

Company reinstatements: conundrum and clarity*

Since the advent of the Companies Act, 71 of 2008 ("**New Act**"), two related questions have confounded legal practitioners and this confusion has been compounded by conflicting high court decisions. These questions are: (a) whether or not an interested person may apply to court for reinstatement of a company (or close corporation) deregistered because of failure to file annual returns and (b) whether or not a court may, when reinstating a company (or close corporation), make an order that such reinstatement shall have retrospective effect. Under the Companies Act, 61 of 1973 ("**Old Act**"), these questions did not require the wisdom of interpretation high priests; the genesis of the confusion is the New Act.

The purpose of this note is not to traverse the growing list of cases on the above-mentioned company reinstatements issues.¹ The note is limited to the discussion of the full-bench decision of 19 April 2013 in *ABSA Bank Ltd v Companies and Intellectual Property Commission of South African and Others*² ("**ABSA Case**"). It is argued that the reasoning in the ABSA Case is an affirmation of plausible convergence among judges on the interpretation of the New Act in regard to company reinstatements.

Effect of company deregistration

One of the grounds on which a company may be deregistered is failure to file annual returns. Indeed, during July 2010, the Companies and Intellectual Property Registration Office, the precursor of the Companies and Intellectual Property Commission ("**CIPC**"), deregistered a number of companies who had failed to lodge annual returns. It is primarily in relation to companies deregistered during this period that the effects of the uncertainty on company reinstatements are being felt.

It is a trite that when a company is deregistered, its corporate personality ceases similarly to the death of a human being and its assets are 'forfeited' to the state as ownerless property.³ It therefore follows that a person who may have a claim against a deregistered company which owned a property may not attach such property without first resurrecting that company.

The Old Act

s 73(6) of the Old Act provided as follows:

- "(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.*" [Emphasis added]

Further, s 73(6A) of the Old Act provided as follows:

"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

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¹ At the time of writing this note, company reinstatements under the New Act were dealt with in the following decisions: *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC), ("**Peninsula Case**"); *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 (1) SA 570 (GSJ), ("**Fintech Case**"); *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC); *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* (Case No.71624/2012), (GNP), (7 March 2013), Unreported, ("**Du Rand Case**") and *ABSA Bank Ltd v Companies and Intellectual Property Commission of South African and Others* [2013] 2 All SA 137 (WCC).

² Case No. A29/13, (WCC), yet to be reported. Refer to the Absa Bank case cited in footnote 1 for a decision of the court *a quo*.

³ Peninsula Case, at Para [5] and [12].

*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."* [Emphasis added]

The New Act

Section 82(3)(a)(i) and (ii) of the New Act provides that a company may be dissolved if it has failed to file annual returns for two or more years in succession and has, on demand by the CIPC, failed to give satisfactory reasons for the failure to file annual returns or show satisfactory cause for the company to remain registered.

Section 82(4) of the New Act provides as follows:

*"If the Commission deregisters a company as contemplated in subsection (3), any interested person **may apply in the prescribed manner and form to the Commission**, to reinstate the registration of the company."* [Emphasis added]

A comparison of s 73(6) and s 73(6A) of the Old Act with s 82(4) of the New Act reveals the following omissions in the New Act:

- there is no section which gives courts power to reinstate a company upon application by an interested person in the form of the wording similar to s 73(6)(a) of the Old Act; and
- s 82(4) of the New Act (which is similar to s 73(6A) of the Old Act in that it gives reinstatement powers to the CIPC) does not contain a deeming provision to the effect that such reinstatement will have retrospective effect.

Section 83(4) of the New Act provides as follows:

"(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." [Emphasis added]

ABSA Case – The facts

Absa Bank Ltd ("**Absa**") lent and advanced money to a close corporation. A mortgage bond was registered by Absa over the property owned by the close corporation as security for Absa's loan. The close corporation defaulted on loan repayments and the loan amount became immediately due and payable. Absa obtained a default judgment against the close corporation, the property was declared executable and Absa caused the property to be attached in execution. Absa discovered belatedly that another creditor of the close corporation had obtained a writ of execution against the same immovable property. Absa then applied, and was granted, a provisional order for the liquidation of the close corporation. Before the final liquidation order was granted, Absa discovered that the close corporation had been deregistered by the CIPC for failure to file annual returns. Absa then approached the High Court for reinstatement of the close corporation with retrospective effect.

To succeed in its application, Absa had to convince the court a quo that, contrary to the decision in the Peninsula Case,⁴ the court may in terms of the New Act reinstate a deregistered entity with retrospective effect similarly to reinstatement in terms of the Old Act and that s 83(4) of the New Act applies to reinstatement of entities deregistered for failure to file annual returns. Absa failed to convince the court a quo. First, the court a quo affirmed the decision in the Peninsula Case that reinstatement of deregistered entities is an exclusive preserve of the CIPC. Second, Henney J drew a distinction between dissolution and deregistration of entities and decided that s 83(4) of the New Act was not applicable to the case in issue because the close corporation had not been dissolved but was deregistered. He decided that it could only be reinstated in terms of s 82(4) of the New Act by approaching the CIPC. Absa appealed to the full-bench.

