

IN THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

(NATAL PROVINCIAL DIVISION)

CASE NO: 2623/07

In the matter between:

PIERRE DE VILLIERS BERRANGE N.O.

1st APPLICANT

RANJITH CHOONILALL N.O.
APPLICANT

2nd

PREETHA DABIDEEN N.O.
APPLICANT

3rd

NICOLA CRONJE N.O.
APPLICANT

4th

YVONNE THOKOZILE MBATHA N.O.
APPLICANT

5th

and

REGISTRAR OF COMPANIES

1st RESPONDENT

MINISTER OF FINANCE
RESPONDENT

2nd

SOUTH AFRICAN REVENUE SERVICES

3rd RESPONDENT

THE MASTER OF THE HIGH COURT

4th RESPONDENT

PRICEWATERHOUSECOOPERS INC

5th RESPONDENT

PRICE WATERHOUSE

6th RESPONDENT

PRICE WATERHOUSE MEYER NEL

7th RESPONDENT

CHRISTOPHER STEFAN SEABROOKE

8th RESPONDENT

JUDGMENT

THERON J

[1] This is an application for an order that the registration of NRB Holdings Limited (in liquidation) ('NRBH') be restored to the company register in terms of s 73(6) of the Companies Act 61 of 1973 ('the Act') and, *inter alia*, to ensure the validity of acts performed by the liquidators of NRBH during the period of deregistration. The applicants are the liquidators of NRBH.

[2] New Republic Bank Limited ('NRB') was established as a bank in 1970 and traded as such until April 1997 when the name of the company was changed to NRB Holdings Limited and it transferred its banking business to New Republic Bank Limited in accordance with the provisions of s 54 of the Banks Act.^[1] With effect from 1 April 1997, NRB was a wholly owned subsidiary of NRBH.

[3] During 1999, there was a 'run' on the banking business of NRB when its depositors *en masse* sought to suddenly withdraw their funds due to circumstances that undermined public confidence in the financial viability of the bank and, as a consequence thereof the banking business of NRB collapsed. On 29 January 1999, NRB was placed under curatorship by the Minister of Finance and was discharged from curatorship on 24 November 1999 after the local division of this court sanctioned a Scheme of Arrangement in terms of s 311 of the Companies Act.

^[2] NRB is a creditor of NRBH and on 14 May 2003, NRB launched an application to wind-up NRBH. On 14 November 2003 an order was granted in terms of which NRBH was placed under provisional liquidation. A final winding up order was granted on 19 December 2003.

[4] On 5 February 2005, the first respondent (the Registrar of Companies) wrote a letter to NRBH, its company secretary, and a director in which it was recorded:

'As I have reasonable cause to believe that the abovementioned company is not carrying on business or is not in operation. Advise me within one month from the date of this letter of the company's true state of affairs. If I do not receive an answer within one month from the date of this letter, further steps will be taken to deregister the company.'

In terms of a letter dated 25 April 2005, the first applicant advised the Registrar of

Companies that NRBH had been placed under provisional liquidation on 14 November 2003, and that the provisional order made final on 19 December 2003.

The first applicant concluded the letter by stating:

‘As the company has been liquidated, you must take whatever action you deem necessary.’

On 19 August 2005 the Registrar of Companies deregistered NRBH.

[5] Since the first applicant’s appointment as liquidator, he has been involved in extensive litigation in his capacity as liquidator. On 15 November 2006, he instituted legal proceedings in terms of s 424 of the Companies Act^[3] against the 5th, 6th and 7th respondent for claims in excess of R500 million. The 5th, 6th and 7th respondents (‘PWC’) were the auditors of NRBH and NRB during the period 1 April 1992 to 29 January 1999 and 20 February 1997 to 20 January 1999, respectively. In the s 424 claim it is alleged that PWC knowingly became party to the business of NRBH being conducted recklessly, and are on this basis liable for the debts of NRBH.

[6] On 30 March 2007, the first applicant applied, in terms of s 73(6) of the Act for the restoration of the registration of the company and other ancillary relief.^[4] The first applicant has alleged that the deregistration of NRBH has inhibited him from performing his duties as liquidator.^[5]

[7] The Registrar of Companies authorised Johannes Helberg to depose to an affidavit in support of the restoration application. In his affidavit, Helberg states that practice of the Registrar of Companies is not to deregister a company that was subject to a winding-up order and NRBH would not have been deregistered if the Registrar had received copies of either the provisional or final winding-up orders. It was alleged that the Registrar of the local division of this court had failed to forward the provisional and final winding-up orders of NRBH to the Registrar of Companies.

