DEREGISTRATION AND DISSOLUTION OF COMPANIES: A CRITICAL EVALUATION OF THE LAW AND JURISPRUDENCE

BY

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Deregistration and dissolution of companies: A critical evaluation of the law and jurisprudence

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Declaration

I, the undersigned, hereby declare that except for references indicated as such in the text, and any other assistance as has been acknowledged, the work contained in this thesis for the degree of Doctor of Laws at the University of Fort Hare is my own independent study that has not been previously submitted in part or in its entirety at any university for degree purposes or otherwise.

Signed at Kempton Park, Gauteng Province on this day the 22nd day of April 2015.

DAVID MAPHUTI MATLALA

Abstract

There are two very closely related but otherwise distinct processes that may take place in the life of a company and that of a close corporation for that matter. The first process is known as "deregistration" while the second is "dissolution". Neither is defined in the Companies Act of 2008. However, in terms of the Companies Act of 1973 "deregistration" was defined, in relation to a company, to mean "the cancellation by the Registrar [of Companies] of the registration of the memorandum and articles of the company and, in relation to an external company, the cancellation by the Registrar of the memorandum of the external company" while the word "deregister" had a corresponding meaning. The Act did not define "dissolution".

The purpose of this study is to examine the meaning and effect of both deregistration and dissolution on the existence of the company, the circumstances under which each process may be achieved, the procedure to be followed and the consequences of each process. The Companies Act of 1973 had very few grounds on which a company could be deregistered, which were in fact limited to three. The procedure to do so was fairly elaborate. This should be contrasted with the dispensation under the current Companies Act of 2008 which is elaborate on the grounds on which a company may be deregistered but is lacking on the procedure to be followed. This begs the question: If there is no procedure at all, fair or unfair, to be followed in order to deregister a company, can the end result of that process be fair? The answer is probably no, which immediately raises the question of constitutionality of the whole process. In the case of dissolution, the question of fairness and constitutionality of the process need not arise at all since in terms of the Companies Act of 2008, just as was the case under the Companies Act of 1973, dissolution takes place after the affairs of the company have been "completely wound up".

According to the Van Wyk de Vries Commission Report of 1970, which report led to the enactment of the Companies Act of 1973, if after deregistration of a company its erstwhile members continued carrying on business, and in most instances such took place without knowledge that the company had been deregistered, those members would be doing so as an "association of persons" which did not have the status of a legal entity. As a result members doing so would be personally liable for any arising debts. Indeed, there was judicial and academic support for such a view, although such was very much limited. The

predominant view was, and still is, that deregistration, just like dissolution, finally brought to an end the existence of a company just like death brings the life of a human being to an end. Surprisingly, and seemingly for no apparent reason, it appears that the "association of persons" theory is trying to make a come-back in South African law. It will be argued in this study that such an attempt is doomed to fail and should not be encouraged.

Deregistration and dissolution have a number of consequences on the existence of a company, its rights and obligations as well as legal proceedings in which the company is involved. There is also the question of liability which arises by virtue of the occurrence of either event. Furthermore, there is the issue of *bona vacantia*, namely the principle that any property which belonged to the company at the time of deregistration or dissolution and which was not dealt with, usually because of oversight or because it was considered of no value, becomes the property of the State without further ado, meaning that no transfer to the State, in any of the known modes of transfer of property, is necessary. This is more interesting as the most common ground on which companies are deregistered is failure to file annual returns and pay annual duty. Therefore, the position is that the Companies and Intellectual Property Commission (the Commission), an organ of State, will deregister a company as a result of which the State, immediately and without further ado, becomes the owner of property which until then belonged to the company.

Neither deregistration nor dissolution marks the final end of the life of a company. The Companies Act of 2008 makes provision for reinstatement of registration of a company by the Commission and voidance of dissolution by the court. Reinstatement of registration by the Commission is an administrative act which was intended to simplify the process of revival of a deregistered company. However, it appears that the process was not given proper consideration since far from solving problems it simply makes it very difficult to achieve revival of the company whereas if granted there is the problem of the effect thereof on activities of the company during deregistration period. Furthermore, the Commission is not a court of law and does not have inherent or statutory power to validate deregistration period activities of the company. In the case of voidance of dissolution the position is much better because a voidance order is granted by the court which is given power to make any order which it considers "just and equitable". The purpose of this study is to interrogate these and many others issues associated with deregistration and dissolution of companies and, after a quick comparative analysis of comparable jurisdictions, a number of recommendations will be made on the way in which the legislature can intervene and make some amendments to the Companies Act of 2008 with a view to improving the position. It is hoped that this study will make a helpful contribution to an understanding of South African company law relating to deregistration and dissolution as well as the many issues that arise in that regard.

Acknowledgments

I would like to thank my family for the support, patience and sacrifice shown during the long and difficult time of preparing this study. Many thanks also to institutions and libraries, and especially librarians, who gave invaluable support in gathering the required material.

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Any shortcomings in this study are entirely mine.

The study covers the law as at the end of March 2015.

Dedication

I dedicate this work to the entire Matlala family. Thank you very much for your constant support through prayer and encouragement when this thesis was being written. Many thanks in particular to my brother Thomas and my sisters for their earnest desire that this work come to completion. May this work serve as inspiration to future generations to do much more. Many thanks also to friends and a host of well-wishers.

LIST OF ABBREVIATIONS

ALJ	Australian Law Journal
AS	Annual Survey of South African Law
BIP	Burrells Intellectual Property Law
CILSA	Comparative and International Law Journal of Southern Africa
DJ	De Jure
DR	De Rebus
JBL	Journal of Business Law
JOL	Judgments Online
Lawsa	The Law of South Africa
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SATC	South African Tax Cases
Sol J	Solicitors Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg

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CHAPTER 1

Introduction and brief overview of the study

1 1 INTRODUCTION

The Companies Act of 2008,[1] like its predecessor the Companies Act of 1973[2] as well as those that came before it,[3] makes provision for incorporation of companies by persons interested in doing so. To this end the Act provides in section 13(1) that one or more persons may incorporate a profit company, or three or more persons may incorporate a non-profit company, by completing and signing a Memorandum of Incorporation[4] in the prescribed form or in a form unique to the company and filing a Notice of Incorporation[5] in accordance with subsection (2). For its turn subsection (2) makes a cross-reference to subsection (1) and requires that the Notice of Incorporation should be filed with the Companies and Intellectual Property Commission[6] (the Commission) together with the prescribed fee and be accompanied by the Memorandum of Incorporation. However, this is not what this study is about. On the contrary it is the other end of the spectrum, namely the termination of the life of a company, which is the subject under consideration.

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1 Act 71 of 2008. The Act, as amended by the Companies Amendment Act 3 of 2011 and the Companies Regulations 2011, came into operation on 1 May 2011.

2 Act 61 of 1973 which has since been repealed.

3 Transvaal Companies (Consolidation) Act of 1909 and the Companies Act 46 of 1926.

4 The Memorandum of Incorporation is defined in s 1 to mean the document, as amended from time to time-
(a) that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15; and
(b) by which-
(i) the company was incorporated in terms of this Act, as contemplated in section 13; or
(ii) a pre-existing company was structured and governed before the later of
(aa) the effective date; or
(bb) the date it was converted to a company in terms of Schedule 2.
The Memorandum of Incorporation is the only document that must be registered in order to form a company. It is therefore a combination of the memorandum and articles of association, both of which were required in the past in order to register a company.

5 This is defined in s 1 as a notice to be filed in terms of section 13(1), by which the incorporators of a company inform the Companies and Intellectual Property Commission of the incorporation of the company for the purpose of having it registered.

6 Established in terms of s 185(1) of the Act.

Apart from amalgamation or merger,[7] the two most common ways in which the existence of a company comes to an end are by way of dissolution and/or deregistration.[8] Under the 1973 Act, as well as its predecessors, dissolution and deregistration were treated as two distinct processes in terms of which the life of a company could come to an end.[9] The details of deregistration were contained in section 73 which dealt with the grounds on which that could be done as well as the procedure to be followed to achieve it. Some of the consequences of deregistration were mentioned,[10] albeit very briefly, while others were only implied. The bulk of the consequences though were dealt with by the courts applying rules of procedure and the common law. Subsection (6)(a) made provision for restoration[11] of registration while the other paragraphs of the subsection dealt with related issues.

Dissolution was dealt with very briefly in section 419 of the 1973 Act which provided that in any winding-up when the affairs of a company had been completely wound up the Master had to transmit to the Registrar of Companies a certificate to that effect and send a copy thereof to the liquidator. The Registrar was then required to record the dissolution and publish notice thereof in the Government Gazette, which date of publication was

7 Amalgamations or mergers are dealt with in sections 113, 114, 115 and 116 of the 2008 Act.

8 Neither deregistration nor dissolution is defined in the present Companies Act of 2008. The furthest that the Act can go in giving an idea regarding the description of the concepts is to be found in s 82(2)(a) where, in relation to dissolution, it is provided that after the affairs of the company have been completely wound up the Commission must "record the dissolution of the company in the prescribed manner". In the case of deregistration, s 82(2)(b) provides that after recording the dissolution in the prescribed manner, the Commission must "remove the company's name from the companies register". Under the Companies Act 61 of 1973, deregistration, but not dissolution, was defined in s 1 to mean, in relation to a company, the cancellation by the Registrar of Companies of the registration of the memorandum and articles of the company and, in relation to an external company, the cancellation by the Registrar of the registration of the memorandum of the external company. The word "deregister" had a corresponding meaning.

9 In *Income Tax Case* 1306 1980 42 SATC 139, 145 Melamet J very explicitly said: "Dissolution and deregistration, in company law in South Africa, are two different concepts, with different procedures and different results."

10 For example, s 73(5) provided that after deregistration the liability (if any) of every director, officer and member of the company would continue and could be enforced as if the company had not been deregistered.

11 Application for restoration of registration had to be made to court by "any interested person" or the Registrar of Companies, on the ground that at the time of deregistration the company was carrying on business, was in operation or that it was otherwise just that registration be restored – s 73(6)(a).

taken as the date of dissolution of the company.[12] In terms of section 420 the court was given power to declare the dissolution void and thus revive the company. Apart from providing that voidance of dissolution could be granted on such terms as the court saw fit, the only other consequence of the order indicated in the section was in the following words: "and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved". The heated debate generated by the words "and thereupon any proceedings may be taken against the company as might be taken if the company had not been dissolved" which are found both in English and South African statutes, which debate started about a century ago, is yet to be resolved.[13]

Currently dissolution and deregistration are dealt with in section 82 of the Companies Act of 2008 which provides that when the affairs of a company have been completely wound up and a court order of final liquidation has been made, the Master must file with the Commission a certificate to that effect together with a copy of the court order.[14] Upon receipt of a certificate from the Master the Commission is required to record the dissolution of the company in the prescribed manner and remove the company's name from the companies register.[15] Thus, contrary to the approach of the 1973 Act which treated the two processes separately, the present Act conflates them. As a result these days a company is dissolved and deregistered rather than dissolved or deregistered.

12 Section 419(1)-(3). In the case of any other body corporate, all that the Master had to do was to transmit to the Registrar a certificate to the effect that the affairs of the company had been completely wound up and send a copy thereof to the liquidator. It was therefore not necessary for the Master to record the dissolution of the company and publish notice thereof in the Government Gazette – s 419(4).

13 The debate is much more fierce in English law than in South African law. The starting point though is that when dissolution is declared void, a revived company becomes one in liquidation, in respect of which see among others *Ex parte White and Smith* 1914 CPD 414; *Ex parte McCalgan: In re Meyer and Charton Gold Mining Co Ltd 1936 WLD 53; Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (W). Nevertheless the real challenge is about things that were done during the period of dissolution, and which should not have been done, and those which were not done but which could have been done but for the dissolution. It is said that a court order declaring the dissolution to have been void renders the dissolution void *ab initio* – *Re Servers of the Blind League* 1960 2 All ER 298; *Re C W Dixon Ltd* 1947 1 All ER 279. This has the result that the company is restored to its status quo as of the date of dissolution – *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W). In *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) Goldstone J (as he then was) held that the effect of reregistration (voidance of dissolution) in both South African companies legislation and that of England was that the company was deemed never to have been dissolved. Much of the debate about the effect of voidance of dissolution is to be found in such cases as *Morris v Harris* 1926 All ER 15; *Pieterse v Kramer* 1977 1 SA 589 (A); *Re Spottiswoode, Dixon and Hunting Ltd* 1911 – 1913 All ER Rep 526; *Tymans Ltd v Craven* 1952 1 All ER 613 (CA); *Ebrahim v Evans* 1990 4 SA 424 (D) and *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W).

14 Section 82(1).

15 Section 82(2).

Nevertheless provision is made in section 82(3) for deregistration only without dissolution. Such deregistration may take place on anyone of a number of grounds therein specified. The list of the grounds on which deregistration may take place is longer than that which was provided under the repealed 1973 Act. The grounds appear to be reasonable and satisfactory but unlike the 1973 Act the present Act does not prescribe the procedure to be followed. All that section 82(3)(b) provides for is that deregistration may take place if the Commission has "determined in the prescribed manner" that it is called for. At this relatively early stage of operation of the Companies Act of 2008[16] a satisfactory determination of what constitutes "determined in the prescribed manner" is yet to be made.

Some, albeit only a few, of the consequences of deregistration are dealt with in section 83. Notable by its omission though is one important consequence of both dissolution and deregistration, namely a provision to the effect that any property of the company not dealt with vests in the State as *bona vacantia*. This is a chapter[17] on its own which has a very long history and enjoys statutory regulation in comparable jurisdictions such as Australia, New Zealand and the United Kingdom (UK). While it was still at the draft stage the Companies Bill 2008 had a clause[18] dealing with *bona vacantia*, which clause was later dropped from the Act. It is not apparent why that was done but the fact of the matter is that there are no *bona vacantia* provisions in the Act.

The issues raised above and a lot more will be dealt with in this study. Issues being interrogated will be put in an historical context after which a comparative analysis will be

16 The Act, as amended by the Companies Amendment Act 3 of 2011 and the Companies Regulations 2011, came into operation on 1 May 2011.

17 *Bona vacantia*, as indicated in para 11 below, will be dealt with in Chapter 7 of the study.

18 Clause 82(4) which provided as follows:

(4) If the Commission deregisters a company as contemplated in subsection (3)-

(a) any assets of the company, irrespective of the person holding those assets at the time-

(i) are, for five years after the date of deregistration, trust property held for the joint benefit of the deregistered company, any person having an interest in its assets and the State; and

(ii) thereafter forfeit to the State; and

(b) any interested person may apply within the five-year period contemplated in paragraph(a)(i)-

(i) in the manner prescribed and form to the Commission to reinstate the registration of the company; and

(ii) apply to court for an order transferring to the company any assets contemplated in (a).

(5) The Commission may hold assets of a deregistered company in trust, as contemplated in subsection (4).

done on a few selected comparable jurisdictions, being mostly English, Australian and New Zealand law. A limited reference will also be made to Canadian law and a few other selected jurisdictions.

1 2 CONTEXTUAL BACKGROUND

The Companies Act of 2008 accepts that a company may be dissolved and/or deregistered and elaborately provides the grounds on which this may be done. In this respect it goes much further than the repealed Companies Act of 1973. Its drawback though is that no provision is made for the procedure for deregistration. All that it says is that such process may take place after the Commission "has determined in the prescribed manner" that the company qualifies for deregistration or has received a request for deregistration in the "prescribed manner". Determination of the envisaged "prescribed manner" is yet to be made. Whereas deregistration and dissolution are two different and separate processes, section 82(2) provides that the Commission must, "after dissolution" of the company, "remove its name from the companies register". Therefore, the section effectively provides that the Commission must both dissolve and deregister a company. Interpreting the more or less similarly worded English legislation, the courts took the view that when it came to revival of a company, the applicant had a choice whether to seek "restoration of registration" or "voidance of dissolution", irrespective of the manner in which the demise of the company was brought about.[19] It remains to be seen if this will also be the approach in South Africa.

Except for a few instances of liability of any former director, shareholder or any other person provided for in section 83(2), the Companies Act of 2008 does not deal with the consequences of either deregistration or dissolution as well as those of restoration of

19 Dealing with the provisions of the UK Companies Act 1948 which conflated striking off the name of a defunct company from the register of companies with dissolution in R*e Test Holdings (Clifton) Ltd* 1969 3 All ER 517 Megarry J said (518I): "If on the true construction of the Act the applicant is entitled to proceed under either subsection, it is not for the court to say that he ought to have proceeded under what the court considers to be the more suitable subsection instead of under what the court considers to be the less suitable subsection. It would be wrong for the courts to seek to take away a choice which the legislature has decided the applicant should have".

registration or voidance of dissolution. All these consequences need careful analysis, this being a matter to be interrogated in terms of the common law as there are no applicable statutory provisions.

1 3 STATEMENT OF THE PROBLEM

Like its predecessors the present Companies Act of 2008 makes provision for deregistration and dissolution of companies. Once deregistration or dissolution is granted, the question which arises is the impact which doing so has on the existence of the company.[20] It is not uncommon for deregistration of a company to go unnoticed by the shareholders and/or directors who, unaware of it, continue acting for the company until the problem eventually comes to their attention. True, registration of a company can be restored and so can dissolution be declared void. The central question that remains though is the effect which revival of a company has on activities carried out in its name and on its behalf during that period of deregistration or dissolution. There is divergence of opinion in this respect and two schools of thought come to the fore. One school of thought holds that a thing which is a nullity remains so even after resuscitation of a company.[21] The

20 Seemingly there are two schools of thought applicable here. The first school of thought, which is traceable to the Van Wyk de Vries Commission of Enquiry into the Companies Act (Main Report)(1970) 517-521 and is cherished by such writers as Cilliers, Benade et al *Cilliers and Benade Corporate Law* 3rd ed (2000) 555 states: "Deregistration is to be distinguished clearly from the dissolution of a company; the company's existence is terminated for all purposes by dissolution while on deregistration the association of persons sustaining the company merely loses its corporate personality. Should a deregistered 'company' nevertheless continue with business, it is no longer a company doing so but an association without legal personality". See also Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 396. The second school of thought holds that both deregistration and dissolution have the same effect on the existence of a company, namely that a deregistered or dissolved company ceases to exist as a legal entity just like the life of a human being comes to an end upon death – see Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 Part 3 First Reissue (1996) para 88; *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *Standard Bank of South Africa Ltd v The Master* 1997 3 SA 178 (C) 185I-J. The Van Wyk de Vries Commission, named after its chairman Judge Van Wyk de Vries, was established in October 1963 to consider major amendments which were required in company law relating to the constitution, incorporation, registration, management, administration and winding-up of companies and other associations as well as matters incidental thereto. It finalised its work and submitted a report in April 1970, which report led to the enactment of the Companies Act of 1973. The main findings of the Commission were noted by Benade "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *CILSA* 277 which is also available at http://www.sabinet.co.za/webx/access/journal_archive/.../1266.pdf (accessed 02-09-2012).

21 *Morris v Harris* 1926 All ER 15; *Ebrahim v Evans* 1990 4 SA 424 (D); *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W).

other school of thought holds that a nullity is validated by the resurrection of the company.[22]

In both English and South African law no satisfactory solution has been found to date. Courts in both jurisdictions have unsuccessfully grappled with the words "and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved". What is not the problem though is the institution of fresh proceedings after voidance of dissolution. The problem relates to proceedings which were initiated before voidance of dissolution. Does a voidance order validate them or does it not?[23] A few other issues also arise such as, for example, the question of vesting of property of a deregistered or dissolved company in the State as *bona vacantia* and how such property is to be dealt with.

1 4 RESEARCH AIMS AND OBJECTIVES

1 4 1 Aims

The aims of this study are to examine the nature of deregistration and dissolution and thereafter discuss their consequences both in relation to their effect on the existence of the company itself as well as in general. As the Companies Act of 2008 makes provision for reinstatement of registration and voidance of dissolution the effect of these processes will also be analysed.

22 *Re Spottiswoode, Dixon and Hunting Ltd* 1911-1913 All ER Rep 526; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1993 3 SA 846 (W); *Tymans Ltd v Craven* 1952 1 All ER 613 (CA). In a dissenting judgment in *Morris v Harris* 1926 All ER 15 Lord Wrenbury said (21E-F), with reference to an arbitration award made against a company at a time when it was dissolved, that it "must be taken that the dissolution then existing was then a void dissolution and the award was good and such proceedings can be taken upon it as might have been taken if the company had not been dissolved."

23 The issue goes back to the question whether voidance of dissolution is retrospective or not. In *Sandton Town Council v Erf 89 Sandown Extention 2 (Pty) Ltd* 1991 3 SA 846 (W) in a single judge decision the court held that a voidance order revived legal processes which were underway at the time of dissolution. As a result there was no need to start the proceedings afresh. However, the better view seems to be that represented by such cases as *Ebrahim v Evans* 1990 4 SA 424 (D) (849I-J) where it was held that "actions which came to an end upon dissolution are not revived" and *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W) to the effect that "actions which were pending at the time of dissolution would not be revived and a fresh action would have to be instituted".

1 4 2 Research objectives

The specific objectives of this study are the following:

(1) To trace the history of deregistration and dissolution of companies;
(2) To examine the nature of deregistration and dissolution;
(3) To analyse the consequences of deregistration and dissolution;
(4) To discuss the processes of reinstatement of registration and voidance of dissolution;
(5) To discuss the consequences of reinstatement of registration and voidance of dissolution;
(6) To identify gaps in current South African law relating to deregistration and dissolution; and
(7) To develop sound recommendations to fill the gaps thus identified.

A major challenge South African company legislation faces regarding deregistration and dissolution is its brevity. Far from expanding on the gains made under the Companies Act of 1973 regrettably the present Companies Act of 2008 somehow subtracts from what the law once provided for under the repealed Companies Act of 1973, for example, by lack of elaborate provisions dealing with the procedure to be followed in order to secure the deregistration of a company. Also in terms of section 82(2)(b) a company would be deregistered if the Commission has determined in the "prescribed manner" that it is eligible for deregistration. Far from determining the "prescribed manner", regulation 40 of the Companies Regulations 2011 describes the procedure to be followed when deregistering a company for failure to pay annual duty. Nothing is said about the procedure to be followed for deregistration of a company on other grounds.

The more substantive shortcomings of South African law though, and which need to be addressed and will accordingly be dealt with in this study, include among others, the question of *bona vacantia* which is not dealt with at all in the new Act, liability which could and would arise if a transaction is entered into by somebody on behalf of a deregistered or dissolved company and the effect of restoration of registration or voidance of dissolution on transactions and/or steps taken for or against a company during the period of deregistration or dissolution. Neither legislation, court decisions nor literature provide satisfactory guidance in this regard. This study will make an attempt to raise and address these and other related issues. While the issues will be canvassed it is nevertheless not pretended that final answers will be provided. Nevertheless tentative suggestions will be made as to the best possible way forward. Accordingly, the study seeks to fill a gap as there are still quite a few aspects of deregistration and dissolution that need to be attended to notwithstanding the coming into operation of the Companies Act of 2008. Equally the positive achievements of the Act will also be noted, for example, the oversimplified process of reinstatement (restoration) of registration of a deregistered company which is now an administrative exercise done by the Commission[24] as opposed to a judicial function which needed a court order under the 1973 Act.[25]

1 5 RESEARCH QUESTIONS

Several questions are raised concerning deregistration and dissolution of companies. The fundamental questions this study seeks to address are as follows:

(1) What is deregistration and dissolution and where do they come from?
(2) What philosophy guided their introduction?
(3) Once granted how do these processes affect the existence of a company?
(4) What effect do these processes have on legal proceedings by and against the company?
(5) What happens to the property which belonged to the company and which was not dealt with when the processes were put in place?
(6) Is it possible for interested third parties to acquire ownership of property which belonged to a deregistered or dissolved company?
(7) What happens to the unpaid debts of a deregistered or dissolved company?
(8) Can legal steps be taken by or against a deregistered or dissolved company?
(9) Does prescription run for or against a deregistered or dissolved company?

24 Section 82(4) of the Companies Act 2008.
25 Section 73(6) of the Companies Act of 1973.

(10) When registration is restored or dissolution is declared void, what happens to proceedings or actions taken by or against the company during the period of deregistration or dissolution?

1 6 SCOPE OF STUDY

This study deals with two concepts and processes, namely deregistration and dissolution. An attempt will be made to put them in historical perspective and thereafter discuss their meaning as well as application in South African law. An analysis of the issues which they generate will be made. In the process a discussion of the two processes as they apply to close corporations[26] will also be dealt with, albeit only briefly.[27] Other aspects of company law as well as deregistration and dissolution of other entities such as banks and insurance companies will not be dealt with.

As the two processes are not dealt with satisfactorily in South African law, comparison will be made with comparable jurisdictions of Australia, United Kingdom, New Zealand and to a lesser extent Canada as well as a few selected Commonwealth jurisdictions. Some American judgments or pieces of legislation will be referred to where this may add value to the present discussion.

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26 According to s 1(1) of the Close Corporations Act 69 of 1984 read together with s 2(1) thereof a "close corporation" refers to business entity, having one or more members but not exceeding ten who qualify for membership thereof, which has been registered as such in terms of s 2(1) of that Act. Close corporations were introduced into South African law in terms of the Close Corporations Act of 1984 which came into effect in January 1985. The purpose of the Act was to create a small business form which enjoyed the benefit of a legal entity and conferred on its members the advantage of limited liability. Its membership is limited to between one and ten natural persons. In essence a close corporation is an additional form of a small business form which, unlike a sole proprietorship or partnership, is a legal entity with limited liability and thus concers to its members the benefits which a company offers to its shareholders. A close corporation is self-regulating in the sense that the Close Corporations Act has very few sections, 83 in all, aimed at governing minimal requirements. For that reason it was misused, hence its phasing out under the Companies Act of 2008. In terms of the latter Act existing close corporations are recognised but since its coming into operation in 2011, no new close corporations were allowed to be registered.

27 Deregistration of close corporations was once governed by s 26 of the Close Corporations Act of 1984 as amended by s 4 of the Close Corporations Amendment Act 25 of 2005 and s 62(b) of the Corporate Laws Amendment Act 24 of 2006. Since the coming into operation of the Companies Act of 2008, it is regulated by same. Section 1(1) of the Close Corporations Act 69 of 1984 defines "deregistration", in relation to a close corporation, as the cancellation of the registration of the corporation's founding statement while "deregister" has a corresponding meaning.

1 7 LIMITATION OF THE STUDY

This study is confined to a discussion of the processes of deregistration and dissolution as they apply in South African law. As South African law is comparatively underdeveloped in this area, reference will be made to comparable jurisdictions of Australia, United Kingdom, New Zealand and to the extent that it is helpful to do so, Canada and the United States of America, though only to a very limited extent indeed. One would have preferred accommodating as much as is possible the comparable law of the Southern African countries of Botswana,[28] Lesotho, Namibia, Swaziland and Zimbabwe. However, two main problems were encountered in this respect, namely relative inaccessibility of the sources and underdevelopment of their corporate law.

This study does not pretend to be an international or Commonwealth law discussion of the two processes or a discussion of company law in general. There is no doubt that many similarities, and differences, are bound to be found if one were to endeavour to cover other jurisdictions, especially those having colonial ties with the United Kingdom. To keep a check on the study and have it focused it was decided to limit it as indicated above.

1 8 JUSTIFICATION FOR THE STUDY

The Companies Act of 2008 makes provision for deregistration and dissolution which it regulates in two sections, namely sections 82 and 83 providing the grounds on which such may be done. The sections also make provision for reversal of the two processes, in the form of reinstatement / restoration of registration and declaration of voidance of

28 At least for Botswana the work of Professor Kiggundu proved invaluable. In this respect reference may be made to Kiggundu "Company Law Reform in Botswana: The Agenda for the Twenty-First Century" 1996 *SALJ* 496; Kiggundu *Botswana Company Law Service* (2005); Kiggundu *Supplement to the Botswana Company Law Service* (2009); Kiggundu *Company and Partnership Law in Botswana* (2010). However, to get court decisions dealing with issues arising proved elusive.

dissolution. However, the Act does not spell out the consequences of these processes as well as those of their reversal. To compound the problem there is not a sufficient body of case law in this country dealing with the issues that arise. On the contrary in the United Kingdom and Australia there are detailed statutory provisions and a vast body of case law dealing with the issues arising.

It is submitted that there is so much that can be learned and borrowed from the United Kingdom and Australia that could be of assistance in the development and enhancement of South African company law jurisprudence. This is especially so as regards the *bona vacantia* question. In view of the property clauses of the Constitution,[29] one would be more comfortable with a dispensation that makes provision for erstwhile members of a deregistered or dissolved company who have residual interest in the property of the company to be able to take ownership thereof in an equitable manner,[30] even without having to revive the company, if doing so is intended to do nothing other than only deal with its remaining property which had been overlooked or was considered of no value and thus left alone. Statutory provisions elsewhere cater for such an eventuality, something that is lacking in South African law.

1 9 LITERATURE REVIEW

Not much is written on deregistration and dissolution of companies, be it by way of secondary sources of the law in the form of textbooks or scholarly discussion. As a result, most of the discussion on the topic under consideration emanates from primary sources of the law, being court decisions both in this country and elsewhere. Nevertheless a few salient features can be gathered from available material, limited as it may be.

29 Section 25 of the Constitution of the Republic of South Africa, 1996.

30 Clause 82(4)(b) of the Companies Bill 2008 had brief provisions to that effect. As indicated above, the clause has since been dropped and does not form part of the present Companies Act of 2008.

The Van Wyk de Vries Commission[31] was of the view that neither winding-up nor dissolution of a company had to be confused with deregistration as the latter did not affect the existence of the company but only deprived it of legal personality so that it continued to exist as an association whose members were personally liable for its debts.

Cilliers[32] and co-authors say that deregistration should be distinguished clearly from dissolution of a company. The company's existence is terminated for all purposes by dissolution while on deregistration the association of persons sustaining the company merely loses its corporate personality. Should a deregistered company nevertheless continue with business, it is no longer a company doing so but an association without legal personality.

Blackman[33] says that deregistration is the process whereby a formal end is put to a company which has become defunct. Deregistration is to be distinguished from dissolution, which takes place either after the winding-up of a company or when the court provides for the dissolution of the transferor company after a reconstruction or amalgamation. Both deregistration and dissolution put an end to the corporate existence of a company, but their purposes and certain of their consequences are different.

Sonnekus[34] argues that the concepts of *bona vacantia*, *res nullius* and prerogative of the Crown, as applied in South African law, are a reflection of the old English feudal system which is not part of South African law. As a result they are alien to our legal system. In particular he refers to the *bona vacantia* principle as a "diabolic" concept. In his view the correct approach in South African law is reflected in the case of *Ex parte*

31 Commission of Enquiry into the Companies Act (Main Report) (1970) 517 – 521.

32 Cilliers et al *Cilliers and Benade: Corporate Law* (2000) 555 para 30.06.

33 Blackman et al *Commentary on the Companies Act* vol 1 Revision Service 8 (2012) 4-171; Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 Part 1 First Reissue (1996) para 339.

34 Sonnekus "Enkele opmerkings na aanleiding van die aanspraak on *bona vacantia* as sogenaamde regale reg" 1985 *TSAR* 121; Sonnekus "Regsgevolge van natrekking en die formulering van aanhegtingsmaatstawwe" 1990 TSAR 320; Sonnekus "Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond" 2001 *TSAR* 82; Sonnekus "Persoonlike Diensbaarhede en die herregistrasie van 'n deregistreerde Maayskappy as Reghebbende op gespanne voet" 2008 *TSAR* 130.

Montrose Exploration Co Ltd[35] where the court held that there was no dominium in the Crown (State) which, if it claimed to be entitled to the property as *bona vacantia,* had to first obtain a court order to that effect. However, the case has since been overruled by the Appellate Decision in *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy*[36] where it was held that property belonging to a deregistered company and which was not dealt with became vested in the State as *bona vacantia* without further ado.

Erasmus[37] is of the view that the effect of the power of *dominium* over *bona vacantia* is that ownership of the subject property passes to the State directly by operation of law and by the very nature of the same power, notwithstanding that the general common law requirements of delivery or registration might not have been fulfilled.

Brusser[38] suggests that because of a number of questions raised by the principle that the assets of a deregistered company which have not been dealt with vest in the State as *bona vacantia*, it is necessary to revisit the principle and have a closer scrutiny of the fate of property which once belonged to the since deregistered company.

Williams[39] argues that section 73(6) (which dealt with restoration of registration) and section 420 (voidance of dissolution) of the Companies Act 1973 did not cover mutually exclusive situations and therefore where a company had been deregistered, the applicant could apply for its resurrection under either section 73(6) or section 420. This argument is reinforced by the obliteration of the difference between deregistration and dissolution by section 82(2) of the present Companies Act of 2008 which provides that the Commission must record the dissolution of the company and remove its name from the companies register. However, the issue is further compounded by the fact that

35 1918 TPD 179.

36 1984 3 SA 1 (A).

37 Erasmus *Expropriation and the social contract with reference to the relation between citizens and their property* (LLM-dissertation, University of Natal, 1983) 40.

38 Brusser "The status of a deregistered company" 1985 *The South African Company Law Journal* 9.

39 Williams "An Agent's Liability When Acting for a Non-existent Principal" 1990 *SALJ* 203; Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610.

reinstatement of registration of a company is an administrative act done by the Commission[40] while voidance of dissolution is a judicial function performed by the court[41] thus making it almost impossible to treat a dissolved company like one that had simply been deregistered.

Matlala[42] argues that contrary to the High Court decision in *Pieterse v The Master*[43] the better approach would be to hold that voidance of dissolution of the company does not result in automatic revival of proceedings pending as at the date of its dissolution. This must be so as automatic revival of the proceedings in which the company was involved results in uncertainty, the main problem being lack of a time limit within which the dissolution may be declared void. After all in terms of the repealed Act, just as is the case under the current one, voidance of dissolution could be granted at "any time",[44] thus creating the danger of possible lingering litigation, which may take place many years after dissolution.

Matlala[45] further argues that personal liability which members of a close corporation incurred in terms of section 26(5) of the Close Corporations Act[46] should, contrary to the decision in *Mouton v Boland Bank*,[47] come to an end on restoration of registration of the corporation. Interestingly, the legislature has since taken note of the call and amended legislation by making it possible for a member of the corporation to obtain a court order exonerating him / her from liability. Before the amendment, once a member attracted liability in terms of the section there was no way in which such burden could be avoided.

40 Section 82(4) of the Companies Act of 2008.
41 Section 83(4) of the Companies Act of 2008.
42 Matlala "The Effect of Voidance of Dissolution of a Company on Legal Proceedings" 2005 *SA Merc LJ* 81.
43 2004 3 SA 593 (C).
44 Section 420 of the Companies Act of 1973. The position remains the same in terms of s 83(4) of the Companies Act of 2008.
45 Matlala "Liability for the Debts of a Close Corporation after Deregistration" 2001 *SA Merc LJ* 429.
46 Act 69 of 1984.
47 1997 4 All SA 67 (C).

It should be pointed out though that the literature outlined above only deals with some aspects of deregistration and dissolution, leaving much uncovered terrain. For example, as Brusser correctly points out, it is necessary to revisit the principle of *bona vacantia* and have a closer scrutiny of the fate of property which once belonged to the since deregistered company, and one should add, also the dissolved company. There is also the question of persons continuing to do business in the name of a deregistered company unaware of its deregistration. Too many questions arise in this respect such as the identity of the parties to the transactions and the liability that arises, if any. If registration of a deregistered company were to be restored or dissolution of a dissolved company declared void, the main question becomes the status of transactions concluded or steps taken on its behalf during the deregistration or dissolution period. These and many other issues need to be attended to, something which has to date not been done.

1 10 RESEARCH METHODOLOGY

This research is a qualitative study based on primary sources of the law, namely statutory law and judicial pronouncements. It will also utilise secondary sources of law in the form of books, academic writings in journals as well as online material. A visit was also paid to the office of the Registrar of Companies before it was renamed the Companies and Intellectual Property Commission as it is presently known. Meaningful information was obtained as to the working of the office concerning deregistration of companies and the aftermath thereof, for example the position relating to the handling of *bona vacantia* property.

The study is intended fill a gap by noting the strong points of the current law and indicating areas of concern which need legislative intervention by way of amendment of current legislation, relatively new as it still is. One would venture to say at the outset that a major problem with the present Companies Act of 2008 is its brevity. The Act has the framework but is lacking in detail. This should not come as a surprise since unlike the United Kingdom Companies Act of 2006 which has some 1 200 sections and the

Australian Corporations Act of 2001 which has some 1 300 sections, the South African Act has 225 sections only.

Because of comparable statutory provisions and court decisions in English, Australian and New Zealand law, and to a limited extent American, Canadian law and a few selected Commonwealth jurisdictions, comparative legal method will be used to point out salient aspects of deregistration and dissolution that are lacking in South African law and in respect of which much can be learned and borrowed from elsewhere.

1 11 OUTLINE AND OVERVIEW OF CHAPTERS

This study consists of eleven chapters which are structured as follows:

Chapter 1 is introductory in nature as it sets out the terms of reference of this study. In doing so it identifies the research problem, articulating its relevance, objectives, scope, methodology and limitation of the study.

Chapter 2 deals with historical aspects of the study, indicating in very broad terms, the general history and development of English company law from where South African company law is derived. The chapter seeks to show that originally company law did not make provision for deregistration and dissolution and that the two processes emerged out of necessity along the way.

Chapter 3 deals with the *rationale* for both processes and seeks to show that while originally the law did not make provision for deregistration and dissolution, it was realised along the way in the development of company law that there was a need for both. Whereas in the case of dissolution the purpose was to formally bring to an end the life of a company when it had failed or its goals had been achieved, a few other uses of the process emerged in the course of time. In the case of deregistration the original main purpose appears to have been a desire to clear the register of companies of defunct companies. Since then a few other uses of deregistration emerged, ranging from tax considerations to using it as a cheap and quick alternative to winding-up of the company.

Chapter 4 deals with the meaning of both deregistration and dissolution. The debate about the essence of deregistration is an ongoing one as two schools of thought are detectable in this regard. According to the Van Wyk de Vries Commission, a deregistered company could still continue doing business as an association of persons without legal capacity, which view was endorsed by some court decisions and certain academic writers. However, the vast majority of the decisions and academic writings do not subscribe to this view, this leading to the belief that the issue had been laid to rest. However, a recent court decision and few academic writers have resuscitated the issue and made it an ongoing debate.

Chapter 5 deals with the grounds on which each of the two processes may be founded as well as the procedure to be followed. It seeks to establish the extent to which the present Companies Act of 2008 deals with the two processes differently from the Companies Act of 1973, if at all. In this respect the study seeks to show that unlike the Companies Act of 1973, the Companies Act of 2008 provides a few more grounds on which a company may be deregistered, which is a positive step, but also creates a problem by not providing a procedure to be followed before a company may be deregistered. As a result deregistration of a company in terms of the Companies Act of 2008 raises the question of constitutionality of the whole process.

Chapter 6 deals with the general consequences of both deregistration and dissolution, including the effect of the two processes on legal proceedings in which the company was involved at the relevant time. The effect of each of the processes on the very existence of the company itself and its activities, as well as those activities which took place before or during deregistration and dissolution period, will also be dealt with.

Chapter 7 deals with the question of *bona vacantia*. The basic common law principle is that upon deregistration or dissolution of a company its property that has not been dealt with vests in the State as *bona vacantia* without further ado. The vesting of property in the State without further ado is not without problems. First, doing so is contrary to transfer of ownership of property, be it movable, immovable or incorporeal. Moreover, like its predecessors, the Companies Act of 2008 does not have provisions dealing with *bona vacantia* property. Furthermore, if a deregistered or dissolved company were to be revived, the property returns to it. However, South African law does not provide an answer as to which part of the property returns to the revived company, for example, the property as it was at the time of vesting in the State or as it is at the time of returning to the company. For the property could have appreciated or depreciated in the process or worse still it could simply have disappeared or been disposed of while in the hands of the State. South African law simply does not have a solution to any of these issues and many others arising in this respect.

Chapter 8 deals with liability after deregistration and dissolution. The starting point is that debts cannot be enforced against a deregistered or dissolved company for the duration of deregistration or dissolution. The only notable exception is that liability of a surety is not affected by deregistration and may be enforced without problems. There is a heated debate as to whether liability is terminated by deregistration or dissolution or is only rendered unenforceable during that period. Court decisions are not harmonious in this respect. As a deregistered or dissolved company cannot be held liable, the question which arises is whether some person, for example, a director, other officer or shareholder can be held liable for existing debts as at the time of deregistration or dissolution or perhaps only for those arising after deregistration or dissolution. The issue is no doubt very contentious. Whereas in the case of close corporations the position used to be that its members as at the time of dissolution were personally liable for its debts, this has since changed with the coming into operation of the Companies Act of 2008. Accordingly, the position concerning companies and close corporations is now the same and no personal liability attaches to members of a close corporation merely because of its deregistration. This raises an interesting question of the source of satisfaction of the company creditor's claim, assuming that there is one such source from which the creditor can recover performance.

