

## Debt collecting against a deregistered close corporation or company

By Perino Pama

### The process of deregistration

The Companies and Intellectual Properties Commission (CIPC) has placed numerous companies and close corporations (CCs) in the process of deregistration for failing to file their annual returns on time, as is required by the Companies Act 71 of 2008 (the Act).

In terms of s 82(2)(b) of the Act, the CIPC must remove the company's name from the register only if the company has failed to file an annual return for two or more years in succession (see s 33), and in terms of s 82(3)(a)(i) and (ii) (aa) or (bb) has, on demand by the CIPC, failed to give satisfactory reasons for the failure to file the required returns or show satisfactory cause for the company to remain registered.

The registrar must serve a notice on the company or CC that it will be deregistered unless good cause is shown to the contrary. There is no provision made to inform potential creditors of the pending deregistration.

### The effect of deregistration

The effect of deregistration is that a company or CC is deprived of its legal existence.

According to PM Meskin, B Galgut, and JA Junst *Henochsberg on the on the Close Corporations Act* (Durban: LexisNexis 1997) vol 3 issue 20 Com 550: '[I]t is submitted that the effect of deregistration of a corporation is that its existence as a legal person ceases ... and that upon such deregistration all its property, movable and immovable, corporeal and incorporeal, passes automatically (ie, without any necessity for delivery or any order of court) into the ownership of the State as *bona vacantia*' (see also *Miller and Others v Nafcoc Investment Holdings Co Ltd and Others* 2010 (6) SA 390 (SCA) at para 11 and *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) at 549C).

A debt due to a creditor of a company or CC that has been deregistered is not extinguished, but it is rendered unenforceable against the corporation (*Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) at 295D) and if a creditor of a company or CC wishes to sell in execution any immovable property owned by the company or CC that has been deregistered, the creditor will not be able to do so and will, in effect, lose its security.

Any summons served on a company or CC that has been deregistered, cannot be enforced; similarly a company or CC that has been deregistered cannot issue summons against a defaulting debtor.

Sechaba Mohapi (S Mohapi 'The effects of deregistration of corporate entities during litigation proceedings' [www.phfirms.co.za/NewsPublications/NewsArticle.aspx?CategoryID=1&articleId=148#.UdbFQ9UaKUk](http://www.phfirms.co.za/NewsPublications/NewsArticle.aspx?CategoryID=1&articleId=148#.UdbFQ9UaKUk), accessed 3-7-2013) argues that: 'Where a director or officer of the entity authorises the institution of an action on behalf of a corporation after the date of deregistration, and if the fault lies with him [or her] for taking such action despite knowledge of such deregistration, such director or member will be personally liable for the defendant's legal costs.'

Furthermore, the courts have also been known to grant punitive cost orders against legal practitioners who bring wasteful actions on behalf of deregistered corporations (see, for example, *Barclays National Bank Ltd v Traub, Barclays National Bank Ltd v Kalk* at 295; *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 (4) SA 306 (W)).

Deregistration terminates the authority of a person who was a lawful agent of the company or CC prior to deregistration and an attorney who continues to act for the company or CC may be held personally liable for the costs of the action from the date of deregistration.

There is an onerous duty on members and directors of corporate entities, as well as attorneys acting on behalf of such company or CCs, to ensure that the entities are registered at all times when they engage in commercial transactions and in litigation. What this requires is that the aforementioned officers and agents have an obligation to check the 'status' of the corporate entities with the CIPC.

Finally, it must be pointed out that, although liabilities are not enforceable against a CC while the deregistration of the corporation subsists, '[i]f a [CC] is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities' (s 26(5) of the Close Corporations Act 69 of 1984). However, this may not be of assistance to a creditor if the deregistered CC owned immovable property against which the creditor wished to execute.

### **Options available to proceed against a company or CC that is in the process of being deregistered or that has been finally deregistered**

The question arises: How does a creditor sue a company or CC that has assets and is in the process of being deregistered or that has been finally deregistered?

#### ***Application to court to restore a company or CC***

Under the previous Companies Act 61 of 1973 (the 1973 Act), an interested person could apply to a competent court for a restoration order and the court could restore the company if it was satisfied that the company was, at the time of its deregistration, carrying on business or was in operation or, otherwise, that it was just that the company was restored (s 73(6)(a)).

However, in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at para 5, one finds the following *dicta* by Binns-Ward J:

'Furthermore, under the 2008 Companies Act, the reinstatement of the registration of companies deregistered in terms of s 82(3) of the Act falls exclusively within the province of [CIPC]. There is no provision in the 2008 Act for the restoration of the registration of a company by order, on application to a court.'

