

NOTES / AANTEKENINGE

DEREGISTRATION AND REINSTATEMENT OF REGISTRATION OF DEREGISTERED COMPANIES

1 Introduction

One of the grounds upon which a company can be deregistered by the Companies and Intellectual Property Commission (hereinafter “CIPC”) is where a company has failed to lodge annual returns for two or more years in succession (s 82(3)(a)(i)).

Prior to the Companies Act 71 of 2008 coming into operation, a large number of entities (approximately 900 000) were deregistered for failure to submit annual returns (Morley “What a Mess” 6 July 2011 11(6) *Without Prejudice* 20–21). While the then Companies and Intellectual Property Registration Office (CIPRO) was well within its rights to de-register non-compliant entities, many of these entities continued to operate despite their deregistration. Many creditors who were unaware of the deregistration commenced proceedings against the deregistered entities. Once creditors became aware of the deregistration, the validity of proceedings entered into during the period of deregistration was questioned.

Section 82(4) of the Companies Act 71 of 2008 provides that any interested person may apply to CIPC to have a deregistered company reinstated (administrative reinstatement). At any time after a company has been dissolved, the liquidator of the company, or other interested person, may apply to court for an order declaring the dissolution void, or any other order that is just and equitable in the circumstances (s 83(4)(a)). In *Newlands Surgical Clinic v Peninsula Eye Clinic* ((086/2014) [2015] ZASCA 25 (20 March) http://www.justice.gov.za/sca/judgments/sca_2015/sca2015-025.pdf (accessed 2015-08-30) par 1), the court held that reinstatement of the registration of a company in terms of section 82(4) is completely retrospective to the date of deregistration. The court held that the retrospectivity includes the validation of corporate actions during the period of deregistration. This decision brought to an end the conflicting decisions of different divisions of the High Court on the retrospective validity of corporate actions during deregistration. This note discusses the decision of the Supreme Court of Appeal in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*. The note also considers some aspects relating to the interpretation of section 82(4) and section 83(4).

2 Facts

This matter was an appeal of the decision in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* (21325/11) [2013] ZAWCHC 156; 2014 (1) SA 381 (WCC); [2014] 1 All SA 592 (WCC) (22 October 2013), where the court decided that administrative reinstatement of the registration of a company retrospectively re-establishes the company's corporate personality and title to property but it does not validate the company's corporate activity during the period of deregistration (par 51). The court held that only a court could, in terms of section 83(4), validate the corporate actions on the principle of its being just and equitable.

Newlands Surgical Clinic (Pty) Ltd (Newlands) operated a surgical clinic in Newlands, Cape Town. Peninsula Eye Clinic (Pty) Ltd (Peninsula), is an incorporated association of ophthalmic surgeons. Peninsula did not have its own clinic and its members made use of the facilities offered by Newlands. To encourage the use of its clinic, Newlands made incentive payments (kickbacks) to Peninsula at the end of each financial year in accordance with the income generated by its doctors for Newlands (par 2). In 2000 the Health Professions Council of South Africa (HPCSA) published draft guidelines that prohibited the payment of incentives. Peninsula received their last incentives payment in 1999. From 2000 no further payments were made to Peninsula (par 3). The unpaid kickbacks after 1999 were valued at around R570 000. In order to facilitate the payment of the outstanding R570 000 and not to contravene the HPCSA guidelines, the parties entered into a simulated sale agreement in terms of which Peninsula agreed to purchase 10% of the Newlands shares. The purchase price for the shares was being paid for with machinery belonging to Peninsula that was valued at R570 000. The true value of the assets was far below R570 000. The true intention of the parties was to enter into an agreement that saw Peninsula receiving the incentives due to it. The relationship between the parties soured and Newlands cancelled the agreement on the basis that the value of the goods were far less than R570 000 (par 3). The parties agreed to refer their dispute to arbitration (par 4). The arbitrator found in favour of Peninsula (par 5). The arbitrator's reward was appealed but the appeal was unsuccessful (par 5). Subsequent to the appeal of the arbitrator's reward Peninsula found out that Newlands was deregistered by CIPC on 4 January 2008 because of its failure to file its annual return in terms of section 173 of the Companies Act 61 of 1973. The arbitration proceedings and the appeal of the arbitration proceedings took place during the period in which Newlands was deregistered. Newlands' registration was only reinstated on 3 April 2012.

