IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: 8598/2011

In the matter between:

MISSOURI TRADING CC	First Applicant
PERUMAL REDDY	Second Applicant

and

ABSA BANK LIMITED	First Respondent
COLIN MARK POOLE N.O.	Second Respondent
NICOLA CRONJE N.O.	Third Respondent
THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent
THE MINISTER OF RURAL DEVELOPMENT & LAND REFORM	Fifth Respondent

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J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The central issue for determination in this application is a legal one namely whether the reinstatement of the registration of a formerly deregistered close corporation, in terms of s 82(4) of the Companies Act 71 of 2008,[1] operates prospectively from the date it is reinstated, or retrospectively from the date of its deregistration.

[1] Hereinafter referred to as 'the Act'.

BACKGROUND:

[2] On 2 August 2011 the First Respondent launched an application, lodged with the Registrar of the Court on 2 August 2011,[2] for the provisional winding up of the Applicant. That application was opposed. On 31 May 2012 a provisional winding up order was however granted. On 27 August 2012 a final winding up order was granted. The Second and Third Respondents were appointed as the liquidators of the First Applicant and have been involved in winding up its estate. The aforesaid orders were granted and given effect to and the estate of the First Applicant administered whilst, apparently unbeknown to both the First Applicant and its sole member, the Second Applicant, and also the First Respondent, the First Applicant had been deregistered by the Fourth Respondent[3] on 29 July 2011. The First Applicant was deregistered due to its failure to submit annual returns.[4]

THE RELIEF CLAIMED BY THE APPLICANTS:

[3] The First Applicant applies for an order:

'(a) Declaring the First Applicant (Missouri Trading) to have been deregistered as a close corporation with effect from 29th July 2011.

(b) Declaring the orders of this court for the provisional liquidation of the First Applicant and the final liquidation of the First Respondent on the 31 May 2012 and the 27 August 2012 respectively, void *ab origine* and of no force and effect.

(c) Costs as against the Respondents, but only in the event of the opposition to any relief in (a) and (b) above.

(d) Further and/or alternative relief.'

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[2] In *Development Bank of South Africa Limited v Van Rensburg and others NNO* 2002 (5) SA 425 (SCA) it was held that this 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 'a winding up of a company by the court shall be deemed to commence'.

[3] The Fourth Respondent is the Companies and Intellectual Property Commission.

[4] As contemplated in s 82(3)(a)(i) and (ii) of the Act.

THE FIRST RESPONDENT'S CONTENTIONS AND COUNTER APPLICATION:

[4] The relief claimed by the Applicants is opposed by the First Respondent. It has raised the non-joinder of Internet Visionary Systems (Pty) Ltd, a company which concluded a purchase agreement with the Second and Third Respondents of certain immovable property falling within the insolvent estate of the First Applicant.[5] Apart from placing in dispute whether the First Applicant was indeed deregistered, the First Respondent also indicated in its Answering affidavit that it had applied in terms of section 82(4) of the Act for the First Applicant to be reinstated to the register of Close Corporations held by the Fourth Respondent. The First Applicant's reinstatement had however not yet been achieved at the time that the Answering affidavit was filed. An affidavit in support of such an application for restoration to the register had been attested to on 11 April 2013, a copy whereof was annexed to the First Respondent's papers. In anticipation of such reinstatement the First Respondent counterclaimed for the following relief:

'1. That the main application and this application be and are hereby heard on an urgent basis, and that the normal rules of service and notice are dispensed with.

2. That –

2.1 it is declared that the orders of this court dated 31 May 2012 and 27 August 2012 respectively, whereby the first applicant was placed under provisional winding up and final winding up respectively, are of full force and effect and binding on the affairs of the first applicant and its estate;

2.2 the appointment of COLIN MARK POOLE (Second Respondent) and NICOLA CRONJE (Third Respondent) as liquidators in the insolvent estate of the first applicant pursuant to the said orders be and is hereby confirmed and declared valid;

2.3 all actions taken by the said joint liquidators pursuant to their appointment as such be and are hereby declared valid and enforceable;

3. Alternatively to paragraph 2 above –

3.1 that the first applicant be and is hereby placed under a final winding up order in the hands of the master of the High Court, Durban, and

[5] The property has not yet been transferred from the estate.

that a copy of this order be published once in the Government Gazette and once in the Natal Mercury, such publication to take place on or before the day of 2013;

3.2 that the Master is directed to appoint COLIN MARK POOLE and NICOLA CRONJE as liquidators in the said insolvent estate;

