is amenable to resurrection. Under the 1973 Act this could occur in terms of an order of court made in terms of section 73(6), or by restoration of its registration by the registrar of companies in terms of section 73(6A) of the Act. The liabilities of a company which have been deregistered is not extinguished; the debt is merely rendered unenforceable against the company that is deregistered (*Barclays National Bank Ltd v Traub; Barclays National Bank Limited v Kalk* 1981 (4) SA 291 (W) 295). Accordingly, deregistration does not operate to discharge a surety for any such liability (see *Absa Bank Limited v Hlathini Safaries CC* [2012] JOL 29520 (GSJ)).

Henochsberg (*Henochsberg et al Commentary on the Close Corporations Act* (1997) 3(2) 550) submits 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 without any necessity for delivery or any order of court into the ownership of the State as *bona vacantia* (see also *Miller v Nafcoc Investment Holdings Co Ltd supra*; and see also *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) 549C).

If a close corporation is deregistered while having outstanding liabilities, members at the time of the deregistration are jointly and severally liable for these liabilities (s 26 (5) of the Close Corporations Act). Section 26(6) of the Close Corporations Act provided that the registration of a deregistered close corporation is retrospective (*Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA)). If the registrar restores the registration of a close corporation, such close corporation will continue to exist and be deemed to have been in continued existence as from the date of deregistration as if it were not deregistered (s 26(7) of the Close Corporations Act). In *Mouton v Boland Bank Ltd* (2001 (3) SA 877 (SCA)), the SCA held that section 26(7) does not extinguish a liability imposed on a member in terms of section 26(5) (par 10 of the judgment). In *Kadoma Trading 15 (Pty) Ltd v Noble Crest (supra)* the Supreme Court of Appeal (SCA) had to consider whether the provisions of section 26(7) of the Close Corporations Act (above), validate sale and franchise agreements concluded by the parties during the period of the respondent’s deregistration (par 1 of the judgment). Maya JA stated that it was necessary to have regard to the manner in which our courts have dealt with the counterparts to section 26(7) when dealing with the resuscitation of corporate entities. These, according to the judge, are couched in section 73(6)(a) and 73(6A) of 1973 Act, from which the provisions of section 26(7) originate (par 12 of the judgment). In dealing with the interpretation of section 73(6) of the 1973 Act the judge referred to the

case of *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* (2007 (4) SA 467 (SCA) par 23), where the court held:

“As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company – precisely because the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order seems to validate, retrospectively, all acts done since deregistration – including for example, the institution of legal proceedings – on behalf of a company that did not exist” (see also *Ex Parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) 477C–D; see also *Ex Parte Jacobson: In re Alec Jacobson Holdings supra*; see *Re CW Dixon Ltd* [1947] Ch 251; [1947] 1 All ER 279; *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136 (27 September 2013); and *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 (4) SA 484 (WCC); [2012] 3 All SA 183 par 23).

The effect of these sections was that upon the restoration of the corporation to register by the registrar all rights and obligations that had been extinguished by its deregistration were *ipso facto* revived with retrospective effect (par 12–15 of the judgment; and see also Visser *et al* *South African Mercantile & Company Law* 8ed (2005) 440). Maya JA held that there was no reason for the court to depart from this reasoning in the context of the Close Corporations Act (above) and, accordingly, confirmed that acts taken by a corporation performed “in good faith” during its period of deregistration are saved from invalidity by section 26(7) of the Close Corporations Act, and that such acts are retrospectively validated upon the corporation’s re-registration (par 15 of the judgment).

Those provisions, which expressly allowed that upon the restoration of a corporation’s registration it would be treated, at least to the extent required, as if it had remained in existence during the period of its deregistration, were repealed in terms of section 224 of the currently applicable Companies Act 71 of 2008.

In terms of in terms of section 224(2) of the Act the laws referred to in Schedule 3 to the Act are amended in the manner set out in that Schedule. Item 8(1) of Schedule 3 of the Act substitutes section 26 of the Close Corporations Act which previously regulated the position regarding deregistration and re-registration. Section 26 of the Close Corporations Act (above) now reads:

“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.”

The currently applicable provisions found in section 82 and 83 of the Act, specifically in section 82(4), do not contain anything, at least expressly, equivalent to the retrospectivity provisions that were contained in terms of section 73(6)(a) and (b) and section 73(6A) of the 1973 Act (see *Kadoma Trading 15 (Pty) Ltd v Noble Crest supra*; *Ex Parte Sengol Investments (Pty) Ltd supra*; *CA Focus CC v Village Freezer t/a Ashmel Spar supra*; *Peninsula*

Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd supra – the express retrospectivity provision that provided the basis for the court’s reasoning in these cases are, however, absent from section 82 and 83 of the Act).