3 Issue

At issue was whether the reinstatement of registration validated the arbitration proceedings that occurred during the period of deregistration. The court had to decide on the retrospective effect of reinstatement of registration in terms of section 82(4) of the Companies Act 71 of 2008.

4 Court's finding on retrospective effect of reinstatement

The court held that reinstatement of registration by CIPC in terms of section 82(4) is automatically retrospective. Reinstatement of registration re-vested the company with its property and validated its corporate activities during the period of deregistration (par 29).

The court held that there is an inherent risk of prejudice to third parties where a company is deregistered. It found that the refusal to validate the corporate activities of a company during its period of deregistration can be equally prejudicial to *bona fide* third parties who were unaware of the deregistration. The court held that it is not entirely correct to compare deregistration of a company with the death of a natural person because a deregistered company very often continues running its business despite being deregistered and without other persons having knowledge of the deregistration (par 26).

The court held 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. Brand JA found that there is "no textual basis to distinguish between re-vesting of property and re-vesting the company with the capacity to continue operating" (par 29).

5 Analysis and discussion

Prior to the decision of the SCA in *Newlands Surgical Clinic v Peninsula Eye Clinic* there were a number of conflicting High Court decisions on the retrospectivity of reinstatement of a company's registration. The number of court decisions dealing with interpretation of section 82(4) and section 83(4) can be directly attributed to poor formulation of the legislative provisions. The purposive approach in interpretation of statutes allows the courts to give effect to the objects or purpose of the legislation (Botha *Interpretation of Statutes* (2013) 97; Du Plessis "Statute Law and Interpretation" in Joubert and Faris *The Law of South Africa Vol 25(1)* (2011) par 323; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1 par 18; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12 par 61; and *Mistry v Interim Medical and Dental Council of South Africa* [1998] ZACC 10 par 17–18). When applying the purposive approach the courts can take into account social- and political-policy directions. (Botha *Interpretation of Statutes* 97; Du Plessis in Joubert and Faris *The Law of South Africa Vol 25(1)* par 323). The purposive approach allows consideration of the common law prior to the enactment of the legislation, defects in the law not provided for by the common law, new remedies provided for in the legislation and the true reason for the remedies (*Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) 852–853; Botha *Interpretation of Statutes* 97; and Du Plessis in Joubert and Faris *The Law of South Africa Vol 25(1)* par 323). This approach to interpretation of statutes is what allows the judiciary its inherent law-making discretion (Botha *Interpretation of Statutes* 99). In applying the purposive approach the SCA was able to provide a solution to the

interpretation problem around the retrospective validity of corporate actions after reinstatement of registration.

Section 82(3)(a)(i) and (ii) of the Companies Act allows the CIPC to deregister a company that failed to file annual returns for two or more successive years, and who failed to provide satisfactory reasons for the failure to file the required returns, or that failed to show satisfactory cause for the company to remain registered. Where a company or close corporation is deregistered its property becomes *bona vacantia* and vests in the State (*ABSA Bank Ltd v Companies and Intellectual Property Commission, ABSA Bank Ltd v Voigro Investment 19 CC* ((8250/12, 6601/2012) [2012] ZAWCHC 182; [2013] 2 All SA 137 (WCC) (14 November 2012) par 13; Delpont *Henochoberg on the Companies Act 71 of 2008* (2014) Service Issue 8 332(10); *Suid Afrikaanse Nasionale Lewensassuransie Maatskappy v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (C) 637–638). The court in *ABSA Bank Ltd v Companies and Intellectual Property Commission of South African* (par 37(e)) held that the concepts of dissolution and removal from the register are brought together by section 83(1). A company is dissolved when its name is removed from the register (excluded are companies who are transferred to a foreign jurisdiction and not dissolved) (par 37(e)). The terms “deregistration” and “dissolution” are used interchangeably and have the same meaning (par 43). The court held that the term “dissolution” is now used in relation to deregistration in terms of section 83(1), dissolution pursuant to liquidation and dissolution pursuant to administrative deregistration (par 50). The court held that “if s 83(1) applies to all companies dissolved by the removal of their names from the register, there is no reason that s 83(4), which forms part of the same section and applies ‘at any time after a company has been dissolved’, should not apply to a company dissolved by the removal of its name from the register pursuant to s 82(3)” (par 43).