4. Further alternatively to paragraphs 2 and 3 above –

4.1 that the first applicant be and is hereby placed under a provisional winding up order in the hands of the Master of the High Court, Durban;

4.2 that a Rule Nisi be hereby issued calling upon the first applicant to show cause, if any, to this court, on the day of 2013 why the aforesaid provisional winding up order should not be made final;

4.3 that the Master be and is hereby directed to appoint COLIN MARK POOLE and NICOLA CRONJE as liquidators in the said insolvent estate;

4.4 that a copy of this order be published once in the Government Gazette and once in the Natal Mercury, such publication to take place on or before the day of 2013;

5. It is declared that any property previously owned by the first applicant is no longer *bona vacantia*, and vests in the first applicant.'

THE NON-JOINDER OF VISIONARY SYSYTEMS (PTY) LTD:

[5] At the outset it appeared to me that Internet Visionary Systems (Pty) Ltd. would have a direct and substantial interest in the relief claimed by the Applicants. The grant of the relief in the Notice of Motion would impact on the validity of its agreement with the Second and Third Respondents. Accordingly, it should have been joined. The issue of the non-joinder of Internet Visionary Systems (Pty) Ltd. has however became academic because a notice was filed by that company's attorney waiving its right to be joined and indicating that it abides by the decision of this court.

THE NON-JOINDER OF THE MINISTER OF FINANCE:

[6] The relief in the First Respondent's counter application presupposes a valid reinstatement of the First Applicant, which will necessarily entail that its assets would

no longer be *bona vacantia*. No doubt, because it recognizes this fact, the First Respondent joined the Fifth Respondent to the application, being the Minister of Rural Development and Land Reform. The joinder of this particular Minister was explained on the basis that the Fifth Respondent was the party in whom the land owned by the First Applicant and its other assets would vest as *bona vacantia* pursuant to the First Applicant's deregistration.[6] I however raised with Mr Stokes SC, who appeared on behalf of the First Respondent, whether the Fifth Respondent was the correct party to represent the interest of the State as to whether the former assets of the First Applicant were still *bona vacantia* or not. In *Peninsula Eye Clinic (Pty) Ltd. v Newlands Surgical Clinic (Pty) Ltd and others*[7] the following was said:

> '[12] The Minister of Finance was joined because it is a well-established principle in our law that the property of a dissolved company goes as bona vacantia to the state; see *Rainbow Diamonds (Edms) Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (a) at 10-12. In consequence it became a standard requirement that the Minister of Finance, as the Minister responsible for the Treasury, be joined in any application to a court for reversal of the dissolution of a company by re-registration (see *Rainbow Diamonds (Edms) Bpk* at 1 4F-H).'

[7] Whether the Fifth Respondent was the correct party to be cited, need not be considered further in this judgment as a notice was filed by the State Attorney on behalf of the Minister of Finance dated 18 February 2014 stating that to the extent that the Applicant wished to have the First Applicant re-instated the Minister of Finance did not wish to participate in the proceedings and will abide by the decision of this court, and further, that the Minister of Finance does not object to the declaration that will have the effect that the assets of the First Applicant are no longer *bona vacantia* provided no costs order is sought against the Minister of Finance.

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[6] Reliance was placed on JA Kunst, P Delport and Q Vorster (eds) *Henochsberg on the Companies Act 61 of 1973* (June 2011 – Service Issue 33) 142 for the contention that the Fifth Respondent is the appropriate Minister where land is involved.
[7] 2012 (4) SA 484 (WCC).

WAS THE FIRST APPLICANT PROPERLY RE-INSTATED:

[8] It is trite law that a party claiming relief, must make out its case in its founding papers and not in reply.[8]

[9] A notice from the 'Manager: Disclosure Unit' of the Fourth Respondent, which notice was annexed to the replying affidavit to the First Respondent's counter application, records the following:

> 'According to the records of this Office, the close corporation MISSOURI TRADING CC registration number 2000/000/802/203 was incorporated on 07 January 2000.
> The Close Corporation was deregistered final (sic) on the 29 July 2011 due to non-compliance of annual returns.
> The Close Corporation was restored into business on 18 April 2013 and it is in business'.

This letter bore a stamp of the Fourth Respondent's office dated the 23 July 2013.

[10] I raised the issue whether there had been a proper re-registration,[9] particularly because this document, purporting to evidence the re-registration or reinstatement of the First Respondent, only emerged in the replying affidavit to the counter application, and there had been no opportunity for the Applicants to comment on this document or to dispute its validity.