The absence of an express provision relating to retrospectivity in section 82 and 83 of the Act would usually indicate an intention by the legislature to exclude any retrospective effect of a corporation upon reinstatement (*Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC)). Furthermore there is no provision in the Act for the restoration of the registration of a company by order, on application to a court. However, Binns-Ward J in *Peninsula Eye Clinic v Newlands Surgical Clinic* (2014 (1) SA 381 (WCC)) indicated that, although the absence of any such express provision maybe a very significant indicator that retrospectivity might not have been intended, this is not necessarily conclusive (par 30 of the judgment). In order to determine whether the reinstatement of the close corporation operates retrospectively it is necessary to make reference to the ordinary meaning of the words used in the Act (par 27), and to take into account that in terms of section 5 and 7 of the Act, it would be acceptable to construe our statute purposively in a manner that would effectively address such generally recognised needs and considerations unless the language clearly excludes that.

In *Chegettu Municipality v Minyora* (1997 (1) SA 66 (2) (ZSC)) the court found that it would be customary to look for additional words to provide for retrospectivity in cases where a word does not carry a connotation of retrospectivity, but retrospectivity was intended.

The word “reinstate” alone does not imply retrospectivity or prospectivity. In general, administrative acts, in both their nature and effect, operate prospectively from the date of occurrence unless a contrary intention appears from the wording of the statute (par 27).

In *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 case (*supra*), Peninsula sought an order declaring that the reinstatement of the registration of the respondent in terms of section 82(4) of the Act was with retrospective effect, with a consequent re-vesting in Newlands of the property it had owned when it was deregistered and that it validated all of Newlands’ acts, from the date of its deregistration until the date of its reinstatement. Newlands, on the other hand, contended that reinstatement under section 82(4) did not validate corporate activity during the period of deregistration and that, if section 82(4) was used for reinstatement, section 83(4) could not thereafter be resorted to (par 1).

Binns-Ward J found that construing the provisions of section 82(3) and section 82(4) to the effect that administrative reinstatement of a company’s registration retrospectively re-establishes its corporate personality and title to its property, but does not validate its corporate activity during the period that it was deregistered, seems to give the preferred result, given the choice of meanings available. According to the judge this view acknowledges the probably intended significance of the omission from the currently applicable provisions of the phrase “*the company shall be deemed to have continued in*

existence as if it had not been deregistered’ in the statutory predecessors of the provisions, but still allows the inevitable practical needs bound up in the reinstatement exercise to be addressed while minimising the incidence of prejudicial “anomalies” (*CA Focus CC v Village Freezer t/a Ashmel Spar supra*, (par 51 of the judgment)).

The same line of reasoning was accepted and adopted by the SCA in *CA Focus CC v Village Freezer t/a Ashmel Spar (supra)*, where the court made the following comment at the end of the judgment (although not binding as it is merely *obiter*):

“In conclusion it is interesting to note that ss26 (7) of the Act and 73(6) of the 1973 Companies Act were repealed by s224 of the Companies Act 71 of 2008, which came into operation on 1 May 2011. Section 82(4) of the 2008 Act now allows the registration of deregistered company or close corporation to be reinstated, but the provision permitting the restoration to operate retrospectively was omitted, perhaps because the lawmaker is now aware of potential anomalies” (par 22 of the judgment).

The court in *Focus CC v Village Freezer t/a Ashmel Spar Focus (supra)* was alluding to its concern that, despite its obvious merits and practical utility, automatic retrospective reinstatement could, in a given set of circumstances, bring about its own potential difficulties and inequities for other parties.