Chapter 9 is about restoration of registration. The issues that need to be dealt with are the grounds on which restoration of registration may be granted, the procedure for doing so and the forum where that should be done. In terms of the Companies Act of 1973 application for restoration of registration was made to the court. If a restoration order was granted the company was deemed to have continued in existence as if it had not been deregistered. Furthermore, the order could contain such directions and make such provision as seemed just to the court for placing the company and all other persons in the position, as nearly as could be, as if the company had not been deregistered. Therefore, under the Companies Act of 1973 a restoration order had retrospective operation and validated deregistration period activities of the company. After all a court granting a restoration order was given power to make a fair order as the circumstances of the case required. This is not so under the Companies Act of 2008 in terms of which reinstatement of registration application is made to the Commission and not the court. Three problems arise. First, the Commission is not a court of law; secondly, the Companies Act of 2008 does not give the Commission the powers which the 1973 Act gave to a court; and thirdly, although reinstatement of registration will invariably affect third parties, such as debtors and creditors, as the status of a company would change, they are not given the opportunity to oppose reinstatement of registration or at least request that it be granted on certain terms and conditions which would ameliorate prejudice to which they would be subjected.

Chapter 10 deals with voidance of dissolution. It looks at the circumstances in which dissolution of a company may be declared void as well as the effect of such a voidance order. Because of blurring of the distinction between deregistration and dissolution brought about by the Companies Act of 2008 and a number of problems associated with reinstatement of registration, voidance of dissolution proves more attractive under the present Companies Act of 2008 and is increasingly used as an alternative to reinstatement of registration. This stems mainly from two reasons, namely the difficulty of obtaining reinstatement of registration as it requires compliance with annual returns filing obligations before it can be granted and the fact that voidance of dissolution is granted by a court and not the Commission. The court is given the power to grant an order declaring the dissolution to have been void or "any other order that is just and equitable in the circumstances". Thus by virtue of its discretion, inherent jurisdiction and the power to grant any other order which is "just and equitable in the circumstances" the court may do much more when granting a voidance order than the Commission may do when reinstating registration of a company. Another contentious issue regarding voidance of dissolution is the effect of such an order on pending litigation at the time of dissolution. There is a heated debate, both in English and South African law, on whether a voidance order revives pending litigation or whether such litigation should start afresh which, were that to be the case, would raise the issue of possible prescription of the claims sought to be enforced. One other pertinent issue is the fact that voidance of dissolution does not validate dissolution period activities.

Chapter 11 deals with conclusions and recommendations. The purpose of the chapter is to highlight a few shortcomings of the Companies Act of 2008 relating to the treatment of deregistration and dissolution and the consequences thereof. It will be shown that the notable distinction between deregistration and dissolution that used to be there in the past has since been blurred, that the good intention of insisting that the company that has been deregistered has to bring its annual returns up to date before its registration can be reinstated by the Companies and Intellectual Property Commission has brought about the unintended consequence of making it very difficult, if not altogether impossible, for many deregistered companies to be reinstated with the result that emphasis has since changed from reinstatement of registration to voidance of dissolution in circumstances where the proper course to follow would have been reinstatement of registration. It will be recommended that the relevant sections of the Companies Act of 2008 be amended accordingly and further that some court decisions should be looked at differently to achieve the desired results.

1 12 SUMMARY

The Companies Act of 2008 the Act blurs the distinction between deregistration and dissolution, something which was not there in the past. It also gives the Companies and Intellectual Property Commission the power to reinstate registration of a deregistered company but does not give it the power to make an order or at least give directives that would make reinstatement just and equitable. The result is that reinstatement of registration could be granted by the Commission in circumstances which make it "just and inequitable" to reinstate but without in any way making provision to ameliorate hardships that could arise. Furthermore, when reinstatement of registration is granted, interested third parties such as creditors and debtors of the company are not given the opportunity to oppose it or make representation that would avoid or minimise prejudice to which they would be exposed. Also the Act does not say anything at all about *bona vacantia*, a key feature of deregistration and dissolution. Therefore, there is every good reason to look closely at both deregistration and dissolution to assess their impact on the company itself as well as on other persons under the Companies Act of 2008.

1 13 REFERENCING STYLE

The referencing and technical presentation style employed in this thesis is that of *Speculum Juris*, an accredited online law journal published by the Nelson R. Mandela School of Law, University of Fort Hare

CHAPTER 2

History of deregistration and dissolution of companies

2 1 INTRODUCTION

It is common cause that unlike many other branches of South African law which have Roman-Dutch law origin, South African company law is derived from English law. This fact is well-documented. For example, Beuthin and Luiz write:

> "Until the enactment of the Companies Act 61 of 1973, it was, in general, legislative policy in South Africa to follow the example set in England. No real assistance was to be derived from the Roman-Dutch law, whereas the English company law had undergone extensive examination and developments. Its roots are to be found deep in English history, the social and economic events of which have largely determined the form which it has taken ever since the English Stock Companies Act of 1844."[48]

It is for this reason that a discourse of South African company law, especially historical aspects thereof, would not be complete without reference to English law, even if perhaps only in brief outline. The other comparable jurisdictions such as Australia, New Zealand and to a lesser extent Canada, as well as a host of other English law based systems, being mostly former colonies of Great Britain, while helpful in many other aspects of company law, are not particularly useful as regards historical aspects of South African company law. As a result

48 Beuthin and Luiz *Beuthin's Basic Company Law* 3 ed (2000) 1. See also Pretorius *et al Hahlo's South African Company Law through the Cases: A Source Book* 6 ed (1999) 1; Kiggundu "Company Law Reform in Botswana: The Agenda for the Twenty-First Century" 1996 *SALJ* 496; Benade *et al Entrepreneurial Law: Incorporating the New Companies Act Manual* Special Edition (2009) 64 para 8.03 where it is said: "incorporated company of our law is modeled after its English counterpart. Many of the rules of the English common law of companies were readily accepted by our courts and thus introduced into South African law with little or no modification ..." These sentiments were reiterated more recently by the court in *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) 503 para 26 where Gamble J said: "Our company law has for many decades closely tracked the English system and has often taken its lead from the relevant English Companies Acts and the judicial pronouncements thereon." The court further indicated that the new Companies Act 71 of 2008 constituted a significant shift from the past in that it "encourages our courts to look further afield and to have regard, in appropriate circumstances, to other corporate law jurisdictions – be they American, European, Asian or African – in interpreting the Act" 503G para 26. See also *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 4 SA 343 (GP) para 34.

reference to other legal systems would be avoided in this chapter as they did not have any influence on the history and development of South African company law.

2 2 ENGLISH LAW

2 2 1 General

For present purposes it is not possible, nor is it desirable, to trace the origin and development of English company law to antiquity. In this regard it is worth noting that literature on early forms of business enterprise, as documented in both English and South African sources, abounds.[49]

2 2 2 Guilds

Leaving aside the sole proprietorship, suffice it to say for present purposes that generally speaking by the fourteenth century, the most common forms of business enterprise in English law and practice were a guild, a partnership and a company. Guilds were not trading entities as such but were instead used by occupational groups to control entry into, and thereby also the standard of, craft groups.[50] According to Tomasic:

49 See for example Pretorius *et al* 2 where it is indicated in the notes that a useful starting point for research on the historical development of English and South African company law is among others Davies and Prentice *Gower's Principles of Modern Company Law* 6 ed (1997) 18 ff; Hunt *The Development of the Business Corporation in England* 1800 - 1867 (1936); Cooke *Corporation, Trust and Company* (1950); Williston "History of the Law of Business Corporations before 1800" 1882 *Harvard LR* 105 149; Scott *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720* (1910 – 1912); Schmitthoff "The Origin of the Joint Stock Company" 1939 *University of Toronto LJ* 74 and Evans "The Evolution of English Limited Joint Stock Trading Companies" 1908 *Columbia LR* 340. Reference may also be made to Davies & Prentice 18 fn1 where the following sources are also indicated, namely Formoy *The Historical Foundations of Modern Company Law* (1923); Cooke *Corporation, Trust and Company* (1950); Carr *Law of Corporations* (1905); Hunt *The Development of the Business Corporation in England 1800-1867* (1936) and Grant *Law of Corporations* (1850). See also Kiggundu *Company and Partnership Law in Botswana* (2010).

50 In the current South African context guilds would compare favourably with taxi associations. Being a member of such an association, itself not being a commercial entity, does not give a member any direct

"Guilds were often incorporated[51] upon the basis of royal charters, although their members were independent traders who only came together for the social fellowship and for the ceremonial purposes of their guilds. As guilds were tied closely to local areas they were not a flexible form of business organisation. Despite the local monopolies they provided, they were not suited for larger business ventures as they could not marshal the capital needed for joint ventures."[52]

2 2 3 Partnerships

It is said that the true origins of modern companies were not guilds themselves, which were not legal entities, but partnerships which were formed between traders.[53] Indeed the law of partnership played an important part in the development of modern company law, more so in respect of small business entities.[54] Two types of partnerships existed in those early days, namely a *commenda* and a *societas*. The former had the elements of both a partnership and a loan.[55] A *societas*, on the other hand, was a more permanent association which eventually evolved into the modern-day partnership.[56]

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financial benefits. However, the association confers indirect commercial benefits of uniformity in the manner of operation, for example uniform taxi fares, and more significantly, monopoly of trade from which non-members are excluded and unfortunately quite often violently so.

51 As guilds were not legal entities the "incorporation" referred to would in this context mean no more than mere registration rather than incorporation in the sense of registration which is followed by acquisition of status of legal personality.

52 Tomasic *et al Corporation Law: Principles, Policy and Process* (1990) 9 para 1.4.

53 Tomasic 9 para 1.4.

54 *Ibid.*

55 In terms of a *commenda* arrangement a financier who wished to profit from an enterprise advanced a loan to an active trader. The liability of the financier extended only as far as the capital actually advanced - see Tomasic 9 para 1.4. Of course this was the well-known French *en commandite* partnership which never really took root in English law where book-keeping practices were not as developed as they were in Continental Europe.

56 Members of a *societas* were tied to each other and often traded under a collective name. Partners were seen as representing each other and each was fully liable personally to all the creditors of the firm. Like the *commenda* a *societas* never really took root in English law. Nevertheless, as a medieval business form it formed the basis of modern partnership law - see Tomasic 9 para 1.4 and Holdsworth *History of English Law* vol 8 (1939) 199.

2 2 4 Companies in general

From the end of the fourteenth century, English monarchs gave privileges to companies of merchants trading abroad, a phenomenon traceable way back to 1391 AD.[57] The merchants were required to obey the rules of the company but each continued to trade on the basis of his own stock and account. To that extent they were similar to old guilds. Charters were sought, and granted, with a view to acquiring a monopoly, and sometimes governmental power, over territory for the particular company.[58] By the early seventeenth century the manner of trading had shifted from an individual to a joint account, in what was a move away from the influence of the guild system to partnership law. Thus while entrepreneurs traded in the form of a company, principles of partnership law were clearly visible in their way of doing business.

The main advantage of incorporation at that time was the ability of promoters to obtain capital more readily to finance the enterprise. The company was a permanent body which was distinct from its members. It was during that time that the joint stock principle developed. The words "joint stock" were used not in the sense of "shares" but "trading stock".[59] The trading stock was jointly held such that unlike in the earlier practice when each member of the company traded own stock for own account, members contributed trading stock to a common pool.[60]

In those early days, while incorporation of a company was achieved through a Royal Charter, one important element was missing, namely limited liability. This was so as a

57 See Tomasic 9 para 1.4 and Holdsworth 199.

58 Holdsworth 199.

59 Tomasic 9 para 1.5.

company at the time was essentially an incorporated partnership whose members were personally liable for the debts of their company just as partners were liable for partnership debts, subject to one qualification, namely that their liability was secondary. First and foremost, it was the company which was liable for business debts but if it was unable to pay, liability fell on the members.[61]

The main challenge of the time was to secure limited liability for members of the company, a development which was to occur much later in English company law history. That being the case to expect provisions dealing with niceties such as deregistration and dissolution of companies would, by any standard, have been premature. At best, for dissolution, provision for it could be made in the charter of incorporation, if the issue was ever given a thought. However, evidence to show the existence of the practice is hard to find. It is nevertheless reasonable to assume that in some instances provision to that effect was made in the charter of incorporation.

2 2 5 The South Sea Company

In the early eighteenth century the South Sea Company was incorporated to take over most of the state debt, issuing creditors with shares in the place of their claim on the state.[62] As it was not uncommon at the time the company was given a monopoly of trade in South America. In

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60 Tomasic 9 para 1.4.
61 Tomasic 10.
62 For more information about the company see for example Tomasic 10; Benade "The South Sea Bubble" 1965 6 *Codicillus* 27; Cowles *The Great Swindle* (1960); Williston "The History of the Law of Business Corporations before 1800" 1888 *Harvard LR* 105; Hahlo "Early Progenitors of the Modern Company" 1982 *Judicial Review* 139; De la Rey "Aspekte van die Vroee Maatskappyreg: 'n Vergelykende Oorsig" 1982 *Codicillus* 4; Carswell *The South Sea Bubble* (1960) and Cowell *The Great Swindle* (1960); Smith *South Sea Bubble* (1925) .

63 Holdsworth 199.

64 Tomasic 10; Schmitthoff 6 para 2-01 where reference is made to Maitland *Collected Papers* (1911) 390.

return for taking over state debt the company was to receive interest from the government. It was the belief of the company that it would be able to borrow large sums of money on the basis of the capital lent to the state and the resulting interest received would be its revenue. However, the scheme failed and led to the collapse of the company which got entangled in much litigation as it instituted legal action against various entrepreneurs who had purchased charters of dormant businesses after which they proceeded to trade in areas other than those in respect of which the charters were originally granted. The effect of the litigation was that the charters involved were forfeited.[63] The litigation, together with instances of corruption and not so competent management, led to panic which brought about the downfall of the company.[64] The panic which characterised the end of the South Sea Company led to the next stage in the development of English company law, namely the Bubble Act of 1720.

It should be noted that while it did not deal with deregistration or dissolution of companies as such, the South Sea Company was nevertheless an interesting aspect in the history and development of English company law and is therefore helpful in putting that issue in a better light.

2 2 6 The Bubble Act of 1720

As a direct result of the collapse of the South Sea Company the "panic stricken"[65] legislature passed the Bubble Act of 1720.[66] The Act, which exempted partnerships and companies incorporated before 24 June 1718, prohibited incorporation of companies except in terms of a Royal Charter or Act of Parliament. The purpose of the Act was to put a stop to the flood of

65 In 1740 an anonymous author described the South Sea Company as a company calculated for "scheming" rather than "trading" - see Schmitthoff *Palmer's Company Law* (1987) 6 note 4 where reference is made to Library Pamphlet Collection XVIII-40-4 *Description of Trades, Goldsmiths* (1740).

66 6 Geo 1 c 18, the full title being Royal Exchange and London Assurance Corporation Act of 1719 (c

speculative and often fraudulent schemes of company floatation, a very big problem at the time.

Far from controlling the formation of companies the Bubble Act had the opposite effect. This was so in that it was in fact time-consuming and costly to get a Royal Charter or an Act of Parliament just to float one company.[67] Because of the difficulty of incorporating a company under the Act various alternatives of establishing a business were initiated, the most common one proving to be a "deed of settlement company". Commenting on the Bubble Act Sugarman and Rubin write:

> "As regards companies, the Bubble Act of 1720 had [formally] made it difficult to secure the attributes of separate personality and limited liability: ie the vast bulk of business organisations were legally required to adopt the form of an unincorporated association, such as a partnership. Attempts to circumvent the obtuse provisions of the Bubble Act added fuel to the uncertainties which characterised this area of the law."[68]

The Act was in the statute book for one hundred and five years when it was repealed in 1825.[69] Apart from hindering the incorporation of companies the Bubble Act did not achieve much as under it only one prosecution was launched.[70] However, for what it was worth it could be regarded as the first example of English companies legislation,[71] rudimentary as it was.

Although like the South Sea Company, the Bubble Act as such was not of particular importance to deregistration and dissolution of companies, it is nevertheless worthy of

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67 Gower *et al Gower's Principles of Modern Company Law* (1992) 37 note 2 which refers to Hunt *The Development of the Business Corporation in England 1800 - 1867* (1969) 82 where an example of two railway incorporations is given. One incorporation cost 72 866 pounds sterling and the other 40 588 pounds sterling. The fees for a Royal Charter amounted to 402 pounds sterling, a very substantial amount in those days. The Report on Investments for the Savings of the Middle and Working Classes (1850 B.P.P vol X1X, 169) refers to a Royal Charter incorporation which cost 1 134 pounds sterling, which amount was alleged to have been "greater than that of obtaining an Act of Parliament."

68 See Tomasic 12 where the quotation is extracted. There the authors do not cite the work referred to presumably because that is done elsewhere in their book.

69 By the Bubble Companies Act of 1825 c 19.

70 Tomasic 11.

71 *Ibid.*

mention as a stage in the history and development of English company law. Moreover, in terms thereof an attempt was made to introduce company law legislation and therefore served as a precursor to legislation that was to follow in the years to come.

2 2 7 Deed of settlement company

Because of obstacles put by the Bubble Act in the formation of companies, the business community and their legal advisers found a new way of forming a business structure. This was in the form of a "deed of settlement company". To call it a company was no doubt a misnomer since although that was the intention, the form that the new business entity took was more in the nature of a partnership. As a result the deed of settlement company had the features of both a company and a partnership. The precise nature of the entity notwithstanding, it nevertheless achieved the desired goal of being an instrument through which entrepreneurs could do business.

The company was formed through a deed of settlement to which members subscribed and agreed to be involved in an enterprise having joint stock divided into a specific number of shares.[72] The deed usually declared that several persons for the time being holding shares in the capital of the company constituted a company with a specific name, with a specified capital and that the running of the business of the company would be subject to the regulations as specified in the deed until the company was dissolved[73] in a manner therein specified.[74] Shares in the company were usually made transferable. To secure continuity of the concern, management of the enterprise was transferred to a select body of directors to the

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72 Tomasic 11.

73 Already then and without much legislative help entrepreneurs had to have the foresight and make provision for the dissolution of their company in the deed of settlement lest they encounter many problems for failing to make such provision if that eventuality were to become a reality. To provide for the dissolution of the company in the deed of settlement was very important and necessary. In the absence of statutory machinery providing for same, dissolution of a company would become a thorny issue, simply for lack of the basis on which to do so. The alternative basis on which to dissolve the company was presumably by way of members' resolution or a court order.

74 Schmitthoff 7 para 2-03.

exclusion of the members generally while the property of the company was vested in all or some of the directors as trustees.[75]

What the founders of the company wanted to achieve was a company with continuous existence and transferable shares but without any individual member having the power to bind other members or deal with the assets of the company.[76] As the enterprise was not registered it was not a legal entity and its members remained personally liable for its debts. At the same time it was not a partnership either for the intention was to form a company and not a partnership. Moreover, no individual had the power to bind the entity or its members since its management was vested in its directors as trustees.[77]

Significantly for present purposes though the company would usually make provision in its constitution, being the deed of settlement, for its dissolution. Deregistration, on the other hand, was a term unheard of and was never provided for. Moreover, it was at that time an irrelevant concept in that the company not being registered there was no need to provide for its deregistration in the first place. After all there was no office for registration of companies.

2 2 8 Letters patent company

After the repeal of the Bubble Act in 1825 it became more evident that there was a need to make a law facilitating the formation of companies. A half-measure was taken in 1834 with the passage of the Trading Companies Act of that year. The Act empowered the Crown to confer, by letters patent, any of the privileges of incorporation without actually granting a charter. Furthermore, it also obviated the need for special acts of Parliament creating and enabling companies to sue and be sued in the name of their officers.[78]

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75 *Ibid.*
76 Schmitthoff 7 para 2-03.
77 *Ibid.*
78 Schmitthoff 38.

The significance of the 1834 Act lay in its being the first general statute requiring public registration of companies. However, the Act contained no express provision to the effect that the letters patent could limit the liability of members. On the contrary it expressly provided that judgments against the company could, with the leave of the court, be enforceable against every member until three years after he had ceased to be a member.[79]

Once again, it should be noted that like its predecessors, namely the South Sea Company and the Bubble Act, the letters patent company was of importance in the history and general development of English company law although it did not specifically deal with either of the twin topics of deregistration and dissolution.

2 2 9 Chartered Companies Act of 1837

Only three years after the introduction of letters patent companies emphasis shifted from companies to partnerships. Parliament was looking into ways of introducing legislation that could limit liability of the partners just like the French commanditarian partnership did.[80] The result was the Chartered Companies Act of 1837 which simply re-enacted the Trading Companies Act of 1834 with this one notable exception, namely that personal liability of members of the company could be limited by letters patent to a specified amount per share.[81] Thus what started as an inquiry into possible limitation of the liability of partners resulted in confirmation of liability of members of a letters patent company.

While creating a basis on which liability of members of a chartered company could be limited, the 1837 Act did not solve the old problem of facilitating flotation of companies.

79 *Ibid.*
80 A partner *en commandite* of the French law was a secret or passive partner who did not take part in the running of the affairs of the partnership. He only made a contribution and took part in the sharing of profits and losses. In the event of loss, his liability was limited to his contribution, not being a general liability for all debts of the partnership.
81 Gower 38.

This had to be so as the cost of obtaining a Royal Charter was considerable[82] while a charter itself was not easily granted. A letters patent company was nevertheless a half-measure and compromise as it was not as cumbersome to form as a Royal Charter company. Like its predecessors, the Chartered Companies Act did not deal with deregistration and dissolution of companies.

2 2 10 Joint Stock Companies Registration Act of 1844

2 2 10 1 Basic tenets of the Act

From time to time various authors commented on one or other significant English company law legislation as the beginning of modern company law.[83] While not denying the importance of various pieces of legislation on company law, it is submitted that labelling them as what could be described as the foundation of modern company law is in all fairness not correct. If anything, it is the Joint Stock Companies Registration Act 1844 that deserves that adoration.

Commenting on the Act, Gower says that the "1844 Act introduced three main principles which have constituted the basis of our company law from that time".[84] The three principles alluded to by the author refer, first to the distinction between private partnerships and joint stock companies,[85] secondly and more significantly, incorporation of companies by mere registration as opposed to a specific Act or charter. Thirdly, the Act provided for full

82 See para 2 2 6 above.

83 See for example Tomasic 11 who describes the Bubble Act of 1720 as "probably the first English example of what would now be called corporation law", this notwithstanding the notoriety of the Act. Denouncing the Bubble Act Schmitthoff 6 para 2-01 says that the history of modern company law began in 1825 when the Bubble Act was repealed by the Bubble Companies Act 1825. Mention may also be made of such other authors as Gower 40 where the fact of the beginning of modern English company law is emphasised. Coming closer home Benade *et al* 65 para 8.08 say the Joint Stock Companies Act of 1856 can lay claim to being the first modern English Companies Act, referring in this respect to Cilliers and Benade *Company Law* (1982) 25-30.

84 Gower 39.

85 Which distinction had, as was shown above in para 2 2 7, been blurred by the deed of settlement company.

publicity,[86] an aspect of company law which has ever since been regarded as the most potent safeguard against fraud.

More than anything else, the second point mentioned by Gower cannot be over-emphasised, namely the simple flotation of a company by mere registration. Therefore, the Act became a general enabling one in terms of which companies could be registered, a process which had hitherto been lacking in English law. It should, however, also be mentioned that oversimplified as the process of incorporation became under the Act, it was nevertheless not an exercise that did not require some effort. This was so as the process of registration of a company was done in two stages, namely provisional registration which authorised the company to function for certain strictly limited preliminary purposes, which process was followed by complete registration on filing a deed of settlement containing the prescribed particulars and other documents at which stage the company became fully and officially incorporated.[87]

2 2 10 2 Shortcomings

The 1844 Act was one of the pieces of legislation brought about by the efforts of Gladstone during his tenure of office as President of the Board of Trade. He succeeded for the first time in placing joint stock companies on a sound legal footing and is accordingly labelled the "father of modern company law".[88] However, the Act had one main drawback, namely that it only solved legal but not commercial problems. It gave a company the legal status of incorporation but denied its members the most sought after advantage of it all, being the freedom from personal liability.[89] In this respect the only advantage of incorporation was the

86 The importance of publicity as the cornerstone of company law cannot be over-emphasised. See for example Pretorius *et al* 6 where reference is made among others to Farrar & Hannigan *Farrar's Company Law* (1998) 8-13; Bird "Company Accounting and Disclosure" 1980 *Journal of Business Law* 32; Kripte "The Myth of Informed Layman" 1973 28 *Business Lawyer* 631 and Sealy "The Disclosure Philosophy and Company Law Reform" 1981 *Company Lawyer* 51.

87 For further discussion of the Act see among others Gower 39.

88 Gower 40. See para 2 2 10 1 above for a discussion of the foundation of modern company law.

89 See Gower 39. Limited liability was expressly excluded under the Act. Although the company was incorporated personal liability of its members was preserved by s 25. Such liability was to cease three years after members had transferred their shares to others by registered transfer. However, creditors had to attach the assets of the company first before they could proceed against members - s 66.

recognition that the company itself was primarily liable and that its insolvency did not necessarily involve the insolvency of its members.[90]

2 2 11 Winding-up

The 1844 Act did not deal with winding-up of companies which was otherwise dealt with in a separate Act of the same date and which made companies subject to insolvency law.[91] This had to be so and that for a good reason as Gower puts it: "... Company Law should concentrate on the life, rather than the death and internment, of companies."[92]

It is said that the 1844 Act was passed at the height of the "railway mania".[93] However, the boom was followed by a collapse one year later which changed emphasis from promotions to liquidations.[94] A Winding-up Act applying to railway companies[95] was passed in 1846 and then followed in 1848[96] and 1849[97] by Acts of general application conferring winding-up jurisdiction on the Court of Chancery.

It should be obvious that winding-up of a company leads to its "death and internment", namely its dissolution. Thus one cannot speak of winding-up to the exclusion of dissolution. It should be noted though that during those early days of winding-up of companies not much was said about regulating dissolution, let alone its mere mention. That being the case it would be asking too much to even think of the other aspect of the present discussion, namely deregistration. As already indicated this was a concept which was to emerge much later in the development of English company law.

90 Gower 40.
91 Companies Winding-up Act of 1844 (7 & 8 Vict c 111).
92 Gower 52.
93 Gower 40.
94 Gower 41.
95 Companies Winding-up Act of 1846 (9 & 10 Vict c 28).
96 Companies Winding-up Act of 1848 (11 & 12 Vict c 28).
97 Companies Winding-up Act of 1849 (12 & 13 Vict c 108).

It is evident therefore that since 1844 legislation made provision for winding-up of companies. The inevitable result of winding-up is obviously dissolution, being a completion of the work started through the former process. However, literature covering the development of company law during that period hardly ever mentions dissolution, if at all. Dissolution, with all its implications, was a concept to enjoy attention much later, and in any event, not at that stage. Though hard to pinpoint at that stage, it is nevertheless safe to accept that dissolution was there in the statute books even though it was relegated to obscurity. Moreover, it should not be forgotten that by the deed of settlement which surfaced after the repeal of the Bubble Act in 1825, when its dispensation came to an end after some one hundred and twenty five years of existence, provision had to be made for dissolution of a company. Furthermore, it should also be borne in mind that dissolution does not come out of the blue, it must be preceded by a process, traditionally winding-up. Thus the deed of settlement, provision for which was also made in the 1844 Act, had to deal with both winding-up and dissolution of a company, especially where the law did not make provision for same. If that was not done a problem would arise if the company were to fail or if its members were to decide to bring its life to an end, only to find that neither the law nor the deed of settlement made provision for the process. That would indeed have presented a serious predicament.

2 2 12 Limited Liability Act of 1855

A year after the passing of the 1844 Act another piece of legislation dealing with companies followed, namely the Company Clauses Consolidation Act 1845. The Act is of no particular significance for present purposes as it simply contained provisions which had to be included in private statutes (articles) of incorporation.[98]

A more substantive company law statute followed ten years later in the form of the Limited Liability Act 1855.[99] The Act solved the problem which had been perpetuated by the 1844 Act by expressly providing that members of the company were not personally liable for

98 See Tomasic 12.
99 18 & 19 Vict c 133.

its debts. As a result of the 1855 Act for the first time in English company law there were statutory provisions which made it possible for members of a company to be protected against personal liability for its debts.

It should be mentioned though that the Act did not provide for blanket protection against personal liability. Instead, it applied only if certain specified requirements had been complied with, failing which members of the company, and directors in certain instances, remained liable. In terms of the Act, personal liability would not arise if the company had at least 25 members, three-quarters of the nominal capital had been subscribed for, the word "Limited" was part of the company's name and further if the company had approved auditors.[100]

2 2 13 Joint Stock Companies Act of 1856

The 1855 Act was repealed a year later with the passing of the more elaborate Joint Stock Companies Act of 1856. The Act dropped most of the safeguards which had been introduced by the 1855 Act relating to members' personal liability. Under the 1856 Act limited liability became generally more, but not absolutely, freely available.

The 1856 Act is said to have marked the beginning of a new era in English company law in that it abandoned the old cumbersome system introduced by the 1844 Act of provisional and complete registration.[101] It made registration of a company a simple and inexpensive process in that all that was required for the formation of a company were seven signatures to a written or printed document which was called the memorandum of association but in addition the company had to register the articles or adopt the model articles attached to the Act.[102] The two documents, being the memorandum of association and the articles, took the place of the deed of settlement. On payment of a fee the two documents were to be

100 See Tomasic 12.
101 Schmitthoff 10 para 2-07.
102 In Table B of the Schedule to the Act.

registered and a certificate of incorporation was given whereupon the company was at liberty to commence business. The hitherto much sought after benefit of limited liability was, as it was in the case of the 1855 Act, secured by the insertion in the memorandum, and as part of the name of the company, of the word "Limited", together with a clause stating that the liability of the members was limited.[103]

2 2 14 Companies Act of 1862

The Companies Act 1862 is described as the "*magna carta* of co-operative enterprise".[104] The Act consolidated the 1856 Act with a number of other Acts which had been passed in the interim and also introduced a number of additions to the existing body of law. For example, for the first time the model set of articles which a company could adopt instead of registering its own articles appeared in Table A of the First Schedule to the Act. Among the many other changes introduced by the 1862 Act were for example elaborate provisions dealing with winding-up of companies.[105] Winding-up provisions are very important for present purposes since, as already mentioned, the next logical step in completing the winding-up process is dissolution of the company. This was done in sections 111 and 143 which provided for dissolution of a company at the end of a compulsory or voluntary winding-up.[106]

2 2 15 Companies Act of 1880

For the first time in English company law the Companies Act of 1880[107] introduced provisions dealing with defunct companies.[108] That was a significant development in that

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103 Schmitthoff 10 para 2-07; Black *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 4 (1991) 229 para 304.

104 Schmitthoff 11 para 2-09, quoting Sir Frances Palmer.

105 The Act had 99 sections devoted to liquidation which were found in Part IV sections 74 - 173.

106 This issue is noted by Arden, Prentice *Buckley on the Companies Acts* (2000) 651/2 footnote 2.

107 43 Vict c. 19

108 Striking off a defunct company from the register is not the terminology commonly used in this country. In South Africa the words used are "deregistration" or "removal of the name of the company from the register of companies", the latter being for instance the wording of ss 82 - 83 of the current Companies Act of 2008, just as their predecessors did.

since then striking off the names of defunct companies from the register became a permanent feature of subsequent statutes to this day. It is amazing that the position was such that the language of section 353(6) of the Companies Act of 1948 remained substantially the same as that of section 7 of the 1880 Act when the process was first introduced.

The importance of the 1880 Act cannot be over-emphasised notwithstanding Lord Blanesburgh's utterances in *Morris v Harris*[109] that the provisions dealing with striking a defunct company off the register first made their appearance in company legislation under the Companies Act of 1900. Winding-up and dissolution hardly warrant mentioning as by then they had become firmly entrenched as a permanent feature of companies legislation as indicated above.[110]

2 2 16 Companies Winding Up Act of 1890

The Companies Act 1862 remained the principal Act until 1908 when the Companies (Consolidation) Act came into operation.[111] However, this does not mean that during a period of 46 years leading to the 1908 Act there were no statutory developments in English company law. As a matter of fact a number of pieces of legislation dealing with company law matters were passed. For example pieces of legislation such as the Companies Act of 1867, 1879, 1880 and 1900 were passed. There was also the Directors' Liability Act of 1890.

Of note here one can refer to the Companies Winding-Up Act of 1890. The Act demonstrated the importance which the legislature attached to winding-up of a company and its resulting dissolution in those early days of English company law development. Whereas up to that time winding-up was accorded a relatively small percentage of company legislation, the 1890 Act gave it due prominence, finding it as deserving of separate treatment and attention.

109 [1926] All E.R. Rep 15.
110 See para 2 2 11 above.
111 See Gower 47 note 81. The 1908 Act was an implementation of the Report of the Loreburn Committee: 1906 Comnd.3052.

2 2 17 Companies Act of 1900

The Companies Act of 1900 had provisions dealing with deregistration of registration, referred to as "striking the company of the registrer", dissolution of companies and voidance of dissolution. The significance of the Act was demonstrated among others by the case of *Morris v Harris*[112] where, dealing with the provisions of the Companies (Consolidated) Act of 1908, the court indicated that the provisions dealing with restoration of registration of defunct companies first appeared in companies legislation in sestion 26 of the Companies Act of 1900.[113] The correct position though is that, as already indicated, the provisions dealing with defunct companies made their first appearance in section 7 of the 1880 Act. This error was pointed out and corrected in *Tymans Ltd v Craven*[114] which specifically dealt with defunct companies.

2 2 18 Companies (Consolidation) Act of 1908

The Companies Act of 1862 marked significant development in the history of English company law, especially as far as achievement of limited liability on the part of members of the company was concerned. After that Act, a number of piece-meal legislative developments did nevertheless take place as several amending statutes were passed to deal mostly with specific aspects of company law. It so happened that by 1908 no less than eighteen statutes had been enacted. However, a general consolidation of companies legislation did not take place until 1908 when the Companies (Consolidation) Act of that year was passed. With the passage of that Act much ground was laid for the development of English company law as we know it today.

112 [1927] AC 252, [1926] All E.R Rep 15.

113 Lord Blanesburgh (whose judgment was read by Viscount Dunedin) said ([1926] All E.R Rep 15 23) that the provisions [of s 242(6) of the Companies (Consolidation) Act, 1908] first appeared in company legislation in s 26 of the Companies Act, 1900.

114 [1952] 1 All ER 613 (CA), [1952] QB 100 (CA).

For example, the Act carried forward the work initiated in 1900 when the Act of that year, for the first time, made a distinction between a private and a public company. For present purposes though, it cannot be over-emphasised that in terms of the 1908 Act striking off a defunct company from the register as well as dissolution of a company after winding-up had become permanent features of companies legislation. While those were fairly early days nevertheless the basic principles, including the grounds and procedure for dealing with defunct companies, had been laid. What was to happen in the years to follow was by and large elaborating on the basic principles of striking off defunct companies as well as dissolving those that had been wound up.

The importance of the 1908 Act was demonstrated among others by the language of section 242(6) which dealt with restoration of registration of a defunct company which had been struck off the register. It is amazing how the wording of the equivalent section in the UK statute is, more than a century later, very much the same today as it was then. In South Africa, the language of the equivalent section remained the same up to the 1973 Act after which it slightly changed under the 2008 Act. Section 242(6) of the Companies (Consolidation) Act 1908 provided as follows:

> "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application of the company or member or creditor may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."[115]

The section was repeated *verbatim* in section 353(6) of the Companies Act of 1948. While it is true that the section was inelegantly drafted and appeared rather clumsy nevertheless not much changed over the years. After more than one hundred and thirty years the essence of striking a company off the register and the subsequent restoration of its registration remain

115 Quoted in *Morris v Harris* [1926] All E.R Rep 15 23B-C. Italics omitted.

essentially the same. That is without doubt a remarkable development, demonstrating the attention that was given to the provisions when they were first introduced.

2 2 19 Voidance of dissolution

By the turn of the twentieth century, the process of dissolution of a company, whether as a result of its compulsory winding-up, voluntary winding-up or reconstruction[116] had become well-established in English law and enjoyed statutory sanction. However, there was a little follow-up procedure which was yet to make its way into the system, namely voidance of dissolution. Dealing with the effect of declaring the dissolution to have been void, as the House of Lords did in *Morris v Harris*[117] which was provided for in section 223(1) of the Companies (Consolidation) Act of 1908, Lord Blanesburgh remarked that section 223 did not appear in companies legislation until it was introduced in the Act of 1908. Thus, until 1908, although there was in English company law and practice a procedure for dissolution of a company, there was nevertheless no provision for voidance of the dissolution procedure regardless of how much it might have been necessary to obtain a court order declaring the dissolution to have been void. Thus the 1908 Act closed that gap by providing for such process.

2 2 20 Subsequent developments

By 1908 the Board of Trade had a practice of appointing at intervals of about 20 years a Departmental Committee to review company law and thereafter implement its recommendations by an amending Act only to be repealed and replaced by a consolidation of all company law legislation to date in a Companies Act.[118] This practice, which started towards the end of the nineteenth century, was followed during the first half of the twentieth

116 The case of *Morris v Harris* [1926] All E.R. Rep 15 appears to have dealt with a takeover. There the business, assets and liabilities of Morris, Russell & Co. Ltd were taken over by a new company having a largely similar name and which was called Morris, Russell & Co. (1919).

117 [1926] All E.R Rep 15 23F-G.

118 Gower *et al Gower's Principles of Modern Company Law* (1992) 49.

century and resulted in new consolidations of the Companies Acts in 1908,[119] 1929[120] and 1948.[121]

However, occasionally the practice ran into difficulties and could thus not be sustained. Nevertheless, in keeping with the tradition in 1960 a committee, the Jenkins Committee, was appointed and submitted its report in 1962.[122] While the Committee was still sitting, legislation was passed that introduced the concept of the floating charge into Scottish law.[123] Shortly thereafter two further Acts were passed, namely the Protection of Depositors Act 1963[124] and the Stock Transfer Act 1963. As will be noted, none of the three statutes was a consolidating Act as they dealt with specific aspects of company law.

Some recommendations of the Jenkins Committee were translated into law in 1967 with the passing of the Companies Act 1967 which dealt with, among others, the prudential regulation of insurance companies as well as a few other amendments relating to companies generally.[125] A Bill intended to implement most of the recommendations of the Committee was introduced in 1973. However, it was defeated in Parliament and never became law. As a result no consolidation of company law followed as would have been the case had the Bill been passed. Thus, the tradition of consolidating company law every 20 years was broken in the 1970's, albeit just for a single decade, only to be revived in the 1980's with the passing of the Companies Act of 1985.

119 Companies (Consolidation) Act of 1908 which implemented the Report of the Loreburn Committee: 1906 Cmnd.3052.

120 Companies Act of 1929, implementing the Greene Committee: 1926 Cmd 2657 and an earlier Report of the Wrenbury Committee: 1918 Cd. 9138.

121 Companies Act of 1948 which implemented the Report of the Cohen Committee: 1945 Cmd. 6659.

122 1962 Cmnd.1749.

123 Companies (Floating Charges) (Scotland) Act of 1961, which implemented a Report of the Scottish Law Reform Committee: (Cmnd. 1017).

124 The Act was later superseded by the Banking Act of 1979 and eventually the Banking Act of 1987.

125 See in this respect Gower (1992) 50.

2 2 21 European Communities Act of 1972

The United Kingdom[126] (UK) acceded to the Treaty creating the European Economic Community (EEC)[127] in 1972 in terms of the European Communities Act of 1972. As a result of membership of the EEC the UK had to pass several laws to ensure compliance with various directives whose aim was to harmonise the laws of member states. For example, the UK had to implement the First Company Law Directive relating to publicity, pre-incorporation contracts, the doctrine of *ultra vires* and the authority of directors. In this respect in 1980 and 1981 two Companies Acts were passed primarily to implement the Second Company Law Directive relating to the formation of public companies and the maintenance of share capital.

In brief, the various Companies Acts passed in response to EEC directives dealt mostly with duties of directors, conflict of interest, company names, acquisition by companies of their own shares, providing financial assistance for purchase of the company's own shares, disclosure of interest in shares and the remedies of members for unfairly prejudicial conduct.[128] It will be noted that EEC directives did not deal with deregistration or dissolution of companies. As a result the law in that respect remained the same as before accession to the EEC.

2 2 22 Companies Act of 1985

Because of a multiplicity of statutes dealing with various aspects of company law, the need for a consolidation Act became very obvious. The result of an endeavour to bring together the

126 The United Kingdom of Great Britain and Northern Ireland, consisting of England, Scotland, Wales and Northern Ireland as per the Royal and Parliamentary Titles Act of 1927.

127 There has since been a name change in that the European Economic Community (EEC) is now known as the European Union (EU), a change which came about in terms of the Maastricht Treaty of 1993.

128 For a summary of the various Directives see Gower (1992) 50 - 51, especially note 93 on page 51 where reference is made to a number of statutes passed in compliance with EEC Directives such as the Companies (Floating Charges and Receivers) Scotland Act 1972; Stock Exchange (Completion of Bargains) Act 1976; Companies Acts 1976, 1980, 1981 as well as the Companies (Beneficial Interests) Act 1983.

various pieces of legislation and amendments was the Companies Act of 1985. However, the history and development of company law in the UK was such that it was not possible to put together everything under one roof. As a result, apart from the principal Act supplementary Acts also had to be passed, being the Companies Securities (Insider Dealing) Act of 1985, the Business Names Act of 1985 and the Companies Consolidation (Consequential Provisions) Act of 1985.