[11] The contents thereof were furthermore vague in referring to the First Applicant having been 'restored into business'. That is not the terminology employed in s 82(4).

[12] I was furthermore troubled by the fact that it was common cause that the First Applicant had been deregistered due to non-submission of annual returns. Regulation 40(6) of the regulations to the Act accordingly would apply. It requires

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[8] *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469, *Pearson v Magrep Investments (Pty) Ltd and others* 1975 (1) SA 186 (D) at 187C – 188A.
[9] In *Peninsula Eye Clinic v Newlands Surgical Clinic* 2012 supra; see *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and others* 2014 (1) SA 381 (WCC) para 26 on page 396C 'the reinstatement of the of the respondent's registration as a company had [initially] not yet been confirmed to the court's satisfaction'.

that such returns firstly be furnished together with an explanation for the failure to have surrendered same. The latter explanation would probably require the co-operation of a person intimately involved with the affairs of the First Applicant at the relevant time, such as the Second Applicant. The Second Applicant had not stated that he had co-operated in that manner by providing an explanation. I would be surprised if he did. Furthermore, Practice Note 6 of 2012 issued by the Commissioner of the Fourth Respondent dealing with the 'Requirements for re-instatement in terms of the Companies Act, 2008 (Act 71 of 2008)' details various requirements.[10] These requirements were not all addressed pertinently in the affidavit of Mrs Bosch, an employee of the First Respondent, in her affidavit submitted to the Fourth Respondent, of which a copy was annexed to the answering affidavit, and being the basis upon which the reinstatement of the First Applicant was sought by the First Respondent and apparently granted. Specifically, it is unclear how the requirements relating to publication could have been complied with in view of the alleged reinstatement being effected on the 23 July 2013, being less than one week after the date on which Ms Bosch's affidavit had been attested.

[13] Regarding the procedural difficulty alluded to in paragraph [10] above Mr Suhr, on behalf of the Second Applicant, indicated that the Applicants did not want to deal with or respond to the notice which emanated from the office of the Fourth Respondent, albeit it that it only emerged during the reply. He confirmed from the bar

[10] In order to re-instate a company or close corporation from **1 November 2012**, the reinstatement application on an original signed CoR40.5 must comply with the following requirements **regardless** of the cause or date of registration:

(1) Certified ID copy of the applicant (director/member);
(2) Certified ID copy of the customer filing the application;
(3) Deeds search (reflecting ownership of immovable property or not);
(4) Letters from National Treasury and the Department of Public Works, indicating that such departments have no objection to the re-instatement, if it has immovable property;
(5) Advertisement in a local newspaper giving 21 days' notice of proposed application for re-instatement;
(6) Affidavit indicating the reasons for the 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 the close corporation itself applied for deregistration; and
(8) Sufficient **documentary** proof indicating that the company or close corporation was in business or that it had any outstanding assets or liabilities (eg property, intellectual property rights) **at the time of deregistration**'.

that the Second Applicant accepted that the notice is what it purports to be and what it records.[11]

[14] Regarding the meaning of the words appearing in the notice emanating from the Fourth Respondent, counsel were agreed that they accepted that the words 'restored into business' purported to convey that the First Applicant had been reinstated by the Fourth Respondent in terms of s 82(4) of the Act. Although the terminology is not in accordance with the wording of the Act, it certainly appears to me to convey nothing other than that the First Applicant had been reinstated.

[15] As regards the other reservations expressed in paragraph [12] above, the following in my view is apposite. The act of reinstatement pursuant to the provisions of s 82(4) of the Act clearly is an administrative act by the Fourth Respondent. Whatever suspicions one might have as to whether it was validly affected, it remains a valid administrative act until set aside.[12] No attack has been made on the validity of the notice of 23 July 2013. Indeed, the parties have disavowed any intention to impeach the 'restoration to business' asserted by the Fourth Respondent. Where the parties all accept that this meant the First Applicant had been reinstated, a conclusion which I also favour, and did not attack the validity of the administrative act of reinstatement of the First Applicant to the register, I am not entitled to go behind the validity of the administrative act.[13]

THE ISSUE FOR DETERMINATION:

[16] The real issue for determination is whether a reinstatement pursuant to s 82(4) operates retrospectively to the date of deregistration or not. On a first reading of the relief claimed in the counter application one might be forgiven for believing that