Binns-Ward J held that section 83(4) permits any interested person to apply for relief connected with or arising from the dissolution of a company, and the court is empowered upon such application to make any order that is just and equitable in the circumstances. According to the court, the ambit of section 83(4) is wide enough to empower a court to deal, not only with the validation, conditionally or otherwise, of corporate activity purportedly conducted on behalf of the company during its period of deregistration, but also, if it is just and equitable to do so, with any prejudicial consequences of the ordinarily retrospective effects of reinstatement, *viz* the re-establishment of corporate personality, the reinvestment of ownership of property and the reconstitution of the company's board of directors and general body of members. The wide breadth of the court's power in terms of the second category of remedy affords the ability to make the effect of any restoration of the company retrospective, whether generally or selectively (par 52 of the judgment). It appears from the judgment that the extent to which the court will validate actions taken on behalf of the company will depend on the facts of the case and, *inter alia*, the prejudice suffered by third parties as a result of the validation. The decision in *Peninsula Eye Clinic 2014* case (*supra*) can be seen as the court striking a balance between the concerns and interests of the company and third parties in circumstances where a deregistered company is re-registered (see *Recent developments in the de-registration and restoration of companies in liquidation* <http://www.lexology.com/library/detail.aspx?g=cb1ac465-19eb-4bf6-8c16-6fd69e4797d7>).

Newlands appealed the judgment handed down by Binns-Ward J, in the Western Cape High Court. The appeal turned on the interpretation of section 82(4) of the Act which is concerned with the restoration of the name of a

company onto the Companies Register after it had previously been registered. More pertinently, the issue in the SCA was whether the reinstatement of a company by the Companies and Intellectual Property Commission (CIPC) under section 82(4) operates retrospectively so as to validate actions performed on behalf of the company during its period of deregistration. Brand JA (Lewis, Pillay JJA, and Dambuza and Mayat AJJA, concurring) held that the indication of a different intent that usually follows from a change of wording in amending legislation, is diluted by the fact that the new Act is not merely an amendment to the 1973 Act. It is a complete reinvention of our corporate law. The organisation and arrangement of its provisions are completely different, particularly with regard to deregistration and reinstatement. In this light, different wording used in a completely new scheme can hardly be construed, in itself, as indicative of a complete reversal of intent. In addition to this, the concept of reinstatement of the company's registration, as opposed to re-registration, appears to support the notion of placing the company in its former position (*Newlands Surgical Clinic v Peninsula Eye Clinic* 2015 (4) SA 34 (SCA) par 24 of the judgment).

The court noted that deregistration of a company bears an inherent risk. It results from the fact that a comparison between the deregistration of a company, on the one hand, and the death of a person, on the other, is not entirely correct. Unlike a deceased person, a deregistered company often, as in this case, carries on with its business as if the deregistration never occurred and with third parties having no knowledge of its disability. Indiscriminate validation of corporate activities, on the one hand, and the indiscriminate refusal to validate these activities, on the other, therefore cut both ways. Potential prejudice to third parties therefore affords no reason to interpret section 82(4) so as to exclude retrospective validation in principle (*Newlands Surgical Clinic v Peninsula Eye Clinic supra* par 26 of the judgment).

Brand JA held that the position of partial retrospectivity held by the court *a quo* was untenable as the wording of section 82(4) simply leaves no room for this construction. According to the judge "reinstatement" in section 82(4) is construed as indicating retrospective operation. There is no justification for construing it to mean that retrospective operation must stop halfway, in the sense that it pertains to revestment of the company's property only. The court *a quo* held the view that its interpretation of section 82(4) read with section 83(4) of the Act has "the preferred result given the choice of meanings available" (*Peninsula Eye Clinic v Newlands Surgical Clinic supra* par 51). The wording of the section, according to Brand JA leaves no room for the pragmatic approach adopted by the court *a quo*. Brand JA, held that the only meaning available on that wording, is that section 82(4) has automatic retrospective effect, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration (*Newlands Surgical Clinic v Peninsula Eye Clinic supra* par 29 of the judgment).

Section 83(4)(a) allows any "person with an interest in the company" to apply for relief connected with the dissolution of the company. Upon such

application the court is afforded authority to make “any ... order that is just and equitable in the circumstances”. Moreover, section 83(4) expressly provides that this application can be brought “[a]t any time after the company had been dissolved”. Brand JA stated that he was of the view that the legislature had intended to alleviate the prejudicial effect on third parties or even the company which may be brought about by the retrospective effect of reinstatement under section 82(4). As a result any party who is prejudiced by this automatic retrospective action, is afforded the opportunity to seek amelioration under section 83(4) of the Act, in which event the court is authorised to grant any relief it considers just and equitable. The court accordingly dismissed the appeal with costs and confirmed the judgment of the High Court, subject to certain amendments being made to the order issued by the High Court (*Newlands Surgical Clinic v Peninsula Eye Clinic supra* par 31 of the judgment).