[8] On 4 April 2007 this court granted a rule *nisi* in the following terms:

- ‘1.1 The registration of NRB Holdings Limited (in liquidation) (‘NRBH’) is restored to the company register in terms of s 73(6) of the Companies Act, No 61 of 1973.
- 1.2 The assets of NRBH:
- 1.2.1 are declared to be no longer *bona vacantia*;
- 1.2.2 will vest in NRBH with retroactive effect to the date of deregistration as if NRBH had not been deregistered.
- 1.3 NRBH shall be deemed to have continued in existence as if it had not been deregistered and the period between deregistration and restoration shall not be counted for the purpose of prescription in the case of any creditors whose debts were not prescribed at the date when NRBH was deregistered.
- 1.4 The costs of this application shall be costs in the administration of NRBH, alternatively paid by any respondent or other person, body or institution that opposes this application.’
- [9] The rule *nisi* was served on all parties who had a direct and substantial interest

in the outcome of this application, including PWC and the 8th respondent. PWC applied for leave to intervene as respondents in this application. PWC opposed the application on the basis that since NRBH had been deregistered when the s 424 summons against PWC had been issued, the summons was, in law, a nullity; that prescription had continued to run in favour of PWC until a fresh summons was issued and that the court ought not to make an order which detracts from this consequence. The eighth respondent initially opposed the application, but has since withdrawn such opposition.

[10] On 2 May 2007, the court, by agreement between the applicant and PWC granted orders, *inter alia*, restoring to the company register the registration of NRBH in terms of s 73(6) of the Act and allowing the intervention of PWC.

[11] The issues in this matter relates to the further relief sought by the applicant, and in particular whether paragraphs 1.2, 1.3 and 1.4 of the rule *nisi* granted on 4 April 2007 should be confirmed. In the alternative to seeking the dismissal of the application for the further relief, PWC suggested, in its opposing affidavit, that the relief ought to be qualified by the insertion of the following:

‘Notwithstanding the remainder of this paragraph [1.3 of the order granted on 4 April 2007], nothing in this order it self renders valid the issue of summons by the applicant against the first to third defendants in November 2006 under case number 37943/06 [the s 424 claim].’

At the hearing of this matter, it was suggested that if the qualification proposed by PWC was not acceptable, the court should protect PWC's position by directing that:

'Restoration of the registration will not have the effect of prejudicing PWC's defence of prescription in any manner, and for that purpose the summons shall be deemed to have been served no earlier than the day on which restoration was ordered.'

[12] The effect of a restoration order is an important consideration in the determination of this application. Section 73(6)(a) of the Act provides:

'The Court may, on application by any interested persons 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.'

It was accepted that in terms of s 73(6)(a) the automatic and general effect of a restoration order granted without qualification, is that the company is deemed to have continued in existence as from the date of deregistration as if it had not been deregistered.^[6] The dispute in this matter revolves around the question whether a court has in terms of s 73(6)(b) of the Act jurisdiction to qualify or limit the retroactive effect of a restoration order. Section 73(6)(b) provides:

'Any such order may contain such discretions and make such provisions 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.'

[13] Counsel for the applicant argued that a court cannot qualify or limit the general retrospective effect of a restoration order. It was argued that the discretionary powers conferred upon the court by s 73(6)(a) does not envisage the imposition of a qualification or limitation that detracts from, as opposed to enhancing, the objective of 'placing the company and all other persons in the position, as nearly as may be' that they would have been in had the company not been deregistered. It was also argued that s 73(6)(b) was designed to enable the court to achieve to the fullest extent possible the 'as you were' position of the company that is contemplated by s 73(6)(a). In support of this argument, reliance was placed on a number of foreign

decisions.^[7]

[14] The Supreme Court of Appeal in *Insamcor (Pty) Ltd v Dorbyl Light General Engineering (Pty) Ltd; Dorbyl Light Engineering (Pty) Ltd v Insamcor (Pty) Limited*,^[8] considered the effect of s 73(6), Brand JA stated that:

‘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.’