[11] Both counsel were desirous that the issue whether such reinstatement operates retrospectively or not be decided.
[12] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) paragraph 26.
[13] If the validity of that administrative act is accepted, then it is the administrative act which would have changed the status of former assets of the First Respondent from being *bona vacantia* to no longer being *bona vacantia*. That issue will not be affected by any order of this court. Accordingly, the joinder of the Fifth Respondent and whether it is the correct party to join and the potential non-joinder of the Minister of Finance do not arise in the present application, more correctly the counter application, if not already adequately addressed in the notice filed by the state attorney on behalf of the Minister of Finance.

the relief claimed in paragraph 2 of the notice of counter application appears unnecessary on the basis that if the relief claimed by the Applicants is not granted, then there would appear to be no need for the relief in paragraph 2 of the Notice of counter application, but that if the relief claimed by the Applicants is granted, then it should follow that the relief in paragraph 2 of the counter application must fail, and the only question remaining would be whether any of the relief in paragraphs 3, 4 and 5 of the Counter application should be granted. Mr Suhr conceded that in the event of the Applicants being successful, he would be hard pressed to say anything against the relief claimed in paragraph 4 of the counter application being granted. That concession is correctly made on what is contained in the papers.[14]

[17] Placing such a construction on the terms of paragraph 2 of the Notice of Counter application would however be unduly restrictive and unjustified. The relief claimed in paragraph 2 of the Counter application is, properly interpreted, not solely dependant on a finding that reinstatement operated retrospectively, but independent relief which may be granted if 'just and equitable in the circumstances'[15], were it to be found that reinstatement operates prospectively.

[18] But first it is necessary to briefly consider the applicable legal provisions which might find application.

THE LEGISLATIVE FRAMEWORK**:**

[19] The previous, but now repealed s 26(6)[16] of the Close Corporations Act 69 of 1984 provided:

> 'The Registrar may on application by any interested person, if he or she is satisfied that a corporation was at the time of its deregistration carrying on business or was in operation, or that it is otherwise just that the registration of the corporation be restored, restore the said registration: Provided that if a corporation has been

[14] All the procedural formalities for the grant of a provisional order of liquidation have been complied with and the necessary requirements for the grant of such an order established on a balance of probability.

[15] As contemplated by s 83(4)(a) of the Act. There is no express reference in paragraph 2 of the Notice of Counter Application to this relief being claimed pursuant to the provisions of s 83(4)(a) of the Act. That is however not required provided it is relief which could qualify as 'just and equitable in the circumstances'.

[16] Before its substitution in terms of s 224(2) of the Act with effect from 1 May 2011.

deregistered due to its failure to lodge an annual return in compliance with section 15A, the Registrar may only so restore the registration of the corporation after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.'

Such an application for reregistration was an administrative process which could be applied for by 'any interested person'. Upon restoration to the register, all rights and obligations that had been extinguished by deregistration were *ipso facto* revived with retrospective effect[17] and would validate retrospectively, all acts done since registration – including for example, the institution of legal proceedings – on behalf of a company that did not exist'.[18]

[20] The previous, but now repealed s 73(6) and (6A) of the Companies Act 61 of 1973 provided that:

'(6) (a) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

(b) Any such order may contain such directions and make such provision as to the Court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.'

[17] *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA).
[18] *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* supra paras 14 – 15.

Such an application for reregistration appeared to have been a judicial process which could be brought only by the deregistered company itself. Its effect also seems to have been 'to validate retrospectively, all acts done since registration – including for example, the institution of legal proceedings – on behalf of a company that did not exist'.[19]

[21] In terms of s 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 to the Companies Act substitutes s 26 of the Close Corporations Act which previously regulated the position regarding deregistration and re-registration. Section 26 of the Close Corporations Act 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.' [20]

[22] Section 5 of the Act provides that the Act 'must be interpreted and applied in a manner that gives effect to the purposes set out in section 7'. Section 7 sets out the purposes of the Act emphasizing simplicity, flexibility, efficiency and predictability.

[23] The relevant parts of s 82 dealing with 'Dissolution of companies and removal from register provides:

> '(3) In addition to the duty to deregister a company contemplated in subsection 2(b) [which relates to removing a company's name from the company's register where it had been wound up], the Commission may otherwise remove a company from the company's register only if –
>
> (a) the company has transferred its registration to a foreign jurisdiction in terms of subsection (5) or, -
>
> (i) has failed to file an annual return in terms of section 33 for two or more years in succession; and
>
> (ii) on demand by the Commission, has failed to –

[19] *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 (4) SA 467 (SCA); *CA Focus CC v Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA).

[20] Note sections 81(1)(f) and 81(3) do not arise in the context of this application.