The principal Act could not accommodate important pieces of legislation then under preparation which resulted in the Insolvency Act of 1985. This Act introduced major reforms to the law of individual bankruptcy[129] and winding-up of companies. On the other hand the Insolvency Act of 1986 consolidated the law and also dealt with those issues that survived earlier legislation. The result of the two Insolvency Acts was therefore to remove provisions relating to winding-up and receivership from the Companies Act of 1985 to a separate piece of legislation.[130]

Another matter which was not dealt with in the Companies Act of 1985 was the disqualification of directors. A separate Act, the Company Directors Disqualification Act of 1986, consolidated provisions empowering the courts to disqualify miscreants from acting as directors.[131] A further Act, the Financial Services Act of 1986, was passed to regulate the profession of those engaged in investment business as well as takeovers.

As a result of the Companies Act 1985 and its supplementary legislation company law of the UK was divided into three areas being company law proper (for lack of better description), insolvency law and securities regulation.

129 "Insolvency" is the word used in South Africa.
130 For a detailed discussion of the topic see Gower (1992) 52.
131 Gower 52.

2 2 23 Companies Act of 1989

The primary aim of the Companies Act of 1989 was to implement the European Economic Community company directives on consolidated accounts and audits.[132] Nevertheless, the legislature used that opportunity to deal with a number of domestic reforms and also amend the Financial Services Act 1986. The Act did not deal with dissolution of companies or defunct companies which continued to be governed by the law as it was before its passing.

2 2 24 Companies Act of 2006

The Companies Act of 2006 reforms and restates substantially the greater part of existing company law legislation for the UK and codifies significant areas of case law, including fiduciary duties and derivative actions.[133] It is a massive piece of legislation having some 1 300 sections with 16 schedules spread into 701 hard copy pages and 761 electronic ones, 60 of which are devoted to an arrangement of the sections and schedules.

The Act was brought into operation gradually over a period beginning December 2006 and ending 1 October 2009. Initially the Act did not deal with striking off of defunct companies which continued to be governed by sections 652 - 658 of the Companies Act of 1985.[134] However, the phasing-in implementation of the Companies Act of 2006 was eventually completed. As a result, striking off of a company and dissolution associated with striking off are now found in sections 1000 - 1034 of the Act.[135] With the repeal of sections

132 See Gower (1992) 53-54.

133 For a summary of the significance of the Act, which appears to be somewhat exaggerated, see an abstract by Davies and Rickford *An Introduction to the New UK Companies Act* (2006) at http://www.reference-global.om/doi/abs (accessed 11-11-2009). Exaggerated as they may seem the views of Davies and Rickford are nevertheless shared by the editors of the *Explanatory Notes* para 7 to the Act who say that the company law provisions of the 2006 Act (Parts 1-39) restate almost all of the provisions of the 1985 Act, together with the company law provisions of the Companies Act (1989) and the Companies (Audit, Investigations and Community Enterprise) Act 2004 - see http://www.opsi.go.uk/acs/acts 2006 (accessed 11-11-2009).

134 Section 651.

135 Section 651.

501 - 650 of the 1985 Act, the twin subjects of winding-up and dissolution of companies are now governed by the Insolvency Act 1986.

2 3 SOUTH AFRICAN LAW

2 3 1 Cape Colony

The first South African company law legislation dealing with incorporation of companies in general was the Cape Joint-stock Companies Limited Liability Act of 1861.[136] The Act was based on the UK Limited Liability Act of 1855[137] as incorporated into the Joint Stock Companies Act 1856,[138] which Acts were adopted almost verbatim.[139] The 1861 Act was amended by the Joint Stock Companies Act of 1888.[140] Four years later a comprehensive Companies Act of 1892[141] was passed and thereafter supplemented by the Company Debentures Act of 1895[142] which was amended by the Companies Amendment Act of 1906.[143]

Winding-up, and therefore dissolution, was dealt with in a separate statute, the Cape Winding-Up Act of 1868.[144] Deregistration was not dealt with as it was not known in those early days.

136 Act 23 of 1861. According to Blackman *et al Commentary on the Companies Act* vol 1 Revision Service 8 (2012) 5 prior to that statute incorporation was possible only by legislation incorporating the particular company, being a process which, as English law demonstrated, was time-consuming and very expensive.

137 See para 2 2 12 above.

138 See Hahlo 2.

139 See Cronje "Country Report: South Africa" http://www.justiz.nrw.de/WebPortal_en/projects/.../country_report_sa.pdf (accessed 04-11-2011).

140 Act 13 of 1888.

141 Act 25 of 1892, based on the UK Companies Act 1862.

142 Act 43 of 1895.

143 Act 8 of 1906.

144 Act 12 of 1868.

2 3 2 Natal

The applicable legislation in Natal was the Joint-Stock Companies Limited Liability Law of 1864[145] which was based on the 1861 Act of the Cape Colony. The Act was amended three times[146] and supplemented by the Share Pledge Act of 1899. Winding-up of companies was provided for in a separate piece of legislation, the Winding-Up Law of 1865 (N).[147]

2 3 3 Orange Free State

In the Orange Free State the applicable law was *De Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschapen* of 1891[148] which was based on the 1861 Cape Act.[149] A year later this was followed by a winding-up statute called *De Wet voor Liquideeren van Naamlooze Vennootschappen* of 1892, it being based on the Cape Act which, as already indicated, had English law origin.

2 3 4 Transvaal

The first company law statute of the Transvaal[150] was *De Akte van Maatschappijen met Beperkte Verantwoordelijkheid* of 1874[151] which closely followed the 1861 Cape Act. Law 1 of 1899 (T) adopted the provisions of Directors' Liability Act 1890[152] of the United

145 Law 10 of 1864.
146 By Act 18 of 1865, Act 19 of 1883 and Act 3 of 1896, referred to by Blackman *et al* vol 1 5.
147 Law 19 of 1865.
148 The terminology sounds more like the *Naamlooze Vennootschap* of Holland which had its origin in the French *societe anonyme* (public company) created in terms of *Code de Commerce* of 1807 and which is mentioned briefly in Hahlo 1.
149 Joint Stock Companies Limited Liability Act of 1861 (C).
150 Initially known as the *Zuid Afrikaansche Republikensche* (South African Republic).
151 Law 5 of 1874.
152 53 & 54 Vict c 64.

Kingdom. Winding-up was provided for in the *Wet op Liquideeren van Maatschappijen* of 1891.[153]

The most significant development was, however, the passing of the Companies (Consolidation) Act of 1909 (T).[154] The Act was a reproduction of the then recently enacted English Companies (Consolidation) Act of 1908 and was thus a reflection of latest developments in the company law of the time. At that time English company law was fully developed and dealt adequately with among others winding-up, dissolution and striking off of defunct companies. Such development was to be reflected in the law of the Transvaal which served as a model for the next stage in the development of South African company law.

2 3 5 Companies Act of 1926

At the time of the establishment of the Union of South Africa[155] in 1910, the then colonies[156] and republics[157] became its four provinces. Company statutes in the various provinces remained in force until national legislation was passed to apply countrywide. That happened when the Companies Act of 1926[158] was enacted. The Act was based on the Transvaal Companies (Consolidation) Act of 1909 and was as a result a reflection of the English Companies (Consolidation) Act of 1908. The 1926 Act remained in the statute book for some 48 years until it was repealed in 1974 when the Companies Act of 1973[159] came into operation.

The 1926 Act had comprehensive provisions dealing with winding-up, dissolution and voidance of dissolution as well as those dealing with striking off defunct companies from the

153 Law 8 of 1891.
154 Act 31 of 1909.
155 The Union was established in terms of South Africa Act of 1909, being an Act passed by the British Parliament as Great Britain was the colonial power. The Act came into operation on 31 May 1910.
156 Being the Cape Colony and Natal.
157 *Zuid Afrikaansche Republikensche*, being the Transvaal, and the Orange Free State.
158 Act 46 of 1926.
159 Act 61 of 1973.

register.[160] It should not therefore come as a surprise that these concepts and processes were fully dealt with in the Act since it was itself a continuation of the work of the Transvaal Act of 1909 and its English predecessors, especially the Companies (Consolidation) Act of 1908.

2 3 6 Companies Act of 1973

The Companies Act of 1973[161] was the result of the work of Van Wyk de Vries Commission[162] which was established in 1963 shortly after the Jenkins Committee[163] reported in England in 1962. The Commission reported in the early 1970's.[164] The resulting Act was passed in 1973 and came into effect at the beginning of 1974.

Section 73 of the Act contained fairly detailed provisions dealing with deregistration. The section governed the grounds for deregistration and the procedure to be followed to achieve that outcome as well as restoration of registration. Dissolution was dealt with in section 419 while section 420 dealt with voidance of dissolution.

2 3 7 Companies Act of 2008

The Companies Act of 2008,[165] together with the amendments,[166] came into operation on 1st May 2011.[167] The Act has provisions dealing with both deregistration and dissolution of companies. In terms of section 82 dissolution of the company takes place after its affairs have been completely wound up, a court order confirming final liquidation has been made and the

160 For example, striking a defunct company off the register as well as restoration of registration were provided for in s 199. Sections 154 and 174 dealt with dissolution while s 191 dealt with voidance of dissolution.
161 Act 61 of 1973.
162 The full name of which was the Commission of Enquiry into the Companies Act.
163 Cmnd 1749 of 1962.
164 RP 45/1970 and RP 31/1972.
165 Act 71 of 2008.
166 Major amendments to the Act were contained in Companies Amendment Act 3 of 2011 which was published in Government Gazette 34243 Notice No. 370 of 26 April 2011.
167 As per Notice No. R.32 of 19th April 2011.

Master having promptly filed a certificate to that effect, together with a copy of the court order. Armed with these documents the Companies and Intellectual Property Commission[168] is required to record the dissolution of the company in the prescribed manner and remove the company's name from the companies register.[169] Removal of the name of the company from the register is nothing other than its deregistration which, apart from being obtainable after completion of winding-up the affairs of the company, the Act in section 82(3) specifies further grounds on which it may be obtained. Section 82 is carefully worded and has the result that the risk of inadvertent deregistration is much reduced.

However, unlike the very clear language and approach of the repealed 1973 Act, the 2008 Act contains seeds of potential confusion by not drawing a clear line of dermarcation between deregistration and dissolution. Great care should therefore be taken when treating these two processes even though there is an area of overlap between them. The 2008 Act does not seem to take into account the distinction between the two processes. One fears that doing so will probably lead to unnecessary problems in the years that lie ahead.

2 4 SUMMARY

From the fourteenth century guild of English law much has taken place both in English and South African company law. The recent Companies Act of 2006 of the UK and the South African Companies Act of 2008 bear testimony to the latest thinking and approach to corporate governance jurisprudence. The 2008 Act draws heavily on international experience, borrowing extensively from the Australian dispensation. The UK statute, on the other hand, is not only a consolidation of various statutes applicable to that jurisdiction, but was required to comply with European Union directives aimed at the harmonisation of the company laws of the member states of the Union.

168 The Companies and Intellectual Property Commission established in terms of s 185 of the Act.
169 Section 82(2).

It should be noted that while the South African Companies Act of 2008 has 225 sections only, the statutes of both the UK and Australia which precede it, have over 1 200 sections each. Deregistration and dissolution of companies are just two examples of those areas of company law that need further attention as much ground still needs to be covered. The need for improvement will be examined in the chapters that follow. While the Companies Act of 2008 is no doubt a step in the right direction it should be pointed out though that much still has to be done to catch up with progress made in comparable jurisdictions. It is not acceptable that the latest piece of legislation should have so many palpable deficiencies, there seemingly being no good reasons for such a weakness. However, for now though the question is why deregistration and dissolution of companies in the first place? This is the subject of the next chapter.

CHAPTER 3

Rationale for dissolution and deregistration of companies

3 1 INTRODUCTION

In the first chapter it was shown that the purpose of this study is to examine the meaning and effect of the processes of deregistration and dissolution while the second chapter dealt with historical aspects of the study. It was also shown that as far as dissolution is concerned it is not easy to pinpoint the exact date from which it can be said that the process started whereas in the case of deregistration the UK Companies Act of 1880 is generally taken as the starting point. Perhaps this should not come as a total surprise since according to Gower: "Company law should concentrate on the life, rather than the death and internment, of companies."[170] The death and internment of companies refers to the effect of the two processes on the existence of a company as a legal person, the principle being that on deregistration or dissolution of a company it ceases to exist as a legal entity,[171] much the same way as when a natural persons dies.[172] For as much as deregistration and dissolution bring about the death of a company, there is this interesting issue that unlike a human being, the life of a company can be resuscitated[173] by way of reinstatement of registration[174] or voidance of dissolution.[175]

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170 Davies and Prentice *Gower's Principles of Modern Company Law* 6 ed (1997) 52.

171 *Ex parte Rolls Radio Corporation (Pty) Ltd* 1962 2 SA 316 (W) 317A. It is indeed very common to come across reference to a deregistered company as being "non-existent", for which see for example *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), 2012 3 All SA 183 (WCC) para 22 or to its "non-existence" as was done among others in *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), 2011 ZAWCHC 61 (9 June 2011) para 2 or "non-existent entity" as a deregistered company was referred to in *Fintech (Pty) Ltd v Awake Solutions* 2013 1 SA 570 (GST) 573H-I para 8. In *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd: Dorbyl Light and General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 4 SA 467 (SCA), 2007 ZASCA 6, 2007 SCA 6 (RSA) (12 March 2007) para 31 a deregistered company was referred to as one that "did not exist" while in *Boland Bank Ltd v Mouton* [1997] 4 All SA 67 (C) 73b-c it was described as one that "ceases to exist".

172 This issue will be dealt with in the next chapter and in this respect a number of decisions will be referred to such as for example *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859; *Ex parte P. J. Yelland & Co (Pty) Ltd* 1934 NPD 158; *Ex parte Montrose Exploration Co Ltd* 1918 TPD 179 181; *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ) 576D.

173 *Miller v Nafcoc Investment Holdings Co Ltd* 2010 6 SA 390 (SCA) para 11; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 5;

The purpose of this chapter is to look at the philosophy behind the processes of deregistration and dissolution and their role in company law. For example, one wonders what would happen if the law did not make provision for these processes, only to find that a situation arose which calls for the application of either of them. As the previous chapter demonstrated, initially the law did not make provision for deregistration and dissolution of companies. However, the position is different now and the two processes are part of the law.

3 2 *RATIONALE* FOR DISSOLUTION OF COMPANIES

3 2 1 Earlier manner of winding-up and dissolution

In the early days, before the introduction of legislation having winding-up and dissolution provisions, a company would be wound up in terms of its founding documents such as a Royal Charter or deed of settlement. A number of events could trigger the winding-up of a company such as the expiry of a specified period for which the company was established, completion of the project for which the company was formed, failure of the project or realisation that it was no longer achievable, failure of the company itself, agreement to wind up the company and so on and so forth.[176] That called for realisation of the assets of the company, payment of liabilities and distribution of surplus funds among the members of the company, be it in cash or dividend *in specie*. Completion of the distribution process would mark the end of the life of the company which, if it was registered, would require cancellation thereof, namely dissolution.

Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd 2013 1 SA 570 (GSJ) para 14; *Insamcor(Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 1.

174 This will be discussed in chapter 9 below.

175 Discussed in chapter 10 of this study.

176 This is encapsulated in article 14.01 of the American Model Business Corporation Act of 2002 which demonstrates the necessity for eventual dissolution of a company if the need were to arise. Article 178 of the Companies Ordinance of 1895 of the British South Africa Company, that is, Rhodesia, also made provision to that effect.

Indications of earlier manner of winding-up and dissolution of companies can be gathered from some provisions of current legislation.[177] For example, section 331(1) of the Botswana Companies Act of 2003 provides that a company may be deregistered if it has ceased to carry on business, has discharged in full its liabilities to all its known creditors and has distributed its surplus assets in accordance with its constitution and the Act. Although these provisions govern deregistration of a company, in essence what they describe is the "informal winding-up" of a company. This is referred to as "informal winding-up" because it is done by the members themselves without the authority of a court order and also because instead of being done as a winding-up that leads to dissolution of the company, it simply leads to deregistration. Moreover, the assets of the company have to be distributed in accordance with "its constitution" or the Act.[178] Since in earlier times there were no Companies Acts, distribution could only be done in terms of the company's constitution. In brief therefore, not much has changed between then and now, except for the presence of Companies Acts these days.

3 2 2 Dissolution after winding-up of the affairs of the company

Looking at the manner in which the Companies Act of 2008, as well as its predecessors, both in the United Kingdom and South Africa, treat dissolution, it is submitted that it would be fair to say that dissolution can be looked upon as final internment of a company that has run its full course. Although sections 82 and 83 of the Companies Act of 2008 treat dissolution somewhat differently from the treatment it received under the Companies Act of 1973 by

177 A few recent or current pieces of legislation have provisions to that effect. In this respect reference may be made to, amongst others, s 12(2)(n) of the Nonprofit Organisations Act 71 of 1997 which provides that a nonprofit organisation which intends to register must "set out s procedure by which the organisation may be wound up or dissolved". In the same way s 37(1) of the Friendly Societies Act 25 of 1956 provided for the dissolution or termination of a friendly society in terms of "its rules" as well as for the liquidation and distribution of its assets in the manner provided for "by the rules". See also s 28(1) of the Pension Funds Act 24 of 1956, dealing with dissolution of a pension fund, s 32(1) of the Financial Markets Act 55 of 1989 which dealt with dissolution of a financial exchange in terms of its rules and s 29 of the Medical Schemes Act 131 of 1998 dealing with dissolution of medical schemes. It should be noted that the Financial Markets Act of 1989 was repealed by the Securities Services 36 of 2004 which in turn was repealed by the Financial Markets Act 19 of 2012.

178 For a discussion of company law of Botswana in general see Kiggundu "Company Law Reform in Botswana: The Agenda for the Twenty-First Century" 1996 SALJ 496; Kiggundu *Company and Partnership Law in Botswana* (2010). Kiggundu *Botswana Company Law Service* (2005) and Kiggundu *Supplement to the Botswana Company Law Service* (2009) contain, among others, the provisions of the Botswana Companies Act of 2003.

blurring the distinction between dissolution and deregistration, it is nevertheless submitted that in the main the essence of dissolution remains the same under the present Act just as it was under the Companies Act of 1973.

In terms of section 82(2) of the Companies Act of 2008 dissolution of a company is recorded by the Companies and Intellectual Property Commission in the "prescribed manner" when it receives a certificate of winding-up from the Master of the High Court confirming that the affairs of the company have been "completely wound up". Therefore, dissolution marks the final act in recording the end of the life of a company as it brings to an end the existence of a company as a legal entity in much the same way as death marks the end of the life of a human being.[179] Removing the name of the company from the companies register thus serves the purpose of clearing the register of the name of a dead company which is no longer a legal entity.[180] In this respect dissolution serves the purpose of completing a process which started with winding-up of the company as a dissolved company is required to be removed from the companies register.[181]

3 2 3 Dissolution after merger, amalgamation or reconstruction

Dissolution may also take place in terms of section 115(9)(d) of the Companies Act of 2008 where no winding-up of the affairs of the company takes place. In this context winding-up of the company is not necessary, and will not take place, since s 115 deals with an agreement between two or more companies in terms of which there is disposal of all or the greater part of the assets or undertaking of the company to be dissolved when the agreement is carried out to implement an amalgamation, merger or a scheme of arrangement between the companies

179 *Pieterse v Kramer* 1977 1 SA 589 (A) 601F-G; *Bowman v Sacks* 1986 4 SA 459 (W); *Standard Bank of South Africa Ltd v The Master* 1997 3 SA 178 (C) 185I-J.

180 In this respect the role of dissolution and deregistration overlap. The role of deregistration was described by Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 46 as that of "facilitating the discarding of deadwood from the register of companies".

181 In terms of s 82(2) of the Companies Act of 2008 when the Companies and Intellectual Property Commission receives a certificate of winding-up of the company from the Master it is required to record the dissolution of the company in the "prescribed manner" and "remove the company's name from the companies register."

involved. Although the section also mentions disposal of the "greater part of the assets or undertaking" of the company to be dissolved, it is submitted that it is only when "all the assets" of the company had been disposed of that dissolution without winding-up could follow. It is submitted further that while the "greater part of the assets or undertaking" may be transferred to one of the companies involved in the amalgamation, merger or scheme of arrangement, the remaining part would still have to be dealt with one way or the other for example by being sold, donated, transferred to another person or perhaps simply declared as a dividend *in specie* to the shareholders before the company could be dissolved. It follows therefore that unless the remaining assets or business of the company is completely dealt with, its affairs would not have been finalised so as to justify its dissolution. For then there would still remain unfinished business, something which is contrary to the idea of dissolution of a company which, if properly done, marks the formal end of the life of a company as already indicated. Therefore, section 115(9)(d) deals with termination of the life of a company whose assets and business have been transferred to another company in terms of a disposal, merger, amalgamation or scheme of arrangement agreement since as a result of that agreement the transferor company would become an empty shell.

3 2 4 Dissolution of a "phoenix" company

In the United Kingdom it is possible to dissolve a company so that its place can be taken by a new company which is commonly referred to as a "phoenix" company.[182] This happens when an existing company which is in debt is liquidated and dissolved after which a new company, the "phoenix" company, is registered to deal with the same customers, clients and suppliers of the dissolved company. However, the founders of the new company would have to be careful and ensure that it does not use the same name or confusingly similar name as the dissolved company thereby creating the impression that it is the same old company or is otherwise related to it. For if that impression is created while the "phoenix" company does not have authorisation of the court to do so, its directors would have acted in contravention of section 216 of the Insolvency Act of 1986. Section 216 prohibits, for a period of five years from the date of liquidation of the company, the use of the liquidated company's name or a

182 For a general explanation of a "phoenix" company see http://en.wikipedia.org/wiki/Liquidation (accessed 24-05-2014).

name similar to it, by another company. The use of the liquidated company's name or one similar to it is permitted if the person using it bought the business of the liquidated company, received a court order to use that name or if that company was already using the name at least twelve months before liquidation of the other company. Furthermore, persons participating in the management of the "phoenix" company could also be held personally liable for the debts of the company under section 217 of the Insolvency Act of 1986 unless they received permission of the court to do so.

3 3 *RATIONALE* FOR DEREGISTRATION OF COMPANIES

3 3 1 General

There are a good number of reasons for seeking deregistration of a company. Some reasons come from the company itself, through its shareholders or directors, while others come from the Companies and Intellectual Property Commission or its predecessor the Registrar of Companies. Further reasons may come from outsiders such as creditors. A closer look at the various reasons for deregistration of a company shows that in some instances it is done with the active or passive role of the company itself through those in charge of running its affairs whereas in other cases deregistration is the result of neglect of the company's affairs by those who are in charge without in any way contemplating such a result. Below follows a discussion of some of the most common reasons for deregistration of a company.

3 3 2 Clearing the register of companies of defunct entities

In terms of section 73(1) of the Companies Act of 1973 a company could be deregistered if, among others, the Registrar of Companies had reasonable cause to believe that it was not carrying on business or was not in operation.[183] Under section 82(3) of the Companies Act of

183 Deregistration of a company on any of these grounds means that the company is no longer needed for business purposes – eServices "Deregistration Process- and how to Restore a CC/PTY"

2008 the approach is slightly different although the essence thereof remains the same as it was in terms of its predecessor. Section 82(3)(b)(i) provides that the Companies and Intellectual Property Commission may deregister a company if it appears that it has been inactive for at least seven years and no person has demonstrated a reasonable interest in or reason for the company's continued existence. Commenting on similar provisions as found in the Canadian Business Corporations Act of 1995,[184] it is said that the purpose of these provisions is to "clear the Director's file [register of companies] of dead corporations".[185] That should be correct as the company would truly be dormant but still remain on the companies register as if it were an active company. Therefore, one of the purposes of deregistration is to clear the companies register of "deadwood".[186] According to Gower, deregistering a company in such circumstances is a "method of clearing the register of companies which are indeed defunct".[187] Accordingly, deregistration is a way of getting rid of a company which is no longer needed.[188]

The same purpose is served by section 116(5)(b) of the Companies Act of 2008 which provides that after receiving a notice of amalgamation or merger of companies, the Companies and Intellectual Property Commission must "deregister" any of the amalgamating or merging companies that did not survive the amalgamation or merger. However, sometimes the line of demarcation between various processes and statutory provisions relied on is not always clearly drawn. For example, in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[189] restructuring of a number of companies took place. As a result thereof a subsidiary company became redundant as its business was taken over by the holding company. In terms of the Companies Act of 2008 that would have called for deregistration of

http://www.deregistration.co.za (accessed 11-05-2013). That would be so as the company would at that stage be "moribund" – *Boland Bank Ltd v Mouton* [1997] 4 All SA67 (C) 74d –e.

184 Section 212 of the Canada Business Corporations Act of 1995.

185 Gray *The Annotated Canada Business Corporations Act 1995* Part XVIII (1994) 432.

186 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 46. This was alluded to in *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309A-B where the court held that the deregistration provisions (s 199) of the Companies Act of 1926 were there to assist the Registrar of Companies in removing from the register of companies such companies as were not carrying on business or were not in operation. Very much the same happened in *Village Freezer t/a Ashmel Spar v C A Focus CC* 2012 6 SA 80 (ECG) para 3 where a company was deregistered upon receipt of a statement submitted by its only shareholder to the effect that it never traded and had no assets or liabilities.

187 Davies and Prentice *Gower's Principles of Modern Company Law* (1997) 846.

188 Companies House "strike off, dissolution and restoration" http://www.companieshouse.gov.uk/infoAndGuide/faq/strikingOff.shtml (accessed 21-09-2012).

189 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007) para 10.

the subsidiary company in terms of section 116(5). However, as the restructuring was done in the days of the Companies Act of 1973, the subsidiary company was simply deregistered in terms of section 73(5) as a company that was not carrying on business or in operation.

3 3 3 Enforcing compliance with annual returns filing obligation

Section 33(1) of the Companies Act of 2008 requires every company to file an annual return in the prescribed form with the prescribed fee and that within the prescribed period after the end of the anniversary of the date of the company's incorporation. The annual return is required to be accompanied by a copy of the company's annual financial statements and any other prescribed information. In terms of section 82(3)(a) of the Act failure to file the annual return as required for two or more years in succession is a ground on which the company could be deregistered. In this respect therefore the purpose of deregistration is punitive as the Companies and Intellectual Property Commission is given an effective remedy against defaulting companies.[190] However, before carrying out deregistration the Companies and Intellectual Property Commission is required to afford the company the opportunity to provide satisfactory reasons for failure to file the annual return or otherwise show satisfactory cause for it to remain registered.[191] As a matter of fact this is the most common ground[192] on which companies are deregistered and most often without their knowledge which is very strange since before carrying out deregistration on this ground the company and its officers such as directors and auditors have to be notified of pending deregistration.[193]

190 Blackman *et al Commentary on the Companies Act* vol 1 Revision Service 8 (2012) 4-172.

191 Section 82(3)(a)(ii) of the Companies Act of 2008.

192 See for example *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC); *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP); *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC).

193 Notification of pending deregistration is required in terms of regulation 40 of the Companies Regulations, 2011. In terms of s 73(7) of the Companies Act of 1973 a letter or notice by the Registrar, enquiring if the company was carrying on business or was in operation, was required to be addressed to the company at its registered office, its postal address and to the care of the directors or officers and the auditor of the company or could, if there was no director, officer or auditor, be sent to each of the persons who signed the memorandum of the company, at the address mentioned in the memorandum. That being the case the court in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 4 footnote 2 found it "puzzling" that the directors of the company could claim ignorance of the notice of pending deregistration.

3 3 4 Avoiding enforcement of obligations of a company

In terms of section 26(5) of the Close Corporations Act of 1984 members of a close corporation at the time of deregistration were personally liable for its outstanding debts. Therefore, there was every good reason to avoid deregistration of a close corporation unless it did not have outstanding debts. The Companies Act of 1973 did not have equivalent provisions. So is the position under the Companies Act of 2008 which in fact goes a step further by repealing the entire section 26 of the Close Corporations Act of 1984. As deregistration deprives a company of legal personality[194] debts owed by it cannot be enforced during deregistration period.[195] The first step to be taken before enforcing a debt against the company would be to obtain reinstatement of registration which, if it is granted and the company is revived, would make it possible to recover outstanding performance from it. Therefore, deregistration of a company is prejudicial to its creditors since as long as the company is deregistered its outstanding debts would not be enforceable.[196] Moreover, there is a debate in South African law as to the effect of deregistration on a company's debts. Some cases hold that a company's debts are extinguished[197] by its deregistration while others hold that the debts are merely rendered unenforceable during deregistration although they remain valid and would be enforceable upon reinstatement of registration.[198]

194 *Ex parte Rolls Radio Corporation (Pty) Ltd* 1962 2 SA 316 (W) 317A. It is indeed very common to come across reference to a deregistered company as being "non-existent", for which see for example *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), 2012 3 All SA 183 (WCC) para 22 or to its "non-existence" as was done among others in *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), 2011 ZAWCHC 61 (9 June 2011) para 2 or "non-existent entity" as a deregistered company was referred to in *Fintech (Pty) Ltd v Awake Solutions* 2013 1 SA 570 (GST) 573H-I para 8. In *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd: Dorbyl Light and General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 4 SA 467 (SCA), 2007 ZASCA 6, 2007 SCA 6 (RSA) (12 March 2007) para 31 a deregistered company was referred to as one that "did not exist".

195 *Sandton Town Council v Erf 89 Sandton Extension 2 (Pty) Ltd* 1991 3 SA 846 (W) 849A-B; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R); *Pieterse v Kramer* 1977 1 SA 589 (A); *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 4 SA 154 (D); *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 377A; *Boland Bank Ltd v Mouton* [1997] 4 All SA 67 (C) 73d. The position is the same whether the company is deregistered or dissolved as both have the same effect on the existence of a company as a legal entity.

196 *Bowman v Sacks* 1986 4 SA 459 (W); *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309B; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (T); *Boland Bank Ltd v Mouton* [1997] 4 All SA 67(C) 73d.

197 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309F; *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006); *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

198 *Barclays National Bank Ltd v Traub: Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 295D;

It was precisely for inability to enforce debts against the companies concerned during deregistration period that in *Du Rand v The Companies and Intellectual Property Commission of South Africa*[199] directors of several companies apparently deliberately refrained from filing annual returns with the result that the companies in question were deregistered. Thereafter, the same directors did not cooperate in securing reinstatement of registration of their companies, it being their desire that registration should not be reinstated. As a result creditors had to resort to voidance of dissolution of the companies concerned although they had not been dissolved but were deregistered so as to call for reinstatement of registration instead of voidance of dissolution. Deregistration is therefore beneficial to the company to the extent that debts which it owes cannot be enforced during that period and for so long as that remains the position. It is also beneficial to its debtors as the company cannot enforce claims against them during that period.

3 3 5 Elimination of a competitor

When deregistration of a company is sought by or at the instance of a third party, it could be that in some instances such party is simply motivated by commercial interests. For if the company to be deregistered is a business rival it would benefit the competitor to have such eliminated provided there is a basis on which deregistration could be secured, such as for example, on the ground that the company has not complied with its annual returns filing obligations or that it is not carrying on business or that there does not seem to be reason for its continued existence etc as provided for in section 82(3) of the Companies Act of 2008. Accordingly, deregistration of a business rival would have eliminated a competitor.

Boland Bank Ltd v Mouton 1997 4 All SA 67 (C); *Absa Bank Ltd v Hlathini Safaris CC* [2012] ZAGPJHC 176 (17 August 2012); *Boland Bank Ltd v Mouton* [1997] 4 All SA 67 (C) 73i-j.

199 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court delivered on 7 March 2013.

3 3 6 Deregistration used as alternative to dissolution

The most common way in which deregistration is used is by looking at it as a form of quick, cheap, affordable and informal way of winding-up a company.[200] That was exactly what happened in *Ex parte Sengol Investments (Pty) Ltd*[201] where the property of the company was sold, debts collected and the company's reserves distributed by way of a dividend after which the company was deregistered. The court described the method followed by the directors and shareholders of the company to liquidate it as an "informal one" which fell outside the scope of section 160 of the Companies Act of 1926 which was then in force and provided for voluntary winding-up of a company. It was held that the method followed was "probably faster and cheaper and effected the same result" as a formal winding-up in that the company was thereafter dissolved.[202] Therefore, deregistration offers a method whereby a small company could, in practice, often be inexpensively dissolved without any formal winding-up.[203] As a result deregistration is a convenient alternative to winding-up of a small private company, especially one which does not have sufficient assets to pay winding-up costs but is not intended to be used in place of liquidation where the company has substantial assets or liabilities outstanding at the time of intended deregistration.[204] This is in line with section 82(3)(b)(ii)(bb) of the Companies Act of 2008. It is nevertheless a "wholly irregular" manner of winding-up a company[205] since deregistration is not a surrogate or substitute for liquidation[206] although in practice it is nevertheless used that way. The result is that deregistration is used to terminate the corporate existence of a moribund company, or close corporation for that matter, which no longer carries on business or is not in operation.[207]

The formal winding-up of a company which needs a court order and the appointment of a liquidator which must be conducted under the watchful eye of the Master of the High

200 See for example *Peel v Hamon J & C Engineering (Pty) Ltd* 2013 2 SA 331 (GSJ) para 9; Davies, Prentice *Gower's Principles of Modern Company Law* (1997) 847.
201 1982 3 SA 474 (T).
202 *Ex parte Sengol Investments (Pty) Ltd* 476E. In Canada this "simple and quick" form of liquidation is governed by sections 210 and 211 of Canada Business Corporations Act of 1995.
203 As was done in *Ex parte Reid M F* 1982 1 PH E5 (N).
204 Davies, Prentice *Gower's Principles of Modern Company Law* 846 and 848.
205 *Commissioner of Taxes (SR) v "T" Company* 1957 4 SA 90 (SR), 21 SATC 335.
206 *Boland Bank Ltd v Mouton* [1997] 4 All SA 67 (C) 75e.
207 *Boland Bank Ltd v Mouton* [1997] 4 All SA 67 (C) 74d; *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 475H.

Court and accordingly takes time and money and, in the case of a two-dollar company, may not be the most cost effective way of bringing about an end to the life of a very small company with very little assets and capacity to bear bear liquidations costs. This reality was realised by the legislature and now enjoys statutory recognition.

Section 82(3)(b)(ii) of the Companies Act of 2008 provides that the Companies and Intellectual Property Commission may deregister a company if it receives a request in the prescribed manner and form and has determined that the company has ceased to carry on business and has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated. While the need to create a special dispensation in which a company may have to avoid winding-up because of meager resources is understandable, the question must still arise concerning the other point covered by the subsection, namely a once trading company that simply does not have assets. In that case the obvious question would be - where did the assets go? Most often they would have been disposed of in an informal backyard winding-up. Long before the creation of this dispensation the business community in this country, and elsewhere, had from time to time resorted to informal winding-up of a company by paying its creditors, declaring a dividend in cash or *in specie* and, seeing that the company would by then remain an empty shell, duly approach the Registrar of Companies with a request that the company be deregistered.[208] As all the creditors would have been paid in full and the company denuded of all the assets, deregistration of a company in those circumstances would not prove a challenge. After all, in such a situation deregistration would clear the register of companies of a company that existed in name only.

3 3 7 Untying the name of a company

In the business world a good name, meaning of course goodwill, is a valuable asset as it is evidence of the ability of the business to attract custom. A good name stands between success

208 As was done, for example, in *Peel v Hamon J & C Engineering (Pty) Ltd* 2013 2 SA 531 (GSJ) para 3; *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T); *Commissioner of Taxes (SR) v "T" Company* 1957 4 SA 90 (SR), 2 SATC 335.

and failure and would naturally be a much sought after asset. A company having a good name would rather keep it that way to continue enjoying the benefits thereof. A company may wish to keep its good name even if it is not carrying on any business at the time hoping that at some stage it would be able to do so. That would mean that the name is tied to a company which is otherwise not doing business and that as a result such name would not be available for registration and use by other companies. The Companies Act of 2008 does not allow registration of a company name that is the same as or similar to the name of another company or entity as there would be confusion.[209] As a result a company that wishes to use a name that is already used by another company, which other company could in some instances turn out to be very passive, would have to apply for deregistration of the company bearing the earmarked name from the register of companies before being able to register and use that name as its own.[210] In this respect the company interested in using the name that is tied to another but otherwise very passive company would rely on section 82(3)(a)(i)(bb) of the Companies Act of 2008 and demonstrate that the other company has failed to show satisfactory cause for it to remain registered.

In Canada application can be made in terms of section 212 of the Canada Business Corporations Act of 1995 for deregistration of a company that is registered simply to tie down a desirable name without intention to do business. However, the opposite was the case in Botswana, at least in the past. Section 276(9) of the Botswana Companies Act of 1959 provided that the Registrar of Companies could, upon payment of a fee, retain on the register the names of those companies which, although defunct, that is were deregistered, did not wish another company to be registered by a name, title, description or style which was identical or similar to their own. According to Kiggundu,[211] that provision was significant in the general context of the law of business names and the delict of passing-off and the protection of goodwill in that if utilised it would make restoration proceedings unnecessary. However, it should be mentioned that since preservation of the name of a company is not

209 Section 11(2)(a) and (b) of the Companies Act of 2008.

210 This issue is commented on by Roodt Inc Attorneys "The inadvertent deregistration of a close corporation can prove costly for its members if it had unpaid debts at the time" http://www.roodtinc.com/newsletter59.asp (accessed 11-05-2013) who say that other "damaging consequences may flow from the deregistration of a cc [close corporation]. Its name becomes available two months after deregistration and can legitimately be applied for and taken over by other persons." It should be added though that it is not so apparent why after only two months in particular.

211 Kiggundu "Company Law Reform in Botswana: The Agenda for the Twenty-First Century" 1996 *SALJ* 496 507 – 508.

preservation of the company itself, it does not follow that simply because the name of a defunct company is reserved for it, that the company iself is, for that reason alone, an existing company. In brief, there is a big difference between the existence of the company itself and preservation of the name of a non-existence of a company, brought about by its deregistration. After all, in South African company law, the first step in the registration of a company is reservation of a name which once done should be followed by registration and therefore creation of the company itself.[212] Accordingly, it is possible to have and preserve a name for a company that does not exist. Therefore, existence of the name of a company does not translate into existence of the company itself. It should be noted that the present Botswana Companies Act of 2003 does not have similar provisions. It is not so apparent why such interesting and potentially very useful provisions were left out from the current statute.

3 3 8 Seeking release of a trade mark and other rights

In terms of section 27(1) of the Trade Marks Act of 1993,[213] a trade mark may be removed from the trade marks register and thereby become available for use and registration by other interested parties if the trade mark owner is a body corporate (legal entity) which has been dissolved not less than two years prior to the making of the application to court or to the Registrar of Trade Marks. In this context it should be noted that although the Trade Marks Act refers to a body corporate that has been "dissolved" rather than "deregistered", in terms of section 82(2) and section 83(1) of the Companies Act of 2008 "dissolution" includes "deregistration" and vice versa. As a matter of fact in *Ex parte Ziman*[214] the company whose trade marks were at stake had been deregistered rather than dissolved. As a result restoration of registration of the company was granted so that it could protect its trade marks. The Trade Marks Act of 1993 makes provision for deregistration of a trade mark for non-use. Furthermore, a trade mark becomes available for registration in the name of a new owner two years after deregistration of a company in whose name it was registered. Therefore, deregistration of a company makes its trade mark available for use and registration by other

212 Section 12 of the Companies Act of 2008.
213 Act 194 of 1993.
214 1970 1 SA 164 (T). The case dealt with deregistration of a trade mark under s 36(1)(c) of the Trade Marks Act 62 of 1963, the predecessor of the current s 27(1) of the Trade Marks Act of 1993.

interested parties. There is therefore every reason to seek deregistration of a company if what is sought to be acquired is in fact its trade mark.

The same principle also applies to mineral or petroleum rights. Section 56(c) of the Mineral and Petroleum Development Act of 2002[215] provides that any mineral or petroleum right, permit, permission or licence granted or issued in terms of the Act shall lapse whenever a company or close corporation is deregistered in terms of the relevant Acts. Therefore, in terms of the Act, if a company having mineral or petroleum rights is deregistered without having alienated them, they simply lapse. Thereafter, an interested person can apply for acquisition of those rights. The principle of lapsing of mineral rights after deregistration of a company was applied in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa*[216] which was followed in *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*.[217]

3 3 9 Failure to pay income tax

In the past failure by a company to pay income tax was the primary reason for deregistration, albeit indirectly so. Whereas failure to pay income tax by a company was not a ground for deregistration under the Companies Act of 1973 or its predecessor, this also being the position under the current Companies Act of 2008, it was nevertheless the main reason for the Registrar of Companies to become aware that the company was either not carrying on business or that it was not in operation. As the company started failing to render its income tax returns the Commissioner for Inland Revenue, commonly referred to as the Receiver of Revenue, and now known as the Commissioner for South African Revenue Service, would make a follow up and on establishing that the company was neither carrying on business nor in operation would inform the Registrar of Companies accordingly. Thus in the past the Receiver of Revenue acted as an informer to the Registrar of Companies and as a result an income tax defaulting company could be deregistered accordingly. This is demonstrated by

215 Act 28 of 2002.
216 2013 3 SA 78 (WCC).
217 2014 6 SA 403 (GP).

the case of *Ex parte Minister of Lands; Ex parte Ventersdorp Muslim Trust (Pty) Ltd*[218] where the events which took place were described by the court as follows:

> "On 25th November, 1948, the Receiver of Revenue requested the Registrar of Companies to remove the company from the register. A notice pursuant to sec. 199(6) of the Companies Act, 46 of 1926, as amended, was thereupon, on 29th November, 1948, served on the company at 9, Barkley Arcade, Market and Diagonal Streets, Johannesburg, the registered office of the company. No reply was received. A further notice was served on the company on 25 May, 1949, and again there was no response. The name of the company was consequently, on 28th October, 1949, placed on a preliminary list of companies to be struck off, which list was published in Government Gazette 936 of 1949. After the expiration of three months the name of the company was struck from the register on 27th January, 1950, which fact was published in Government Gazette 56 of 1950."[219]

3 3 10 Tax considerations

3 3 10 1 General

In terms of the Income Tax Act of 1962,[220] liquidation, dissolution and deregistration of a company have consequences relating to income tax and capital gains tax. As a result some tax benefits may be gained by having a company liquidated, dissolved or deregistered. It should be mentioned though that the Act also has anti-tax avoidance provisions, this having the result that whereas in certain circumstances liquidation, dissolution or deregistration of a company could confer some tax benefits, in other instances the opposite could be the case. This therefore underscores the importance of proper tax planning and the well-known rule that transactions should be commercially and not fiscally driven as in some cases the intended tax benefits may well be nullified by related disadvantages.