On 14 November 2012, Henny J delivered a judgment in the Western Cape High Court in *ABSA Bank Limited v Companies and Intellectual Property Commission of South Africa and Others; ABSA Bank Limited v Voigro Investments* 19 CC [2013] 2 All SA 137 (WCC). He held that 'if a close corporation has been deregistered for failing to file its annual returns, the registration thereof can be re-instated only by the commissioner and only in terms of section 82(4) of the Companies Act of 2008. In my view there is no other manner in which reinstatement can occur. No provision is made for the restoration of a deregistered company, or in this case deregistered close corporation, by order, on application to a court' (at para 34).

This case also revolved around s 83(4) of the Act, which permits the liquidator of a company, or other person with an interest in the company, to apply for an order declaring the dissolution to have been void or any other order that is just and equitable in the circumstances.

Henney J disagreed with the contention that s 83(4) is equivalent to s 73(6)(a) of the 1973 Act and said that, in his opinion, s 83(4)(a) only gave a possible remedy to an interested party when a company is dissolved following a winding-up and does not empower a court to reinstate a company that has been deregistered for a failure to lodge annual returns.

This judgment was set aside on appeal before Yekiso, Rogers and Cloete JJ (*ABSA Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC)). The court held that the dissolution of the CC, which occurred on the deregistration of the CC, was declared void in terms of s 26 of the Close Corporations Act, as amended, read with s 83(4) of the Companies Act.

Absa Bank obtained default judgment against Voigro Investments 19 CC on 7 November 2011. There were other creditors who also obtained default judgment, but all of them were unaware of the fact that Voigro Investments 19 CC had already been deregistered by the registrar on 24 February 2011, due to failure to lodge its annual returns.

The court held that s 83(4) applies as much to a company or corporation dissolved pursuant to an administrative deregistration as to one dissolved pursuant to its liquidation as a solvent company.

This is an expensive process. Unfortunately, the CIPC has placed seemingly insurmountable obstacles in the path of a creditor wishing to apply to it to restore the company or CC.

### ***Application by a creditor to the CIPC to restore a company***

It is perhaps useful to first consider the options that were available to a creditor in terms of the 1973 Act.

In terms of s 73(6)(a) of this Act the court could, on application by any interested person or the registrar, if it was satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it was just that the registration of the company be restored, make an order that the registration be restored accordingly, and thereupon the company would be deemed to have continued in existence as if it had not been deregistered.

Under s 73(6)(b), any such order could contain such directions and make such provision as the court deemed 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.

Section 73(6)(a) provided that, notwithstanding subs (6), the registrar could, if a company has been deregistered due to its failure to lodge an annual return in terms of s 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company would be deemed to have continued in existence as if it had not been deregistered.

### ***Reinstatement of a CC before the coming into being of the 2008 Act***

Before the promulgation of the 2008 Act, in the case of a CC and in terms of s 26(6) of the Close Corporations Act:

‘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 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.’

In the past, any 'interested party', including a creditor, could apply to restore a company or CC. In *Ex Parte Stubbs NO: In re Wit Extensions Ltd* 1982 (1) SA 526 (W), Slomowitz AJ stated, in relation to the provisions of the s 73(6) of the Act at the time: '[I]t seems to me that it was intended to widen substantially the class of people who could make the necessary application ... members and creditors are obviously interested persons' (at 529A).

### ***Reinstatement of a CC after the coming into being of the 2008 Act***

In terms of s 82(4) of the 2008 Act, any interested person may apply in the prescribed manner and form to the CIPC to reinstate the CC.

One must now read s 26(1) of the Close Corporations Act, with ss 81(f), 81(3) to (4), and 83 of the Act.

### **The procedure to be followed to apply to the CIPC to reinstate a company or CC**

On 17 October 2012, the CIPC issued a notice to customers of the CIPC that they are now required to refer to Practice Note 5 (sic – should be 6) of 2012 for the new requirements for re-instatement applications on form CoR40.5, which took effect on 1 November 2012.

### **The practical difficulties**

With effect from 1 November 2012, one may no longer apply for 'instant' electronic restoration of companies and CCs deregistered due to non-compliance with submission of CIPC annual returns. This facility has been removed from the CIPC website. This means the processing time would therefore increase from one day to approximately 30 days (refer to Practice Note 6 of 2012).