(aa) give satisfactory reasons for the failure to file the required annual returns; or

(bb) show satisfactory cause for the company to remain registered; or

(b) the Commission –

(i) has determined in the prescribed manner that the company appears to have been inactive for at least seven years, and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or

(ii) has received a request in the prescribed manner and form and has determined that the company –

(aa) has ceased to carry on business; and

(bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.

(4) If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply on the prescribed manner and form to the Commission, to reinstate the registration of the company.'

[24] Section 83 dealing with the 'Effect of removal of company from register' provides:

'(1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction, as contemplated in section 82(5).

(2) The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.

(3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.

(4) At any time after a company has been dissolved –

(a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and

(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'[21]

DISCUSSION:

[25] It is trite law that the liabilities of a company are not extinguished by its deregistration; they are merely rendered unenforceable while the deregistration subsists.[22] Being unenforceable it should follow that liquidation, as the ultimate form of execution, would not be competent during the period a corporation is deregistered.

[26] The express retrospectivity provisions previously found in the relevant legislation and confirmed to apply in the case law[23] on those provisions, do not appear in s 82 and s 83. This would usually manifest an intention by the legislature to exclude any retrospective effect upon reinstatement[24] of a corporation. But although the absence of any such express provision is a very important indicator that retrospectivity might not have been intended, it is not necessarily conclusive.[25]

[27] In considering whether reinstatement operates retrospectively, regard must also be to the ordinary meaning of the words used in the Act. The word 'reinstate' does not of itself necessarily imply retrospectivity or prospectivity. Normally administrative acts, in both nature and effect, operate prospectively from the date of occurrence unless an intention to the contrary appears from the wording of the

[21] This section is to some extent the re-enactment of section 420 of the 1973 Act. It was held in *Absa Bank Ltd v Companies and Intellectual Property Commission and others* 2013 (4) SA 194 (SCA) para 41 and 42 that s 83(4) applies to companies and close corporations alike.
[22] *Barclays National Bank Ltd v Traub; Barclays National Bank Limited v Kalk* 1981 (4) SA 291 (W) at 295. Accordingly, deregistration does not operate to discharge a surety for any such liability – see *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Limited* 1983 (3) SA 619 (A) at 633 – 634 and *Absa Bank Limited v Hlathini Safaries CC* [2012] JOL 29520 (GSJ).
[23] *Kadoma Trading v Noble Crest* supra; *Insamcor v Dorbyl Light & General Engineering* supra and *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 477C.
[24] This was held to be the position in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC), although that finding is probably not 'safe authority' as the reinstatement in that case fell to be determined under the old Act as was rightly observed in *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra para 29.
[25] In *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra para 30 Binns- Ward J found himself 'unable to subscribe to the approach that, by itself, the omission plainly and unambiguously establishes the meaning [that it operates prospectively] the learned judge arrived at … in *Bright Bay Property Service* [and that] on a purposive reading of the provisions of s 82, that there has not in fact been a change of legislative intention [although recognizing] that an argument to the opposite effect can also be advanced persuasively'.

statute. Where a word does not carry a connotation of retrospectivity, but retrospectivity was intended, one would normally look for additional words providing for such retrospectivity.[26]

[28] The various arguments and counter arguments on the correct interpretation of the provisions have been analysed in detail by Binns- Ward J in *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra[27] and will not be repeated herein. Before me the Applicants submit that the absence of a specific provision providing for retrospectivity in the 2008 Act as opposed to earlier amendments is significant. It is a well-established rule of construction that the legislature is presumed to know the law, including the authoritative interpretation placed on its previous enactments by the courts.[28] It was argued that the deliberate omission not to follow the wording of previous enactments that expressly provided for retrospectivity when s 82(4) was enacted, leads to the only irresistible inference that such a radical change did not intend to provide for retrospectivity, otherwise it would have been a simple matter to state such an intention, as had been done in the past.[29]

[29] In *Fintech (Pty) Ltd. v Awake Solutions (Pty) Ltd. and others*[30] it was suggested obiter that the word 'reinstatement' in s 82(4) of the Act carries the same effect as the clearly articulated section 26(7) of the Close Corporations Act 69 of 1984 and that a corporation continues to exist and shall be deemed to have continued to exist from the date of re-registration as if it were not deregistered i.e. reinstatement operates retrospectively. Van Oosten J however expressed the view 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

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[26] *Chegettu Municipality v Minyora* 1997(1) SA 66(2) (ZSC). That decision however dealt with retrospectivity in that contractual context. It was not referred to in either the *Peninsula Eye Clinic v Newlands Surgical Clinic* 2012 supra case or in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd. and others* 2013 (1) SA 570 (GSJ) paras 12 – 13.