As the purpose of this study is to discuss company and not tax law issues, only a very brief overview of the tax issues emanating from liquidation, dissolution and deregistration

218 1964 3 SA 469 (T).
219 *Ex parte Minister of Lands; Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 469G-H.
220 Act 58 of 1962.

will be noted. It falls outside the scope of this study to embark on an in-depth analysis of tax aspects of deregistration and dissolution which can best be done elsewhere and not here.

3 3 10 2 Capital gains tax

In terms of paragraph 77(1) of the Eighth Schedule[221] to the Income Tax Act of 1962 a shareholder of a company that is being wound up, liquidated or deregistered is treated as having disposed of all the shares held in the company. Such disposal is deemed to have taken place at the earlier of the date of dissolution or deregistration of the company or, in the case of liquidation or winding-up, the date when the liquidator declares in writing that no reasonable grounds exist to believe that the shareholder of the company will receive any further distributions in the course of the liquidation or winding-up of the company.[222] Any "capital distribution" of cash or assets *in specie* received by or accrued to that shareholder in respect of those shares after their disposal is treated as a capital gain in determining that shareholder's aggregate capital gain or aggregate capital loss for that year of assessment.[223]

The application of the above principles can best be understood against the background of voluntary liquidation of a company or alternatively, informal liquidation of the company through liquidating its assets, paying the creditors and distributing the remaining assets after conversion into cash or distribution of the assets themselves as dividend *in specie*. After dealing with the assets and liabilities that way and nothing of the company remaining, application could then be made to the Companies and Intellectual Property Commission for deregistration of the company in terms of section 82(3)(b)(ii) of the Companies Act of 2008 on the ground that the company has ceased carrying on business and has no assets. In the past, and until the introduction of capital gains tax in 2001, disposal of the assets of the company in this manner had no tax implications since as the receipt was of a capital nature it was exempt from income tax as per the definition of "gross income" in section 1 of the

221 This is the part of the Income Tax Act of 1962 which governs capital gains tax and was introduced in 2001 when it was inserted in terms of s 38 of Taxation Laws Amendment Act 5 of 2001.
222 Paragraph 77(1)(a) and (b).
223 Paragraph 77(2).

Income Tax Act of 1962.[224] However, with the introduction of capital gains tax, capital receipts now attract tax in the form of capital gains tax. Fortunately, capital gains tax was introduced under a very conciliatory dispensation. First, it is only the "gains" part of the receipt that attracts tax, this meaning that it is not the whole proceeds received but the "gain" part of it that is subject to capital gains tax. This is so as in terms of the Income Tax Act of 1962 the "base cost"[225] must be deducted from the proceeds with the result that only the "gain" part is subject to capital gains tax.[226] Secondly, in the case of a taxpayer who is a natural person or special trust the first R10 000.00 of the capital gains is exempt from tax.[227] Thirdly, in the case of a taxpayer who is a natural person or special trust, the taxable portion of the capital gains tax is 25% of the gain while in any other case that taxable portion is one half thereof, meaning that the other half is tax free.[228] It is therefore submitted that except for someone who would definitely wish to receive income totally free of tax, capital gains tax is not a very burdensome tax because of the many concessions made by the legislature. Comparatively speaking it may not be much but it is nevertheless tax to be paid.

Therefore, there is a tax advantage in liquidating the assets of the company, making a distribution to shareholders, be it in cash or otherwise and thereafter dissolve, or better still deregister the company. In the case of dissolution a formal winding-up of the company would be required whereas in the case of deregistration an informal winding-up by way of disposal of the assets, collection of debts, payment of liabilities and distribution of cash or dividend *in specie* which is followed by deregistration would be sufficient. The distribution would be subject to capital gains tax which is a very lenient form of tax compared to income tax. Before the introduction of capital gains tax in 2001, that capital distribution was tax free.[229]

224 See also Walters "Solvent but unwanted companies" 1985 *Businessman's Law* 47 48.

225 The "base cost" and adjustments to be made, especially those relating to pre-2001investments, are discussed by Williams "Deregister your company and avoid dividends tax" 17 January 2010 Sunday Times, also available at http://www.werkmans.co.za/.../Deregister_Your_Company_And_Avoid_Div... (accessed 16-09-2012).

226 Paragraph 3(a) of the Eighth Schedule.

227 Paragraph 5(1) of the Eighth Schedule.

228 Paragraph 10 of the Eighth Schedule.

229 The definition of "gross income" in s 1 of the Income Tax Act of 1962 refers to the total amount, in cash or otherwise, received by or accrued to or in favour of a person [the taxpayer] excluding receipts or accruals of a "capital nature". See also *Income Tax Case No.* 346 9 (1935) SATC 49.

3 3 10 3 Transactions between subsidiary and holding company: Capital gains tax

Section 47 of the Income Tax Act of 1962 regulates transactions relating to liquidation, winding-up and deregistration between a subsidiary and holding company where the latter holds no less than 75% of the shares of the subsidiary. Because of control of a subsidiary by a holding company the danger of subverting the law as regards treatment of any distributions which the subsidiary may make is ever present. For this reason the section has anti-tax avoidance measures and attempts to bring in a dispensation as would obtain if the distribution was done between parties dealing at arm's length. The section applies to a "liquidation distribution" in terms of which a liquidating company (subsidiary company) distributes all its assets to its shareholders in anticipation of or in the course of liquidation, winding-up or deregistration of that company but only to the extent to which those assets are so disposed of to the holding company which is subject to tax and the holding company holds at least 75 per cent of the shares of the liquidating company.[230]

Should the above jurisdictional requirements be met, the section goes on to determine the treatment of those assets in the hands of the holding company. Very briefly, on subsequent disposal of the assets by the holding company, the subsidiary and holding company are treated as if they are one company so as to generate the same capital gains tax as the assets would have generated had they been disposed of by the subsidiary. In other words, the holding company is not allowed to obtain capital gains tax advantage which had the subsidiary company disposed of those assets itself it would not have obtained. In this respect the holding company takes over the "base cost" of the subsidiary company in the assets concerned while one tax allowance (deduction) is allowed with the result that the two companies cannot each take an allowance as that would amount to double deduction in respect of the same assets. Should the holding company dispose of the assets within a period of eighteen months of acquiring them from the subsidiary company, the capital gains tax treatment thereof would be the same as at the time they were acquired from the subsidiary company; is subject to tax as such; and may not be mingled with other capital gains of the holding company for that year of assessment. Furthermore, any capital loss that may be made

230 Section 47(1)(a) of the Income Tax of 1962.

is treated the same, meaning that it is not allowed to be mingled with other assessed capital losses made by the holding company. Equally, capital gains made from disposal of those assets within a period of eighteen months may not be set off against the holding company's other assessed losses or balance thereof of the holding company. These are ring-fencing provisions. The intention here is that the tax position should be the same as if the assets were still in the hands of the subsidiary, thereby denying the holding company a tax advantage arising out of taking the assets of a subsidiary company in anticipation or in the course of liquidation, winding-up, dissolution or deregistration of the subsidiary.[231]

3 3 10 4 Transactions between subsidiary and holding company: Income tax

The same principle relating to treatment of capital gains or capital loss made by a holding company also applies to income tax. That is so since section 47(2)(b) of the Income Tax Act of 1962 provides that where a subsidiary company disposes of an asset held by it as "trading stock" in terms of a liquidation distribution to a holding company which acquires it as such, the two companies would be treated as one company and the holding company takes over the same tax deductions and allowances which the subsidiary was allowed. Moreover, for the purposes of determining the taxable income of the holding company from trade carried on by it, as far as the trading stock is concerned, the two companies are treated as if they were one and the same company and not two separate companies. The intention is that tax deductions and allowances in respect of that trading stock should not be taken twice, first by the subsidiary company and thereafter by the holding company after acquisition of the trading stock as that would give the two companies a massive tax advantage which would not have been available but for the liquidation, winding-up or deregistration.

Significantly though, section 47(4) of the Income Tax Act has at its core ring-fencing provisions which provide that where a holding company acquires any asset from the subsidiary company in terms of a "liquidation distribution" and thereafter disposes of that asset within a period of eighteen months of the acquisition, the income so derived shall be

231 Section 47(4) of the Income Tax Act of 1962.

deemed to be attributable to a separate trade carried on by the holding company, the taxable income or assessed loss from which separate trade would not be set off against or added to any assessed loss or balance of assessed loss of that holding company. For tax purposes an "assessed loss" is a very valuable asset and a business having one would be the target of acquisition so that the acquirer may set off that loss against its income and accordingly pay less or no tax until that loss is fully set off. But in the case of subsidiary and holding company whose liquidation distribution is covered by section 47 a set off of assessed loss is not allowed. Obviously, this provision is an anti-tax avoidance measure.

3 3 10 5 Disregarding disposal of shareholding in subsidiary company

In yet one more instance of anti-tax avoidance measure, section 47(5) of the Income Tax Act of 1962 provides that where a holding company disposes of any shares in a subsidiary company as a result of the liquidation, winding-up or deregistration of that subsidiary company, the holding company must disregard that disposal for the purposes of determining its taxable income or assessed loss. This means that for the purposes of determining the taxable income or assessed loss of the holding company, the disposed of shares and their resulting tax consequences would be treated as if they are still in the hands of the holding company with the necessary tax consequences. Therefore, the holding company is not allowed to off-load shares as a result of liquidation, winding-up or deregistration of the subsidiary company and hope to change its tax position. Section 47(5) does not allow this to happen.

3 4 SUMMARY

If the beginning of companies and company law is shrouded in mystery, so is the beginning and development of dissolution of companies. This should not come as a surprise since early company law was more concerned with the creation of a company, the form and implications thereof, especially as far as liability for debts was concerned, rather than the demise thereof. Consequently, not much was said about the demise of a company in early company law.

Whatever little there was concerning dissolution of companies was to be found in a document in terms of which the company was formed be it in the form of a charter, deed of settlement, Act of Parliament and so forth. However, clarity was brought about in the year 1844 with the passing of the UK Companies Winding-up Act 1844. The purpose of the Act was obviously to regulate winding-up and dissolution of companies. The other reason for dissolving a company, in this instance without winding-up but instead in the process of merger, amalgamation of companies etc, was to emerge much later.

However, this is not so with deregistration. The process started with the Companies Act of 1880 and was not known until then. It started as a very simple process which was intended to clean the register of companies of defunct companies, meaning those companies which were on the register of companies but existed in name only as they were not carrying on business or in operation and were not expecting to carry on business in the foreseeable future. Over the years though that very simple process expanded much more than was initially anticipated. It remains to be seen what further uses and possibly abuses of the process of deregistration will emerge in future. Needless to say that without the advent of deregistration a few uses to which the process is put as outlined above would not have been possible and the benefits alluded to would not be available. Therefore, deregistration has a meaningful role to play in company law even though it does not seem to enjoy the full respect and treatment it deserves, at least in the South African statutory company law context. It is therefore submitted that the approach to deregistration under the Companies Act of 2008 leaves much to be desired and needs to be revisited. There are a number of good uses to which deregistration of companies can be put, a matter which does not seem to have enjoyed careful attention under the Act.

CHAPTER 4

Meaning of deregistration and dissolution of companies

4 1 INTRODUCTION

There are two very closely related concepts and processes which, although overlapping to a great extent and having the same effect on the existence of a company, are nevertheless distinguishable not only in their purpose and role but also in the procedure involved as well as some of their consequences.[232] The first one is known as "deregistration" and is dealt with in a number of sections of the Companies Act of 2008 even though it is not defined in the Act. Nevertheless, in very broad terms it is described as "the process whereby a formal end is put to a company which has become defunct"[233] and therefore puts a formal end to a "company which has in practice become defunct or lapsed into animation".[234] Contrary to the approach of the Companies Act of 2008 which does not define the word "deregistration" the Companies Act of 1973 Act did provide a definition thereof. The second concept and process, namely "dissolution" is also not defined in the 2008 Act, just as it was the case under the Companies Act of 1973. Perhaps it should be mentioned that the predecessor of the 1973 Act, being the Companies Act of 1926,[235] did not use the word deregistration. Instead the applicable section[236] made mention of the name of a company being "struck off the register ... and the company ... dissolved." Again after a complete winding-up of its affairs a company

232 The grounds on which each of the processes may be initiated and the procedure to be followed will be discussed in Chapter 5 while the consequences will be looked at in later chapters. The fact that the two processes are not the same notwithstanding an overlap in some of their features is noted by among others Cassim *et al Contemporary Company Law* (2012) 922 para 19.6 where, referring to Blackman *et al Commentary on the Companies Act* vol 1 (2002) 4 – 172 they say: "... dissolution and deregistration are not the same. While both have the effect of terminating the legal existence of a company, their purpose and some of their consequences are different".

233 Blackman *et al Commentary on the Companies Act* vol 1 (2012) 4 - 171.

234 *Tyman's Ltd v Craven* [1952] 1 All ER 613 (CA) 616, [1952] 2 QBD 100 107.

235 Act 46 of 1926.

236 Section 199(3).

was also dissolved. Thus under the Companies Act of 1926 there was always dissolution of the company, it making no difference whether the name of the company was struck off the register or the affairs of the company were completely wound up.

After a careful analysis of the events taking place under section 199 of the Companies Act of 1926 the Van Wyk de Vries Commission[237] concluded that it was not "dissolution" but "de-registration" that was taking place and accordingly recommended amendment of the section to accommodate the "correct principle" of "deregistration" instead of "dissolution". The recommendation was accepted by the legislature and this had the result that section 73 of the Companies Act of 1973 made use of the word "deregistration". The present Companies Act of 2008 continues usage of the word "deregistration".

The Van Wyk de Vries Commission also identified another problem as being the likelihood that as much as there was no winding-up of the affairs of the company under section 199 of the Companies Act of 1926, there was a danger that even after striking the name of the company off the register it could still happen that the members of the company, unaware of that fact, continued carrying on the business of the erstwhile company. If that were to be the case it would no longer be the company which conducted such business but the persons who made up the "association of the erstwhile body corporate".

As a result of the views of the Van Wyk de Vries Commission a leading textbook,[238] one of whose co-authors[239] was a member of the Commission, confidently proclaims:

237 Commission of Enquiry into the Companies Act - Main Report (1970) para 50.20.

238 Cilliers *et al Cilliers and Benade: Corporate Law* (2000) para 30.06. See also Benade *et al Entrepreneurial Law: Incorporating The New Companies Act Manual* – Special Edition (2009) para 36.71. The view that a deregistered company becomes an association without legal personality is also shared by Sharrock, De la Rey, Van der Linde, Smith *Hockly's Insolvency Law* (1996) para 23.14; Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 396 and Mohapi "The effect of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012)

239 Professor M L Benade.

> "Deregistration is to be clearly distinguishable from the dissolution of a company: the company's existence is terminated for all purposes by dissolution while on deregistration the association of persons sustaining the company merely loses its corporate personality. Should a deregistered 'company' nevertheless continue with its business, it is no longer a company doing so but an association without legal personality ..."[240]

The question is whether the above statement correctly reflects current legal thinking on deregistration. This chapter attempts to examine the issues involved and in the process also seeks to draw a distinction between deregistration, dissolution and a third concept lurking in the background, namely winding-up. Because dissolution and winding-up are not particularly controversial, at least in the present context, they make up a relatively small portion of the chapter.

4 2 GENERAL DESCRIPTION

Many labels have been coined and various descriptions attributed to a dissolved but especially a deregistered company. Prior to the coming into operation of the Companies Act of 1973 and in terms of the Companies Act of 1926, which was in line with the terminology inherited from English law jurisprudence, a deregistered company was referred to as a "defunct"[241] company that has been "struck off" the register.[242] The generally used

240 Cilliers and Benade para 30.06.

241 Consistent with the pre-1973 legislation all cases decided thereunder used the term "defunct", for which see for example *Ex parte Minister of Irrigation* 1948 2 SA 779 (C) 784; *Ex parte National Bank of SA Ltd: In re B.A. Meintjies Ltd* 1924 WLD 64 (headnote); *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd* 1914 TPD 458 459; *Re Jacobsons Ltd* 1927 CPD 857; *Ex parte Auckland Park Racing Club Ltd* 1918 TPD 37 38; *ITC* 1306 (1980) 42 SATC 139 141. In *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549A, 548H the court also used the rather unfamiliar phrase saying that the company had been "struck off the roll" by the Registrar of Companies. Reference to a defunct company that had been struck off the register is a historical concept which comes from English law where the term "deregistration" never found place. Nowhere in s 652 of the UK Companies Act of 1985 or s 1000 of the Companies Act of 2006 does the word "deregistration" appear. Surprisingly even the term "defunct' does not appear in the text of the section but is instead confined to the heading. Consistent with that tradition some cases decided under the Companies Act of 1973 continued using the term "defunct" as was done for example by Van Dijkhorst J in *Ex parte Sengol Investments (Pty Ltd* 1982 3 SA 474 (T) 476F.

242 This was the terminology of s 199(3) of the Companies Act 46 of 1926, including its South African and English predecessors.

terminology notwithstanding, a host of other labels and descriptions can be gathered from case law, such as one saying that dissolution has a "decisive effect on the company's existence"[243] or that a company struck off the register must be "assumed to be dead".[244] As if there were degrees of death, in *Ex parte Ziman*[245] Viljoen J described dissolution as a "final demise of the company" in that dissolution of a company was placed on a par with the "death of a natural person". Therefore, said his Lordship, a dissolved company was "completely dead".[246]

In the past a deregistered company was referred to as one that had been "removed from the register"[247] and was consequently "non-existent".[248] It was also said that upon

243 *Ex parte Rolls Radio Corporation (Pty) Ltd* 1962 2 SA 316 (W) 317A. It is indeed very common to come across reference to a deregistered company as being "non-existent", for which see for example *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), 2012 3 All SA 183 (WCC) para 22; *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), 2011 ZAWCHC 61 (9 June 2011) para 2 or "non-existent entity" as a deregistered company was referred to in *Fintech (Pty) Ltd v Awake Solutions* 2013 1 SA 570 (GST) 573H-I para 8 and *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) paras 37, 43, 48 and 50. In *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd: Dorbyl Light and General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 4 SA 467 (SCA) para 31 a deregistered company was referred to as one that "did not exist".

244 *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859D.

245 1970 1 SA 164 (T) 173D-E. The equation of dissolution or deregistration of a company with the death of a human being has been done on a number of occasions, including in the following cases: *Ex parte P. J. Yelland and Co (Pty) Ltd* 1934 NPD 158 162; *In re Sewell* (1903) 17 NLR 30; *Ex parte Montrose Exploration Co Ltd* 1918 TPD 179 181; *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859D; *Bowman v Sacks* 1986 4 SA 459 (W) 462B; *Fintech (Pty) Ltd v Awake Solutions* 2013 1 SA 570 (GST) 576D para 1 where it was pointed out that the only difference with the death of a human being was that a company was amenable to resurrection; *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 7.

246 *Ex parte Ziman* 173D-E.

247 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 476A; *Ex parte National Bank of SA Ltd, In re B. A. Meintjies Ltd* 1924 WLD 62; *Ex parte Marchini* 1964 1 SA 147 (T) 149A. Surprisingly, the old terminology is once again used in sections 82 and 83 of the Companies Act of 2008.

248 "Non-existent", "no longer exists", "ceases to exist" are the most popular descriptions commonly encountered - see *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458 461 (ceases to exist); *Ex parte the Government* 1914 TPD 596 (dissolution puts an end to the existence of a company); *Ex parte Marchini* 1964 1 SA 147 (T) 149B (no longer exists); *Ex parte Auckland Park Racing Club Ltd* 1918 TPD 37 38 (ceased to exist); *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 36C; *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 472H-373A (no longer in existence); *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 458 (R) 459F (does not exist); *H L Hall and Sons (Group Services) Ltd v Wilsnach* 1997 3 SA 116 (T) 119E (non-existent company); *Income Tax Case* 1306 (1980) 42 SATC 139 145 (ceases to exist); *Ex parte Jacobson: In re Jacobson Holdings*

dissolution or deregistration of a company it disappeared from the legal scene[249] and further that the legal personality of the company was "destroyed".[250] But perhaps the most unusual way of describing a dissolved[251] company was that of Lord Blanesburgh[252] who in *Morris v Harris,*[253] using an otherwise convenient metaphor, said that a dissolved company "remains buried, unconscious, asleep and powerless" until an order declaring the dissolution to have been void was made, if at all.

4 3 MEANING OF DISSOLUTION AND DEREGISTRATION

4 3 1 Literal / dictionary meaning

4 3 1 1 *Dissolution*

Dictionaries go a long way to explain the word "dissolution" in its various meanings and usages, as well as its application in a number of contexts. According to Collins English Dictionary[254] the term has at least six applications. Usage number four[255] explains

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1984 2 SA 372 (W) 377B-C (ceases to exist); *G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), 2011 ZAWCHC 261 (9 June 2011) para 2 (The effect of deregistration is that the corporation's existence as a legal person ceases).

249 *Bowman v Sacks* 1986 4 SA 459 (W) 462A-B and also 463F-G where it was said that the company "disappears as a legal entity".

250 *Bowman v Sacks* 1984 4 SA 459 (W) 463 G-H.

251 This applies equally to a deregistered company since, as will be shown later, the courts hold that both deregistration and dissolution have the same effect on the existence of a company.

252 Whose judgment was read by Viscount Dunedin.

253 [1926] All ER Rep 15 (HL) 24B, [1927] AC 252, 96 LJ CH 253, 136 LT 587, [1927] B & CR 65.

254 Collins English Dictionary (1991).

255 The other applications explain the term to mean - 1. the resolution or separation into component parts; disintergration. 2. destruction by breaking up and dispersing. 3. the termination of a meeting or assembly, such as Parliament ... 5. the state of being dissolute; dissipation. 6. the act or process of dissolving. The *Oxford English Dictionary* vol 3 Reprint (1978), on the other hand, gives the term a fair amount of consideration, ascribing at least ten meanings and applications to it. Some of them

dissolution as the "termination of a formal or legal relationship, such as a business enterprise, marriage, etc". While not conclusive and somewhat confusing it is nevertheless submitted that to the extent that mention is made of the "termination of a business enterprise" some useful[256] clue can be gathered therefrom. Moreover, it is submitted that the "business enterprise" would, in the present context, be a reference to among others a company.

4 3 1 2 *Deregistration*

Dictionaries summarily dismiss the verb "deregister" and the noun deriving therefrom, namely "deregistration". The Collins English Dictionary says very briefly that to deregister means to "remove from a register" and further indicates that "deregistration" is a noun.[257] This is in line with, among others, sections 82(2)(b) and 83(1) of the Companies Act of 2008 which, dealing with deregistration and dissolution of companies, refer to "removal of the name of a company from the register of companies".

include: termination of the existence of a constituted body of persons (eg of the monasteries and now esp of Parliament), termination of life, death, decease, the action of bringing or condition of being brought to an end, undoing, termination, destruction, ruin, breaking up, disintegration.

256 Of the ten meanings and applications ascribed to the verb "dissolve" only two appear to be of some relevance for present purposes. Meaning 4 says: to come or bring to an end while meaning number 8 (tr) declares: to terminate legally, as a marriage. It should be obvious that reference to termination of a marriage does not help much in the present discussion. As is the case with the noun "dissolution" the verb "dissolve" is given careful thought in the *Oxford English Dictionary* where it carries some seventeen meanings and applications which include: to loosen or put asunder ... to destroy the physical integrity, to disintegrate, to cause to vanish or disappear from existence, to bring to nought, undo, destroy or consume, to put an end to, bring an end, to break up, dismiss, disperse, to put an end to the association or connexion of, to terminate the existence, to destroy the binding power or authority or force of, to annul, abrogate. It should be noted that almost all the meanings carry some kind of negative connotation and do not therefore bode well for a dissolved company.

257 Obviously deriving from "deregister". Therefore, in the present context to deregister a company means to "remove it from the companies register" as section 82(2) of the Companies Act of 2008 clearly specifies.

4 3 2 Legal dictionaries

4 3 2 1 Dissolution

The verb "dissolve" and its derivative "dissolution" enjoy much attention in legal dictionaries. The meanings and explanations given range from the literal grammatical usages, digest of court decisions and go as far as taking excerpts from a few leading cases. However, the verb "dissolve" is mostly given its literal dictionary meaning.[258] According to Radin *Law Dictionary*[259] dissolution means among others[260] "the ending of the corporate capacity by lapse of time, or judgment or decree of a court, or by filing papers of dissolution, or by act of the legislature." These rather unfamiliar concepts and terms largely reflect the grounds on which a company may be dissolved in American corporate law.[261] Dissolution is further explained in exactly the same terms in both Black's *Law Dictionary* and West's *Law and Commercial Dictionary in Five Languages*[262] where it is said first that it is an "act or process of dissolving; termination; winding-up" and secondly that "the dissolution of a corporation[263] is the termination of its existence as a body politic. This may take place in several ways; as by act of the legislature, where that is constitutional; by surrender or forfeiture of its charter; by expiration of its charter by lapse of time; by proceedings for winding it up under the law; by loss of all its members or the reduction below the statutory limit; by bankruptcy".[264]

258 See for example Black's *Law Dictionary* (2011) and also West's *Law and Commercial Dictionary in Five Languages* (1985) where the word is explained in terms of: to terminate, abrogate, cancel, annul, disintegrate, to release or unloose the binding force of anything.

259 Green (ed) *Radin Law Dictionary* (1955).

260 The other meanings deal with the dissolution of a marriage, partnership and the release of property held by attachment or similar legal process, by means of legal proceedings necessary for that purpose etc.

261 This dictionary having been published in New York City it is possible that the description given is mainly a reflection of the law of the State of New York even though the likelihood of this also being the position in a number of other States cannot be ruled out.

262 Whether this is by design or a mere coincidence the similarity is striking to say the least.

263 Both dictionaries also describe other dissolutions such as that of a marriage, parliament and partnership but these would not be helpful in the present context.

264 The authority they refer to is *Bruun v Katz Drug Co Inc* 351 MO 731, 173 S.W. 2nd 906 (1985) 909.

While the opening statement that the "dissolution of a corporation is the termination of its existence as a body politic" should not raise eyebrows[265] the grounds on which this can come about certainly do. These grounds should not, however, sound too strange as they reflect the legal position in a number of states in America and in the case of *Bruun v Katz Drug Co Inc*[266] in particular, the law of the State of Missouri.

4 3 2 2 Deregistration

The minimalist exposition of the verb "deregister" and its derivative noun "deregistration" in major dictionaries is perhaps indicative of the underlying scarcity of sources on the subject. Going through a number of leading legal dictionaries one notes with surprise the total omission of the words "deregister" and "deregistration".[267]

4 3 3 Statutory meaning

4 3 3 1 Dissolution

There is no statutory definition of the noun "dissolution" or the verb "dissolve" in the Companies Act of 2008. Neither did the Companies Act of 1973 nor any of its predecessors define the two words. One would therefore have to fall back to the ordinary, everyday

265 Indeed the literal meaning of dissolution has everything to do with this. The "body politic" should in this context be understood to mean "legal entity".

266 351 MO 731, 173 S.W 2nd 906 (1985) 909.

267 The following legal dictionaries were perused and found wanting in this respect: Black's *Law Dictionary* (2011); Saunders *Words & Phrases Legally Defined: Supplement* (2005); Sisson *The South African Judicial Dictionary* (1960); Bells' *South African Legal Dictionary* (1953); Broom's *Legal Maxims* (1925); Green (ed) *Radin Law Dictionary* (1955) and West's *Law and Commercial Dictionary in Five Languages* (1985).

meaning of the word "dissolution" but particularly the meaning it carries in company law context. It is submitted that case law would prove to be of much help in this regard.

One notes in passing though that in a few instances in which the word "dissolution" appeared in the Companies Act of 1973, such as in sections 311(4),[268] 313(1)[269] and 419[270] and especially in the latter section where dissolution took place after the affairs of the company have been "completely wound up", the intended meaning and usage of the word appeared to have been that of the "formal termination of the existence of a company". This view derives support from the fact that in all those sections the fate of the company was at stake. The present Companies Act of 2008 does not take the matter any further as the approach is much the same as it was under the 1973 Act. For example, section 82 of the Act makes provision for dissolution of a company after a complete winding-up of its affairs. Again as a result of an amalgamation or merger of two or more companies which takes place in terms of sections 112, 115 and 116, there would invariably be "dissolution" of one or more of the amalgamating or merging companies, provision for which is made in section 115. Most commonly though dissolution takes place in terms of section 82 after the affairs of a company have been "completely wound up".

4 3 3 2 Deregistration

According to section 1(1) of the repealed Companies Act of 1973 the word "deregistration", in relation to a company, referred to the cancellation by the Registrar of Companies of the registration of the memorandum and articles of the company while the verb "deregister" had a corresponding meaning. Therefore, in terms of the 1973 Act "deregistration" meant reversal of registration of the memorandum and articles of association of a company, which registration process the Registrar did in terms of section 63 of the Act. Upon registration of

268 Dealing with compromise or arrangement and now replaced by s 113 of the Companies Act of 2008.

269 Dealing with reconstruction, amalgamation or merger and now replaced by s 116 of the Companies Act of 2008.

270 Dealing with dissolution after winding-up and now replaced by s 82 of the Companies Act of 2008.

the memorandum and articles of a company the Registrar was required to endorse thereon a certificate under his hand and seal to the effect that the company had been incorporated.[271] Deregistration was therefore the opposite of registration of a company.[272]

Under the Companies Act of 2008 the approach to deregistration is slightly different and to some extent confusing. Apart from in a way treating deregistration as totally different from dissolution, which approach is correct, it is submitted, the Act somehow goes further to conflate the two concepts. For a start, unlike the 1973 Act, the 2008 Act does not define the words "deregistration" and "deregister". Secondly, in section 82(2) the Companies Act of 2003 provides that after receiving a certificate to the effect that the affairs of a company have been completely wound up the Commission must "record" the dissolution of the company in the prescribed manner and "remove the company's name from the companies register". It is this removal of the company's name from the companies register that constitutes deregistration. The other subsections of section 82 deal with further grounds on which deregistration may be granted as well as subsequent reinstatement of registration, should this become necessary.

While the view of Williams[273] that "when the [1973] Act defines deregistration as the 'cancellation ... of the registration of the memorandum and articles,' this must be interpreted to mean that the *certificate of incorporation*[274] endorsed on those documents - though juridically distinct from them - is *ipso facto*[275] also cancelled" is correct, it is submitted that the point that this is meant to prove, namely, that "it is ... the certificate of incorporation that brings the company's separate *persona*[276] into existence" cannot be accepted. Another point there made that "... it is not ... correct that registration of the memorandum and articles

271 Section 64(1).

272 That is to say, the incorporation of the company was reversed.

273 Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 611- 612.

274 My emphasis.

275 My emphasis.

276 My emphasis.

brings the company into existence", it is submitted, is also not correct. Before its amendment in 2006, section 64(1) was very clear on this point and provided that upon registration of the memorandum and articles of a company the Registrar had to endorse thereon[277] a certificate under his hand and seal that the company was duly incorporated. After the amendment the section provided that upon the registration of the memorandum of a company the Registrar had[278] to issue a certificate to the effect that the company was incorporated.

It should not be forgotten that the certificate of incorporation was not submitted as one of the documents needed for registration, nor was it registered in any event. It was simply endorsed on the memorandum as accompanied by the articles of association, serving no other purpose than that of being "conclusive evidence [proof]", meaning that in the absence of proof of fraud all the requirements of the Act in respect of registration and of matters precedent and incidental thereto had been complied with. If that was the case the company was thereby duly incorporated under the Act.[279] In providing that "from the date of incorporation stated in the certificate of incorporation, the subscribers of the memorandum ... shall be a body corporate..."[280] the Act merely indicated the date of registration of the memorandum and the articles and consequently the date on which the certificate of incorporation was endorsed thereon as the date on which the company was duly incorporated. Proof of registration by way of certificate of incorporation was no more than conclusive evidence of that fact.

The position under the 2008 Act is much clearer. The Act uses the phrase "registration certificate" instead of "certificate of incorporation", which registration certificate is defined in section 1 to mean, when used in respect of a company incorporated after the coming into operation of the Act, the certificate or amended certificate, issued by the Companies and Intellectual Property Commission, as "evidence of the incorporation and

277 That is to say on the memorandum and articles.

278 The word used was "must".

279 Section 64(2).

280 Section 65(1).

registration of that company". Therefore, the registration certificate is not the incorporation of the company but evidence of such process having taken place. Unlike the 1973 Act which required registration of the memorandum and articles of association in order to incorporate a company, section 13(1) of the 2008 Act requires registration of the "memorandum of incorporation" and "notice of incorporation". Therefore, deregistration of a company as provided for in section 82(2)(b) of the Act refers to removal of the two documents from the companies register.

In the case of an external company,[281] deregistration under the 1973 Act was defined to mean "cancellation by the Registrar of registration of the memorandum of that company".[282] A reference to the memorandum alone and not also to the articles was in line with section 322(1)(a) and (2) which required and made provision for registration of the memorandum without reference to the articles. As against this, the 2008 Act on the other hand does not have special rules applicable to deregistration of an external company. The same principles, in respect of both the grounds and procedures which apply to domestic companies, also apply to external companies. All this is found in regulation 40 of the Companies Regulations, 2011[283] which simply refers to a company or external company.

281 Which was defined in s 1(1) to mean a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of the Act had established a place of business in the Republic.

282 Section 1(1) of the 1973 Act.

283 Published in Government Gazette No. 34239, GNR 351 of 26 April 2011.

4 4 THE EFFECT OF DISSOLUTION AND DEGISTRATION ON THE EXISTENCE OF A COMPANY

4 4 1 The effect of dissolution

Dissolution has a decisive effect[284] on the very being of a company in that it puts an end to the existence of a company as a legal person.[285] This must be so since until its dissolution[286] the company continues to exist in its name and right. Termination of the existence of a company as a result of its dissolution has been described in so many terms, phrases and metaphors most of which have already been referred to above.[287]

It is said that dissolution is the final demise of a company which deprives it of any further right to continued existence. It therefore renders the company completely dead.[288] The alleged complete death of the company has, in a number of cases, been compared with the death of a natural person.[289] This being the position, it is submitted that it can be accepted as settled law that upon the dissolution of a company it formally and finally disappears from the legal scene[290] and thus from this life. It was no coincidence that the Supreme Court of

284 *Ex parte Rolls Radio Corporation (Pty) Ltd* 1962 2 SA 316 (W) 317A.

285 *Pieterse v Kramer* 1977 1 SA 589 (A) 601F-G; *Bowman v Sacks* 1986 4 SA 459 (W); *Standard Bank of South Africa Ltd v The Master* 1997 3 SA 178 (C) 185I-J.

286 Under the 1973 Act dissolution which took place after winding-up was done in terms of s 419, the equivalent provisions under the 2008 Act being found in s 82. In both instances dissolution follows only after the affairs of a company have been "completely wound up". See also *Standard Bank of South Africa Ltd v The Master* 1997 3 SA 178 (C) 185J. Alternatively dissolution could take place without winding-up, which was possible in terms of ss 311(4) and 313(1)(d) of the 1973 Act, the equivalent provisions being found in s 115 of the 2008 Act which deals with amalgamation, merger and scheme of arrangement.

287 See para 4 2 above.

288 *Ex parte Ziman* 1970 1 SA 164 (T) 173D-E; *In re Sewell* (1903) 17 NLR 30.

289 See para 4 2 above and also *Bruun v Katz Drug Co Ltd* 351 MO 731, 173 S.W 2nd 906 (1985) 909 where the court, citing the case of *Petrogradsky M. K. Bank v National City Bank* 253 N.Y. 23 170 N.E, commented that while there could be some analogy between the death of a human being and the dissolution of a company, there was also a vast difference between the two.

290 *Bowman v Sacks* 1986 4 SA 459 (W) 462B; Williams 612 fn 17 says: "There is no doubt that the

Missouri looked upon dissolution as the "utter extinction and obliteration of a company" as an entity or juristic body.[291]

4 4 2 Unfamiliar dissolution

Dissolution of a company as known in South African, English, Australian and New Zealand law among others, takes a somewhat different dimension elsewhere. In some jurisdictions dissolution is used in such a way and plays a role which would seem unfamiliar. In *Bruun v Katz Drug Co. Inc:*[292] the court made the following observations regarding dissolution:

> "It [dissolution] has been described as that condition of law and fact which ends the capacity of a body corporate to act as such and *necessitates a liquidation* and extinguishment of all legal relations existing in respect of the corporate enterprise."[293]

The above statement is in line with the nature of a dissolution in terms of Chapter 14 of the American Model Business Corporations Act of 2002 (the Model Act) whose section 14.03 provides that at any time after dissolution is authorised[294] the corporation may dissolve by delivering to the secretary of state the articles [resolution] of dissolution. Describing the application of section 14.03 the Official Comment thereto explains that its effect is that the action of filing the articles of dissolution, as required by law, makes the decision to dissolve a corporation a matter of public record and establishes the time when the corporation must begin the process of winding up and cease carrying on its business except to the extent

'dissolution' of a company following a winding-up terminates its existence for all purposes."

291 Per Barrett, Commissioner, in *Bruun v Katz Drug Co Inc* 351 MO 731, 173 S.W 2nd 906 (1985) 909 where the court defined the dissolution of a company as the "extinguishment of its franchise [certificate] to be a corporation and the termination of its corporate existence."

292 351 MO 731, 173 S.W 2nd 906 (1985).

293 *Bruun v Katz Drug Co. Inc* 909 (My emphasis).

294 In terms of section 14.01 dissolution may be initiated by a majority of the incorporators or initial directors by delivering for filing to the secretary of state the articles of dissolution. That is usually done in the initial stages in the life of the corporation. In the later stages of its life dissolution would normally be initiated by the board of directors who make a proposal and submit it to the shareholders for consideration – see section 14.02.

necessary for winding up. A corporation is dissolved on the date on which the articles of dissolution are effective. After that date the corporation is referred to as a "dissolved corporation" although its existence continues for the purposes of winding up. Moreover, that dissolution does not terminate the authority of the corporation's registered agent.[295] This is understandable since a corporation thus dissolved continues its corporate existence although it may not carry on any business except that appropriate to wind up and liquidate its business and affairs.[296]

The special dispensation brought about by Chapter 14 is correctly summarised in the Official Comment on section 14.05 where it is said that the Model Act uses the word "dissolution" in the "specialised sense" and not to describe the final step in the liquidation of the corporate business. This is made clear by section 14.05(b) which provides that a Chapter 14 dissolution does not have any of the characteristics of common law dissolution which treat corporation dissolution as analogous to the death of a natural person, abates legal proceedings and revokes the authority of the registered agent. Thus section 14.05 expressly reverses all the common law attributes of dissolution and makes clear that the rights, powers and duties of shareholders, the directors and the registered agent are not affected by the dissolution and further that legal proceedings by or against the corporation are not affected in any way.

The American position outlined above is also a true reflection of French law, in respect of which Le Gall and Morel write:

> "It will be noted that in French law the dissolution of a company precedes its winding up and is the event which brings about the winding up. It *does not terminate the legal personality of a company*, which continues until all its assets have been disposed of and all claims against it have been discharged, and the liquidation has been formally concluded."[297]

295 Section 14.05(b)(7).

296 See Official Comment on s 14.05(a).

297 Le Gall, Morel *French Company Law* (1992) 270. My emphasis.

It should be noted that this is the opposite of the South African position and practice. In French law dissolution of a company is treated much the same way as dissolution of a partnership where the challenge is to establish sufficient ground on which to seek dissolution and thereafter commence liquidation. As a matter of fact French law treats a private company, and especially a small private company, to a very large extent much the same way as a partnership.[298] It is thus evident that in French law dissolution of a company does not result in the "termination of its existence and its utter extinction and obliteration as an entity or body" as was held in the American case of *Bruun v Katz Drug Co. Ltd.*[299]

4 4 3 The effect of deregistration

4 4 3 1 General

As the paragraphs which follow will indicate, deregistration is a subject of much debate and controversy. This is largely due to the historical context in which the concept was treated by the legislature over the years. Initially the position was that there was not much separating deregistration from dissolution although at a later stage deregistration as a distinct process came to achieve independent and visible status.