Where a company was deregistered by the CIPC, any interested party may apply to the CIPC to reinstate the registration of a company (also referred to as administrative reinstatement). The retrospectivity question was left open in the *ABSA Bank* decision because the court did not hear argument on it (*Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* (21325/11) [2013] ZAWCHC 156; 2014 (1) SA 381 (WCC); [2014] 1 All SA 592 (WCC) (22 October 2013) par 26).

In *Newlands Surgical Clinic* the court recognized the inherent risk of prejudice to third parties in the event of retrospective validation of corporate activities. The court, however, acknowledged that revesting a company with its property could have similar detrimental effects on *bona fide* third parties who acquired rights to the property. Potential prejudice to third parties, the court found, was not sufficient reason to interpret section 82(4) to exclude retrospective validation in principle (par 50). The court held that section 83(4) is available even where the company has already been administratively reinstated in terms of section 82(4). The court preferred to ascribe a wide meaning to section 83(4). Brand JA said that the legislature “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 s 82(4)". Anyone who is prejudiced by the automatic retrospective action may approach the court in terms of section 83(4) for an order that the court would consider just and equitable in the circumstances (par 30).

CIPC may only reinstate a deregistered company if it had filed all its outstanding annual returns and had paid the prescribed fees (regulation 40(6)). An application to reinstate a deregistered company must be made on Form CoR40.5 and must comply with such conditions as CIPC may determine (regulation 40(7)). In *Du Rand v Companies and Intellectual Property Commission of South Africa* (2013 JDR 0503 (GNP)) the court held that regulation 40(6) is *ultra vires* (De Lange and Sutherland "Deregistrasie Sonder Likwidasie van Maatskappye en Beslote Korporasies Ingevolge die 2008 Maatskappyywet" 2014 25(2) *Stellenbosch LR* 265 297; 2013 JDR 0503 (GNP) par 34; and Delport *Henochsberg on the Companies Act 71 of 2008* 332(12)). The court held that the regulation interferes with the independence and impartiality of the CIPC by prescribing conditions in relating to the exercise of its discretion to restore registration (Delport *Henochsberg on the Companies Act 71 of 2008* 332(12)).

CIPC must increase knowledge of the nature and dynamics of company- and intellectual-property law, and promote public awareness of company and intellectual property law by, amongst others, issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of the Act (s 188(2)(b)(i)). To achieve this CIPC may issue guidelines and practice notes. A Practice Note is a document issued by a regulatory agency (in this case CIPC) with respect to a matter within its authority which sets out a procedure that will be followed by the regulatory agency, or a procedure that must be followed when dealing with the regulatory agency or the regulatory agency's interpretation of, or intended manner of applying a provision of the Act or the regulations (regulation 4(b)). CIPC issued a Practice Note dealing with reinstatement of companies (Practice Note 6 of 2012). In terms of Practice Note 6 of 2012 any application for reinstatement must comply with the following requirements:

- 1 Certified copy of the identity document of the applicant (director or member);
- 2 Certified copy of the customer filing the application;
- 3 Deed search (reflecting ownership of immovable property or not);
- 4 Letters from the National Treasury and Department of Public Works, indicating that such departments have no objections to the re-instatement; if it has immovable property;
- 5 Advertisement in a local newspaper giving twenty one (21) days' notice of proposed application for re-instatement;
- 6 Affidavit indicating the reasons for non-filing of annual returns, if deregistration was due to non-compliance in relation to annual returns;
- 7 Affidavit indicating the reason for the original request for deregistration, if the company or close corporation itself applied for deregistration;
- 8 Sufficient documentary proof indicating that the company or close corporation was in business or that it had outstanding assets (e.g. property or intellectual property rights) and liabilities at the time of deregistration" (<http://www.cipc.co.za/files/9913/9565/1722/PracticeNote6of2012.pdf> (accessed 2015-09-01)).

The SCA decision in the *Newlands Surgical Clinic* solves but one of the problems experienced with section 82(4) and section 83(4). The other problems remain. For example, the problem of interested persons who are not shareholders or directors of the company not being able to comply with the requirements as set out in Practice Note 6 of 2012 issued by CIPC still exists (the court in *Newlands Surgical Clinic* was not required to deal with this issue) Practice Note 7 of 2011 (<http://www.cipc.co.za/files/8413/9764/1424/PracticeNote7of2011.pdf>) that acknowledged that interested parties could not comply with the abovementioned requirements, and that it could not be expected of creditors to pay the outstanding fees but the Practice Note was withdrawn by the CIPC. Despite section 82(4) making provision for interested parties to apply for administrative reinstatement, creditors or third parties will not succeed in meeting the requirements of Practice Note 6 of 2012, unless the directors, shareholders or members of the deregistered company or close corporation cooperates with the application for reinstatement. It is respectfully submitted that the requirements set out in Practice Note 6 of 2012 for reinstatement unfairly force a third party to incur the costs of a court application. The act allows application by interested persons for administrative reinstatement, and the practical requirements must likewise consider the fact that the applicant could be an interested party that cannot comply with the prescribed requirements set out in Practice Note 6 of 2012. Regulation 4(3) provides that a practice note must be consistent with the act. Although not inconsistent with the act the practice note does not take into account the fact that *bona fide* interested third parties will be unable to comply with the prescribed requirements.

A company is dissolved on the date that its name is removed from the companies' register (s 83(1)). At any time after the dissolution of a company the liquidator or any other interested party may apply to court for an order declaring the dissolution void or any other order that is just and equitable in the circumstances (s 83(4)(a)). In the *ABSA Bank decision* the court held that the "legislature brought the terms dissolution and deregistration together by establishing dissolution as the juristic effect of deregistration" (par 48). Section 83(4) allows the court not to merely declare the dissolution void but to make any order that would be just and equitable in the circumstances (par 48). The court found that "the word 'dissolution' is now used in relation to the deregistration of companies in section 83(1); dissolution pursuant to liquidation and pursuant to administrative deregistration are now dealt with together; and there is now a single judicial remedy" (par 50). The court held that section 83(4) applies to all situations where a company's name was removed from the register or where a company was dissolved (par 52).

6 Conclusion

The decision of the SCA in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* ((086/2014) [2015] ZASCA 25; 2015 (4) SA 34 (SCA) (20 March 2015)) brings clarity on the retrospective validity of corporate actions after reinstatement of registration. The court cases could have been prevented had the legislature merely added a statutory provision that, upon

reinstatement of registration, the company shall be deemed to have continued in existence as if it had not been registered. The procedures for both administrative reinstatement and an application in terms of section 83(4) make provision for giving notice prior to making the application. The notice requirements provide the opportunity to third parties to object to reinstatement of registration. The requirements listed in Practice Note 6 of 2012 prevent interested persons like creditors and *bona fide* third parties to apply for administrative reinstatement through CIPC. The act provides for application by interested parties, and the prescribed requirements should consider the fact that an applicant could be a third party who cannot be expected to comply with the company's outstanding responsibilities to CIPC.

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