[27] This judgment was not referred to during the argument before me.

[28] Per Scott JA in *Road Accident Fund v Monjane* 2010 (3) SA 641 (SCA) para 12.

[29] In support of the argument that such a deliberate change in intention was manifest I was also referred to the omission of the former s 13 of the 1973 Act, which essentially had reacted s 216 of the Companies Act No. 46 of 1926 but is not repeated in the 2008 Act, and also s 30 prohibiting associations, syndicates or partnerships with more than 20 members carrying on business for gain save for certain ministerially exempted professions which although also enacted in s 41 of the Companies Act 1926, does not appear in the 2008 Act.

[30] 2013 (1) SA 570 (GSJ) paras 12 – 13.

company between deregistration and its reinstatement, and to make such order as it considers just. In *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra paragraph 34 at page 400B the court doubted whether the High Court has such jurisdiction. I share the concern whether this court would have such inherent jurisdiction, but concur that such an order could be one that in appropriate circumstances might be just and equitable, as contemplated in s 83(4)(a).

[30] The courts in *Absa Bank Limited v Companies and Intellectual Properties* Commission *and others*[31] and *Nulandis (Pty) Ltd. v Minister of Finance and another*[32] did not deal directly with the issue whether s 82(4) operated retrospectively. What is however significant in the *Absa* matter is the finding that the power to grant an order which is just and equitable in the circumstances as contemplated by s 83(4) is available not only where an order is claimed that the dissolution of a company was void in terms of s 83, but also where the dissolution of the company followed upon deregistration in terms of s 82(3). In *Nulandis*[33] D Pillay J stated that

> 'any interested person who wants reinstatement and avoidance 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 s 83(4) of the new Act'.

[31] A somewhat compromised stance was adopted in *Amarel Africa Distributors (Pty) Ltd v Padayachee*.[34] It was concluded in regard to the validity of proceedings instituted by a company when it was not on the register of companies at the time that the action was instituted, but reinstated before the matter came to trial, that an administrative application for re-instatement operated retrospectively and validated the 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.

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[31] 2013 (4) SA 194 (WCC).
[32] 2013 (5) SA 294 (KZP).
[33] At para [53].
[34] [2013] ZAGPPHC 87.

[32] *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra also concluded with a compromise, but in a slightly different form. The court concluded[35] that the 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. This was described to 'give the preferred result given the choice of meanings available'. It was said that:

> '[i]t is a construction that 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" of the sort postulated in the Supreme Court of Appeal's judgment in *CA Focus CC* supra'.

There is much to be said for this view, although I incline to an inverse stance to that adopted, although it has little if any different practical effect in the present application, for reasons which will follow below.

[33] The position in our law regarding reversing the dissolution of a close corporation appears to be as follows:

(a) When a corporation is deregistered by its name being removed from the register for whatever reason, it is 'dissolved' for the purposes of s 83(1).

(b) Basically two[36] main different remedies for reversing the dissolution of a close corporation are provided:

  (i) An administrative process, in terms of s 82(4);

  (ii) A judicial process requiring an order of court declaring the corporation's dissolution to have been void, in terms of s 83(4);

  A court can grant an order, probably in either of the above instances pursuant to s 83(4)(a), that is just and equitable in the circumstances, as the procedure in terms of s 82 does not exclude such an order also being made in an application to court.

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[35] At para 51.

[36] In *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra at para 41 Binns-Ward J identified what follows as 'three different remedies'. Nothing turns on this.

(c) The administrative procedure in s 82 of the Act is effected upon application by 'any interested person', a term wide enough to also include a creditor of the corporation, by the Fourth Respondent;

(d) No provision for notice to interested parties is made where reinstatement of a corporation is sought in terms of this administrative procedure and the views of interested parties are not taken into account. Such an administrative process 'is not as well suited as a judicial process to determine and afford appropriate remedies applying justness and equity';[37]

(e) Not only is the administrative 'reinstatement' effected by the Fourth Respondent without regard to the interests of any potentially interested parties who might be prejudiced by such a reinstatement, but specifically without there being any power to grant a reinstatement on terms that might be 'just and equitable in the circumstances'. If any just and equitable order is to be granted, it is to follow upon a separate application to court pursuant to the provisions of s 83(4)(a);