The controversy surrounding the precise effect and full implications of deregistration start as soon as the process is completed, especially if it were to be reversed. In the few paragraphs which follow an attempt will be made to put in their proper perspective a number of issues which arise in this regard.

298 See generally Le Gall & Morel paras 19.4 - 19.41 where one comes across interesting statements such as: "The Law of 1966 now provides, however, that 'if all the *shares* of a company or *partnership* are held by *one person*' ..." - para 19.5 (own emphasis) and "a company or partnership is dissolved automatically by the extinction of the purpose, or accomplishment of the objects, for which it was formed (Civil Code, art 1844-7" - para 19.12).

299 351 MO 731, 173 S.W 2nd 906 (1985) 909.

4 4 3 2 Struck off the register and dissolved

Before the coming into operation of the Companies Act of 1973[300] the word "deregistration" was not used in South African company law. The Companies Act of 1926[301] and its predecessors used the description "striking the name of the company off the register"[302] at which stage the company was "dissolved". The heading to section 199 of the 1926 Act referred to a deregistered company as a "defunct company" and provided for "removal of defunct companies from the register".

Cases decided under pre-1973 legislation thus correctly dealt with "striking the name of a defunct company off the register". Moreover upon striking the name of the company off the register the company was "dissolved". The happening of these two events, namely "striking the name of the company off the register" and its "dissolution" brought about some definite consequences for the company. There was therefore, and that for good reasons, not much difference between a deregistered company ie one whose name had been struck off the register and which was as a result dissolved and a company that had been wound up and thereafter dissolved since in both cases the result was the same, namely the company was "dissolved". The result of that dissolution, whether it was preceded by a winding-up or striking the name of the company off the register, was always the same in that the company's existence as a legal entity was terminated[303] just like a natural person who came to die.[304] Not only was the effect of both striking the name of the company off the register (deregistration)

300 Act 61 of 1973 which came into operation on 1 January 1974.

301 Act 46 of 1926.

302 As provided for, for example, in s 199(2) of the Companies Act of 1926.

303 *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 474 (T) 476; *Ex parte National Bank of SA Ltd: In re B.A. Meintjies* 1924 WLD 64; *Ex parte Marchini* 1964 1 SA 147 (T) 149A; *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458 461; *Ex parte the Government* 1914 TPD 596; *Ex parte Auckland Park Racing Club Ltd* 1918 TPD 37 38; *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 472; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 458 (R) 459F.

304 *Norton District Tobacco Warehouse (Pvt) v Skea* 1963 1 SA 856 (FC) 859D; *Ex parte Montrose Exploration Co Ltd* 1918 TPD 179 181.

and dissolution after winding-up the same but was also accepted by the courts as such without reservation.[305]

4 4 3 3 Company deregistered

Usage of the word "deregistration" as provided for in section 73 and defined in section 1(1) of the 1973 Act, which word is now also used in section 82 of the 2008 Act, is a relatively new approach that reflects to a very great extent the views and philosophical stance of the Van Wyk de Vries Commission which made the following observations:

> "But it is the case of the company still carrying on business but dealt with under section 199[306] which raises the anomaly and the pertinent question whether it is technically correct to speak of a 'dissolution' of the company ... Does the concept of 'dissolution' mean that the company as such, and the association of persons as such, and the business, have all been dissolved? We think not; it seems to us that what takes place is not a 'dissolution' but a de-registration accompanied by the logical concomitant of the loss of its legal personality. In fact and in law it appears to be a de-registration resulting in the association of persons ceasing to be a body corporate".[307]

The Commission accordingly recommended that section 199 of the 1926 Act be amended by substituting the concept of "dissolution" for that of "de-registration" of a company. The recommendation was accepted by the legislature and translated into a statutory provision, namely section 73 of the 1973 Act and now section 82 of the 2008 Act.

305 See para 4 2 above.

306 Of the Companies Act of 1926, which became s 73 of the Companies Act of 1973 and is now s 82 of the Companies Act of 2008.

307 Para 50.20 of the Main Report.

4 4 3 4 Cancellation of the memorandum and articles

As already indicated the word "deregistration" as used in section 73 of the 1973 Act was defined in section 1(1) to mean the "cancellation by the Registrar of the registration of the memorandum and articles of the company" while "deregister" had a corresponding meaning. It should be noted that that newly found key word and philosophical approach was the brainchild of the Van Wyk de Vries Commission and constituted a significant shift from the previous dispensation. The equivalent provisions under the 2008 Act are found in section 82(2)(b) which deals with the duty of the Companies and Intellectual Property Commission to "remove the company's name from the companies register". Section 82(3) goes on to provide for additional grounds on which a company may be "deregistered".

It is generally accepted, and there does not appear to be any notable opposition, that the effect of the cancellation of the registration of the memorandum and articles in terms of section 73 of the 1973 Act was that a company ceased to exist as a legal person and should henceforth be assumed to be dead.[308]

The happy state of affairs on the convergence of both judicial and academic opinion as to the effect of deregistration was, however, affected by the further question as to the precise meaning of cessation of the existence of the company as a legal person. It is at this point that two schools of thought emerge. Commenting on Goldstone J's decision in *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd*[309] Larkin[310] says: "One detects perhaps two very different theoretical approaches to corporate personality lurking beneath the surface

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308 See para 4 4 3 2 above. As Van Oosten J put it in the recent case of *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GST) 575C para 12: "It is by now settled law that deregistration puts an end to the existence of the company". Roodt Inc Attorneys "The inadvertent deregistration of a close corporation can prove costly for its members if it had unpaid debts" http://www.roodtinc.com/newsletter59.asp (accessed 11-05-2013) would concur. Describing deregistration of a close corporation they say that it "means the cancellation of the registration of its founding statement by the Close Corporations Registration Office, and in consequence the cc [close corporation] ceases to exist as a legal entity."

309 1984 2 SA 372 (W) 377.

310 Larkin "Companies" in *Annual Survey of SA Law* 1984 336.

here." These two theoretical approaches merit close scrutiny, as the discussion which follows endeavours to do.

4 4 3 5 The deregistered company becoming an "unincorporated association" of persons theory

There is a school of thought which for the sake of convenience may be labelled the "classic unincorporated association theory" which is to the effect that a deregistered company loses its status as a legal entity but at the same time converts into an "unincorporated association of persons" which lacks legal personality. This view appeared in this country apparently for the first time during the time of the Van Wyk de Vries Commission. In its report the Commission said "if the business of the 'company' is continued after it has been de-registered ... it is no longer the company which conducts such business but the persons who make up the 'association' of the erstwhile body corporate."[311]

The report of the Commission indicated the reasons but not the sources relied upon in reaching this very important conclusion. The main factor that weighed heavily in favour of the conclusion appears to have been the problem of possible deregistration (striking the name of the company off the register and the consequent dissolution of the company) by default, this being a situation which could arise where, as a result of communication breakdown with the Registrar of Companies, the company was deregistered even though it was still carrying on business at the relevant time. The approach was that since as a result of deregistration the company ceased to exist as a legal person, it had to be somebody else who was continuing with business as the company itself had disappeared. It was therefore not a difficult matter to point a finger at the person who continued carrying on business. If more than one person was involved such persons formed an "association".

311 Main Report (1970) para 50.20.

It is very difficult to establish authorities supporting this otherwise significant conclusion. The problem was also noted in *Akromed Products (Pty) Ltd v Sulivan*[312] where De Villiers J observed that no authority was referred to in support of the proposition. It is possible though that the view was based on some aspects of American corporate law in terms of which a dissolved corporation is in certain circumstances considered not to have totally disappeared.[313]

The "unincorporated association theory" enjoys wholehearted and regrettably uncritical support in certain academic quarters.[314] It does also have judicial support, albeit only to a very limited extent. Since publication[315] of the report of the Van Wyk de Vries Commission Cilliers and Benade have been consistent in all the editions of their work in saying:

> "After winding-up [ie dissolution] the company's existence is terminated for all purposes while on deregistration the association of persons sustaining the company merely loses its corporate personality. Should a deregistered 'company' nevertheless continue with its business it is no longer a company doing so but an association without legal personality ..."[316]

It is interesting to note that in its first edition the work of Cilliers and Benade[317] did not have this statement. It should also be noted that Benade was a member of the Commission and

312 1994 1 SA 673 (T) 674I.

313 The issue is discussed in para 4 4 3 6 9 below.

314 Cilliers *et al Cilliers & Benade: Corporate Law* (2000) para 30.06. See also Benade *et al Entrepreneurial Law: Incorporating The New Companies Act Manual* – Special Edition (2009) para 36.71. The view that a deregistered company becomes an association without legal personality is also shared by Sharrock, De la Rey, Van der Linde, Smith *Hockly's Insolvency Law* (1996) para 23.14; Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 396 and Mohapi "The effect of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012)

315 On 15 August 1970.

316 Cilliers and Benade *Company Law: Practioner's Edition* (1973) 33-34; Cilliers and Benade *Corporate Law* (2000) para 30.06.

317 Cilliers and Benade *Company Law* (1968) 385-386. In their latest edition Cilliers and Benade *Corporate Law* (2000) para 30.06 in which they were assisted by Henning JJ, Du Plessis JJ and Delport PA, the same view is still maintained even though the language has somewhat changed. See also Benade *et al Entrepreneurial Law: Incorporating The New Companies Act Manual* Special Edition

further that he did not disagree with its position on this or any other point for that matter. Apart from these learned authors there are a few other writers who also follow this approach.[318]

There is visibly limited judicial support for the "unincorporated association theory". The weight to be attached to such supporting utterances seems, however, much diminished by the hierarchy of the source from which they emanate. In *Income Tax Case* 1306[319] the Special Court for Hearing Income Tax Appeals held, per Melamet J, that dissolution and deregistration in company law in this country were two different concepts, with different procedures and different results. After winding-up the company's existence was terminated for all purposes while on deregistration the company ceased to exist as a corporation, so it was explained. In reaching this conclusion the Special Court relied heavily on the statement by Cilliers and Benade and their reference to the views of the Van Wyk de Vries Commission. The Special Court also derived support from section 1 of the Income Tax Act of 1962[320] which distinguished between deregistration and winding-up in that profits distributed by a company which was being wound up were taxable in the hands of the recipients but only if they were of a revenue nature while profits distributed by a company which was not being wound up were taxable in the hands of the recipients without regard to their capital or revenue nature. The Special Court held that the process of deregistration, which had been resorted to in the case, was not the same thing as a formal winding-up procedure as specified in the Companies Act of 1973 and could not therefore achieve the same result, including the same tax result, as winding-up.

(2009) 405 para 36.71.

318 See for example Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 397; Sharrock, De la Rey, Van der Linde, Smith *Hockly's Insolvency Law* (1996) para 23.14; Mohapi "The effects of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (posted 22 February 2012) (accessed 16-09-2012). The last-mentioned being the latest contribution on this point and given the abundance of authorities to the contrary, is difficult to reconcile with existing authorities.

319 1980 42 SATC 139 145.

320 Act 58 of 1962.

It is submitted that the Special Court was correct in holding that deregistration did not achieve the same tax result as winding-up (dissolution) since that was what the Income Tax Act of 1962 provided for. However, it is also submitted that the Special Court erred in over-simplifying the position and readily concluding that winding-up (dissolution) was therefore different from deregistration regarding its effect on the existence of a company as a legal person. It is further submitted that while the effect of dissolution and deregistration on the profits distributed by the company might not be the same, this being enshrined in the Income Tax Act, it did not follow that the cessation of the existence of the company as a legal person, which took place on deregistration, was any different from the termination of the existence of a company which took place on dissolution. If upon dissolution the company's existence is terminated for all purposes, this must equally be the position upon deregistration. Does it mean that there are two kinds of cessation of the existence of a company, one being cessation of existence for all purposes and the other for certain purposes only but not others? Taken to its logical conclusion, that would be the result of the *Income Tax Case 1306* Special Court approach, an anomalous result indeed.

It should be pointed out though that apart from a reference to Cilliers and Benade, who were quoted with approval, the Special Court did not refer to any authority. If anything the decision of the Southern Rhodesian High Court in *Commissioner of Taxes (SR) v "T" Company*,[321] which was referred to by the Special Court, was to the contrary. In that case the operations of the company had been suspended and a distribution to the shareholders made after which application was made to the Registrar of Companies to have the company struck off the register as defunct. The Registrar acceded to the request and the company was accordingly struck off the register. The court per Beadle J (as he then was), while pointing out that the procedure followed by the company had been wholly irregular in that there was no formal winding-up of the company as should have been the case, nevertheless held that the company had succeeded in dissolving[322] itself. Therefore, the question of distinguishing dissolution from deregistration simply did not arise.

321 1957 4 SA 90 (SR), 21 SATC 335.

322 The company had been dissolved in terms of s 277(b) of the Southern Rhodesia [now Zimbabwe] Companies Act 47 of 1951 which provided for "striking the name of the company off the register" and its "dissolution". As the company had been "dissolved" the question of "deregistration" did not arise.

4 4 3 6 The nature of an unincorporated association of persons without legal personality

4 4 3 6 1 It is not a sole proprietorship or partnership

The exact legal nature of the alleged unincorporated association whose "members are personally liable for its debts" is difficult to tell. According to the Van Wyk de Vries Commission "if the business of the 'company' is continued after it has been de-registered ... it is no longer the company which conducts such business but the persons who make up the 'association' of the erstwhile body corporate."[323]

If the "association of persons" were to be made up of one member, a very serious contradiction would indeed arise as the plurality of "persons" automatically excludes the situation of a sole member. In that event such a sole member could only carry on business in the form of a sole proprietorship. There would in any event be the danger of possible unlawful carrying on of business, stemming from lack of licence by the particular proprietor to conduct the business. This must be so as a licence granted to the since deregistered company to do business would not become the licence of the sole proprietor. The question is whether the two issues, namely one relating to the status of a deregistered company and the other concerning the legality of the continuation of business of the former company now conducted by erstwhile members, could be reconciled. The approach of the Van Wyk de Vries Commission was: "That they [members of the erstwhile company] may be doing so unlawfully in terms of Section 4*bis*[324] is not relevant to the question of Section 199."[325] Thus there was therefore not only the problem of the identity of the new "association" but also the danger of illegality of its business activities.

323 Para 50.20 of the Main Report.

324 Of the Companies Act 46 of 1926, which later became s 30 of the Companies Act of 1973 and is now s 8(3) of the Companies Act of 2008.

325 Section 199 of the Companies Act of 1926 was to later become s 73 of the Companies 1973 Act and now s 82 of the Companies Act of 2008.

If the "association" has more than one member the simplest business structure that it could be would be a partnership. Indeed the association could very easily pass the partnership test except that there could possibly be one or two obstacles in the way.[326] It is noteworthy that in *Joubert v Tarry and Co*[327] the court acknowledged that even if Pothier's four point formulation of the essentials of a partnership[328] were satisfied, there could still be something which showed that the association (agreement) did not amount to a partnership. There is the question of the fifth essential of a partnership, added by the courts over the years, namely the intention to form and work in a partnership relationship.[329] Without the necessary intention to be and work in a partnership relationship it would be difficult to hold that the "association" of persons is indeed a partnership. Unless such an intention is imputed to the persons who continue carrying on the business formerly run by the since deregistered company, the *affectio societatis* requirement would not be satisfied. The problem remains though that when persons continue carrying on the business of a defunct company, often unaware that the company has been deregistered, their intention is not that they should be carrying on the business themselves in their own names and for their own account. To the best of their knowledge it is the company's business they are conducting. The necessary intention to work together in a partnership relationship would thus be missing.

326 Pothier *Traite des obligations* (1761)'s four point formulation of the essentials of a partnership, which have been accepted among others in *Joubert v Tarry & Co* 1915 TPD 277, namely: contribution, joint benefit, profit and lawfulness, could in some instances be satisfied in that the members would be carrying on the business of the since deregistered company for their own benefit. The contribution they made when joining the former company could be considered sufficient for these purposes. It is, however, interesting to note that the issue of lawfulness raised by Pothier also arose in the context of s 30 of the 1973 Act. The enquiry under s 8(3) of the 2008 Act is different as the only issue is whether the new business form satisfies the requirements for a partnership or alternatively business trust as after deregistration there is no more compliance with the registration requirement. Under s 8(3) the number of members of an association is no longer an issue.

327 1915 TPD 277.

328 As confirmed, for example, in such cases as *Joubert v Tarry &* Co 1915 TPD 277.

329 This is the so-called *affectio societas* which was dealt with among others in *Pezzuto v Dreyer* 1992 3 SA 379 (A) and *Purdon v Muller* 1961 2 SA 211(A).

There is one interesting statement which if true could cast doubt on the possibility of an unincorporated association ever becoming a partnership. Williams[330] says the "courts have rejected the proposition that an unincorporated association is to be equated to a partnership." If this was the case it would certainly put paid to the debate. But looking at the context in which the statement was made and the sources referred to the picture changes completely.[331] Unfortunately all that this appears to be intended to mean was no more than that the members of a common law voluntary association are not personally liable for the debts of the association merely by virtue of their membership since doing so would be equating the position (liability) of a member with that of a partner, something which has been rejected by the courts.[332] This, of course, is true.

If a deregistered company had more than twenty members, there was under the 1973 Act the added problem that unless the "association" consisted of members who qualified to and in fact carried on any organised profession which was designated by the Minister of Trade and Industry by notice in the Government Gazette, the carrying on of the business by the association, if the object was the acquisition of gain by the association itself or its individual members, was unlawful for non-compliance with section 30. Under section 8(3) of the 2008 Act, illegality of the association is not dependent on the number of members. Therefore, whether the association has more or less than twenty members, it remains an illegal association if it is formed for the purpose of carrying on any business that has as its object the acquisition of gain by the association or its individual members. The only way of avoiding illegality is if it is registered as a company under the 2008 Act, was formed pursuant to another law or was formed pursuant to Letters Patent or Royal Charter before 31 May 1962. It is, however, self-evident that a deregistered company does not fall under any of these categories.

330 Williams "Disinterring a Corporate Body: Sections 73(6) and 420 of the Companies Act of 1973" 1990 *SALJ* 610 614.

331 Bamford *The Law of Partnerships and Voluntary Associations in South Africa* (1982) 195 where reference is made to the cases of *Wade v Mendelsohn* 1936 CPD 540; *Registrar of Deeds v Victoria Club* (1882) 3 NLR 47 and *In re Cape of Good Hope Permanent Building Society* (1898) 15 SC 323.

332 Bamford 194-195.

4 4 3 6 2 *The "unincorporated association" is not a syndicate*

According to dictionaries, a syndicate means among others "an association of business enterprises or individuals organised to undertake a joint project requiring considerable capital" or better still "any association formed to carry out an enterprise or enterprises of common interest to its members".[333] As Black's *Law Dictionary* explains, a syndicate is "an association of individuals, formed for the purpose of conducting and carrying out some particular transaction [ordinarily of a financial character], in which the members are mutually interested."[334]

It is submitted that Black's description of a syndicate, being as it were a non-technical but otherwise very helpful explanation of the term, is preferable as both workable and useful. Indeed this exposition enjoys the support, albeit an indirect one, of Kunst, Delport and Vorster[335] who say that the word "syndicate", and also a company, association or partnership, as used in section 30 of the Companies Act of 1973 was not used in a technical sense but in its ordinary meaning, the intention being to ensure the application of the section in the case of any combination of natural persons however they themselves described or styled it, as long as the combination carried on a business with either of the stated objects, namely the acquisition of gain by the syndicate or by its individual members.

A syndicate can thus be looked upon as a kind of consortium, agreement or co-operative and therefore a deliberate working together of persons who carry on a business for their joint benefit. It is submitted therefore that a deregistered company cannot be looked

333 Collins *English Dictionary* (1991). The other six meanings, which are not helpful for present purposes, have been excluded. As a noun, Legal Thesaurus http://thesaurus.com/browse/legal (accessed 30-01-2013)) explains a syndicate to mean "alliance, association, cartel, coalition, combine, company, consortium, council, federation, guild, league, machine, merger, organization, partnership, pool, ring, *societas*, union". But it also means "amalgamate, association (alliance), business (commercial enterprise), cartel, coalition, combine (act in concert), committee, confederacy (compact), consortium (business cartel), corporation, enterprise (economic organisation), federation, institute, merger, organization (association), partnership, pool, trust (combination of business).

334 Black's *Law Dictionary* (2011).

335 Kunst, Delport and Vorster (eds) *Henochsberg on the Companies Act* vol 1 (2011) 50.

upon as a syndicate. Should members of the erstwhile company continue business after its deregistration they would not be doing so as a syndicate for lack of the necessary state of mind. To the best of their knowledge, and this being their intention, they would be conducting business on behalf of and in the name of a company which, often unknown to them, is no longer there.

4 4 3 6 3 It is not a company

A deregistered company is no longer a company. It is a company that once was right up to the date of the publication of a notice of its deregistration in the Government Gazette[336] in terms of the 1973 Act. In terms of section 82(2) of the 2008 Act the decisive date is that of removal of its name from the companies register by the Companies and Intellectual Property Commission. In terms of section 1(1) of the 1973 Act a company meant a company incorporated under Chapter IV of the Act (and included any body which immediately prior to the commencement of the Act was a company in terms of any law repealed by the Act). A deregistered company is no longer incorporated and unless it was a company in terms of any law repealed[337] by the Companies Act of 1973 it no longer qualifies as a company.

The position under the 2008 Act is very much the same. Section 1 defines a "company" as a juristic person incorporated in terms of the Act, a domesticated company, or a juristic person that, immediately before the coming into effect[338] of the Act:-

(a) was registered in terms of the –
   (i) Companies Act of 1973, other than as an external company as defined in that Act; or
   (ii) Close Corporations Act of 1984, if it has subsequently been converted in terms

336 The date of publication of the notice was, in terms of s 73(5), deemed to be the date of deregistration. In terms of s 82(2)(b) of the 2008 Act though, the date of deregistration is that on which the Companies and Intellectual Property Commission removes the company's name from the companies register.

337 The repealed law referred primarily, although not exclusively, to the Companies Act 46 of 1926.

338 The Act came into effect on 1st May 2011.

of Schedule 2;

(b) was in existence and recognised as an "existing company" in terms of the Companies Act of 1973; or

(c) was deregistered in terms of the Companies Act of 1973, and has subsequently been re-registered in terms of this Act.

Therefore, in terms of the 2008 Act, a company means one recognised as such in terms of the 2008 Act or the 1973 Act. Evidently, a deregistered company is not one such company. In this regard reference may also be made to section 19(1) of the 2008 Act in terms of which from the date and time that the incorporation of a company is registered, as stated in the registration certificate, the company is a juristic person, which exists continuously until its name is removed from the companies register in accordance with section 82 of the Act. Thus, once the name of a company is removed from the companies register, that is, the company has been deregistered, it is no longer a company.

4 4 3 6 4 It is not an "association" formed in terms of some other law, Letters Patent or Royal Charter

Sections 30 and 31 of the 1973 Act made provision for recognition of companies formed in terms of some other law, Letters Patent or Royal Charter. The 2008 Act does so in section 8(3), the only difference between the two statutes being that the 2008 Act is confined to the equivalent provisions of section 31 of the 1973 Act to the exclusion of those of section 30.

A deregistered company is not a company, association, syndicate or partnership formed in pursuance of some other law, Letters Patent or Royal Charter. Some other law refers mainly to the various statutes under which all sorts of corporate bodies[339] may be

339 Such as for example a close corporation formed under the Close Corporations Act 69 of 1984; a bank formed under the Banks Act 94 of 1990; a mutual bank formed under the Mutual Banks Act 124 of 1993; an insurance company formed under the Long-term Insurance Act 52 of 1998 or Short-term Insurance Act 53 of 1998; a friendly society formed under the Friendly Societies Act 25 of 1956; a welfare organisation formed under the Welfare Organisations Act 79 of 1965; a co-operative society formed under the Co-operatives Act 14 of 2005; a non-profit organisation formed in terms of the

formed. Apart from an association not for gain incorporated in terms of section 21 of the Companies Act of 1973 to take one example, an association may also be formed under the common law as a *universitas personarum*, which has legal personality but does not have as its object the acquisition of gain for itself or its members, or alternatively as a voluntary association that does not have legal personality in which event it should, once again, not have as its main objective the acquisition of gain by itself or its members since if this were so it would be acting illegally.[340] A deregistered company, being as it were a shadow of the now defunct company, is not registered under any statute nor is it a common law *universitas* or voluntary association mainly because the object of whosoever might still be continuing the business of the erstwhile company is the acquisition of gain, just as the now defunct company would have done had it still been in existence.

Again, a deregistered company is also not a company, association etc formed in pursuance of Letters Patent or Royal Charter. A company formed in pursuance of a Royal Charter also includes one formed under the UK Grants of Privileges to Companies Act of 1834, under which the Crown was given the power to grant to unincorporated companies certain privileges, including that of suing and being sued, albeit in the name of a public officer. The 1834 Act was repealed by the Chartered Companies Act of 1837 in terms of which the Crown was given the power to confer on associations formed for trading purposes, some of the privileges of corporations created by Royal Charter, and to vest in those associations certain other powers and privileges.[341] A company formed in pursuance of Letters Patent refers to one incorporated under Letters Patent issued by the Crown under the Great Seal, this having been possible in terms of the Chartered Companies Act of 1837.[342] A deregistered company is obviously nowhere near being a company formed in pursuance of Letters Patent or Royal Charter or some other law, whatever that law might be.

Nonprofit Organisations Act 71 of 1997.

340 *Morrison v Standard Building Society* 1932 AD 229.

341 Hannigan (consulting editor) "Companies" in Halsbury *The Laws of England* vol 14 (2010) para 2379 (Halsbury).

342 Halsbury para 2380 especially fn 1. In terms of the 1837 Act the Crown was given power to grant to a company or body of persons associated together for trading or other purposes any privileges which, according to the common law, it would be competent to the Crown to grant to any such company or body of persons by any charter of incorporation.

4 4 3 6 5 It is not a universitas personarum

A deregistered company cannot be looked upon as a *universitas personarum* since the latter, although formed under the common law and not some statute, is a juristic person having all the characteristics of legal personality such as the capacity to acquire rights and incur obligations, own property apart from its members, sue and be sued as well as perpetual succession.[343] All these characteristics and benefits a company would have enjoyed before and until the time of deregistration. The nature of a *universitas personarum* was succinctly set out in *Webb & Co Ltd v Northern Rifles*[344] where apart from indicating what a *universitas personarum* is, it is submitted, there is by implication also an indication of what it is not. A deregistered company, it is submitted, cannot be that entity. In that case Smith J said:

> "An *universitas personarum* in Roman-Dutch law is a legal fiction,[345] an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members."[346]

Being a common law entity a *universitas personarum* does not need the sanction of the State by way of legislation or otherwise, for example, licensing, in order to come into existence.[347] All it needs is a constitution which shows that it is an entity distinct from its members and that it has perpetual succession, can own property, can sue or be sued etc. Nevertheless

343 *Webb and Co Ltd v Northern Rifles: Hobson and Sons v Northern Rifles* 1908 TS 462; *Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly* 1984 1 SA 160 (W) 163E-G; *S v Arenstein* 1967 3 SA 366 (A) 373B; *African National Congress v Lombo* 1997 3 SA 187 (A) 195J-196A.

344 1908 TS 462.

345 Blackman "Companies" in Joubert (ed) *Lawsa* (1997) para 453 fn 2, referring to *Morrison v Standard Building Society* 1932 AD 229 and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 550, rejects the theory that a *universitas* is a legal fiction and takes the view that it is a legal reality saying: "It is not a merely artificial and technical thing. It is a matter of substance."

346 *Webb and Co Ltd v Northern Rifles: Hobson and Sons v Northern Rifles* 464-465.

347 *Morrison v Standard Building Society* 1932 AD 229 237.

because of availability of legislative machinery for registration, it is submitted that by and large it is totally unnecessary for a *universitas personarum* to stay the outside legislative registration framework if such an entity can, for example, be registered as a non-profit company which is governed by Schedule 1 of the 2008 Act. A few examples of a *universitas* include a church,[348] a political party,[349] and a native tribe.[350]

It will be seen that a deregistered company is far removed from all of the above examples, be it in their nature, objects or activities. An even more serious obstacle in the way of a deregistered company becoming a *universitas personarum* is the requirement that no association of persons formed for the purpose of carrying on any business that has as its object the acquisition of gain for itself or its individual members shall be a body corporate unless it is registered under the Act.[351] As Davis J put it in *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd*:[352]

> "It seems to me that the Act[353] broadly means this: all commercial undertakings shall be registered. It [the Act] distinguishes in so many words - it intends to distinguish - between commercial undertakings on the one hand ... and what we may call literary or charitable associations on the other hand, in which

348 *Louvis v Oiconomos* 1917 TPD 465 474; *De Vos v Die Ringskommissie van die NGK* 1952 2 SA 83 (O) 93; *Malebjoe v Bantu Methodist Church of South Africa* 1957 4 SA 465 (W); Cf *Burgers v Du Plessis* (1866) 1 Roscoe 385 400; *Burgers v Murray* (1866) 1 Roscoe 258 266. See also Bamford 129 fn 32.

349 *Wilken v Brebner* 1935 AD 175 190. Political parties desiring to contest elections are required to register in terms of the Electoral Commission Act 51 of 1996. Formation of a political party itself does not need registration as adoption of a constitution is sufficient.

350 *Rathibe v Reid* 1927 AD 74 86 (but not a section of a tribe); *Hermansberg Mission Society v Commissioner for Native Affairs* 1906 TS 135; *Mogale v Engelbrecht* 1907 TS 836; *Chief Zuhumbaga v Minister of Internal Affairs* 1966 1 PH F35. See also Bamford 130 fn 42.

351 Section 8(3) of the Companies Act of 2008 which, like its predecessor s 31 of the Companies Act of 1973, specifically refers to any date after 31 December 1939 (this being the date on which s 4*bis* of the 1926 Act as substituted in 1951 was deemed to have come into operation - see Henochbergs vol 1 52) as the affected date. Without registration the association would need to have been formed in pursuance of Letters Patent or Royal Charter or "some other law". Such other law would presumably include the common law but as *Morrison v Standard Building Society* 1932 AD 229 238 indicates that could only have been the case until 1909 in the Transvaal because of the Companies (Consolidated) Act of 1909 and 1926 for the rest of the country because of the Companies Act 46 of 1926.

352 1938 CPD 199 202.

353 English Companies Act of 1862 s 21, being the equivalent of s 31 of the Companies Act 61 of 1973 which is now s 8(3) of the Companies Act of 2008.

persons associate, not with a view to obtaining a personal advantage, but for the purpose of promoting literature, science, art, charity, or something of that kind."[354]

Since a *universitas personarum* is not a commercial undertaking it does not necessarily need registration and can pursue its normal activities without hindrance. A deregistered company on the other hand cannot perform any activity legally until its registration is restored.[355] Because of a world of difference in the objectives of a commercial undertaking and a *universitas personarum* it is submitted that it is not feasible to hold that a deregistered company is a *universitas personarum.*

4 4 3 6 6 It is not a voluntary association

A voluntary association (ie an unincorporated association) is defined as a "legal relationship which arises from an agreement among three[356] or more persons to achieve a common objective, primarily other than the making and division of profits."[357]

354 *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 202.

355 This could be done in terms of s 73(6)(a) of the Companies Act of 1973 and now in terms of s 83 of the Companies Act of 2008.

356 Although Bamford 118 takes the requirement of a minimum of three members seriously saying: "Plurality of members is a characteristic of associations. It is difficult, and perhaps impossible, to have an association of only two persons; in this event their rights and duties would almost necessarily fall under some other head of contract." It is submitted that there is no reason in law or logic against a minimum of two persons associating together for any lawful purpose. But according to the learned author two members would at best merely be co-venturers. In support of the three member requirement Bamford refers to the Roman law "*tres faciunt collegium*" statement found in Voet 3.4.1 and also *Woodridge and Co v Colonial Government* (1905) 26 NLR 73 75. It is interesting to note that *Lawsa* para 454 fn 1 dismisses this three member requirement as a mere suggestion.

357 Bamford 117. According to Kunst, Delport and Vorster *Henochsberg on the Companies Act* vol 1 (2011) 52(1), who refer to *Shillings CC v Cronje* 1988 2 SA 402 (A) 419 – 421, a mere plurality of persons having some common purpose is not an association of persons within the meaning of s 31 of the Companies Act of 1973, which is now s 8(3) of the Companies Act of 2008. Such an association exists only if the persons concerned are united for the achievement, as a body or organisation, of such a purpose. Needless to say that in the case of a deregistered company, the common purpose can only be the acquisition of gain, something which is not allowed in view of the fact that the "company" or voluntary association would not be registered.

If one were to follow the case of *R v Twala*[358] without scrutiny, one would be tempted to conclude that a deregistered company does indeed qualify as a voluntary association, especially if one has regard to the court's reference to an association having *de facto* existence. In that case the court made certain observations which if accepted without careful analysis could lead one to a wrong conclusion. The court, per Fagan JA, said:

> "Notwithstanding that the B.I.L.A.[359] may have no separate legal existence apart from the individuals composing it, its name has a very definite meaning. It connotes a number of individuals in their collective aspect. Those individuals have agreed to combine for certain purposes and have assumed, in their collective capacity, that name. It may be that the association, thus far, has no separate legal existence, but its name has a definite meaning to the individuals composing it, and to third parties who have dealings with it. The truth of the matter is that when one says that a voluntary association has no legal existence one means no more than that it is not, in the eye of the law, a person. One does not mean that it has no existence, in the broader meaning of the word. The B.I.L.A., in this broader sense, has a *de facto* existence, just as has 'the Jones family' or 'the Durban South Ratepayers' Association ...' Whatever the legal position may be, the B.I.L.A. has a *de facto* existence as an association (unlawful, if you like) of individuals, and its name, on a strictly legal analysis, connotes those individuals in their collective aspect."[360]

The above *dicta* have the potential to create the impression that from a deregistered company there could emerge some association, *de facto* or otherwise. It is, however, submitted that a deregistered company cannot be a voluntary association since a number of requirements have to be satisfied before it can fall into that category. It does not appear that a defunct company can meet those requirements. According to Caney and Brooks:

> "An association is founded on a basis of mutual agreement.[361] This entails that it will come into being if the individuals who propose forming it have the serious intention to associate[362] and are in agreement

358 1952 2 SA 599 (A).

359 Which stands for the "Bantu Investments and Loans Association".

360 *R v Twala* 609, quoting with approval the remarks of Broome JP in the court *a quo*.

361 *Turner v Jockey Club of SA* 1974 3 SA 633 (A) 646; *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 2 SA 1 (A); *Van Vuuren v Kerkraad van die Morelig Gemeente van die NG Kerk in die OVS* 1979 4 SA 548 (O) 557.

362 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 236; *Valkin v Daggafontein Mines Ltd* 1960 2 SA 507 (W) 513; See also *Peri-Urban Areas Health Board v Breet* 1958 3 SA 783 (T).

on the essential characteristics and objectives of the ... unincorporated association.[363] The latter aspect is usually manifested by the approval and adoption of a constitution. For practical purposes it is advisable but not essential[364] to have a written constitution."[365]

Caney and Brooks continue to say:

> "The constitution of an association together with all rules or regulations collectively constitute the agreement which is entered into by its members.[366] This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association's existence and activities but also, where necessary, prescribes and demarcates the powers of, *inter alia*, the executive committee, secretary and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects."[367]

The various essentials and features of a voluntary association as indicated in the above quotations are nowhere to be found in a deregistered company. For example the name, memorandum of incorporation, notice of incorporation etc of a deregistered company having been removed from the companies register, the alleged association would be without a name, constitution and so forth. After all in terms of the 2008 Act deregistration refers to removal from the companies register of the memorandum of incorporation and notice of incorporation of a company, the former containing the name of the company. Therefore, after deregistration whatever might still seem to remain would be without a name, constitution etc, a very awkward position indeed. Moreover there is, on the part of the members of the so-called

363 *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A).

364 A constitution in the formal sense is not essential: *Ex parte Doornfontein, Judiths Paarl Ratepayers' Association* 1947 1 SA 476 (T); *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 3 SA 291 (A); *Ex parte Gardner* 1940 EDL 175; Bamford 117.

365 Caney and Brooks "Associations" in Joubert (ed) *Lawsa* First Reissue vol 1 (1993) para 455. In the absence of a written constitution the court will take into account factors such as the conduct of the individuals involved and the minutes of meetings which they have kept, in order to establish whether they in fact constitute a voluntary association – Caney and Brooks para 455 fn 5; *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 3 SA 291 304-305.

366 *Ex parte United Party Club* 1930 WLD 277 280; *Saunders v Johannesburg Stock Exchange* 1914 WLD 112 115; *Govender v Textile Workers' Industrial Union (SA), Durban Branch* 1961 3 SA 88 (D) 91; *Solomon v The Alfred Lodge* 1917 CPD 177; *Turner v Jockey Club of SA* 1974 3 SA 633 (A) 646; *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 2 SA 1 (A) 25-26; *Grobbelaar v De Villiers* 1984 2 SA 649 (C) 656; *Lawsa* para 456 fn 1.

367 Caney and Brooks para 456. See also Bamford 117.

association, no mutual agreement or intention to associate. All that the members know and would be trying to achieve would be nothing other than carrying on the business of a company which, unknown to them, is no longer there. Perhaps most damaging to the possible existence of an unincorporated (voluntary) association though is the problem of possible unlawful carrying on of the business, this stemming from the fact that the members would not have obtained a licence to carry on business in the new form in which they now find themselves and also the thorny issue of an association carrying on business that seeks gain without registration as required by law.

4 4 3 6 7 *Voluntary association distinguished from a* universitas personarum

In view of the very close relationship existing between a voluntary association and a *universitas personarum* and as a result of the overlap between them being as it were enormous, the danger of confusing the two is much increased. The main distinguishing feature between the two though is that a *universitas personarum* is a legal entity having its own separate legal existence apart from its members, has the capacity to acquire rights and incur obligations independently of the individual members' rights and obligations[368] and also enjoys the advantage of perpetual succession.[369] A *universitas* can thus sue or be sued in its name.[370]

A voluntary association, on the other hand, is founded on the basis of mutual agreement.[371] This means that it will come into existence if the individuals who propose

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368 *Webb and Co Ltd v Northern Rifles: Hobson and Sons v Northern Rifles* 1908 TS 462; *Woodridge and Co v Colonial Government* (1905) 26 NLR 73 78; *Lawsa* paras 453-454; Bamford 126; Blackman *et al* 3 – 16; Kunst, Delport and Vorster 52(1).

369 *Morrison v Standard Building Society* 1932 AD 229; *Webb and Co Ltd v Northern Rifles: Hobson & Sons v Northern Rifles* 1908 TS 462; *Ex parte Johannesburg Congregation of the Catholic Church* 1968 3 SA 377 (W); *Klerksdorp and District Muslim Merchants Association v Mahomed* 1948 4 SA 731 (T).

370 *Levin v Transvaal Miners Association* 1912 WLD 144; *South African Association of Municipal Employees (Pretoria Branch) v Pretoria City Council* 1948 1 SA 11 (T) 14.

371 *Lawsa* para 455; *Turner v Jockey Club of SA* 1974 3 SA 633 646; *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 2 SA 1 (A) 25-26; *Van Vuuren v Kerkraad van die Morelig Gemeente*

forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the association. It is advisable but not essential to have a written constitution. If the association does indeed have a constitution the same, together with all the rules and regulations collectively constitute the agreement which is entered into by the members.[372] This agreement is the crucial factor in the existence of a voluntary association.

A voluntary association is not a legal entity distinct from its members.[373] Therefore members of the association are co-owners of the property in joint undivided ownership unless by the constitution of the association such property vests in a trustee, person or body of persons.[374] An association cannot sue or be sued as such; nor does an action lie automatically against the members of its executive committee or management, if any, in their official capacity. All the members of the association must be brought before the court.[375]

While it is relatively easy to deal with an organisation once it has been classified as a *universitas personarum* or voluntary association, the real difficulty though lies in establishing the criteria by which the classification should be done. It is submitted that it is reasonably safe to say that the intention of the members of the organisation is crucial, although not conclusive, in the determination of the nature of the particular organisation. This intention can be gathered among others from the constitution[376] of the organisation, if any, its nature, objects and activities.[377] In this respect at least two factors serve as pointers towards a

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van die NG Kerk in die OVS 1979 4 SA 548 557.

372 It could be expected that serious difficulties concerning member's rights and duties would arise if there is no written contritution - see *Valkin v Daggafontein Mines Ltd* 1960 2 SA 507 (W) 514.

373 *Lawsa* para 452; *Shillings CC v Cronje* 1988 2 SA 402 (A) 419F where it was said: "Unincorporated refers to an association which does not have a legal *persona* separate from its constituent members".

374 *Ehrlich v Johannesburg Turf Club* 1903 TS 677; *Bruyns v Rand Sporting Club* 1919 WLD 51; *Lawsa* para 459.

375 Bamford 211; *Hoy v National Union of Railways and Harbour Servants* 1924 JDR 120.

376 *Morrison v Standard Building Society* 1932 AD 229 238; *Cassim v Molife* 1908 TS 748 751; *Leschin v Kovno Sick Benefit Benevolent Society* 1936 WLD 9 11; *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955 3 SA 541 (N) 542; *Ex parte Johannesburg Congregation of the Apostolic Church* 1968 3 SA 377 (W).