ABSA Case – clarity and convergence

The main question on appeal was whether or not s 83(4) of the New Act applies to reinstatement of a close corporation or company deregistered due to failure to file annual returns. Put differently, the question was whether an interested person may apply to court in terms of s 83(4) of the New Act to reinstate a company deregistered due to failure to file annual returns. Rogers J proffered the following reasons for answering the aforementioned legal question in the affirmative:

- the fact that the New Act deals with both the dissolution of solvent companies through liquidation and administrative dissolutions in Part G of Chapter 2 of the New Act indicates that s 83(4) of the New Act should also apply where a company or close corporation is deregistered for failure to file annual returns;⁵
- since section 83(1) of the New Act provides that, other than a company removed from the companies register due to that company's registration being transferred to a foreign jurisdiction (see s 82(5)), all companies are dissolved from the date on which they are removed from the companies register, the specific exclusion in s 83(1) relating to s 82(5) indicates that s 83(1) applies to all companies whose names have been removed from the companies register and not only to those deregistered pursuant to liquidations; consequently, if s 83(1) applies in all cases of removal from the companies register, the same must hold for s 83(4);⁶
- the amendment of the Close Corporations Act, No. 69 of 1984 by making Part G of Chapter 2 of the New Act in its entirety (including ss 82(3) and 83 of the New Act) applicable to close corporations could only sensibly be made on the premise that s 83 will apply to a close corporation dissolved for failure to file annual returns; therefore, if that is true in the case of a close corporation, it must also be true for companies.⁷

In summary, Rogers J said:

"In my opinion, s 83(4) applies in all cases where a company or corporation's name has been removed from the register in terms of Part G of Chapter 2 and where the company or corporation has as a result been dissolved. This includes deregistration on any of the grounds set out in s 82(3). Where a company or corporation has been deregistered by the CIPC in terms of s 82(3) rather than in terms of s 82(2)(b), an interested party may either apply to the CIPC for restoration in terms of s 82(4) or to the court in terms of s 83(4). Particularly where the interested party finds it impossible or practically difficult to comply with the

⁴ Peninsula Case, Para [24] and [26].

⁵ ABSA Case, Para [43].

⁶ ABSA Case, Para [45].

⁷ ABSA Case, Para [46].

*prescribed requirements relating to restoration in terms of s 82(4), an application to court in terms of s 83(4) is available as an alternative."*⁸

In regard to an order sought by Absa that the assets of the close corporation vest in the close corporation with retrospective effect, Rogers J was only prepared to order that the assets will re-vest in the close corporation. He said:

*"I do not think, however, that the assets should be stated to vest in Voigro 'with retrospective effect' and 'as if [Voigro] had not been deregistered'. I do not know precisely what these phrases are intended to convey. If they are intended to mean that Voigro will be deemed to have had some existence during the period of its dissolution, that would be contrary to the ordinary effect of a declaration that the dissolution is void. While the court has the power to make any other order which is just and equitable, and while this power may perhaps include a power to validate things that happened during the period of dissolution, I do not think it has been shown in this case that there is need for such an order."*⁹

The effect of the above paragraph is that although 'reinstatement of a deregistered entity with retrospective effect' may no longer be a magic phrase which automatically clothe a deregistered entity with corporate existence during its period of deregistration, a court may validate specific actions that may have happened during deregistration if it is just and equitable to do so.

The Judge consequently declared the deregistration of the close corporation void and ordered the re-vesting of all of the asset and liabilities of the close corporation before deregistration.

Although it was not referred to in the ABSA Case, the origin of the reasoning of Rogers J may be traced to the Fintech Case. In that case, Van Oosten J validated all acts done by or against a company during the hiatus between that company's deregistration and reinstatement on the basis of s 83(4) of the New Act. In the Du Rand Case, Muller AJ also interpreted s 83(4) similarly to the Fintech Case, albeit without referring to it.¹⁰ Rogers J acknowledged in the ABSA Case that his reasoning was similar to the one in the Du Rand Case.

It is unthinkable that the Legislature would have left without recourse an interested person who is faced with injustice and is practically unable to follow the CIPC prescribed procedure for company reinstatements. Therefore, the decision in the ABSA Case is a reasonable interpretation of the New Act. This decision is not binding on all High Courts; therefore, it may not resolve the confusion referred to in this note. However, the fact that the reasoning in the ABSA Case is a full-bench decision and is substantially in line with the decisions in the South Gauteng High Court, Johannesburg (Fintech Case) and the North Gauteng High Court, Pretoria (Du Rand Case) may provide some interpretation respite until the Supreme Court of Appeal decides otherwise or confirms these decisions.

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⁸ ABSA Case, Para [52]. The CIPC is also, in terms of this decision, not entitled to insist that an interested party file outstanding annual returns, pay outstanding fees or submit copies of identity documents. (see Para [60].

⁹ ABSA Case, Para [63].

¹⁰ Muller AJ said *"There is no reason...why a distinction should be drawn between dissolution of a company in terms of s 82(3) read with s 83(1) due to its failure to render its annual returns and the dissolution for any other reasons, for the purposes of relief under s 83(4)." at Para [21].*