(f) Deregistration through this administrative process can only be granted by the Fourth Respondent in specific instances, namely:

(i) following the winding up of a company;[38]

(ii) where the company has transferred its registration to a foreign jurisdiction in terms of subsection (5);[39]

(iii) where the company has failed to file an annual return in terms of s 33 for two or more years in succession and has failed on demand by the Fourth Respondent to -

(aa) give satisfactory reasons for such failure; or

(bb) show satisfactory cause for it to remain registered;[40]

(iv) Where the Fourth Respondent has determined in the prescribed manner that the corporation appears to have been inactive for at least seven years and no person has demonstrated a reasonable interest in or reason for its continued existence;[41]

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[37] *Peninsula Eye Clinic v Newlands Surgical Clinic* 2014 supra para 49 at page 410.
[38] s 82(1)(2) of the Act.
[39] s 82(3)(a) of the Act.
[40] s 82(3)(a)(i) and (ii) of the Act.
[41] s 82(3)(b)(i) of the Act.

(v) Where the Fourth Respondent has received a request and has determined that the corporation-

(aa) has ceased to carry on business; and

(bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.[42]

(g) The separate and distinct procedure in terms of s 83(4) involves a judicial process brought at any time after a corporation has been dissolved, which will include its deregistration, by a liquidator of the corporation or any other person with an interest in the corporation, such as a creditor. It entails an application to court on notice to all interested parties required to be joined according to the general principles of our civil procedural law, for an order declaring the dissolution to have been void, either with, or alternatively for a separate order that is just and equitable in the circumstances. If the dissolution is declared void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

(h) To remove a company's name from the companies register does not affect the liability of any former director or shareholder or any other person in respect of any act or omission that took place before the company was removed from the register and such liability may be enforced as if the company had not been removed from the register.[43]

[34] A creditor of a deregistered corporation, as either an 'interested person'[44] or a 'person with an interest in the company,[45] elects whether to proceed to obtain re-instatement for the purposes of enforcing its rights and/or claim against the deregistered company either in terms of s 82(4) by the administrative process or alternatively by applying to court pursuant to s 83(4).

[35] The absence of an express provision providing for retrospectivity in s 82 is significant and in my view decisive. Deregistration dissolves the corporation and

[42] s 82(3)(b)(ii) of the Act.
[43] s 83(2)(3) of the Act.
[44] As contemplated in s 82(4) of the Act.
[45] As contemplated in s 83(4)(a) of the Act.

'puts an end to its existence. Its corporate personality ends, in the same way that a natural person ceases to exist on death'.[46] It can acquire no rights thereafter or incur obligations or have steps taken against it for enforcement of any outstanding liability.[47] If it was deregistered due to the lack of filing returns, then before it can be reinstated, the returns have to be submitted up to the date of deregistration. No returns after the date of deregistration and before reinstatement would be required as it was during that time 'dead'. It would survive only from the date of reinstatement from when it will have to comply with returns of whatsoever nature again. It is this simplistic recognition of circumstances, to which effect is given through the simplified administrative process provided for in section 82(4).

[36] To the extent that rights and obligations might accrue *bona fide*, such as the liquidation orders obtained by the First Respondent against the First Applicant in *casu* after its deregistration and demise, same would in the ordinary course and in the absence of a court order declaring them to be valid, be void and remain void unless the initial act of deregistration itself was void. In that event, as the issue is whether the act of deregistration is void, any order declaring it void would operate *ex tunc,* as opposed to the administrative direction that a corporation be reinstated in terms of s 82(4), which would operate prospectively *ex nunc.* If the necessary allegations can be advanced to show that the initial act of deregistration resulting in the company being dissolved was void, then obviously the dissolution of the company would fall away, as there was no valid deregistration, which would mean that the company would have continued in existence from the date of purported dissolution until the dissolution was declared to have been void, and continue to exist thereafter. Such a declaration would require the intervention of a court with its procedural rules relating to the joinder of interested parties, and the right of other parties to intervene but, if granted, must by its very nature operate retrospectively. That is consistent with the wording of the s 83(4) and general principles declaring an administrative act void. It must be recognized that in appropriate instances hardship could possibly follow, thus resulting in a discretion being entrusted to a court to either declare the dissolution to have been void (which would mean that the company has

[46] *Miller v Nafcoc Investment Holding Company Ltd and others* [2010] 4 All SA 44 SCA para 11.
[47] This is also consistent with the interpretation of s 83(2) and (3).

always continued as though it was never dissolved or deregistered), but with relief being granted upon application that is 'just and equitable in the circumstances'.