377 Bamford 128; *Morrison v Standard Building Society* 1932 AD 229. Although the court considered it

universitas, these being firstly, perpetual succession, that is, the fact that an organisation would continue as an entity notwithstanding changes of membership within it, and secondly, the ability of the organisation to hold property in its name and right apart from its members.[378]

It is evident that a voluntary association can very easily satisfy the above test and thereby blur the distinction between the two even further. According to Bamford,[379] an expression of intention in the constitution that an association shall be a body corporate having a separate legal personality with perpetual succession is important but not decisive[380] since in addition it has to be very clear that no member has any rights by reason of his membership to the property of the association.[381] It is submitted that the constitution of an organisation plays an important role in determining its exact legal nature and therefore its classification as a *universitas personarum* or unincorporated association as it is from this document that most of the issues such as the status of the organisation, its objects, capacity to litigate, the rights of the members as regards its property and profits etc can be very clearly set out. Without a constitution much would depend on the actual activities and conduct of the affairs of the organisation, thus creating room for controversy and doubt. This, it is submitted, does not augur well for characterisation of the organisation. One thing that is certain, however, is the fact that if anything a deregistered company is more akin to a voluntary association than a *universitas personarum*. The main difference between a voluntary association and a deregistered company though is that whereas the object of a voluntary association is not the acquisition of gain, be it for itself or its members, on the contrary the acquisition of gain for

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improbable that an association without a constitution could be a *universitas* (*Ex parte Doornfontein, Judiths Paarl Ratepayers' Association* 1947 1 SA 476 (T) 147), as the case of *Ex parte Gardner* 1940 EDL 175 shows, this need not necessarily be so.

378 Bamford 128; *Webb and Co Ltd v Northern Rifles: Hobson and Sons v Northern Rifles* 1908 TS 462 465; *Levin v Transvaal Miners' Association* 1912 WLD; *Tilbrook v Higgins* 1932 WLD 147 153; *Van Rensberg and Others v Afrikaanse Taal en Kultuurvereniging (SAS en H)* 1941 CPD 179 185; *Moloi v St John's Apostolic Faith Mission* 1954 3 SA 940 (T) 942; *Malebjoe v Bantu Methodist Church of South Africa* 1957 4 SA 465 (W).

379 Bamford 128.

380 *Committee of the Johannesburg Library v Spence* (1898) 5 OR 84 87.

381 *Klerksdorp & District Muslim Merchants Association v Mahomed* 1948 4 SA 731 738.

the company, albeit non-existent due to deregistration, is the very reason for continuation of business activities on behalf of an otherwise defunct company.

4 4 3 6 8 A deregistered company is not "some association"

It is submitted that the word "association" which appeared in section 30 of the Companies Act of 1973 and is now also used in section 8(3) of the Companies Act of 2008, refers to a voluntary association and not an association of some other kind. The dictionary[382] meaning of an association is that of a "group of people having a common purpose or interest; a society or club" or the "act of associating or the state of being associated". This fits in well with the description of a voluntary association as being an association (that is, a coming together) of persons[383] that does not have the status of a legal *persona*, as is the case with a *universitas personarum*. As suggested by Kunst *et al*[384] the word is not used in a technical sense to mean some rather unfamiliar association but is used in its ordinary sense of any combination of natural persons, however they themselves may describe or style it. It is submitted therefore that irrespective of what the members of the association may style or call it, the association in fact refers to a voluntary association. Since to be a *universitas personarum* certain requirements have to be met,[385] if the association is not a common law voluntary association, what else could it possibly be?

If it were to be seen as an association, voluntary or otherwise for that matter, a deregistered company would once again face the same old problem, namely that of carrying on business that has as its object the acquisition of gain by the association itself or its members illegally in that it does not have a licence to do so and furthermore that it is not

382 At least according to the Collins *English Dictionary* (1991).

383 According to Black's *Law Dictionary* (2011) an association is "the act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object."

384 Kunst, Delport and Vorster 50.

385 As for which see para 4 4 3 6 5 above.

registered in terms of the 2008 Act or its predecessors nor was it formed in pursuance of some other law, Royal Charter or Letters Patent as the law requires. Moreover, the enquiry is cut short under the 2008 Act because illegality in terms of section 8(3) does not stem from the magic number of more than twenty members as was the case in the past, but from the pursuit of gain without registration regardless of whether the old threshold of twenty members is reached or not.

4 4 3 6 9 *The* de facto *corporation theory*

There is a school of thought, which is mostly prevalent in American corporate law, which holds that in certain circumstances a company which has been administratively dissolved[386] does not result in the "utter extinction and obliteration of a company as a body politic" in that it continues to exist, if not as a legal person in its own name and right, then as a *de facto* corporation. This has the result that a number of consequences attach to that state of *de facto* existence of the company, including for example the fact that certain steps can be taken for or against the company.

A number of states in America have a statute recognising and making provision for the *de facto* existence of a dissolved corporation.[387] Such statutes are in fact based on section 14.21 of the Model Business Corporations Act of 2002 which in paragragh (c) provides that a "corporation administratively dissolved *continues its corporate existence*[388] but may not carry on any business except that necessary to wind up and liquidate its business and affairs...".[389] Paragragh (d) of the section provides that administrative

386 Administrative dissolution, which is enshrined in among others section 14.20 of the Model Business Corporations Act of 2002 is, in the South African context, the equivalent of deregistration at the instance of the Companies and Intellectual Property Commission, even though the grounds are different.

387 Two examples of which are Delaware and Arizona.

388 My emphasis.

389 The sequence of events in this respect, namely dissolution first and then winding-up and liquidation, for comment on which see para 4 4 2 above, resembles what happens in South African partnership law. To the extent that business cannot be carried on except that which is necessary to wind up and liquidate

dissolution of a corporation does not terminate the authority of its registered agent. This provision makes it possible for transactions to be concluded or carried out by the corporation's agent after its dissolution. Various state provisions to that effect are a repeat of section 14.05 of the same Model Act which deals with dissolution initiated by the incorporators or directors of the company.

Dealing with companies which have been administratively dissolved (deregistered) under state legislation based on section 14.21 of the Model Business Corporations Act, the courts have on a number of occasions held that the companies involved continued to enjoy *de facto* existence, a situation to which certain consequences attached. Thus in *Frederick G Krapf and Son, Inc v Gorson*[390] the court held that a Delaware corporation was not dead for all purposes following forfeiture of its charter. It was accordingly held that a creditor's remedy was against the corporation if that creditor dealt in good faith with it as a corporation and if there was no fraud or bad faith on the part of the corporate officers involved. In the instant case the action was founded on a contract concluded with the corporation at a time when its charter had been forfeited for failure to pay franchise taxes, as a result of which it was dissolved by the secretary of state. Again in *Hines v Board of Education of Cleveland City School District*[391] the court held that a corporation whose articles of incorporation had been cancelled for non-payment of taxes was a *de facto* corporation.[392]

It should be noted though that the *de facto* corporation philosophy is the exception rather than the norm and further that in the absence of the necessary statutory provision, a court would not hold that a dissolved (deregistered) corporation has such existence. It came as no surprise therefore that in *T-K Distributors, Inc v Soldevere*[393] the court relied on certain

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the business and affairs of the company, one is immediately reminded of a *concursus creditorium* in South African law.

390 243 A.2d 713 (Del. 1968).

391 482 N.E. 2d 1000 (Ohio Common Pleas, 1985).

392 See also *Spector v Hart*, 139 So.2d 923 (Fla. App. 1962); Model Business Corporations Act (2002) Annotated 1518.3.

393 704 P.2d 280 (Ariz.App.1985).

amendments to the Arizona statutes which were based on earlier versions of the Model Business Corporations Act and abolished the concept of a *de facto* corporation. This had the result that as a dissolved corporation no longer had *de facto* existence anyone who entered into transactions on its behalf during the period of dissolution attracted personal liability. Such a person could no longer raise the issue of the *de facto* existence of the corporation and therefore its ensuing liability.

The *de facto* existence theory of a deregistered company is unheard of in South African law, except perhaps only in the sense of a deregistered company continuing as an unincorporated association whose members could allegedly be held personally liable for its debts, this being the view of the Van Wyk de Vries Commission and which is followed by Cilliers and Benade. The theory was never entertained by Companies Act of 1973, its successor the present Companies Act of 2008, their South African and English predecessors or judicial decisions. One of those very rare occasions on which, if perhaps not the only occasion, the court did mention, but then only in passing, the issue of *de facto* existence of an association, and it should be mentioned though that not in relation to a company for that matter but only an association, was in *R v Twala*.[394] There the court dealt with an association having more than twenty persons which was carrying on business without having been registered as required by the law.[395] The court held that the association was illegal for non-compliance with the law but nevertheless concluded that it was possible to steal funds from it as it had *de facto* existence. It will be noted that the case dealt with an illegal association and not a deregistered company. The *de facto* corporation theory does not therefore find place in South African company law, especially when it comes to a deregistered company.

394 1952 2 SA 599 (A).

395 Section 4*bis* of Companies Act of 1926 which later became s 30 of the Companies Act of 1973 Act and is now s 8(3) of the Companies Act of 2008.

4 4 3 6 10 What exactly is a deregistered company that carries on commercial activities?

The Van Wyk de Vries Commission concluded in its report[396] that if the business of the "company" was continued after it had been deregistered, it was no longer the company which conducted such business but the persons who made up the "association" of the erstwhile body corporate. However, the Commission did allude, albeit in passing, to the illegality on the part of any person who continued carrying on the business of a deregistered company. As the issue was identification of the process taking place, namely whether what was happening under section 199 of the Companies Act 1926 was indeed a dissolution or perhaps something else, the Commission was at pains to explain at length that the process unfolding under such circumstances was in fact nothing other than the "de-registration" of a company. The illegality of the continued carrying on of business after the completion of that process was thus understandably relegated to the back seat. As the Commission put it, that was "not relevant" to the question of deregistration itself.

There is a formidable list of authorities to the effect that carrying on business by any association that has as its object the acquisition of gain for the company, association, syndicate or partnership or its individual members, if same had more than twenty members and was not covered by subsection (2) of section 30 of the Companies Act of 1973, was illegal unless that company, association, syndicate or partnership was registered in terms of the Act, its predecessors or was otherwise formed in pursuance of some other law, Letters Patent or Royal Charter.[397] Briefly section 30 prohibited the formation or continuation of an

396 Para 50.20 of the Main Report.

397 *Morrison v Standard Building Society* 1932 AD 229; *R v Twala* 1952 2 SA 599(A); *South African Millers' Association v Rutowitz Flour Mills Ltd* 1939 CPD 199; *Gaming Association of SA Gauteng Division and Another v Minister of Safety and Security* 1996 4 All SA 336; *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A). The debate by Theron "Artikel 30 van die Maatskappywet 61 van 1973 en die besigheidstrust" 1990 *SALJ* 673, Theron "Die Besigheidstrust" 1991 *TSAR* 268 and Klopper "Besigheidstrust en Artikels 30 en 31 van die Maatskappywet 61 van 1973" 1988 *De Jure* 340, while interesting, may not be of much help for present purposes. Their debate was about whether a business trust which had more than 30 trustees was not carrying on business contrary to s 30 of the 1973 Act. In view of omission of the magic number of twenty members from the Companies Act of 2008 as well as the fact that a trust must be created in terms of a trust deed which must be registered with the Master of the High Court and also that it is inconceivable to have a trust having so many trustees, it is submitted that the issue is not live at all and can safely be disregarded. Moreover, a deregistered company would not have a trust deed or any of the parties to a trust.

association having more than twenty members from seeking gain for itself or its members unless it was registered or was exempted from registration in terms of subsection (2). All these various alternatives have already been considered.

It is submitted that section 30(1) was not aptly worded since it appeared to embody two ideas, one of which was unfortunately not so well expressed. The section would seem to have been intended to require registration for all companies, associations, syndicates, partnerships that carried on business and had as their objective the acquisition of gain. This, it is submitted, appears to have been the first and main objective of the section. The other objective of the section, a secondary one by the way, appears to have been a desire to limit the number of members of a partnership to twenty, unless an exemption was given. The secondary objective of the section is treated fairly well in textbooks whenever the question of the number of members of a partnership arises[398] and in fact originated from section 30(2) which provided that the provisions of section 30(1) did not apply with reference to the formation by persons qualified to carry on organised professions which were designated by the Minister of Trade and Industry by notice in the Government Gazette of any association, syndicate or partnership for the purpose of carrying on such profession and / or combination of such professions. The result was that because of the exception in subsection (2), partnerships, associations or syndicates of persons operating in designated professions could have more than twenty members without registering their association as a company.

Nevertheless in the scheme of things the above-mentioned two ideas underlying section 30(1) were eventually rolled into one, and especially by section 4*bis* of the 1926 Act, during which process the first objective was visibly obscured if not almost entirely lost. As a result the section took a form that required registration of an enterprise only if it had more than twenty members. If not, no registration was required although in terms of section 31 the enterprise could not be a legal entity.[399] A company, association, syndicate or partnership

398 Cilliers and Benade para 3.09; Hahlo's *South African Company Law through the Cases: A Source Book* (1999) 43 and Beuthin's *Basic Company Law* (2000) 12 note 1.

399 In terms of s 31 such a company, syndicate or association would, however, remain a mere association of persons without legal personality. As Kunst, Delport and Vorster 52(1) put it: "The purpose of s 31 is to deny corporate personality to such an association if formed for the stated purpose unless it is registered or formed as envisaged by the section".

which did not have more than twenty members did not need registration under the Companies Act of 1973, or some other law it would seem, in order to carry on any business that had as its object the acquisition of gain for itself or its members. That is what the section (apparently) provided for. It was particularly in the case of a partnership, where registration never was (and still is) not required,[400] that the application of the section was made even more palpable. Wessels JA made this point abundantly clear in *Morrison v Standard Building Society*[401] when he said: "associations, however, which were formed before these Acts[402] are not affected by this provision[403] ...". As authority for the proposition the learned Judge of Appeal referred to *Shaw v Simmons*.[404]

It is submitted that a company, association, syndicate or partnership consisting of not more than twenty persons and which was not registered was not affected by section 30 even though it carried on business that had as its object the acquisition of gain by itself or its individual members. Such association was, however, not problem-free. A major problem that it faced was one of classification. Just what exactly was such an association? Quite obviously it could not be viewed as a sole proprietorship since the words "association, syndicate or partnership" suggested that the legislature had in mind an association having more than one member. Again it could not be a company without registration in terms of the Companies Act or some other law unless it was formed in pursuance of Letters Patent or Royal Charter. Could it be a partnership, syndicate or association of persons without legal personality,[405] a joint venture etc? Since in essence the association was more akin to a partnership than anything else, this being so irrespective of what the members might have called it, it is

400 Leaving aside the question of professional partnerships which are one way or another affected by laws governing particular professions where registration will invariably be required to practise the particular profession.

401 1932 AD 229 238.

402 Companies Act 31 of 1909 (Transvaal) and Companies Act 46 of 1926.

403 Section 4*bis* of the Companies Act of 1926, which required registration of companies, associations etc having more than twenty members if their object was the acquisition of gain.

404 12 QBD 117.

405 Although s 30 and s 31 of the 1973 Act mentioned a syndicate or association of persons without legal personality, it would appear that the only viable possibility was in fact a partnership, particularly if one took into account the provisions of s 30(2) of the Act which dealt with circumstances in which a syndicate, association or a partnership could have more than twenty members.

submitted that the presence of all essentials of a partnership would put paid to any possible argument against the legality of such organisation. It would therefore, on satisfying all the essentials of a partnership, amount to such. In that event all that was needed to carry on business without hindrance was a licence rather than registration (incorporation). However, the problem would still remain that if the association did not satisfy the requirements for a partnership it would not qualify as such.

Reading through the cases one thing that becomes abundantly clear is that it was the number of members that raised the question of possible non-compliance with section 30 of the Companies Act of 1973. This becomes even more evident from such cases as *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd*[406] where the membership of an association reached twenty one at one stage although it later fell below that number, this in fact being the position at the time of the institution of the proceedings. Nevertheless the court held that section 4*bis* of the Companies Act of 1926[407] applied, this resulting in the association remaining illegal.

A deregistered company not having more than twenty members could not, it is submitted, be an association, syndicate, partnership, joint venture etc since there was no intention on the part of the members who continued carrying on the business of the erstwhile company to do so as an association, syndicate, partnership, joint venture etc. Moreover, those members would normally not have applied for a licence to conduct business as a deregistered company, assuming that they could lawfully conduct the business of the former company in the first place. If, on the other hand, the members were so interested there was nothing that stood in their way in forming an association, syndicate, partnership, joint venture etc, applying for a business licence and then carrying on a business which had as its purpose the acquisition of gain but until they did so, that was certainly not the position. There is nothing to show that deregistration on its own and without more converted the erstwhile company

406 1938 CPD 199.

407 46 of 1926. This section was the equivalent of s 30 of the Companies Act of 1973 and now s 8(3) of the Companies Act of 2008.

into an association, syndicate, partnership, joint venture etc and definitely not in South African law.

The issues which arose under section 30 of the 1973 Act are still applicable today save for this one difference, namely that the issue of more than twenty members is no longer relevant. Section 8(3) of the 2008 Act requires every association of persons which is formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members to be registered as a company in terms of the Act unless it is formed in terms of another law or was formed in terms of Letters Patent or Royal Charter. Unlike section 30 of the 1973 Act, section 8(3) applies to every association irrespective of the number of its members. This means that the very same old question of categorisation of the association as discussed above under the various subheadings arises and obviously leads to the same result.

4 4 3 6 11 A deregistered company that carries on commercial activities is a "phantom"

Although section 30(1) provided that no association consisting of more than twenty persons could be formed for the purpose of gain unless it was registered, it did not state what was to happen if such an association was formed, which issue was noted by Wessels JA in *Morrison v Standard Building Society*.[408] It cannot be over-emphasised that in terms section 8(3) of the Companies Act of 2008 the issue is simply whether the association is registered or not and not also how many members it has.

Whether looked at from the angle of section 30(1) of the Companies Act of 1973, section 8(3) of the Companies Act of 2008 or the latter's direct predecessor, namely section 31 of the Companies Act of 1973 such a company, association, syndicate or partnership is illegal and thus disappears from the ken of the law. It ceases to exist and accordingly becomes a phantom which cannot revive. As it is commonly said the position is "once dead,

408 1932 AD 229 238.

always dead"[409] which must be true since the "association as a phantom; it has no legal existence."[410] The position was conveniently summarised by Goldin J in *Wakefield v A.S.A Seeds (Pvt) Ltd*[411] where his Lordship said:

> "The Hybrid Seed Association of Rhodesia, not having been registered and not being exempt from registration, is a prohibited association and rendered illegal under sec.7 of the Companies Act.[412] It cannot be recognised as having any legal existence ..."[413]

As long as gain is sought while the association is not registered the prohibition applies. The law is very clear in prohibiting any business that has as its object the acquisition of gain by the company, association, syndicate or partnership itself or by the individual members thereof if such company, association etc is not registered. A number of associations have been hit by the prohibition even though the gain sought vested in their members rather than the associations themselves.[414] Worse still in a few cases the gain sought for members of the association was an indirect one in that the association merely played a facilitating role, it being the responsibility of the individual members to make use of the positive environment created by the association and seek gain for themselves. Once again the courts held that in such a situation registration in terms of the law was a requirement for the validity of the commercial activities of the association. Such a situation arose in *Gaming Association of SA Gauteng Division and Another v Minister of Safety and Security*[415] where the only business that the association ever carried on was the "enforcement and protection of its members' rights and interests, negotiating for the acceptable dispensation on their behalf and the

409 *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 208.

410 *R v Twala* 1952 2 SA 599 (A) 606D, which was quoted with approval by Wunsh J in *Gaming Association of SA Gauteng Division v Minister of Safety and Security* 1996 4 All SA 336 (W) 340f. For reference to such an association as a "phantom" see also *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 208, 209.

411 1976 4 SA 806 (R).

412 Chap 223 (Rhodesia). That was the equivalent of s 30 of the Companies Act of 1973.

413 *Wakefield v A.S.A Seeds (Pvt) Ltd* 809H.

414 *South African Flour Millers' Association v Rutowitz Flour Mills Ltd* 1938 CPD 199; *Gaming Association of SA Gauteng Division v Minister of Safety and Security* 1996 4 All SA 336 (W); *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A).

415 1996 4 All SA 336 (W) 340e.

acquisition of rights and concessions for them." The court held that the association was a phantom which had no existence in that it carried on business illegally without registration as required by section 30 of the Companies Act of 1973.[416] A similar decision was reached in *Mitchell's Plain Town Centre Merchants Association v McLeod*[417] where the business carried on by the association amounted to no more than promoting the business centre occupied by its members in order to attract more potential customers and patrons for those members. It was held that the association was acting as a sort of publicity agent for the centre and thereby made it its business to improve the business of its members. To do this lawfully the association was held to have needed compliance with section 30 by way of registration.

The prohibition contained in section 30 of the Companies Act of 1973 Act, and now section 8(3) of the Companies Act of 2008, must, however, be put in its proper perspective since its underlying purpose was to prevent the mischief arising from trading undertakings being carried out by large fluctuating bodies with the result that persons dealing with them do not know with whom they are contracting.[418] Thus if the business carried on by the association, syndicate, company or partnership did not have as its objective the acquisition of gain by the association, syndicate etc or its individual members but something else, for example, the protection of the environment, including the preservation of the wetland, fauna and flora, the quality of the water, the value of land together with the value of adjacent property, as was the case in the *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*[419] the section did not apply. Consequently, no registration was necessary and the association could legally carry on its non-commercial activities.

Although the section prohibited the carrying on of a business that had as its object the acquisition of gain, over time the courts modified that requirement by saying that only the

416 As a matter of fact the question of illegality of the association was raised by the court *mero motu* - 338j.

417 1996 4 SA 159 (A).

418 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) 716A; *Smith v Anderson* [1880] 15 ChD 247 (CA) 273; *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A) 169I-170B.

419 1999 2 SA 709 (SCA).

acquisition of gain that formed the main object, as opposed to an ancillary object of the company, syndicate, association, partnership etc was affected.[420] Thus an organisation to which the acquisition of gain formed an insignificant part and was merely incidental to its main object was not rendered illegal by the mere fact of its members being in excess of the specified number, as was required by section 30. The insignificance and triviality of the object remained, however, a matter of degree.[421]

It should be noted that cases dealing with violations of section 30 were mostly confined to voluntary associations while hardly ever involving companies. This had to be so as in the vast majority of cases gain was sought for the individual members rather than the association itself. It is nevertheless submitted that a deregistered company having more than twenty members was prohibited by the section if the members of the erstwhile company carried on business that had as its main objective the acquisition of gain supposedly for the deregistered company or the members individually. This must be so since it was argued above[422] that a deregistered company is neither a voluntary association, some other association, whatever exactly that might be, a partnership, company, syndicate, joint venture nor anything of the sort.

In the past if a deregistered company did not have more than twenty members, section 30 was inapplicable although there would always be the problem of categorisation in that for lack of the necessary intention on the part of those members, and particularly the lack of external manifestation of such intention, to qualify it an association, syndicate, partnership etc the issue became one of its precise legal nature. Moreover, there would ordinarily also be a lack of the necessary licence to carry on business that had as its object the acquisition of gain in the form in which business was being conducted by the deregistered company, whether one looked at the acquisition of gain as being that which was sought by the

420 *South African Flour Millers' Association v Rutowitz Flour Mills Ltd* 1936 CPD 199 205; *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A) 168I-J; *Carlysle & Silloth Golf Club v Smith* [1913] 3 KB 75; Bamford 119; Lawsa para 454.

421 *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A) 158J.

422 See points 4 4 3 6 1 – 4 4 3 6 8 above.

deregistered company itself, which would be improbable as it was no longer in existence and therefore unable to harbour any intentions or perhaps only by the members who continued carrying on the business.

Presently, although in terms of section 8(3) of the Companies Act of 2008 the matter is approached from a different angle, the sole issue being whether the association is registered or not and as already indicated not also whether it has more than twenty members, the result is nevertheless the same as that which obtained under section 30 of the Companies Act of 1973. Not being registered, a deregistered company will, in terms of section 8(3), not qualify as a company or body corporate. It is said that the purpose of the direct predecessor of section 8(3), namely section 31 of the Companies Act of 1973, was to deny corporate personality to an unregistered association whose purpose of carrying on business was the acquisition of gain.[423] The wording of section 8(3) of the Companies Act of 2008 Act being similar to that of section 31 of the Companies Act of 1973, it is submitted that the same purpose of section 31 is now also that of section 8(3). Invariably, this begs the same old question, namely if in terms of section 8(3) a deregistered company whose purpose is the acquisition of gain is neither a company nor other body corporate, what is it? Quite frankly, absent registration, a deregistered company can only pursue gain illegally should it carry on any business unless it converts into an association that pursues a goal other than gain and satisfies the usual requirements for such an association.

4 4 3 6 12 A deregistered company ceases to exist as a legal entity

Deregistration is a process which is used to end the corporate existence of a company.[424] It is a reversal of the incorporation of the company which under the Companies Act of 1973 was effected in terms of section 64(1) when registration of the memorandum and articles of a

423 Kunst, Delport and Vorster 52(1). See also Delport Henochsberg on the Companies Act 71 of 2008 vol 1 (2014) 52(2) where that comment is made with reference to s 8(3) of the Companies Act of 2008 in particular.

424 Van Dorsten *South African Business Entities* (1993) para 3 17 1; Williams "An Agent's Liability When Acting for a Non-existent Principal" 1990 *SALJ* 10; Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 612.

company took place, during which time the Registrar of Companies endorsed on those documents a certificate under his hand and seal that the company had been duly incorporated, from which date the company became a body corporate as provided for in section 65(1). Since in terms of section 1(1) of that Act deregistration was defined to mean the "cancellation by the Registrar of the registration of the memorandum and articles of the company" the effect of deregistration was the exact opposite of registration as provided for in sections 64(1) and 65(1). In other words, upon deregistration a company ceased to exist[425] as it is now settled law that deregistration puts an end to the existence of the company. [426]

Under the Companies Act of 2008, although the form of both registration and deregistration may appear different from that which obtained under the Companies Act of 1973, the substance is nevertheless essentially the same. Registration of a company takes place in terms of section 13(1) and (2) which require the filing of a Memorandum of Incorporation and the Notice of Incorporation in the prescribed manner and form with the Companies and Intellectual Property Commission. If the Commission is satisfied that there is compliance with the Act it is required in terms of section 14(1) to issue and deliver to the company a registration certificate which, in terms of section 14(4), serves as conclusive evidence that all the requirements for incorporation of the company have been complied with and further that the company is incorporated as from the date, and the time, if any, stated in the registration certificate. Deregistration, which is a reversal of the registration process, takes place when the company's name is removed from the companies register and is done in terms of section 82(2).

Because of the sheer volume of decisions involved, and the consistency with which they emphasise the principle, it can be accepted as settled law that a deregistered company does indeed cease to exist. What is not so free from doubt though is the precise meaning of

425 *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 376H-377C; *Village Freezer t/a Ashmel Spar v C A Focus CC* 2012 6 SA 80 (ECG). As was shown in para 4 2 above a number of authorities hold that a deregistered company "no longer exists", "does not exist", "is non-existent", "ceases to exist", "not in existence" "is no longer in existence" etc.

426 *Fintech (Pty) Ltd v Awake Solutions (Pty)* Ltd 2013 1 SA 570 (GSJ); *Miller v Nafcoc Investments Holding Co Ltd* 2010 6 SA 390 (SCA) para 11; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty)* Ltd 1973 3 SA 548 (W) 549C.

the cessation of such existence. However, since there are a few possible meanings of "cessation of existence" lurking beneath the surface of what one would have thought was a fairly simple and straight forward statement, one has to accept that there is enough latitude for divergence of opinion. As Williams[427] correctly points out, deregistration can be seen as implying that a company ceases to exist altogether or merely that it affects the company's continued existence in some less drastic way.

4 4 3 6 13 Cessation of the existence means the end of the "legal personality" of a company

There is a view, which enjoys judicial support, to the effect that upon deregistration a company ceases to exist as a legal person but apparently continues to exist in some other form.[428] The theory is in essence a half measure between two opposite sides, the one being the classic unincorporated association theory of Cilliers and Benade which says that upon deregistration a company automatically converts into an unincorporated association without legal personality and as the learned authors put it "on deregistration the association of persons sustaining the company merely loses its corporate personality".[429] The other view is the more modern approach which holds that deregistration means the total cessation of the existence of a company, just as is the case upon dissolution of a company.[430] According to Sharrock[431] "the effect of deregistration ... is that the privilege of juristic personality is withdrawn. The

427 Williams 1990 *SALJ* 610 612.

428 See Benade *et al Entrepreneurial Law: Incorporating The New Companies Act Manual* – Special Edition (2009) para 36.71. The view that a deregistered company becomes an association without legal personality is also shared by Sharrock, De la Rey, Van der Linde, Smith *Hockly's Insolvency Law* (1996) para 23.14; Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 396 and Mohapi "The effect of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012). See also *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) and *Income Tax Case 1306* (1980) 41 SATC 139.

429 Cilliers and Benade *Corporate Law* (2000) para 30.06.

430 See para 4 2 above. It will be recalled that according to *Bruun v Katz Drug Co Inc* 173 S.W. 2nd 906 (1985) 909 dissolution of a company implies the "termination of its existence and its utter extinction and obliteration as an entity or body".

431 Sharrock *Business Transactions Law* (2011) para 23.14.

entity that remains is simply an association of persons with no juristic personality." This statement, it is submitted, reflects the classic unincorporated association theory.

The possibility that there could be something existing after and in the place of a deregistered company which has thereby ceased to exist was entertained by Flemming J (as he then was) in *Bowman v Sacks*[432] when he said:

> "With the cessation of existence, there is also an end to any corporate activity; acts thereafter done on behalf of the company would be 'acts of mere usurpation' ... It is not now relevant that consequences may flow from such further acts, eg the *ex-shareholders continuing in an unincorporated relationship* ..."[433]

The difference between the classic unincorporated association theory of Cilliers and Benade, as well as that of Sharrock and the more modern and modified unincorporated relationship approach of Flemming J is that under the former, deregistration is seen as a substantially different concept and procedure which is distinctly separate from dissolution, although some of the consequences of the two procedures do overlap. More significantly though deregistration automatically converts the former company into an unincorporated association of persons that lacks legal personality while under the latter deregistration is seen as a concept that is closely related to dissolution and in fact achieving the same result except that after deregistration it may occasionally happen that the former members of the company regroup and carry on business activities in which event same cannot be considered the activities of a non-existent company.

It is conceded though that the distinction between the two theories is a fine and hair-splitting one, there being enough room for much confusion. This notwithstanding, it is submitted that it is still possible to differentiate between the two, even if only after much effort and persuasion. The difference between the two becomes clearer when one looks at the

432 1986 4 SA 459 (W).

433 *Bowman v Sacks* 463H-I. My emphasis.

treatment to be accorded to the property of a deregistered company, this being the question of *bona vacantia*, a matter which is discussed elsewhere.[434]

4 4 3 6 14 The pragmatic approach: Cessation of the existence of a company means death of the company

The unincorporated association of persons theory of the Van Wyk de Vries Commission which is followed by Cilliers, Benade and Sharrock and was applied by Melamet J in *Income Tax Case* 1306[435] does not enjoy much judicial support. If anything, the opposite appears to be the case. The prevailing view these days is that like it was in the past, in the old days of "striking the company off the register and dissolving it", a deregistered company is like a dissolved one even though the word "dissolve" did not appear in section 73 of the Companies Act of 1973. However, the word "dissolution" features prominently in sections 82 and 83 of the Companies Act of 2008. It is said that just like dissolution, deregistration terminates the existence of a company for all purposes in the same way as the life of a natural person who dies comes to a complete end.[436]

The early leading case which settled much of the debate concerning the effect of deregistration on the very existence of a company as well as the aftermath of such an occurrence is *Ex parte Jacobson: In re Alec Jacobson Holdings*[437] where in a well-considered judgment Goldstone J (as he then was) stated a few useful general principles. Because of this very important case Blackman is able to proclaim the position with full confidence as follows:

> "The courts have rejected the proposition that, while on dissolution after winding-up the company's existence is terminated for all purposes, on deregistration a company, although it ceases to exist as a

434 Chapter 7.

435 1980 42 SATC 139 145.

436 *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859D. For other cases equating dissolution with the death of a natural person see para 4 2 above.

437 1984 4 SA 368 (W).

legal persona, will, if its business is still carried on, continue to exist as an association [whose members are personally liable for the debts of the company]."[438]

After referring to the views of Cilliers and Benade, those of the Van Wyk de Vries Commission together with Melamet J's statements and decision, including the authorities there cited, Goldstone J held:

"... the legal position created by the deregistration of a company under s 73 of the Act, is no different, with regard to corporate personality or corporate existence, to that which obtained in respect of a company deregistered under the provisions of s 199 of the 1926 Companies Act (46 of 1926)."[439]

Section 199 (3) of the above-mentioned Act, it will be recalled, provided that "the name of the company ... will ... be struck off the register and the company will be dissolved". Under the Companies Act of 1926 there was no distinction between dissolution following upon a winding-up of the company and dissolution after the name of the company was struck off the register. In both instances dissolution terminated the existence of the company for all purposes, just as it did under section 419 of the Companies Act 1973. The position is no different under section 82(2) the 2008 Act which uses largely the same wording of "dissolution" and "remove the company's name from the companies register".

The similarity of the effect of dissolution after winding-up and dissolution consequent to striking the name of the company off the register was dealt with among others in *Ex parte Sengol Investments (Pty) Ltd*[440] where describing the latter procedure and its effect Van Dijkhorst J said:

"The method followed by the directors and shareholders of the company to liquidate the company seems to have been an informal one falling outside the scope of s 160 of Act 46 of 1926 which was

438 *Lawsa* para 90. The case is also celebrated by Williams "An Agent's Liability When Acting for a Non-existent Principal" 1990 *SALJ* 10 17 who writes: "deregistration causes the company's existence to come to an end and is therefore equivalent to dissolution". See also his other article - Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 612.

439 *Ex parte Jacobson: In re Alec Jacobson Holdings* 377D.

440 1982 3 SA 475 (T).

> then in force and which provided for the voluntary winding-up of a company. The method followed was probably faster and cheaper and effected the same result, namely that the company was dissolved (s 199(3) of Act 46 of 1926)."[441]

It is evident therefore, at least according to Goldstone J, that the change in phraseology from "struck off and dissolve" under section 199(3) of the Companies Act of 1926 to "deregistration" under section 73(5) of the Companies Act of 1973 did not bring about a change in substance. The effect of both deregistration under section 73 and dissolution in terms of section 419 of the Companies Act of 1973 was the same, just as "struck off and dissolve" in terms of section 199(3) and dissolution under section 154(1) of the Companies Act 1926 had that effect.[442] The position is no different under section 82 of the Companies Act of 2008 given usage of the word "dissolution" and of the phrase removal of the "company's name from the companies register".

The equation of deregistration with dissolution was also made in the subsequent case of *Bowman v Sacks*[443] where Flemming J (as he then was) said:

> "Upon dissolution of a company it disappears as a legal entity. A similar result may arise for other reasons eg by deregistration, where legal personality falls away from the association of persons perhaps without any liquidation of company affairs."[444]

Recent decisions underscore this point. Reading a unanimous decision of the Supreme Court of Appeal in *Miller v Nafcoc Investment Holding Company Ltd*[445] Cloete JA held:

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441 *Ex parte Sengol Investments (Pty) Ltd* 476E.

442 In *Ex parte Montrose Exploration Co Ltd* 1918 TPD 179 the company was "dissolved". As a result the court dealt with the consequences of that dissolution. However, that was not a dissolution following upon winding-up but one resulting from striking the name of the company off the register (ie deregistration).

443 1986 4 SA 459 (W).

444 *Bowman v Sacks* 463G.

445 2010 4 All SA 44 (SCA), 2010 6 SA 390 (SCA), 2010 ZASCA 25 (25 March 2010).

> "Deregistration, on the other hand, puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death. Once there has been deregistration there is obviously no purpose in a corporate post mortem and no-one would have the authority to conduct one."[446]

The *Nafcoc* case was quoted with approval by Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd*[447] where the court pointed out the difference between the death of a human being and that of a company by deregistration as being that unlike a natural person, a deregistered company was amenable to resurrection under section 73(6) of the Companies Act of 1973, which finds equivalence in section 82(4) of the Companies Act of 2008.

The equation of the effect of the two processes is seen by Larkin[448] as a "practical approach and, for that, welcome." The position is therefore that deregistration and dissolution have the same effect on the existence of a company even though their procedure and some of the consequences, especially in terms of the repealed Companies Act of 1973, may be different. It is therefore submitted that Maryke is correct to say:

> "Section 83(1) of the new Act [of 2008] states that a deregistered company (and thus a close corporation) must be treated on the same basis as an entity whose winding up is complete. The entity is thus dissolved. Dissolution is the final step that consigns a juristic personality to oblivion."[449]

446 *Miller v Nafcoc Investment Holding Company Ltd* para 11.

447 2012 3 All SA 183 (WCC).

448 Larkin "Companies" in 1984 *Annual Survey of SA Law* 336.

449 Maryke "The dangers of deregistering your company at CIPC" http://ensass.co.za/news/?p=74 posted 27 June 2012 (accessed 28-01-2013).

4 5 THE RELATIONSHIP BETWEEN DEREGISTRATION, DISSOLUTION AND WINDING-UP

As already indicated deregistration is a reversal of the incorporation of a company, a process which was effected by the Registrar of Companies in terms of the Companies Act of 1973 and now the Companies and Intellectual Property Commission under the Companies Act of 2008. Under the Companies Act of 1973 deregistration involved cancellation of registration of the memorandum and articles.[450] In terms section 82(2) of the Companies Act of 2008 deregistration means removal of the company's name from the companies register.

Although seemingly simple and straight forward in that it does not among others generate much controversy, dissolution is apparently a more obscure process. Apart from being excluded from the defined terms and phrases under section 1 or anywhere else in the 2008 Act for that matter, this being a continuation of the approach under the 1973 Act, dissolution is very briefly mentioned in sections 82, 83 and 115 of the Companies Act of 2008. There is, however, no mention of precisely what happens when a company is dissolved. In the context of winding-up of a company section 82(1) provides: "The Master must file a certificate of winding-up in the prescribed form when the affairs of the company have been completely wound up." In terms of section 82(2), upon receiving a certificate of winding up the Commission must "record the dissolution of the company in the prescribed manner" and remove the company's name from the companies register. Section 82(2) thus requires the Companies and Intellectual Property Commission to "record the dissolution of the company in the prescribed manner" without indicating precisely what has to be done. It is submitted that "recording the dissolution of a company" simply means receiving, noting and keeping record of the fact that winding-up has been completed and as a result there is nothing left of the company. For that reason section 82(2)(b) requires removal of the name of the company from the companies register. This has to be so as there would, at that stage, be nothing left of the former company given that all its affairs would have been taken care of. For apart from this it is difficult to imagine what else could be taking place. Assuming that this is indeed so, it should not be a particularly difficult matter to accept that both

450 As per definition of deregistration in s 1(1) of the Companies Act of 1973.

deregistration and dissolution have the same effect on the existence of the company. After all, in essence the two processes are to a large extent similar.

Winding-up, on the other hand, is a process in terms of which the liquidator realises and liquidates the assets of the company, enforces its rights, settles its obligations, pays the claims of the creditors to the extent that the available funds will allow and eventually gives the members of the company a liquidation dividend, should there be surplus funds.[451] To use the language of section 82(1) of the 2008 Act winding-up results in the affairs of the company being "completely wound up" after which the company becomes an empty shell. In a winding-up it is the assets, rights and obligations of the company that are liquidated and disposed of. The process has no bearing on the existence[452] of a company which continues as if nothing has happened at all, except perhaps only in this respect, namely that the process is a fore-runner to dissolution.

Historically deregistration operated on the assumption that the company had no assets or liabilities[453] and accordingly no provision was made for the distribution of its assets or payment of liabilities.[454] In the winding-up procedure provision is made for the liquidation of assets and settlement of liabilities by the liquidator. If a deregistered company turns out to have had assets which have not been dealt with, they become *bona vacantia* and as such vest in the State.[455] In a winding-up should assets not dealt with by the liquidator be discovered, the liquidator's final account will have to be re-opened.[456] Property cannot be *bona vacantia*

451 *Lawsa* para 98.

452 A company ceases to exist when it is finally dissolved - *Commissioner of Taxes v "T" Company* 1957 4 SA 90 (SR) 94F-G; *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 17.

453 See s 82(3)(b)(ii)(bb) of the Companies Act of 2008.

454 Williams 612.

455 *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 4 SA 372 (W); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T).

456 Section 408 of the Companies Act 1973 was of some help even though it allowed re-opening of the account before the liquidator commenced with the distribution. The Companies Act of 2008, which deals with winding-up of solvent companies only, and not also of insolvent companies, does not have provisions dealing with re-opening of accounts. Hopefully, future legislation dealing with winding-up of companies will have such provisions.

after winding-up but before dissolution as the company is still in existence and is therefore the owner.