The differences between the manner in which the deregistration and dissolution of companies are treated in the 1973 and 2008 Companies Act, in particular as between section 82 of the current statute and section 73(6) and (6A) of its predecessor was in discussed by Yekiso J in *Absa Bank Ltd v Companies and Intellectual Property Commission* (2013 (4) SA 194 (WCC), [2013] 3 All SA 34). But the court in that case did not provide a determinative finding of the question of retrospectivity. In *Absa Bank Limited v Companies and Intellectual Properties Commission* (2013 (4) SA 194 (WCC)) the discussion on retrospectivity was incidental to the central question before the court. The court had to decide whether section 83(4) of the Act is available in a case where the dissolution of a company had occurred as a consequence of the company’s deregistration in terms of section 82(3), rather than upon its winding up in liquidation. In terms of section 83(4) of the Act the court may declare the dissolution of a company to have been void, or make any other order that is just and equitable in the circumstances. The full court answered that question affirmatively. Rogers J was prepared to assume that a court might make an order in terms of its powers in terms of section 83(4) of the Act “to validate things that happened during the period of dissolution”, but found it unnecessary on the facts of the case that any such order should be made (par 63 of the judgment).

In *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* (2013 (1) SA 570 (GSJ)), Van Oosten J commented that the import of the word “reinstated” in the subsection, with its connotation of putting something back in its previous state, is indicative of a legislative intention that the restoration of a company to the register in terms of the provision is with retrospective effect (par 13 of the judgment). The judge found it unnecessary, however, to come to a firm determination of the question as to whether the company’s registration in terms of section 82(4) of the Act is with retrospective effect because he found on the facts of the case that the deregistration process of the company concerned had been “cancelled”, with the result that the company had never in fact been deregistered (par 12–13 of the judgment).

Van Oosten J did nevertheless also postulate in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd (supra)* that there was “no reason why the court should

not be able to exercise its inherent jurisdiction, in view of the absence of an enabling statutory provision under the 2008 Act, on application or otherwise, to validate anything done by or against the affected company between deregistration and its reinstatement, and to make such order as it makes appropriate" (par 14 of the judgment; and see also *In Re M. Belmont & Co., Ltd* [1952] Ch. 10, [1951] All ER 898), where Wynn-Parry J used the expression "*inherent jurisdiction*" to describe the powers conferred by the phrase "*order, upon such terms as the court thinks fit*" in section 352(1) of the 1948 English Companies Act. Used in the same manner the expression could apply equally to the phrase "*any other order that is just and equitable in the circumstances*" in section 83(4)(a) of the 2008 Companies Act.

In *Amarel Africa Distributors (Pty) Ltd v Padayachee* ([2013] ZAGPPHC 87 (28 March 2013)), the point was taken by the defendant that the proceedings had been incompetent by virtue of the plaintiff company having not been on the register of companies when the action had been instituted. It had been removed from the register in 2010 for being in default with the lodging of its annual returns. Before the action came to trial in October 2011, the plaintiff company obtained the reinstatement of its registration administratively. It appears that the application for reinstatement had been submitted in September 2011 (that is after the commencement of the Act), and dealt with by the Commission in terms of section 82(4). Legodi J, mentioned the differences between section 73 of the 1973 Act and the regime in terms of section 82 of the Act. The judge came to the conclusion (without providing a basis for the conclusion) that the reinstatement of the plaintiff company's registration had been of retrospective effect and that it had validated the company's institution of the action, subject to the right of the defendant to raise in defence any prejudice it might have sustained as a consequence of the retrospective reinstatement.

The applicant in *Nulandis (Pty) Ltd v Minister of Finance* (2013 (5) SA 294 (KZP)), sought an order in terms of section 83(4)(a), confirming that the registration of a company against which it had obtained a judgment had been restored and that the company's assets had reverted in it (par 1 of the judgment). The court treated the application as being one to void the dissolution of the company, which had occurred consequent upon its deregistration for failure to file its annual returns (par 51 of the judgment). The court in *Nulandis (Pty) Ltd v Minister of Finance (supra)* did not deal precisely with the issue of whether section 82(4) operated retrospectively. Pillay J did express the view (par 53) that "any interested person who wants reinstatement and avoidance (that is, a declaration that a company's dissolution has been void) retrospectively will have to motivate fully for such effect in an application to court to either review the Commission's decision about registration or void dissolution by relying on the 'just and equitable' test in terms of section 83(4) of the new Act". This suggests that the only ways in which reinstatement of registration with retrospective effect could be obtained under the Act would be either by way of application to court for a review (par 39). Pillay J seems to have based his interpretation on the absence of any express provision in section 82 concerning the retrospective effect of the reinstatement of a company's registration, such as that found in

section 73(6A) of the 1973 Act, and that the powers given to the court in terms of section 83(4) of the Act are of a comparable nature to those under section 73(6)(b) of the 1973 Act (*Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 *supra* (par 36 of the judgment)).