There are several costs involved to process the application, namely the party bringing the application must pay for every annual return not submitted, a restoration fee and penalties (the CIPC have waived until March 2013 the penalty payable for the late filing of annual returns of companies and CCs, which should have been filed since 1 May 2011).

There are practical difficulties. For example, one has to produce a certified copy of the identity documentation of directors/members, which a creditor might not be in possession of.

One of the requirements is that one must submit letters from National Treasury and the Department of Public Works, indicating that such departments have no objection to the reinstatement, if it has immovable property (this seems patently unfair to creditors).

An affidavit must be filed indicating the reasons for non-filing of annual returns. This information is clearly not in the possession of a creditor wishing to protect his or her interests.

One has to file sufficient documentary proof indicating that the company or CC was in business or that it has outstanding assets or liabilities at the time of deregistration. Once again, this requirement effectively deprives a creditor of the opportunity to apply for the restoration of the company or CC via the CIPC.

The CIPC requires information such as cellphone numbers, e-mail addresses and the signatures of the directors/members.

If a creditor is somehow able to overcome all these hurdles and restore the company or CC, there are usually significant fees to be paid. The only way to recover these fees is to attempt to rely on an enrichment claim against the company or CC, probably in the form of the extended *negotiorum gestio*, which is based on enrichment and applies where the *gestor* is actually acting in his or her own interests.

## **The effect of reinstatement of a company or CC**

Attorney Tony Tshivhase (T Tshivhase 'Holes in the new Companies Act' [www.blackignition.co.za/download/files\\_19/Tony\\_Tshivhase\\_\\_June\\_2012\\_Newsletter.pdf](http://www.blackignition.co.za/download/files_19/Tony_Tshivhase__June_2012_Newsletter.pdf), accessed 3-7-2013) points out that unfortunately the *Peninsula* case does not confirm whether or not the reinstatement of a deregistered company in terms of the 2008 Act will have retrospective effect. According to him, it is not clear whether or not the CIPC has powers or authority to declare that assets of a deregistered company will re-vest in a reinstated company on its reinstatement.

In *Mouton v Boland Bank Ltd* [2001] 3 All SA 485 (SCA), it was stated that the 'general effect of the restoration of a company (and, no doubt, also of a corporation) to the "roll": ... is that the company is deemed not to have been deregistered at all' (at para 5).

However, in *Insamcor (Pty) Ltd v Dor-byt Light and General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at 475C it was pointed out that this is an oversimplification to regard it as being 'no more than a return to "as you were"'.

In the matter between *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ), the deregistration of the applicant was cancelled as opposed to being reinstated. Van Oosten J held that the court retained its inherent jurisdiction, on application or otherwise, to validate anything done by or against an affected company between deregistration and reinstatement.

In the appeal judgment before Yekiso, Rogers and Cloete JJ referred to above, the court held that the order did not validate the default judgment that Absa Bank purported to take against the dissolved CC or the liquidation proceedings that were brought against the CC in April 2012. The court regarded the default judgment and liquidation proceedings as a 'nullity'.

## **An infringement of the creditor's constitutional rights**

The rights afforded to the registrar seem to constitute an infringement of creditors' right to equal protection and benefits under the law and just administrative action.

It is almost inconceivable that preferent and/or concurrent creditors should lose their rights when a company or CC is deregistered by the CIPC, without being given an opportunity to protect their interests beforehand. The CIPC should not be permitted to set in motion a procedure that effectively expropriates assets belonging to companies and CCs, without this being advertised properly. There is no doubt that the CIPC should be entitled to implement a remedy that is effective, but the powers afforded to it should be in proportion to the mischief that the legislature is trying to prevent.

Henochoberg (*supra*) writes that: 'Having regard to the rights conferred by sections 9(1) and 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (which guarantee the right to equal protection and benefit under the law and just administrative action), it is submitted that the rights accorded to the Registrar, in terms of subs (6) are constitutionally questionable' (vol 3 issue 20 Com58) (the *Insamcor (Pty) Ltd* case at 314 H – J).

## **A creditor is not afforded an opportunity to be heard**

In the latter case, the court concluded that the aim of the relevant provisions of the Constitution could not be achieved where a party whose rights are materially affected by a decision is not afforded an opportunity of being heard before such a decision is made and that the protected constitutional right must be properly taken into account from the outset.

The legislator should be called on to create an appropriate and relatively inexpensive procedure that permits creditors to reinstate a company or CC and to recover the associated costs from the company or CC.

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