Lack of publicity in the deregistration process is such that it is possible in some instances for an active company to be erroneously deregistered without anyone being aware of it,[457] and this has already occurred on a few occasions.[458] In a winding-up the company must either initiate the proceedings by way of voluntary winding-up or at least be a party to them in the case of compulsory winding-up. There is therefore no room for winding-up by default. For its part dissolution comes into play only after the completion of a winding-up of the affairs of the company.[459] As is the case upon deregistration, any property of the dissolved company which was not distributed to the creditors or shareholders before dissolution becomes *bona vacantia* and therefore vests in the State.[460] Because dissolution after winding-up involves the liquidator who acts on behalf of the company and keeps in touch with all interested parties, and also because when the affairs of the company have been

457 Williams 612-613.

458 *Ex parte Ziman and Others* 1970 1 SA 164; *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 4 SA 372 (W). In *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty)* 2012 4 SA 484 (WCC), 2012 3 All SA 183 (WCC) 487 fn 2 Binns-Ward J described as "puzzling" the apparent ignorance by the directors of their company's deregistration. This was more so as in terms of s 73(5) of the 1973 Act the Registrar of Companies was required to give notice of the company's deregistration and the date thereof in the prescribed manner. Furthermore, in terms of s 73(7) a notice under the section was required to be addressed to the company at its registered office, its postal address and to the care of the directors or officers and the auditor of the company and could, if there was no director, officer or auditor of the company whose name and address was known to the registrar, be sent to each of the persons who signed the memorandum of the company, at the address mentioned in the memorandum. Knowledge of deregistration of the company was also denied in *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* 2012 ZAWCHC 36 (24 April 2012) para 9. Again, in *Boseme v Rogers* 2011 ZAGPJHC 174 (23 November 2011) para 2 it was alleged that neither the close corporation nor its members received any notification from the registrar of companies declaring the close corporation deregistered. In *Miller v Nafcoc Investment Holding Company Ltd* 2010 4 All SA 44 (SCA), 2010 6 SA 390 (SCA), 2010 ZASCA 25 (25 March 2010) a Commissioner was appointed to enquire into the affairs of a company in terms of s 418 of the 1973 Act, the parties not being aware that the company in question had since been deregistered while in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) the fact of deregistration of a company was established on the date of hearing of a matter in which it was involved. Again in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GST) a very active company was deregistered for failure to file annual returns and as soon as its only director and shareholder found out he immediately took steps to have deregistration cancelled in terms of the Companies Act of 2008. The apparent ignorance of deregistration by the director of a company was described by Henney J *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) para 38 as "difficult to comprehend".

459 For dissolution without winding-up see s 115(9)(d) of the Companies Act of 2008.

460 *Rainbow Diamonds (Edms) Bpk v Sanlam* 1984 3 SA 1 (A) 11-12 and authorities there cited.

completely wound up the liquidator gets a copy of the certificate to that effect from the Master, the danger of dissolution by default is effectively ruled out.

4 6 OVERLAP BETWEEN DEREGISTRATION, DISSOLUTION AND WINDING-UP

Winding-up is one step towards but does not itself achieve what deregistration and dissolution attain, namely the termination of the existence of a company as a legal entity. Many a times one comes across confusing descriptions of a number of situations where the wrong label is used to describe a totally different scenario. This was particularly so in the past when the legislature referred to a company as having been "dissolved" both when this was the result of striking the name of the company off the register and also after completion of the winding-up process. The same problem is very much likely to re-surface because of the wording of section 82(2) of the present Companies Act of 2008.

Sometimes one encounters unhelpful situations such as this one: "by a special resolution passed at a meeting of shareholders on the 8th September, 1924, Rogerston Collieries Ltd went into voluntary liquidation and its name was removed from the register of companies", these being the words of Cillie J in *Ex parte Marchini*.[461] Without further investigation it is not easy to tell from the description whether there was deregistration (struck off the register and dissolved) or dissolution, the phrase "voluntary liquidation" having been used in a rather loose sense. If, for example, the company has assets to dispose of before the termination of its existence, deregistration, although achieving the same ultimate result as dissolution which follows upon a winding-up, would not be the proper procedure to follow. Because deregistration is comparatively cheap and quick, shareholders and directors are often tempted to resort to it. This, however, is not always the proper thing to do as the case of *Commissioner of Taxes v "T" Company*[462] illustrates. In that case:

461 1964 1 SA 147 (T) 149A-B.

462 1957 4 SA 90 (SR).

> "The company thought that it could achieve a winding-up by a different method, by the simple method of applying to the Registrar to have the name of the company struck off the register as a defunct company after it had divested itself of all its assets. What it did, in effect, was to wind itself up in an irregular manner ..."[463]

In the event, because of the wrong method of terminating the existence of the company chosen in the above case, the desired tax advantages were not forthcoming. That was so because in terms of the Income Tax Act[464] deregistration and winding-up had, and still have, different tax consequences. The capital component of a dividend, commonly known as liquidation dividend,[465] is not subject to income tax[466] if the company is being wound up. In the case of dividend paid other than in the process of a winding-up of the company, such as when there is deregistration of the company, the whole dividend received by or accruing to the shareholders is subject to income tax, there being no distinction between capital and revenue components of the dividend involved. This lesson the taxpayers learned the hard way in the cases of *Commissioner of Taxes v "T" Company*[467] and *Income Tax Case* 1306.[468]

It is important, and this solves many problems, to make a clear distinction between winding-up, deregistration and dissolution and then keep it that way since even though at the end of it all the three do have a common denominator, which is the termination of the existence of a company, their purposes and some of their consequences are different.[469] It is indeed advisable to avoid unnecessary confusion. Regrettably, far from doing so as the Companies Act of 1973 did by drawing a very clear line of demarcation between deregistration and dissolution, the Companies Act of 2008 goes in the opposite direction. In section 82(2) the Companies Act of 2008 simply blurs the distinction between the two by

463 *Commissioner of Taxes v "T" Company* 94B-C.

464 Act 58 of 1962.

465 See *Commissioner of Taxes v "T" Company* 1957 4 SA 90 (SR) 92A, 94F, 94H, 95A and 95H etc.

466 This is provided for in the definition of "dividend" in s 1 of the Income Tax Act 58 of 1962.

467 1957 4 SA 90 (SR).

468 1980 42 SATC 139.

469 *Lawsa* para 88.

providing that the Companies and Intellectual Property Commission must "record the dissolution" and as a result deregister it by removing its name from the companies register. It is submitted that blurring the distinction between the two separate processes is not particularly helpful. That distinction was of particular significance in the past as the Companies Act of 1973 made a clear line of demarcation between deregistration and dissolution, with the result that after a complete winding-up of the affairs of the company, the next step was dissolution and not deregistration of the company. In those circumstances, deregistration could be set aside as having been improperly made.[470]

In an unrelated matter on incorrect labelling the headnote in *Akromed Products (Pty) Ltd v Sulivan*[471] reads: "Contract concluded after deregistration of company under s 199 of the Companies Act 61 of 1973." This is unfortunately not correct since deregistration took place under section 73 of the 1973 Act. Section 199 of the Act dealt with a totally different matter, namely, the requirements for a special resolution. If anything, it was section 199 of the 1926 Act which dealt with striking off the name of a defunct company from the register of companies. The message here is very clear, namely beware of wrong labels as they can be both misleading and confusing. Accordingly, one should be wary of wrong labels which have a tendency to mislead.

4 7 SUMMARY

It is submitted that Goldstone J's decision in *Ex parte Jacobson: In re Alec Holdings (Pty) Ltd*[472] is correct. It follows therefore that deregistration and dissolution have the same effect on the existence of a company, namely that the company ceases to exist. Moreover, the cessation of the existence of a company means its death, just like a natural person who dies.[473] This means nothing more or less than, to use the words of Commissioner Barrett in

470 *Fintech (Pty) Ltd v Awake Solutions (Pty Ltd* [2012] 3 All SA 664 (SCA) para 17.

471 1994 1 SA 673 (T).

472 1984 2 SA 372 (W).

473 *Bowman v Sacks* 1984 4 SA 459 (W) 462A-B; *Ex parte Montrose Exploration Co Ltd* 1918 TPD 179

Bruun v Katz Drug Co Inc[474] "the termination of its [company's] existence and its utter extinction and obliteration as an entity or body". It is submitted that the classic "unincorporated association of persons" theory of Cilliers, Benade and Sharrock is not correct. Moreover, there is lack of sufficient judicial support for it.

It is nevertheless submitted that the position would have been better had the "unincorporated association of persons" theory been part of South African law. This would among others have solved the problem of a company which had been deregistered without the knowledge of interested parties such as shareholders, directors and customers who in all innocence and good faith continued doing business as usual. As things stand now the prejudice to third parties concluding a transaction with persons acting on behalf of a deregistered company is enormous. This must be so since nobody is bound by the contract thus concluded while at the same time there is nobody to recover either performance or compensation from. For now though suffice it to say that suggestions on possible solutions to the unsatisfactory state of affairs concerning deregistration will be made in the forthcoming chapters as each aspect of the process is considered.

As far as dissolution goes, although it is not defined in the current Companies Act of 2008 or any of its predecessors, one striking aspect thereof is that except for a few minor complaints such as the fact that it is now dealt together with deregistration as if the two are one and the same thing and also that it is required to be "recorded" without specifying how, it is nevertheless by and large a problem-free process. The main advantage of dissolution is that it is designed in such a way that in the normal course of events it would never take place without the knowledge of those who are in charge of the company and especially since in the context of a winding-up of the company the liquidator has, after completion of his task, to report to the Master who, in terms of section 82(1), is required to file a certificate of winding-up in the prescribed manner with the Companies and Intellectual Property Commission. Outside of a winding-up, that is in the event of a dissolution of a company taking place as a result of amalgamation or merger of companies in terms of section 115 of the Companies Act

181.

474 173 S.W. 2nd 906 909.

of 2008, the shareholders and directors are very much informed and involved with the result that the risk of a dissolution of the company taking place without their knowledge is effectively reduced to zero.

CHAPTER 5

Procedure and grounds for deregistration and dissolution of companies

5 1 INTRODUCTION

Both deregistration and dissolution of a company are administrative actions which were carried out by the Registrar of Companies under the Companies Act of 1973, and now by the Companies and Intellectual Property Commission under the Companies Act of 2008, to terminate the existence of a company in certain specified circumstances. Section 73 of the Companies Act of 1973 made provision for deregistration of a company by the Registrar if the company had failed, for a period of more than six months, to lodge an annual return in compliance with section 173 or if the Registrar had reasonable cause to believe that the company was not carrying on business or in operation. The section also specified the procedure to be followed.

Under the Companies Act of 2008 the grounds on which a company may be deregistered have been extended. Apart from deregistration on the ground that the company has failed to lodge an annual return or that it has ceased to carry on business as was the case under the Companies Act of 1973, the Companies Act of 2008 creates a few new grounds on which a company may be deregistered. For instance, in terms of section 82(1) a company can be deregistered when its affairs have been "completely wound up", in which case the Master of the High Court (the Master) is required to file a certificate of winding-up with the Companies and Intellectual Property Commission (the Commission). Upon receiving the winding-up certificate the Commission is required to record the dissolution of the company and "remove the company's name from the companies register". The section goes on to provide further grounds on which a company may be deregistered.

As far as dissolution is concerned, section 419 of the Companies Act of 1973 provided that when the affairs of a company had been completely wound up the Registrar had to "record" the dissolution of the company and publish notice thereof in the prescribed manner. The section also made provision for the regulation of related matters. In what is obviously blurring the distinction between deregistration and dissolution, section 82 of the Companies Act of 2008, as already indicated, provides for the filing of a certificate of winding-up with the Commission by the Master when the affairs of the company have been "completely wound up". Upon receiving such certificate the Commission is required to do two things, namely first to "record the dissolution of the company in the prescribed manner" and secondly, to "remove the company's name from the companies register". This has the result that a company is not only dissolved but must at the same time also be deregistered. The provisions of the Companies Act of 2008 therefore leave one with the impression that a "complete winding up" of the affairs of the company and its subsequent "dissolution" are not sufficient to bring about finality to the existence of a company as a legal entity in that the same company still has to be "deregistered" to complete the process.

However, in terms of such provisions of the Companies Act of 2008 as section 115(9)(d) there may be a merger or amalgamation of two or more companies resulting in the dissolution, without winding-up, of one or more of the companies involved. Without winding-up, the affairs of a company cannot be "completely wound up", the latter being a necessary pre-condition for recording the dissolution of the company in the prescribed manner and removing the company's name from the companies register as required by section 82. This being the case it should be obvious that the Companies Act of 2008 does create a few problems some of which, it is submitted, are totally unnecessary, particularly those which were not there in the past. One would have thought that the 2008 Act was enacted to solve rather than create problems.

The purpose of this chapter is to examine the grounds on which a company may be deregistered and / or dissolved, as well as the procedure to be followed. In this respect the differences existing between the approach of the Companies Act of 1973 and that of 2008 will be highlighted.

5 2 DEREGISTRATION PROCEDURE UNDER THE COMPANIES ACT OF 1973

5 2 1 Deregistration of a local company

Under the Companies Act of 1973 deregistration of a company was an administrative action[475] which did not involve the court but was instead carried out by the Registrar of Companies in terms of section 73. The section empowered the Registrar, if the company had failed for a period of more than six months to lodge an annual return in compliance with section 173 or if the Registrar had reasonable cause to believe that a company was not carrying on business or in operation, to send to the company by registered post a letter in which he or she inquired whether it was carrying on business or was in operation.[476] If the Registrar did not within a month after sending the letter receive any answer thereto or if he or she received an answer to the effect that the company was not carrying on business or was not in operation, he or she could publish in the prescribed manner and send to the company by registered post a notice indicating that at the end of a period of two months from the date of the notice the company would be deregistered unless good cause to the contrary was shown.[477] At the end of the two-month period or upon receipt from any[478] company of a

475 The issue was raised in *Boseme v Rogers* [2011] ZAGPJHC 174 (23 November 2011), which case dealt with deregistration of a close corporation rather than of a company, but this did not make any difference as the procedure for deregistration of both a company and a close corporation was largely the same. Moreover, the Registrar for both was also the same. There the argument was that as deregistration was an administrative act it followed that whether rightly or wrongly granted, it remained in place until it was reviewed and set aside. The court held that for the purposes of deciding the matter it was sufficient that the papers made an allegation that application would be made to court for an order reviewing and setting aside deregistration of the close corporation which, as an administrative action, was alleged to have been granted improperly without giving notice thereof to the corporation itself and its members.

476 Section 73(1) of the Companies Act of 1973. It should be noted that emphasis was on verifying if the company was carrying on business or was in operation rather than on whether it had lodged annual return. In practice the issue of non-lodgement of annual return presented no problem at all. A letter would simply be written to the company advising that it had not complied and that it had a period of two months within which to do so, failing which steps would be taken to deregister it. The current Companies Act of 2008 has elaborate provisions dealing with companies that fail to lodge annual returns.

477 Section 73(3). In respect of close corporations, similar provisions were found in section 26(1) – (3) of the Close Corporations of 1984, which provisions were described by Davis AJ in *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) para 10 as circumscribing the "power of the Registrar to deregister a corporation by laying down the specific grounds for

written statement signed by every director thereof to the effect that the company had ceased to carry on business and had no assets or liabilities,[479] the Registrar could deregister the company concerned unless good cause[480] to the contrary was shown. That was the position at the time of the repeal of the Companies Act of 1973 by the present Companies Act of 2008.

Before an amendment introduced in 2001 instead of reference to "registered post" the wording used was that of "certified post". Although largely serving the same purpose of traceability, "certified post", it should be borne in mind, is not the same thing as "registered post". Again, also before the amendment subsections (3) and (5) required publication of the notice to be in the Government Gazette instead of in the "prescribed manner".[481] The date of publication of the notice in the Government Gazette was deemed to be the date of deregistration of the company.[482]

5 2 2 Deregistration of an external company

Section 332 of the Companies Act of 1973, which dealt with deregistration of an external company,[483] provided that if the Registrar had reasonable cause to believe that an external

deregistration and prescribing the procedure to be followed for deregistration.

478 It is not clear why the word "any" was used instead of the more appropriate "the" or "concerned", the latter having been used in subsection (5) before its amendment by the Companies Amendment Act 35 of 2001 and the Corporate Laws Amendment Act 24 of 2006.

479 That the Registrar could accept at face value that a company which was once carrying on business or was in operation should suddenly have no assets or liabilities, without tendering a satisfactory explanation as to what happened to the assets in particular would seem curious.

480 Seemingly "good cause" to the contrary would not be much more than showing that the company was either carrying on business or was in operation.

481 "Prescribed manner" would be as prescribed by the regulations and would serve as an alternative to publication in the Government Gazette, such as for example publication on the Companies and Intellectual Property Registration Office (CIPRO) portal / website.

482 Section 73(5). Given the elaborate procedure and attempts to communicate with a company before it could be deregistered, the apparent ignorance by the directors of a company of its deregistration, where such allegation was made, would indeed be puzzling, as Binns-Ward J remarked in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 5 footnote 2.

483 An "external company" was defined in section 1 to mean a "company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for the purposes of this definition establishing a place of business shall include the acquisition of immovable property".

company had ceased to have a place of business[484] in the country, he had to send by registered post to the company at its postal address and at the address of its registered office, to the person authorized[485] to accept service on its behalf and to its auditor, letters requiring details of its place of business, if any.[486] If the Registrar did not within one month of sending the letters receive any answer thereto or if he received an answer to the effect that the company had ceased to have a place of business in the country, he was allowed to publish in the Government Gazette and also send to the company by registered post at its postal address and at the address of its registered office, to the person authorized to accept service on its behalf and to its auditor, a notice to the effect that at the expiration of a period of two months from the date of that notice the company would, unless good cause was shown to the contrary, be deregistered.[487]

At the expiration of the period of two months mentioned in the notice or upon receipt from the company of a notice advising that it had ceased to have a place of business in the country, the Registrar could, unless the company showed good cause to the contrary, deregister it.[488] Upon deregistering the company the Registrar was required to give notice thereof in the Government Gazette, the date of publication of such notice being taken as the date of deregistration of the company.[489] Thus, in the context of section 332 the deregistration process of an external company was fairly simple and quick.

484 A "place of business" was defined in section 1 to mean "any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office".
485 In terms of section 326(1) every external company was required to appoint and at all times have one or more persons resident in the Republic who was or were authorized by the company to accept on its behalf service of process and any notices required to be served on the company. In terms of s 322(1)(g) the name and address of that person had to be provided to the Registrar by notice in the prescribed form.
486 Section 332(2).
487 Section 332(3).
488 Section 332(4).
489 Section 332(4).

5 3 DEREGISTRATION OF A CLOSE CORPORATION

5 3 1 Position before coming into operation of the Companies Act of 2008

Before the amendment introduced by section 224(2) of the Companies Act of 2008 deregistration of close corporations was governed by section 26 of the Close Corporations Act of 1984[490] which in subsections (1) – (3) specified the procedure to be followed, that being essentially an abridged version of the procedure applicable to companies. Section 26(1) in particular provided, among others, that the Registrar of Close Corporations had to serve on the corporation at its postal address a letter by "registered post" in which the corporation was notified and informed that if the Registrar did not within 60 days from the date of the letter receive confirmation in writing that the corporation was carrying on business or was in operation it would be deregistered unless good cause was shown to the contrary.

The significance of informing the corporation by registered post before it could be deregistered was dealt with in *Boseme v Roger*[491] where members of the corporation who appealed against a High Court order declaring them personally liable for the debts of the corporation in terms of section 26(5) challenged its deregistration on the ground that neither the corporation nor any of its members received notice of intended deregistration either by certified or registered post and were therefore not accorded the opportunity to stave off the deregistration. A full bench of the South Gauteng High Court agreed and upheld the appeal. Claassen J held that for a corporation to be deregistered, section 26(1) had to be complied with. It was only when the hurdle of section 26(1) was crossed that the other provisions of the section dealing with personal liability of the members and restoration of registration of the corporation could come into operation. Without proper notice to a corporation served by the Registrar in terms of section 26(1) the rest of the section could not apply. That had to be so as it was only upon receipt of a section 26(1) notification that members of a corporation could defend themselves against deregistration. If no such notification was issued or received by the corporation, then similarly the members would be unable to defend themselves against the

490 Act 69 of 1984.
491 [2011] ZAGPJHC 174 (23 November 2011).

serious consequences of deregistration. Therefore, should the Registrar for whatever reason deregister a corporation without complying with section 26, that purported deregistration would be a nullity.[492]

The attitude of the courts was that it is neither unjust nor inconvenient to "exact a rigorous observance" of the provisions of section 26(1) regarding sending a letter to the corporation enquiring if it was carrying on business or was in operation.[493] The purpose of the letter was not merely to put the corporation on guard. Accordingly, the Registrar was expected to refer accurately to the wording of the section, to convey the correct information and ask correct questions to enable him to perform his function.[494] The purpose of the letter was threefold, namely: (i) to inform the corporation and its members of the possible impending deregistration and the consequences thereof; and (ii) steps to be taken to avoid deregistration as well as; (iii) to elicit a response from the members of the corporation regarding whether or not it was trading or in operation, had assets and liabilities with a view to assisting the Registrar to make a proper decision whether or not to deregister the corporation.[495] As a result, a letter which merely informed the corporation and its members that as the Registrar had reason to believe that the corporation was not carrying on business or in operation with the result that it was his intention to deregister it unless good cause to the contrary was shown within 60 days from the date of the letter but which did not advise the corporation and its members that deregistration could be avoided by showing that the corporation was carrying on business or was in operation, was held to be inadequate to justify deregistration of the corporation in *MB Barter and Trading (Pty) Ltd v Asbury*.[496] For that reason deregistration was set aside, this having the result that none of the consequences of deregistration followed.

Before its amendment by section 14 of the Close Corporations Amendment Act of 2001[497] section 26(1) provided that the letter sent by the Registrar had to be served on the

492 *Boseme v Roger* [2011] ZAGPJHC 174 (23 November 2011) para 9.
493 *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) para 22, quoting Maxwell *On the Interpretation of Statutes* (1969) 364.
494 *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) para 22.
495 *MB Barter and Trading (Pty) Ltd v Asbury* para 14.
496 [2012] ZAWCHC 177 (25 October 2012).
497 Act 22 of 2001.

corporation by "certified post". In *FirstRand Bank Ltd v Davis,*[498] the Registrar was not able to serve the letter by "certified post" as by then[499] the Post Office had stopped providing the certified post service. As a result the Registrar sent the letter to the corporation and each one of its members by "ordinary mail". There was a debate about whether the letters did reach the addressees but the court decided the matter on the basis that they did not. Hurt J held that by using "ordinary post" the Registrar failed to comply with the requirements of section 26(1). The court explained that since the mandated "certified post" was no longer available at that time what the Registrar ought to have done was to have followed the route specified in section 25(2) of the Act, namely using "registered post" or "hand delivery" of the letters. Deregistration of the corporation was held to have been ineffective as it had not been properly done and was accordingly declared invalid and thus set aside. A further consequence of invalidity of deregistration was that no consequences attached to it. For those reasons FirstRand's application for a *declarator* that members of the corporation be held personally liable for the debts of the corporation as at the time of deregistration, as provided for by section 26(5), was dismissed.

It is submitted that the same reasoning applicable to compliance with the requirements of section 26(1) of the Close Corporations Act of 1984 as held in the *Boseme* and *Davis* cases applied with equal force to section 73(1) of the Companies Act of 1973 as proper compliance with the procedural requirements of the sections was a prerequisite and thus the first hurdle to cross before an effective deregistration could be secured.

5 3 2 Position after coming into operation of the Companies Act of 2008

Since the coming into operation of the Companies Act of 2008 its deregistration provisions which apply to companies also apply to close corporations.[500] There are therefore no separate

498 2004 1 SA 31 (N).

499 The Post Office had, by October 1999, discontinued the "certified post" service. See *FirstRand Bank Ltd v Davis* 2004 1 SA 31 (N) 33I.

500 As substituted by s 224(2) of the Companies Act of 2008 with effect from 1 May 2011, section 26 of the Close Corporations Act of 1984 provides that sections 81(1)(f), 81(3), 82(3) to (4) and 83 of the Companies Act of 2008, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference to any of those provisions to a company must be

deregistration provisions applicable to close corporations. This is so as the amended[501] section 26 of the Close Corporations Act of 1984 provides that the relevant deregistration and dissolution provisions of the Companies Act of 2008, each read with the changes required by the context, apply with respect to deregistration and dissolution of a close corporation.

5 4 DISSOLUTION PROCEDURE UNDER THE COMPANIES ACT OF 1973

If a company was being wound up, whether in a members' voluntary winding-up or by way of compulsory winding-up, dissolution took place only after its affairs had been completely wound up.[502] The procedure to be followed was much simplified. What happened was that the Master of the High Court prepared and transmitted to the Registrar a certificate indicating that the affairs of the company had been completely wound up and gave a copy thereof to the liquidator. On the basis of the Master's certificate the Registrar had to "record" the dissolution of the company and publish notice thereof in the "prescribed manner",[503] that essentially meaning in most cases publication of the notice in the Government Gazette. The date of the dissolution of the company was taken to be that of the "recording" of the dissolution by the Registrar.[504]

In the case of any other body corporate which was not a company, the certificate issued by the Master indicating that the affairs of the body corporate had been completely wound up constituted its dissolution.[505] Thus in the case of bodies corporate which were not companies there was no need, at least according to section 419(4) of the Companies Act of 1973, for their respective registrars to "record" their dissolution and then publish notice of such dissolution in the prescribed manner. The reason for that differentiation is not so

regarded as a reference to a corporation for the purposes of the Close Corporations Act of 1984.

501 Amended by s 224(2) of the Companies Act 71 of 2008.

502 Section 419(1). Thus, once the affairs of the company had been wound up, dissolution had to follow. As Burley J held in the South Australian Supreme Court case of *Re C W Constructions Pty Ltd (In Liq)* (1996) 22 ACLR 78, 14 ACLC 1 599 (SA Sup Ct) unless a court order was made terminating the winding-up, the company had to be dissolved after the liquidator had completed his or her tasks. In other words, once a court order was made that the company should be wound up, that company would eventually be dissolved unless the winding-up process was terminated.

503 "Prescribed" was defined in s 1 to mean "prescribed by or under the Act".

504 Section 419(3).

505 Section 419(4).

obvious although one would suspect that the motivation could possibly have been a desire on the part of the legislature to make the dissolution of bodies corporate comparatively cheaper and quicker. It is submitted that the risk of prejudice emanating from such ostensibly quicker dissolution far outweighed its supposed advantages. For if the dissolution of the particular body corporate was neither "recorded" by the relevant registrar nor advertised in the Government Gazette for example, there was a real danger that it could go unnoticed with the result that members of the public, its customers and creditors would continue, albeit mistakenly so, to regard it as being in existence and could therefore continue dealing with it, and that very much to their prejudice as after dissolution the body corporate would be non-existent.[506]

It is submitted that section 419(4) was a potentially dangerous provision which did not serve much purpose. It should therefore not come as a surprise that it has no equivalent in the present Companies Act of 2008. Also it is no wonder that section 66(1) of the Close Corporations Act of 1984, which rendered the winding-up provisions of the Companies Act applicable to close corporations, expressly excludes this subsection from applying to close corporations. Other pieces of legislation which made the winding-up provisions of the 1973 Act applicable to their respective bodies corporate were not so carefully drafted, this having the result that they took not only the good aspects of the Companies Act of 1973 but also its disadvantages, such as section 419(4). The potential harm which that provision carried was thus effectively passed on to a number of pieces of legislation which incorporated the winding-up provisions of the Act without excluding the operation of the subsection. A few such pieces of legislation are the Medical Schemes Act of 1998,[507] the Long-term Insurance Act[508] and the Short-term Insurance Act.[509] However, a number of statutes have been carefully drafted to make provision for the proper and faultless dissolution of the entities they govern.[510]

506 The effect of dissolution, as well as that of deregistration, on the existence of a company was dealt with at length in Chapter 4 above.
507 Act 131 of 1998, section 53(1).
508 Act 52 of 1998, section 42(1).
509 Act 53 of 1998, section 41(1).
510 There was for example s 32(4) of the Financial Markets Control Act 55 of 1989 which governed voluntary dissolution of a financial exchange. Surprisingly s 33 of the Act which governed winding-up of a financial exchange by the court did not have this safeguard. The Act was repealed by Securities Services Act 36 of 2004 which came into operation with effect from 1 February 2005 but has since been repealed by the Financial Markets Act 19 of 2012. Far from the approach of the Financial Markets

Section 419(2) of the Act provided that the Registrar had to "record" the dissolution of the company and publish notice thereof[511] in the prescribed manner.[512] The subsection did not indicate precisely what "recording" the dissolution entailed. It is nevertheless suspected that "recording the dissolution" amounted to no more than capturing the dissolution on the database followed by cancellation of the registration of the memorandum and articles of association of a company and the withdrawal of the certificate of incorporation.[513] Assuming this to be the case, and there would need to be sufficient justification to the contrary in order to gainsay contradict this viewpoint, there appears to have been very little separating deregistration from dissolution, at least as far as the end result was concerned, leaving aside of course the procedure and grounds for each of the two processes. The manner in which section 82 of the Companies Act of 2008 deals with both deregistration and dissolution bears testimony to this.

A number of statutes are very explicit on what has to be done when an entity has to be dissolved. For example, section 29(8) of the Pension Funds Act[514] specifically states that if the Registrar[515] is satisfied that the winding-up of such a fund has been completed, he shall "cancel the registration of the fund" and thereupon the fund shall be "deemed to be

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Control Act of 1989 which governed dissolution of a financial exchange the Securities Services Act of 2004 does not have dissolution provisions. On the contrary it leaves the question of dissolving a financial institution such as a bank, insurance company, pension fund organisation, friendly society etc to the relevant statute governing that financial institution.

511 Being notice of "recording" of the dissolution.

512 Before amendment of the section which took place in 2006 in terms of Corporate Laws Amendment Act 24 of 2006, the terminology used was that of publication in the Government Gazette. The purpose of changing the wording to the "prescribed manner" was to accommodate changing technology which enabled notices to be published on the portal / website of the Companies and Intellectual Property Registration Office (CIPRO), which is now the Companies and Intellectual Property Commission (CIPC).

513 This would, for example, be in line with s 330 of the Botswana Companies Act, 2003 which provides that a company is removed from the register of companies when an entry is made in the register at the direction of the Registrar recording that the company is removed from the register. The definition of "deregistration" in s 1(1) of the Companies Act 1973 also carried the same message.

514 Act 24 of 1956.

515 The "registrar" is defined in s 1 of the Act to mean the "Registrar or Deputy Registrar of Pension Funds" mentioned in s 3 of that Act which in turn refers to the "executive officer" and a "deputy executive officer" mentioned in s 1 of the Financial Services Board Act 97 of 1990. With the repeal of the latter Act by the Securities Services Act of 2004, cross-reference to "executive officer or deputy executive officer" mentioned in s 1 of the Financial Services Board Act of 1990 can only mean reference to "registrar" or "deputy registrar" of Securities Services as defined in the Securities Services Act of 2004.

dissolved".[516] This provision, it is submitted, helps one understand how "recording the dissolution" of an entity works, namely cancellation of the registration thereof. Under the Companies Act of 1973 registration of a company no doubt entailed the registration of its constitution, this being nothing other than the memorandum and articles of association and the consequential issue of the certificate of incorporation. Therefore, "recording" dissolution of the company would mean nothing other than cancellation of registration of those documents.

It is therefore submitted that the language of section 419(2) could have been much clearer had it provided as follows:

> "The Registrar shall dissolve the company by cancelling the registration of its memorandum and articles of association and thereafter publishing notice thereof in the prescribed manner."

Such a provision would have made understanding the application of the subsection a very easy task indeed. It is true that like the rest of the 1973 Act, section 419(4) is a thing of the past and perhaps does not merit too much attention. But the fact remains that there are a few aspects of deregistration and dissolution of companies which, even under the current 2008 Act, have surprisingly not been dealt with as one would have wished and thus merit closer scrutiny.

5 5 DEREGISTRATION PROCEDURE UNDER THE COMPANIES ACT OF 2008

The procedure to be followed when a company is deregistered under the Companies Act of 2008 depends on the ground on which such deregistration is sought. If the reason for

516 Similar provisions relating to friendly societies were found in s 37(15) of the Friendly Societies Act 25 of 1956. Following the same pattern, s 32(4) of Financial Markets Control Act 55 of 1989 provided that when the affairs of a financial exchange have been completely wound up, the Master of the Supreme Court had to transmit a certificate to that effect to the Registrar of Financial Exchanges who would cancel the financial exchange market licence and thereupon the exchange would be dissolved. It should be noted that the Financial Markets Control Act of 1989 has since been repealed by the Securities Services Act of 2004 which in turn was repealed by the Financial Markets Act of 2012, neither of which makes provision for dissolution of financial institutions. Instead the two Act leave that question to various statutes governing the particular financial institutions concerned.

deregistration of the company is because of its winding-up, the Master[517] of the High Court having jurisdiction is required to file[518] a certificate of winding-up of the company in the prescribed form[519] after the affairs of the company have been completely wound up.[520] Upon receiving the certificate the Companies and Intellectual Property Commission[521] is required to record[522] the dissolution of the company in the prescribed manner[523] and remove the name of the company from the companies register.

The procedure relating to deregistration of a company that failed to file an annual return for two or more years in succession as required by section 33 is governed by regulation 40.[524] The regulation applies to both a company and an external company[525] as defined and

517 Master as defined in s 1 means an officer of the High Court, referred to in section 2 of the Administration of Estates Act 66 of 1965, who has jurisdiction over a particular matter arising in terms of this Act. Section 2(1)(b) of the Administration of Estates Act empowers the Minister of Justice and Constitutional Development to appoint a Master of the High Court in respect of the area of each High Court.

518 In terms of section 1, when used as a verb "file" means "to deliver a document to the Commission in the manner and form, if any, prescribed for that document".

519 "Prescribed" is defined in section 1 to mean "determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation or notice made in terms of this Act." "Prescribed form" would therefore refer to such form as is permitted or otherwise regulated by a regulation or notice made in terms of the Act.

520 Section 82(1).

521 Involvement of the Commission and not court confirms once again that deregistration under the 2008 Act, as was the case under the 1973 Act, is an administrative act and not a judicial function. The court will only get involved when the decision to deregister or refuse to deregister is called into question. For this reason in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 26 Binns-Ward J said that declaratory relief in respect of the registration status of a company should, as a general rule, be sought from a court only in the context of a decision or failure to make a decision by the Commission in that regard.

522 "Record" is not defined in the Act. "Records", used as a noun and not verb, is defined in section 1 in relation to the "records" which a company is required to keep. The *Collins English Dictionary* (1991) meaning no. 19 explains "record" as being "to set down in some permanent form so as to preserve the true facts of [something]". In the present context to say that the Commission shall "record" the dissolution would mean among others that it shall capture on its data (record) system the fact that the company has been dissolved.

523 In the past notice of dissolution was required to be published in the Government Gazette. A change from that requirement to publication in the "prescribed manner" was brought about by section 49 of the Corporate Laws Amendment Act 24 of 2006 which prescribed manner served as an alternative to publication in the Government Gazette. In line with that approach regulation 1 of the Companies Administrative Regulations made in terms of section 15 of the Companies Act of 1973 defined the Companies and Intellectual Property Registration Office (CIPRO) portal to mean the "Internet website or other electronic portal forming part of the CIPRO system". The regulation further defined the "CIPRO system" to mean the "computer system, including the CIPRO portal, through which CIPRO provides electronic services, irrespective of the medium or form of technology underlying or forming part of such services."

524 Of the Companies Regulations, 2011 published in Government Gazette No. 34239, GNR. 351 of 26 April 2011.

525 As a result whatever the regulation says in respect of a "company" applies with equal force to an "external company" even though as per their definitions in s 1 of the Act the two are not the same

provides that the Commission may deliver a demand in Form CoR 40.3 to the company by "registered post" or other means of "verified communication" requiring the company to provide satisfactory reasons for failure to file the required annual returns[526] or show satisfactory cause for it to remain registered.[527] Should the Commission receive a response which confirms that the company is no longer active, it may deregister the company.[528] However, if the response confirms that the company is active, the Commission may require additional information where such information as has been provided appears unsatisfactory.[529] Alternatively, the Commission may issue a compliance notice requiring the company to fulfil its duty to file annual returns for every year that it had failed to do so. Should a company fail to respond within twenty business days after receiving a demand to provide reasons for failure to file its annual returns or, if the company responds but nevertheless fails to provide such additional information as has been requested, should such request have been made, the Commission may issue a Notice of Pending Deregistration to the company.[530] A Notice of Pending Deregistration signifies the end of the life of a company in that after twenty business days of delivering it, the company will be deregistered unless during that time it files its annual return for every year that it had failed to do so.[531]

A company may also be deregistered on the ground that the Commission has determined in the "prescribed manner" that it appears to have been inactive for at least seven years and that no person has demonstrated a reasonable interest or reason for its continued existence.[532] The "prescribed manner" for determination whether a company has been inactive for at least seven years is neither prescribed nor defined but the authors of Henochsberg[533] submit that it refers to regulations 40(2) – (4) which deal with failure to file annual returns as discussed above. This is plausible although regulation 40 deals explicitly with failure to file annual return for two successive years on the part of the company rather than inactivity for at least seven years. One wonders what would happen if a company were to duly file annual returns as required but nevertheless remain inactive for many years, and if

thing.

526 Section 82(3)(a)(ii)(aa).

527 Section 82(3)(a)(ii)(bb).

528 Regulation 40(3)(a).

529 Regulation 40(3)(b)(i).

530 Regulation 40(4)(a). Notice of Pending Deregistration is given in Form CoR 40.4.

531 Regulation 40(4)(b) and Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (2014) 155.

532 Section 82(3)(b)(i).

533 Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (2014) 155.

one may add, for more than seven years. Surely in such a case the issue of filing annual returns would not arise while inactivity for at least seven years would become the problem to deal with. Determining that a company has not been active for the required minimum period of at least seven years is not a difficult exercise at all. The difficulty lies in establishing the "prescribed manner" as no clear guidelines have been given.

The obscure procedure to be followed in the deregistration process of a company under the Companies Act of 2008 is nowhere near the clear provisions of section 73 of the repealed 1973 Act. Furthermore, it does not match the procedure currently in place in jurisdictions having comparable provisions such as New Zealand, Mauritius,[534] United Kingdom and others. For example, before a company may be deregistered in New Zealand, the registrar of companies is required to give the company notice of intended deregistration and also give public notice thereof.[535] "Public notice" is defined to mean publishing notice of the intended deregistration in at least one issue of the Gazette and one issue of a newspaper circulating in the area in which is situated the company's place of business, its principal place of business or registered office.[536] In the UK the procedure is more elaborate.[537] If the Registrar of Companies has reasonable cause to believe that a company is not carrying on business or in operation he may send to the company by post a letter in which he inquires whether that is indeed the case. If he does not within one month of sending the letter receive any answer thereto, he must within fourteen days after the expiration of that month send to the company by post a registered letter referring to the first letter and advising that no answer thereto has been received and further that if an answer is not received to the second letter within one month from its date, a notice will be published in the Gazette[538] with a view to

534 Deregistration procedure in Mauritius is governed by s 310 of the Companies Act of 2001, which Act shares many similarities with the New Zealand Companies Act of 1993. In terms of section 310 of the Mauritian Companies Act of 2001 before removing the name of the company from the register the Registrar is required to give notice of the intended removal to the company; to any person who is entitled to a charge registered against property of the company; must be satisfied that no objection has been lodged against the intended removal or if it has been lodged, it has since been dealt with to finality and must give public notice of the intended removal. Giving "public notice" is defined in section 8 to mean publishing notice in the Gazette and in two daily newspapers which have wide circulation in Mauritius.

535 Section 319(1) of the New Zealand Companies Act of 1993.

536 Section 3 of the New Zealand Companies Act 1993.

537 Which procedure is governed by s 1000 of the UK Companies Act 2006.

538 In terms of section 1173(1) the Gazette means:-

(a) as respects companies registered in England and Wales, the London Gazette;
(b) as respects companies registered in Scotland, the Edinburgh Gazette; and
(c) as respects companies registered in Northern Ireland, the Belfast Gazette.

striking the name of the company off the register. If he does not within one month after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.[539] At the expiration of the three-month period the Registrar may, unless cause is shown to the contrary, strike the name of the company off the register and publish notice to that effect in the Gazette, on publication of which notice the company is deregistered.[540]

5 6 OBJECTION TO DEREGISTRATION

Like its predecessor, the Companies Act of 2008 does not have substantive provisions granting an interested person the right to oppose deregistration of a company. Although it did not create substantive grounds on which any interested person could oppose deregistration, section 73 of the 1973 Act was nevertheless amenable to some limited form of opposition to deregistration. In subsection (3) it was provided that deregistration would go ahead "unless good cause is shown to the contrary" while subsection (5) provided that deregistration of the company would proceed "unless good cause to the contrary has been shown by the company". In essence, deregistration could be prevented if the company was able to show to the Registrar that it had lodged or would lodge annual return as required and pay the required annual duty and, in the case of allegation that it was not carrying on business or in operation, the company could show that it was in fact doing so or was about to comply. The issue arose in *MB Barter and Trading (Pty) Ltd v Asbury*[541] where the court described "good cause" as used in section 26 of the Close Corporations Act of 1984, and by implication also as used in section 73 of the Companies Act of 1973, as a "nebulous concept".[542] The court held that in the case of resistance to deregistration on the ground of "good cause" the Registrar had a discretion whether to go ahead with deregistration or not whereas in the case of a company which was shown to be carrying on business or was in operation there was no discretion at

539 Section 1000(3)(b) of the UK Companies Act 2006.
540 Section 1000(5) and (6) of the UK Companies Act of 2006.
541 [2012] ZAWCHC 177 (25 October 2012).
542 *MB Barter and Trading (Pty) Ltd v Asbury* para 19.

all. In such a case the Registrar was simply not permitted to deregister the company.[543] The constitutional right to just administrative action required that members of a close corporation, and obviously also of a company, whose rights were necessarily materially affected, be afforded a chance of being heard before a decision to deregister the corporation was taken. That was particularly so since a meaningful right to be heard required that the members be properly informed of the ambit of the Registrar's powers and the grounds for the exercise of the power to deregister. Without that information they would not be in a position to answer the case for deregistration.[544]

In the UK there is one instance in which there may be objection to deregistration. Section 1003(3)(b) of the Companies Act of 2006 provides that in an application by the company for striking its name off the register, the Registrar may not strike the name of the company off the register until after the expiration of three months from the publication by him in the Gazette of a notice stating that he may exercise the power under the section in relation to the company and inviting "any person" to show cause why the company's name should not be struck off the register. Apart from this the Act does not create any other ground on which any person may oppose deregistration of a company.