[37] In *casu,* the intention was that the First Applicant be reinstated in terms of s 82(4). All the indications are that it was indeed reinstated in terms of s 82(4). Counsel were at *idem* that the First Applicant had been deregistered due to its failure to render the annual returns. There would be no compelling reason to conclude that its reinstatement would operate retrospectively. The change in the wording from the previous statutory provisions points to prospectivity. Being revived from its corporate death, logic seems to dictate that it be vested with all its assets and liabilities again from the date of reinstatement even if only revived prospectively. That is consistent with giving effect to the administrative act of re-registration and such acts generally operating prospectively only. 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 s 83(4) that the re-instatement, or aspects thereof 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.

[38] The question might be posed whether such an approach would not be unduly artificial and arbitrary, as the position of a litigant like the First Respondent could potentially be affected depending upon whether it proceeds in terms of s 82(4) or s 83(4),[48] or it being presented, possibly at the instance of some other 'interested person', with a reinstatement in terms of s 82(4) which doesn't operate retrospectively rather than an order setting aside the deregistration as void pursuant to s 83(4).

[39] In my view there is little or no danger of that. When the initiative is taken by a creditor like the First Respondent, whether as a 'interested person' or a 'person with an interest in the company', then it must decide whether it has grounds only to apply for reinstatement in terms of s 82(4) or whether the original deregistration and its

[48] Assuming of course that it could make out a case for the initial deregistration to have been 'void', which is not as easy a case to make out as one for reinstatement in terms of s 82(4).

removal of the company's name from the register resulting in a dissolution was void, in which case it should proceed in terms of s 83(4). These are two very separate and distinct remedies providing for widely disparaging factual scenarios. If the act of removing the name of the corporation was not justified in the first place, then the act of deregistration is required to be declared void, which would require proceeding in terms of s 83 with a court application on notice for such relief, either with or without any relief that might 'be just and equitable in the circumstances'. Generally *bona fide* corporate activities 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. In the event of prejudice, such as claims possibly having prescribed, if not catered for in the Prescription Act 1969, a just and equitable order may be granted, in addition to the declaration of voidness, to remove any such prejudice.

[40] No such prejudice will generally arise in respect of reinstatements operating prospectively pursuant to s 82(4). Uncertainties that could remain 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 the First Applicant.

[41] On the facts available to me, where the First Applicant failed to render returns and was administratively deregistered for that reason, if the factual basis for such deregistration existed, it would be difficult to contend that such a dissolution had been void. Clearly the act of deregistration would have been lawful and justified. Section 83 could not find application. In those circumstances reinstatement revives the corporation prospectively but only after it had cured its default.

[42] In the light of the aforegoing, in my view the First Applicant 'died' upon it's deregistration on 29 July 2011 and revived on its reinstatement on 18 April 2013, revested with all its assets and liabilities. In the ordinary course, all corporate activities and actions taken during that period will lack any legal efficacy. But an order such as that claimed in paragraph 2 of the counterclaim may be granted if just and equitable in the circumstances. The grant of that relief appears to me to be clearly not only just and equitable in the circumstances, but also necessary. All the

interested parties have been cited, the Second and Third Respondents representing the interests of all creditors of the insolvent estate. The liquidation orders were granted *bona fide* after a full ventilation of all the issues. In those circumstances the orders of this court dated 31 May 2012 and 27 August 2012 respectively, whereby the first applicant was placed under provisional winding up and final winding up respectively should be declared of full force and effect and binding on the affairs of the first applicant and its estate, the appointment of the Second Respondent and Third Respondent as liquidators in the insolvent estate of the first applicant pursuant to the said orders be confirmed and declared valid and all actions taken by them pursuant to their appointment as liquidators be declared valid and enforceable.

[43] In the light of the above conclusion it follows that the assets of the First Applicant which in the ordinary course became *bona vacantia* when it was deregistered and would have re-vested in the First Applicant when it was reinstated on 18 April 2013, re-vest *ex lege* in the Second and Third Respondents on behalf of the insolvent estate by virtue of the grant of the relief in paragraph 2 of the Counter application. *Strictu sensu*, nothing further need to be said about the status of that property. As the matter is novel however no harm will be done to confirm *ex abudante cautela* that the property previously owned by the First Applicant is no longer *bona vacantia* as claimed in paragraph 5 of the Counter application.

[44] Accordingly, the Applicants' application is dismissed with costs and an order is granted in terms of paragraphs 2 and 5 of the Counter application.

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