In *Insamcor*, the court did not have to deal in detail with the effect of a restoration order on acts of a company during the period of its deregistration. The court accepted that third parties, as a result of deregistration, may have acquired or lost rights or may have decided not to exercise their rights against the company in view of the deregistration of the company. The court in *Insamcor* referred with approval to

Ex parte Sengol Investments (Pty) Ltd^[9] and *Ex parte Jacobson In re Alec Jacobson Holdings (Pty) Ltd*,^[10] where this principle was laid down that third parties who might be prejudiced by the grant of a restoration order must be given notice thereof.

In *Insamcor* an appeal against the setting aside of an order restoring the company to the register failed because third parties who might have been prejudiced by the restoration order were not given the opportunity to persuade the court to exercise its discretion in favour of restoration.

[15] In *Insamcor* it was confirmed that a court has, in terms of s73(6)(a), a discretion to grant a restoration order. It was stated that one of the considerations to which a court would have regard in the exercise of that discretion was the potential prejudice that restoration might cause to third parties.^[11] It is difficult to conceive of a reason why notice ought to be given to interested parties, otherwise than for them to protect their rights in any order that the court might make. Brand JA expressly stated that such third parties must be given the opportunity to persuade the court not to exercise

its discretion in favour of a restoration order. Alternatively they may endeavor to persuade the court to make that order subject to such directions under s 73 (6) (b) as may serve to alleviate its prejudicial consequences.^[12] It is implicit in this reasoning that In my view, *Insamcor* affirms the jurisdiction of the court to qualify the relief given upon restoration subject to directions aimed at preserving the rights of third parties who may be prejudiced by the retroactive consequences of a restoration order. The rights which may be preserved includes rights which such third party may have derived from the very fact of deregistration. If a third party may persuade a court not to exercise its jurisdiction to grant restoration, such third party must by implication be in a position to persuade the court to grant restoration subject to certain qualifications – thus limiting the general and automatic consequences of a restoration order. Concepts such as ‘as to the court seems just’ which embodies fairness and justice between parties and ‘as nearly as maybe’ would not have been inserted into the section had the legislature intended a different result.

[16] In *Insamcor* Brand JA, with reference to the approach adopted by De Vos J in *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd*^[13] reasoned that it was an oversimplification to regard restoration, as De Vos had as no more than a return to an ‘as you were’ position whereby all parties are retrospectively placed in the same position as they were prior to deregistration, as restoration can cause severe prejudice to third parties. In the circumstances, the contentions advanced on behalf of the applicant and enumerated in para [13] above, cannot be sustained.

[17] I turn now to consider whether it would be just, in the context of s 73(6)(b), for this court to exercise its discretion to limit the retroactive effect of the restoration order. Both the qualification and the alternative direction proposed by PWC relates to the question of whether the s 424 summons is a nullity. It is trite that a summons issued by a company after it has been deregistered is a nullity.^[14]

[18] It was submitted on behalf of PWC that the court should, in the exercise of its discretion take into account that PWC is not to blame for the deregistration of NRBH. It was contended, on behalf of PWC, that any order restoring NRBH to the register should not be framed in a manner in which prevents PWC from raising the defence of prescription in the s 424 proceedings. Whether prescription was interrupted by summons in November 2006 or after NRBH was restored to the register, may materially affect the question as to whether the s424 claim has

prescribed.

[19] In my judgment the qualification proposed by PWC would severely prejudice parties represented by the liquidators of NRBH in pursuing claims against and recovering money from PWC. Such a qualification will unfairly advantage PWC by affording them an opportunity to capitalize on an administrative error that resulted in the deregistration of NRBH and to turn such administrative error into a defence.

[20] For these reasons, the following order is made:

(a) Paragraphs 1.2, 1.3 and 1.4 of the order granted on 4 April 2007 are confirmed.

(b) PWC is directed to pay the costs of this application.

Applicants' Counsel: AJ Nelson SC with JL Van Dorsten

Applicants' Attorneys: AlexanderCox c/o Austen Smith Attorneys

5th, 6th and 7th Respondents' Counsel: WHG van der Linde SC with T Plewman

5th, 6th and 7th Respondents' Attorneys: Deneys Reitz c/o J Leslie Smith & Company