Koen J stated that it was the intention that Missouri Trading CC would be reinstated in terms of section 82(4) of the Act. According to the judge all indications were that it was indeed reinstated in terms of section 82(4). The court stated that there was no compelling reason to indicate that were close corporation's reinstatement would operate retrospectively (par 37).

Koen J held that this approach could be argued to be unduly artificial and arbitrary to a litigant in the position of Absa Bank. This is because a litigant in the position of Absa Bank could potentially be affected depending on whether it proceeds in terms of section 82(4) or section 83(4), or its being presented, possibly at the instance of some other "interested person", with a reinstatement in terms of section 82(4) which doesn't operate retrospectively rather than an order setting aside the deregistration as void pursuant to section 83(4) (par 38). However, Koen J was of the view that there was little to no possibility of hardship to a litigant who may be in the position of Absa Bank because according to the judge when the initiative is taken by a creditor like Absa Bank, whether as a "interested person" or a "person with an interest in the company", then it must decide whether it has grounds to apply only for reinstatement in terms of section 82(4) or whether the original deregistration and its removal of the company's name from the register resulting in a dissolution was void, in which case it should proceed in terms of section 83(4) (par 39).

According to the court section 82(4) and section 83(4) are two very separate and distinct remedies which provide for widely disparaging factual scenarios. Section 83 will have application if the act of removing the name of the corporation was not justified in the first instance and if the act of deregistration is required to be declared void. An application made in terms of section 83 must be made with a notice for the relief sought, either with or without any relief that might "be just and equitable in the circumstances" (par 39). According to the judge *bona fide* acts of the corporation during its period of deregistration will upon the corporation's restoration on the register after its deregistration is declared void, operate from the date they occurred (par 39). In cases where there is a possibility of prejudice, a just and equitable order may be granted, in addition to the declaration of voidness, to remove any such prejudice (par 39).

The judge stated that he was of the view that in terms of section 82(4) no such prejudice will arise in respect of reinstatements operating prospectively. If there were uncertainties that remained these would relate to *bona fide* acts, such as actions instituted by or against the corporation and orders being granted in the *inter regnum* period between deregistration and re-registration or reinstatement, such as the liquidation orders granted against Missouri Trading CC (par 40).

6 Conclusion

It is evident from the discussion above that there are anomalies that inevitably arise as an incident of the purpose of section 82(4). It would not be correct to decline to give effect to this purpose only because it appears to give rise to anomalies. In my view it would be incorrect, in the absence of any ambiguity, for a court to give the provision a meaning that does not accord with its plain language (*Focus CC v Village Freezer t/a Ashmel Spar Focus supra* par 21). But perhaps the legislature should provide further clarity by seeking to amend the relevant section to expressly include a clause that provides for retrospective restoration, if this had indeed been the objective of section 82(4).

The court in *Missouri* concluded that the change in the wording from the previous statutory provisions indicates prospectivity. The close corporation being revived from its corporate death dictates that it must be vested with all the rights and liabilities again from the date of reinstatement, even if only revived prospectively. This, according to Koen J, is consistent with giving effect to the administrative act of the re-registration and such acts generally operate prospectively only. The court in *Missouri* did leave open the possibility that, in appropriate circumstances, to alleviate hardship or to give effect to any actions taken *bona fide*, a just and equitable order may upon application to all interested parties be granted by a competent court pursuant to section 83(4). This would have the effect such that the re-instatement, or aspects concerning the close corporation, for example certain acts arising from its "corporate activities", including court orders *bona fide* granted for its liquidation in ignorance of its deregistration, be confirmed and vested with legal validity notwithstanding the deregistration not operating with retrospective effect (par 37). The question as to the retrospective effect of reinstatement under section 82(4) has resulted in conflicting decisions in different divisions of the high court. The SCA in *Newlands Surgical Clinic v Peninsula Eye Clinic (supra)* has now provided clarity by finding that section 82(4) has automatic retrospective effect, not only in re-vesting the company with its property, but also in validating its corporate activities during the period of its deregistration (par 29 of the judgment).

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