However, this is not so in New Zealand, Mauritius[545] and Botswana[546] where legislation has elaborate provisions dealing with the right to object to proposed deregistration of a company, starting with the grounds on which that may be done and the procedure to be followed in dealing with the issue. Statutory provisions in these jurisdictions are largely the same and the more recent Mauritius and Botswana provisions appear to be a reproduction, with minor changes, of the New Zealand dispensation. For present purposes it is proposed to confine the discussion to the New Zealand position which, because of the similarities, is also a fair reflection of the position in Mauritius and Botswana. Section 321(1) of the New Zealand Companies Act of 1993 provides that "any person" may deliver to the Registrar an

543 *MB Barter and Trading (Pty) Ltd v Asbury* para 20.
544 *MB Barter and Trading (Pty) Ltd v Asbury* para 13 where reference was made to *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W) para 27.
545 For which see sections 312, 313 and 314 of the Mauritius Companies Act of 2001.
546 For which see sections 334, 335 and 336 of the Botswana Companies Act of 2003.

objection to the removal (deregistration) on any one or more of the following grounds, namely that:

- the company is still carrying on business or there is other reason for it to continue in existence; or
- the company is a party to legal proceedings; or
- the company is in receivership; or
- the person is a creditor, a shareholder or person who has an undischarged claim against the company; or
- the person believes that there exists, and intends to pursue, a right of action on behalf of the company; or
- for any reason, it would not be just and equitable to remove the company from the register.[547]

These provisions are very important for a number of reasons. First, "any person" may rely on them to prevent the planned deregistration of a company. Secondly, they provide grounds on which a company should not be deregistered, essentially as it would be having unfinished business, for example, in that it is still carrying on business or that there is reason for it to continue in existence or because it would not be just and equitable to remove the company from the register. Thirdly, once an objection is lodged deregistration may not be proceeded with until the objection has been finalized by the Registrar or, in some instances, by the court. The Registrar may only proceed with removal of the company from the register if he /she is satisfied that the objection has been withdrawn, any facts on which the objection is based are not or are no longer correct or because the objection was uncalled for, which is to say that it was is frivolous or vexatious.[548]

If the reason for objection to deregistration is that the person is a creditor, a shareholder or person having an undischarged claim against the company or because the person believes that there exists a right of action on behalf of the company which that person

547 In Mauritius in terms of section 312(1) of the Companies Act of 2001 objection may be lodged with the Registrar against deregistration on exactly the same grounds which apply in New Zealand. The same is the position in Botswana in terms of s 334(1) of the Companies Act of 2003.

548 Section 322(1) of the New Zealand Companies Act of 1993. Similar provisions are also found in s 313(1) of the Mauritius Companies Act of 2001 and s 335(1) of the Botswana Companies Act of 2003.

intends to pursue or if it is because it would not be just and equitable to remove the company from the register, the Registrar is not allowed to decide the issue. Instead he or she is required to advise that person to approach the court for relief.[549] On application to it the court may, if it is satisfied that the company should not be removed from the register on any of the grounds specified, make an order to that effect.[550]

Obviously these are the grounds on which a South African company would have been able to show cause to the contrary in term of section 73 of the Companies Act of 1973 so that the intended deregistration could not go ahead. However, the 2008 Act does not have provisions in terms of which the company, or any interested person for that matter, may show cause for cessation of the deregistration process. It is submitted that these very helpful provisions are needed in the South African Companies Act of 2008. As things stand now, it is only after completion of the process of deregistration that an interested person may apply to the Companies and Intellectual Property Commission for reinstatement of registration. But that would be only after serious damage may have been done as deregistration has serious consequences. Equally, reinstatement of registration may not always bring about the desired results as in some cases it may not be possible to restore the position to exactly what it was before deregistration. It is therefore better to avoid deregistration than reverse it by way of reinstatement of registration since things may not always be exactly the same as they were before. Regrettably the Companies Act of 2008 does not have provisions for objection to intended deregistration and therefore does not afford the opportunity to prevent it in appropriate circumstances. There is no doubt that legislative intervention is required to attend to this obvious loophole.

5 7 DISSOLUTION PROCEDURE UNDER THE COMPANIES ACT OF 2008

As indicated earlier section 82(1) of the Companies Act 2008 provides that when the affairs of the company have been completely wound up the Master must file with the Commission a

549 Section 322(2) of the New Zealand Companies Act of 1993. Similar provisions are also found in s 313(2) of the Mauritius Companies Act of 2001 and s 335(2) of the Botswana Companies Act of 2003.
550 Section 323(2) of the New Zealand Companies Act of 1993, s 314(2) of the Mauritius Companies Act of 2001 and s 336(2) of the Botswana Companies Act of 2003.

certificate of winding-up of the company in a prescribed form. Upon receiving such certificate of winding-up, the Commission is required to record the dissolution of the company in the prescribed manner and thereafter remove the company's name from the companies register.[551] By having a company dissolved and at the same time also deregistered, section 82 of the 2008 Act clearly blurs the otherwise well-known distinction between dissolution and deregistration which are otherwise two separate processes.

This conflation of the two processes was taken over from the Australian Corporations Act of 2001 on which the South African Companies Act of 2008 is based. Section 509(1) of the Australian Corporations Act requires that as soon as the affairs of a company are fully wound up the liquidator should convene a general meeting of the company and, in the case of a creditors' voluntary winding up, a meeting of the creditors and members of the company for the purposes of discussing the liquidation and distribution account, after which the liquidator shall lodge a return (report) with the Australian Securities and Investments Commission (ASIC). ASIC is required to deregister the company at the end of the three-month period after lodgment of the liquidator's return.[552]

Section 509 does not specifically mention dissolution of the company as it only refers to full winding-up of the affairs of the company and thereafter its deregistration. It is nevertheless submitted that dissolution of the company is built into the process of full winding-up of the affairs of the company and its resulting deregistration. While it would be an easy thing to find fault with dissolution and deregistration of the company which flows from it, it should not be forgotten that this is a historical phenomenon dating back to earlier statutes of the United Kingdom, which tradition is still continuing to the present day. In this respect, section 1000(3)(b) of the UK Companies Act of 2006 provides that after completion of the notification process the name of the company will "be struck off the register and the company will be dissolved". However, this is the reverse of the position in South Africa where a company is first dissolved after which its name is removed from the companies

551 Section 82(2).
552 Section 509(5) of the Australian Corporations Act of 1991.

register. In the United Kingdom, the name is first struck off the register (deregistered) after which the company is dissolved.[553]

Under South African law there is another form of dissolution which takes place in terms of section 115 of the Companies Act of 2008 which deals with disposal of all or a greater part of the assets or undertaking of a company, amalgamation or merger of companies or scheme of arrangement. Once such a disposal, amalgamation, merger or scheme of arrangement is finalised any person to whom the assets or undertaking is transferred may apply to court for an order to effect the dissolution, without winding-up, of a company as provided for in the disposal, amalgamation, merger or scheme of arrangement.[554] The section thus provides for dissolution of a company, in terms of a court order, without winding-up. As a result the affairs of the company would not be completely wound up nor would there be a certificate of winding-up as contemplated in section 82(1). As a further consequence the Commission would not be able to receive a certificate of winding-up which is required in order to record the dissolution of the company in the prescribed manner and remove the company's name from the companies register.[555] It should be noted that in terms of section 115 no winding-up takes place, only that the assets or undertaking of the company to be dissolved is transferred to another company. It is difficult to tell if the Commission would be able to record that dissolution and remove the company's name from the companies register and if not, what is to happen to the company and its name as it would have been dissolved in any event. Does it therefore mean that the name of such a dissolved company would remain on the companies register? It should be noted though that this issue would not arise in Australia as section 601AC(1)(c) of the Corporations Act of 2001 provides that ASIC "must" deregister a company if the court orders the deregistration of the company under section 413(5)(b) of that Act, which deals with reconstruction and amalgamation of companies.

553 Section 1000(3)(b) of the UK Companies Act of 2006. See also s 1000(5) and (6).
554 Section 115(9)(d).
555 As provided for in s 82(2).

5 8 GROUNDS FOR DEREGISTRATION UNDER BOTH ACTS

5 8 1 General

Under the Companies Act of 1973 there were three grounds on which a company could be deregistered, namely if the company had failed, for a period of more than six months, to lodge an annual return or if the Registrar had reasonable cause to believe that the company was either not carrying on business or alternatively that it was not in operation.[556] Under the Companies Act of 2008 the list of the grounds on which a company may be deregistered is a little longer and includes deregistration as a result of the dissolution of the company, deregistration after the company has transferred its registration to a foreign jurisdiction, failure to file an annual return for two or more years in succession, failure by the company to show satisfactory cause to the Commission to remain registered, if the Commission has determined in the prescribed manner that the company appears to have been inactive for at least seven years and lastly if the Commission has received a request in the prescribed manner and form and has subsequently determined that the company has ceased to carry on business and has no assets and liabilities or alternatively, if the company does after all have assets but because of their inadequacy there is no reasonable probability of the company being liquidated. Each one of these grounds will be discussed hereunder.

5 8 2 Failure to lodge annual returns

5 8 2 1 Under the Companies Act of 1973

Section 73(1) of the Companies Act of 1973 provided that a company could be deregistered if it failed, for a period of more than six months, to lodge an annual return in compliance with

556 Section 73(1) of the Companies Act 61 of 1973. Until s 26(1) of the Close Corporations Act 69 of 1984 was amended by the Companies Act 71 of 2008 a close corporation could be deregistered on exactly the same grounds which applied to companies.

section 173. The latter section dealt with the requirements that had to be complied with when lodging the required annual return. Briefly, an annual return was intended to assist the Registrar to determine whether the information required to be disclosed by a company in terms of the Act had been disclosed and was still valid. The return was required to be lodged with the Registrar in the prescribed form not later than the end of the month following upon the month of anniversary of incorporation of the company. It may be added though that in terms of section 177 of the Act an extension could be granted by the Registrar for the doing of anything that was required to have been done within a specified period.[557] Therefore, lodgment of an annual return within a month of the anniversary of incorporation of the company also included an extended period, if it had been granted.[558] More significantly, lodgement of the annual return had to be accompanied by payment of the prescribed fee which, it would seem, was the main purpose of requiring the annual return in the first place. In this regard it should be noted though that failure to lodge an annual return and thus pay the required annual duty did not result in an offence. Only that it could result in the payment of an additional fee or deregistration of the company.[559]

The requirement of lodgement of annual returns and payment of the accompanying annual duty has not been treated consistently by the legislature over the years. It has a long history and was there in the Companies Act of 1926[560] where it was not treated as a stand-alone ground on the basis of which, without more, a company could be deregistered. In terms of section 199(5) of that Act a company could be deregistered if it was in default for a period of more than two years in rendering annual returns and the Registrar had reasonable cause to believe that the company was not carrying on business or was not in operation. Therefore, failure to lodge annual return and pay the required annual duty on its own was not sufficient ground on which to deregister a company. Under the Companies Act of 1973 the requirement was initially not there and was only introduced in 1982 when it was inserted in terms of

557 Section 177 of the Companies Act 71 of 1973 provided: "When in terms of this Act anything is to be performed within a specified period of time, the Registrar may in any case, on application to him before or after the expiry of that period, and on payment of the prescribed fee, or generally, and on own motion, extend the said period as he may deem fit subject to the provisions of this Act, and where ay period has been so extended, any reference in section 178 to such period shall be construed as a reference to such period as so extended."

558 Save where otherwise provided for in the Act, the Registrar had an unfettered discretion to grant or refuse the application for extension of period within which a thing had to be done. See Kunst, Delport and Vorster *Henochsberg on the Companies Act* vol 1 (2011) 320(1).

559 Kunst, Delport and Vorster 318.

560 Act 46 of 1926.

section 1 of the Companies Amendment Act of 1982[561] only to be abolished four years later by the Companies Amendment Act of 1986.[562] Surprisingly, it was returned sixteen years later in terms of section 5 of the Corporate Laws Amendment Act of 2002[563] and has since been part of South African company law.

5 8 2 2 Under the Companies Act of 2008

The Companies Act of 2008 retains failure to lodge annual return and payment of annual duty as a ground on which a company may be deregistered. Section 82(3)(a) provides that the Commission may remove a company from the companies register if it has failed to file an annual return in terms of section 33 for two or more years in succession and, on demand by the Commission, the company also failed to give satisfactory reasons for the failure to file the required annual return or show satisfactory cause for the company to remain registered. It is apparent from these provisions that the legislature has expressed its desire to tolerate non-compliance with annual returns filing than was the case under the Companies Act of 1973. Whereas under the Companies Act 1973 a company was given a short period of six months from its anniversary to comply, or such extended period as could have been granted by the Registrar in terms of section 177, under the Companies Act of 2008 the company is given two successive years before steps may be taken to have it deregistered. Moreover, it is not just two years but successive two years. Therefore, a company is given plenty of time within which to remedy the default. The procedural safeguards against avoidable deregistration, such as giving Notice of Pending Deregistration in Form CoR 40.4 etc have already been indicated and will not be repeated here.[564]

In terms of section 33 every company is required to file annual returns in the prescribed form together with the prescribed fee,[565] and that within the prescribed period after

561 Act 59 of 1982.
562 Act 31 of 1986.
563 Act 39 of 2002.
564 As for which see para 5 5 above.
565 In terms of regulation 30 of the Companies Regulations, 2011 a company is required to file its annual return in Form CoR 30.1 together with the prescribed fee set out in Table CR2 B, unless it is exempt from such payment under sub-regulation 8. Such filing is required within 30 business days after the

the end of the anniversary of the date of its incorporation or the date that its registration was transferred to South Africa, in the case of a domesticated company.[566] In that return the company is required to include a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7) as well as any other prescribed information.[567] It is failure to do this, as well as failing to satisfactorily attend to follow-up queries, that could lead to deregistration of the company. Given the flexibility which the legislature has given to treating non-compliance with the filing of annual return obligation, it is submitted that a company that is properly looked after by its management should not be deregistered on this ground.

5 8 3 Company not carrying on business

5 8 3 1 Meaning of "carrying on business"

Deregistration of a company on the ground that it is not "carrying on business" should not, it is submitted, be a difficult concept to understand or apply if one were to follow a common sense approach. However, it is submitted that this is not always the case which often leads to unnecessary complications. "Not carrying on business" was a ground for deregistration in terms of section 73(1) of the Companies Act of 1973 as it is under section 82(3) of the Companies Act of 2008.[568] This ground essentially refers to a dormant company that is not carrying on any lawful business. It is submitted that in order to determine whether a company is carrying on business or not, the pragmatic, common sense approach, as opposed to the legalistic, technical approach is to be preferred. This would be in line with the dictum of

anniversary of its date of incorporation, in the case of a company that has been incorporated locally or within 30 days of the date that its registration was transferred to this country, in the case of a domesticated company. The prescribed fee as contained in Table CR 2 B is based on the annual turnover of the company and the period within which it is paid. Thus for a turnover of less than R1 million, annual duty is R100, between R1 million and R10 million it is R450 while with a turnover of between R10 million and R25 million it is R2 000 while R3 000 is for a turnover of R25 million or more. In the case of annual return filed more than 30 days after the due date the duty increases to R150, R600, R2 500 and R4 000 respectively.

566 Regulation 30(1).

567 Section 33(1)(a) and (b).

568 Section 82(3)(b)(ii)(aa).

Jessel MR in *Smith v Anderson*[569] where his Lordship said "anything which occupies the time and attention and labour of a man for the purpose of profit is business".[570] In essence this refers to the carrying on of commercial activities that have as their direct or indirect objective the pursuit of economic benefit for the company itself or its members. According to *Legal-Explanations.com* "carrying on business is a routine and continuous involvement in an activity undertaken for the purpose of making profit, gain or adding wealth to a person or entity by resorting to get a margin of profit on such transactions".[571] One wishes that things were as simple as that but the truth is that the opposite is the case. After all, Lindley LJ cautioned against the use of dictionaries to determine the meaning of business, saying in *Rolls v Miller*:[572]

> "When we look into the dictionaries as to the meaning of the word 'business,' I do not think they throw much light upon it. The word means almost anything which is an occupation and not a pleasure; anything which is an occupation or duty which requires attention is business. I do not think we can get much aid from the dictionary. We must look at the words [of the covenant] in the ordinary sense, and we must look at the object of the covenant ..."[573]

The difficulty of defining the word "business" was dealt with by Lord Loreburn, LC, in *Kirkwood v Gadd*[574] where he said:

> "What is business? It imports a series or repetition of acts. Each separate piece of business may consist of many stages and incidents, and the business as a whole comprises many separate pieces."[575]

569 [1880] 15 Ch D 247.

570 *Smith v Anderson* [1880] 15 Ch D 247 258. This approach has found favour with the South African courts and has since been following in a number of cases such as *Standard General Insurance Co Ltd v Hennop* 1954 4 SA 560 (A) 565A where Centlivres CJ defined business in the same way saying that it is "anything that occupies the time and attention and labour of a man for the purpose of profit".

571 http://www.legal-explanations.com/definitions/carrying-on-business.htm (accessed 26-05-2013).

572 [1881 - 1885] All ER Rep 915 (CA).

573 [1881 - 1885] All ER Rep 915 (CA) 920. The definition of "business" as anything which is an occupation or duty which requires attention, as opposed to a pleasure, is very much settled and has been accepted in a number of cases including *Cape Town Municipality v Clarensville (Pty) Ltd* 1974 2 SA 138 (C) 148C; *Maharaj v New India Insurance Co Ltd* 1963 3 SA 704 (D) 707A-708D; *Singh v Provincial Insurance Co Ltd* 1963 3 SA 712 (N) 715E-716E; *AA Mutual Insurance Association Ltd v Biddulph* 1976 1 SA 725 (A) 738D-739E and *Gaming Association of SA Gauteng Division v Minister of Safety and Security* [1996] 4 All SA 336 (W) 339h.

574 [1910] AC 422, [1908 – 1910] All ER Rep 768.

575 [1910] AC 422 423. Lord Atkinson (430) was also of the same view saying that the words "carries on" when appearing in the phrase "carrying on business" as was the case in s 4 of the UK Companies Act of 1862, had to be held to imply a repetition of acts, the sum of which constituted "business".

It will be noted that Lord Loreburn's reference to a "series or repetition of acts" creates a problem as it rules out a single transaction constituting the carrying on of business, an issue which was decided in *Cornelius v Phillips*[576] where the House of Lords held that for the purposes of determining whether a person was carrying on the business of money lending in contravention of the Moneylenders Act 1900 it was immaterial whether a single transaction or a number of transactions were involved. In their various speeches their Lordships reiterated that a single transaction could indeed amount to carrying on business for the purposes of the Act. As Lord Parmoor put it:

> "In my opinion, the respondent, in effecting a moneylending transaction with the appellant, was, in the ordinary sense, carrying on the moneylending business, and it is immaterial whether a single transaction or a number of transactions are involved."[577]

It must be conceded though that in the majority of cases carrying on business has an element of continuity, especially as encapsulated in the "carrying on" part of the phrase. It is submitted that Lord Loreburn's views in the *Kirkwood* case are preferable. They find support in the case of *Modderfontein Deep Levels Ltd v Feinstein*[578] where in the court *a quo* Wessels J said:

> "To constitute a business there must either be a definite intention at the first act to carry on similar acts from time to time if opportunity offers or the acts must be done not once or twice but successively with the intention of carrying it on so long as it is thought desirable."[579]

It is said that like "gain", "business" is not a word susceptible of precise or scientific definition. Therefore, the test as to whether business is being carried on is whether that which is being done is what ordinary persons would describe as carrying on business for gain,[580] should gain be the pursuit, as it should be in the case of a commercial entity. It being

576 [1916 – 1917] All ER Rep 685 (HL), [1918] AC 199, 87 LJ KB 246, 118 LT 228, 34 TLR 116, 62 Sol Jo 140 (HL)].

577 [1916 – 1917] All ER Rep 685 (HL) 694.

578 1920 TPD 288.

579 1920 TPD 288 291. See also *Shaw v Benson* 52 LJQB 575 578 from which the quoted words originated.

580 *Armour v Liverpool Corporation* [1939] Ch 422 437, [1939] 1 All ER 363 371H; *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A) 167J – 168A. It should be noted though that making profit is not essential to constitute a series of acts business. See *South African Flour Millers' Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 204; *Gaming Association of SA Gauteng Division v Minister of Safety and Security* [1996] 4 All SA 336 (W) 339g – h.

impossible to define with fullness or accuracy the precise meaning to be given to the phrase "carrying on business", it is to a large extent a question of fact and not of law to be determined in each case by its own special circumstances since little assistance would be gained from the authorities, so it is said.[581] To come to a conclusion that a company is carrying on business the court will take into account the combined effect of the strict words of the statute in question, common sense and the necessities of commercial transactions.[582] Therefore, a helpful interpretation which the court may give to the meaning of the phrase should be one consistent with business,[583] and not contrary to it.

It was against that background that in the *Kirkwood* case, Lord James of Hereford declined to formulate any definition of the words "carrying on business", saying that dangerous consequences could follow from doing so, as for example, by ingenuity the business community could very easily bring itself inside or outside the ambit of the definition, depending on what was considered convenient in the circumstances of the case. If a definition of the phrase were to be given, reasoned his Lordship, ingenious methods of evading or breaking statutory provisions could be resorted to.[584]

It is said that "business" is not the same thing as "trade" as the latter refers to buying and selling of goods and thereby receiving payment. "Business" is a word of very wide meaning which is more extensive than "trade".[585] In very broad terms "trade" means "any occupation from which a man derives profit or subsistence"[586] and has the technical meaning of buying and selling.[587] The essential idea underlying trade being buying and selling, if a person buys and sells with the intention of making gain or profit out of his transactions he is carrying on trade.[588] There are nevertheless too many businesses which do not qualify as a trade, this having the result that business may be carried on without receiving payment as it is

581 *Kirkwood v Gadd* [1910] AC 422 432 per Lord Atkinson. Lord Loreburn LC added (424): "It is always a question of fact, the answer to which depends on the circumstances of each case."
582 *Kirkwood v Gadd* [1910] AC 422 428 per Lord James of Hereford.
583 Per Lord Mersey in *Kirkwood v Gadd* [1910] AC 422 438.
584 *Kirkwood v Gadd* [1910] AC 422 427 & 428.
585 *South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd* 1938 CPD 199 204; *Gaming Association of SA Gauteng Division v Minister of Safety and Security* [1996] 4 SA 336 (W) 339g – h.
586 Per Wesssels J in the court *a quo* in *Modderfontein Deep Levels Ltd v Feinstein* 1920 TPD 288 289.
587 *Harris v Amery* 38 LJCP 89 92.
588 *Modderfontein Deep Levels Ltd v Feinstein* 1920 TPD 288 290.

not essential that payment should be received to constitute business or that profit should be sought or made.[589] On the contrary, the essence of "trade" is the pursuit of profit,[590] which can only be made if payment is received. The mere fact that there is payment under certain circumstances does not necessarily make a thing a business which if there was no payment would not be a business.[591]

Although not synonymous with business,[592] trade is nevertheless an aspect of business and if it is carried on on a sustained basis will constitute business. In *Modderfontein Deep Levels Ltd v Feinstein*[593] the company bought articles of clothing for the purpose of re-selling to its employees at a cost price and therefore did not make profit out of such transactions. There was therefore a *prima facie* trade in goods and as the transactions were sustained and not isolated acts of trading, the court held that a business was being carried on. Moreover, although the company did not receive pecuniary profit from the sale of each article, yet it directly received the benefit of more efficient labour which eventually paid off when the company made larger profits. Therefore, selling goods to its employees at cost price yielded indirect monetary gain of contented labour force which helped the company make better profits. It was held that a person was not to be regarded as not carrying on trade or business merely because he chose to sell goods at cost price. After all, a wealthy person could, out of spite or for other reasons, sell goods at cost price in the neighbourhood of a trading site in order to compel the trader to close his shop. That person would still be considered to be carrying on business.

However, if a commercial company is carrying on non-commercial but charitable activities only such as religious, humanitarian, literary, scientific, cultural , social, recreational or philanthropic ones it cannot, it is submitted, be said to be carrying on business[594] for the purposes of avoiding deregistration unless it seeks shelter as an association

589 *Rolls v Miller* [1881 – 1885] All ER Rep 915 (CA).
590 *Schein v The Germiston Municipality* 1910 TPD 829 where Bristowe J said "... carrying on a trade means carrying it on as a matter of business with a view to making a profit out of it."
591 *Rolls v Miller* [1881 – 1885] All ER Rep 915 (CA) 918.
592 *In re Sarflax Ltd* [1979] 1 Ch 592 599A; *Rolls v Miller* [1881 – 1885] All ER Rep 915 918.
593 1920 TPD 288.
594 In *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) the court held that an association whose activity was to preserve the environment and thereby the value of the property of its members was not carrying on business that had as its object the

not for gain which was incorporated under section 21 of the Companies Act of 1973 or is incorporated as a non-profit company in terms of the Companies Act of 2008, in which event it should observe the requirements applicable to such a company. This will among others require the company to amend its constitution accordingly so that the specific requirements of the section are observed lest it falls foul of the law and thereby run into serious difficulties once again. Such a company should, however, be distinguished from one which carries on business seeking material benefit or advantage, even though not a pecuniary profit, for itself or its members,[595] the carrying on of which will be sufficient to stave off deregistration. "Gain" which the company may pursue is not limited to pecuniary gain or commercial profits. In *Gaming Association of SA Gauteng Division v Minister of Safety and Security*[596] the applicants for restraint orders against the police were associations not for gain. Their business was the enforcement and protection of their members' rights and interests, negotiating for an acceptable dispensation on members' behalf as well as the acquisition of rights and concessions, including the securing of economic justice for all workers in the gaming industry. The court held that this amounted to "carrying on business".

5 8 3 2 "Carrying on business" which does not amount to "carrying on business"

There are certain curious provisions in the UK Companies Act of 2006 which provide that for the purposes of deregistration of a company on request, the doing of certain activities does not amount to trade or carrying on business with the result that although a company may have done any of them it would not be considered to have traded or carried on business with a further result that it may still be deregistered. Without these statutory provisions a company having done any of the listed activities would undoubtedly not be eligible for deregistration

acquisition of gain for itself or its members. This, it is submitted, is a gratifying decision.

595 In *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 4 SA 159 (A) the Appellate Division held that the appellant association was carrying on business that had as its object the acquisition of gain by its individual members who were receiving indirect benefit in the sense that the association was creating the opportunity or climate for members, by own subsequent efforts, to benefit therefrom. In *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35 38 – 39 and *Bruyns v Rand Sporting Club* 1919 WLD 51 53 – 54 it was taken for granted that an indirect gain for the members would qualify as gain for the purposes of determining whether business was being carried on.

596 [1996] 4 All SA 336 (W).

as it would simply still be carrying on business for example only a few weeks or days before the request for deregistration was made. In this respect reference may be made to section 1004(1)(d) of the UK Companies Act of 2006 which prohibits voluntary application for striking off a company from the register if in the previous three months the company has engaged in "any other activity" excluding any activity which was necessary or expedient for the purposes of making the application or deciding whether to do so. This provision is logical and understandable since preparing to make a request for deregistration should not be considered carrying on business.

Hard to understand though is a provision to the effect that any activity necessary or expedient for the purpose of concluding the affairs of the company is not engaging in business.[597] Does it therefore mean that a company can engage in a myriad of activities round the clock in order to finalise its affairs without ever carrying on business? Is not carrying on business to finality carrying on business? This is of course the message which the provision conveys, an obvious anomaly by any standard. The section also excludes from the meaning of engaging in any activity the carrying on of any activity which is necessary or expedient for the purpose of complying with any statutory requirement or one specified by the Secretary of State by order for these purposes.[598]

Another controversial provision is one to the effect that a company is not to be treated as trading or otherwise carrying on business by virtue only of the fact that it makes a payment in respect of a liability incurred in the course of trading or otherwise carrying on business.[599] This seems intended among others to negate the decision in *In re Sarfax Ltd*[600] where Oliver J found himself unable to hold that the expression "carrying on business" was synonymous with actively carrying on trade or that the collection of assets acquired in the course of business and the distribution of the proceeds of those assets in the discharge of business liabilities could not constitute carrying on of business.[601] There the court held that an insolvent carried on business until he had performed all the obligations which the fact of

597 Section 1004(1)(d)(ii) of the UK Companies Act 2006.
598 Section 1004(1)(d)(iii) and (iv) of the UK Companies Act 2006.
599 Section 1004(2) of the UK Companies Act 2006.
600 [1979] 1 Ch 592.
601 *In re Sarflax Ltd* [1979] 1 Ch 592 599.

trading imposed on him. That was very much so in that case as there was not merely a passive suffering of undischarged liabilities but a continuous course of active conduct in the collection of assets. Thus the court accepted that the collection of assets and payment of debts constituted the carrying on of business.

5 8 3 3 Business carried on must be legal

Although section 73(1) of the Companies Act of 1973 did not expressly say so, it is nevertheless submitted that when referring to not carrying on business the subsection implicitly referred to "not carrying on lawful business". This would be in line with section 32 of the Act which allowed interested persons to incorporate companies for "any lawful purpose". It is submitted further that the same issue of legality of the business which arose under section 73 of the Companies Act of 1973 also arises under section 82(3) of the Companies Act of 2008 which mandates deregistration if the company "has ceased to carry on business".[602] It is submitted further that if the very essence of the company itself, its business or the carrying on of the business is tainted with illegality, the company cannot be said to be carrying on business for the purposes of avoiding deregistration.

In the past the most common form of illegality was that of an association that carried on business contrary to section 30 of the Companies Act of 1973 in that it sought gain for itself or its members without having registered in terms of the Act while having more than twenty members. Over the years the courts consistently held that such an association was a non-entity with the result that no legal consequences attached to its otherwise null and void activities and transactions.[603] Being a phantom without legal existence, an illegal association or company was not considered a company for the purposes of section 73(1) of the Companies Act of 1973 and could not therefore, if it was not carrying on business, be deregistered in terms of this section. If its assets and affairs could not be liquidated in terms of its constitution after which it had to be dissolved, for example, there being no provision to

602 Section 82(3)(b)(ii)(aa).

603 Such an association is as it were a "phantom having no legal existence" according to *R v Twala* 1952 (2) SA 599 (A) 606D.

that effect in its constitution, a way out could be found in section 258(2) of the Act in terms of which the Minister of Trade and Industry was empowered to appoint inspectors to investigate the affairs of the company and provide a report. This report could result in the winding-up of the company.[604] Nevertheless there was still an obstacle to the application of section 258(2) since it referred to a "company". Another possibility was the application of section 262(1) which made provision for a winding-up of a "company" or "body corporate" as a result of a report of the inspectors. However, an illegal association, as indicated above, is not a "company" or "body corporate" since it is a "phantom having no legal existence".

In the absence of any legal basis on which to deal with an illegal association, it is difficult to see how the dilemma could be resolved under the Companies Act of 1973. One was faced with this curious situation that the illegal association could not act, for it had no legal capacity to act nor could anyone act against it for lack of legal basis on which to do so. There was apparently a *lacuna* in the law. It could be that the solution was to be found in stretching the principles of company or criminal law beyond the usual limit to deal with that untenable scenario. It is submitted that a reasonable solution to the problem posed by the illegality of a company itself or the business it is carrying on, which renders deregistration or dissolution of the company or association problematic, is to be found in a court order authorising winding-up and eventual dissolution of the company. This, it is submitted, could be one way of dealing with illegal associations which are not companies for the purposes of the Companies Act of 2008 and cannot therefore be dealt with in terms of its provisions.

5 8 4 Company not being in operation

Another ground on which a company could be deregistered in terms of the Companies Act of 1973 was if it was "not in operation", this serving as an alternative to the company "not carrying on business". The Companies Act of 2008 does not expressly use the phrase "not in operation".[605] However, it is submitted that reading between the lines, section 82(3) of the

604 Section 262(1).

605 Disappearance of the phrase "not in operation" from the South African Companies Act of 2008 does not mean that every country has followed the same approach. The phrase is still retained in a number of

Act makes more than enough reference, albeit impliedly, to the phrase. This can be gathered from a number of phrases used in the section such as failure to "show satisfactory cause for the company to remain registered",[606] "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".[607] It is submitted that there is sufficient evidence to show that deregistration of a company on the ground that it is "not in operation", although not specifically mentioned in section 82 of the Companies Act of 2008, is very much part of South African law.

The concept of the company "not being in operation" is very difficult both to understand and apply in practice. One would have thought that if a company was not carrying on business it was equally not in operation but the fact that the latter was expressly made a self-standing ground under the Companies Act of 1973 made the position more complicated. In some jurisdictions, such as Hong Kong,[608] this ground is given more prominence with the result that the company not "carrying on business" serves as an alternative to it and probably only as a back-up.

It is said that a company can be "in operation" although it is not carrying on business.[609] This suggests that a company is "in operation" if it simply exists without doing

statutes such as UK Companies Act 2006 (s 1000 (1)); Zimbabwe Companies Act [Chap 24:03] (s 320(1)); Swaziland Companies Act 8 of 2009 (s 62(1)); Botswana Companies Act 32 of 2003 (s 252(1)); Tanzania Companies Act 12 of 2002 (s 400(1)); Namibia Companies Act 28 of 2004 (s 74(1)); Zambia Companies Act (Amendment) Act 1 of 2000 (s 361(1)); Hong Kong Companies Ordinance 29 of 2012 (s 744(1)) and Pakistan Companies Ordinance XLVII of 1984 (s 439(1)).

606 Section 82(3)(a)(ii)(bb).

607 It is no coincidence that statutes which do not use the phrase "not in operation" resort to its alternative, if not its equivalent. For example the clause "there is no other reason for the company to continue in existence" is used in section 318(1)(b)(ii) of the New Zealand Companies Act 105 of 1993 and section 309(1)(b)(ii) of the Mauritius Companies of 2001. On the contrary section 87(5)(d) of Lesotho Companies Act 18 of 2011 uses the clause "the company has been absent at its registered address of service for 6 consecutive months".

608 Section 744(1) of Hong Kong Companies Ordinance 29 of 2012 provides that a company may be deregistered if it is "not in operation or carrying on business". The Ordinance was passed on 12 July 2012 and was expected to come into operation in 2014.

609 *Ex Parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 470H and 471D-F where it was said that the company could be held to be in operation if it "did anything to administer" its properties such as paying municipal rates and taxes. Obviously, doing so is not carrying on commercial activity; *Ex parte Ziman* 1970 1 SA 164 (T) 172; *Re Financial Corporation* (1883) 27 Sol Jo 199; *Re Estates Investment Co* (1885) Sol Jo 585; Blackman 4-175.

any business, thus effectively referring to a dormant company.[610] Referring to this phrase in *Ex parte Autos Transport Ltd*[611] Quenet J said the company "although in abeyance was alive". There a company was held to have been "in operation" after it was established that it was in a state of dormancy pending revival of trade in the sense that it was ready and able to seize such opportunities as the future might hold and thus turn them to account.

Available sources suggest that a company is in operation if it exists, that is, is alive although dormant,[612] which in reality is the same thing as not carrying on business. Moreover, this statement can be rephrased to say that being "in operation" simply means being "in existence". In *Commonwealth Bank of Australia v Australian Securities Commission*[613] a company was not carrying on business, having ceased to do so. Thereafter the Australian Securities Commission (ASC) deregistered it for failure to lodge annual returns which, although it wished to lodge, was nevertheless unable to do so. The Australian Federal Court ordered restoration of registration, holding that the company was "very much alive" as, although it had ceased carrying on business, it nevertheless intended to institute legal proceedings to recover loss caused by cheques which had been fraudulent signed by its former director. The company was therefore "in operation" and by deregistering it the ASC had committed an "error".

It appears therefore that the phrase "not in operation" is fraught with problems. The impression which one gets is that by and large and especially in view of the other ground, namely that of the company "not carrying on business" the words "not in operation" did not mean much on their own and could not therefore be treated separately from "not carrying on business".

610 According to Hannigan "Companies" in Halsbury *Laws of England* vol 14 (2010) 6 "being in operation" amounts to no more than "being in existence".

611 1956 1 PH E5 (SR).

612 *Ex parte Autos Transport Ltd* 1956 1 PH E5 (SR); *Ex Parte Minister of Lands; Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 470H; *Ex parte Ziman* 1970 1 SA 164 (T) 172; *Re Financial Corporation* (1883) 27 Sol Jo 199; *Re Estates Investment Co* (1885) Sol Jo 585; Blackman *et al* 4-175.

613 (1998) 29 ACSR 170 (Fed Ct of Aust).

It is nevertheless submitted that some helpful insight into the probable meaning of "not being in operation" can be gathered from sections 1004 and 1005 of the UK Companies Act of 2006. In terms of section 1004(1) an application for deregistration by the company itself (voluntary deregistration) may not be made if at any time in the last three months[614] the company has done any of the following activities, namely changing its name; trading or otherwise carrying on business; disposing for value its property or rights that immediately before ceasing to trade or otherwise carry on business was held for the purpose of disposal for gain in the normal course of business or trading or if the company has otherwise engaged in any other activity. By engaging in an activity that was necessary or expedient for the purpose of making the deregistration application or for concluding the affairs of the company or complying with any statutory requirement, the company would not be considered to have done an activity that would disqualify it from applying for deregistration. So too would the doing of anything in compliance with an order of the Secretary of State.[615] Again, a company is not to be treated as trading or otherwise carrying on business by virtue of the fact that it makes a payment in respect of a liability incurred in the course of trading or otherwise carrying on business.[616] Although by engaging in any of the above activities a company would not be carrying on business, it is submitted that it would nevertheless be "in operation" so as to take it beyond the reach of deregistration.

Again an application may not be made for deregistration of a company by the company itself at a time when some process is underway or about to commence relating to the company. In terms of section 1005 such processes include application to court for sanctioning a scheme of compromise or arrangement, voluntary arrangement in terms of the Insolvency Act 1986, an administration order, application for winding-up the company, or if there is receivership of the company's property into administration by a judicial factor.[617]

The upshot of sections 1004 and 1005 of the UK Companies Act of 2006 is therefore that although a company might not be carrying on business and could therefore be

614 In terms of section 1004(3) the Secretary of State may by order amend subsection (1) for the purpose of altering the period in relation to which the doing of things therein mentioned is relevant. The essence of the subsection is therefore that the period of three months may be extended to a longer one.
615 Section 1004(1)(d).
616 Section 1004(2).
617 Section 1005(1)(a) – (g).

deregistered, such should not be done if some activity is happening in the case of section 1005 or has recently happened in the case of section 1004. In essence, although the company would not be carrying on business, it will nevertheless be considered to be "in operation" by reason of the happening of any of the specified activities and would therefore not be deregistered.

5 8 5 Source of information

5 8 5 1 The company itself

Section 73(1) of the Companies Act of 1973 provided that the Registrar of Companies could deregister a company if he or she had "reasonable cause to believe" that it was not carrying on business or was not in operation. Needless to say that the Registrar could only have such cause to believe if he or she had a basis for doing so. In other words the Registrar needed information to come to that belief.

Many a times the Registrar acted after receiving from the company a written statement, mostly in the form of a letter, signed by the directors and which was to the effect that the company has ceased to carry on business and had no assets or liabilities.[618] There were, however, two problems associated with that process. According to the Office of the Registrar it did happen from time to time that letters, ostensibly signed by directors, arrived requesting the deregistration of a company which otherwise satisfied the requirements of the subsection. In the event the Registrar was obliged to and did publish notice to that effect in the Government Gazette. Only after that stage would it come to the attention of the company, often as a result of telephone calls by members of the public, customers or creditors, that it had in fact been deregistered. The company's response would no doubt be that of shock as it started taking up the matter with the Office of the Registrar.

618 Section 73(5).

Section 73(5) required the written statement to be signed by "every director" of the company. A statement falsely alleging that the company was no longer carrying on business or in operation was most unlikely to have been signed by "every director". It should not be forgotten that the Registrar had, and was required to have, a register of the directors of a company which indicated their full particulars.[619] The problem pointed out by the Office of the Registrar in this regard was one of staff training as from time to time, because of lack of sufficient experience and training, members of staff of that office did readily accept and act, all in good faith, upon a written statement without verification. [620] There As a result both the Registrar and the company were inconvenienced and in the case of the former, in order to correct the mistake, had to bear the expenses of an application to court for the restoration of registration[621] of the company.

Another common problem which arose was that section 73(5) required the written statement signed by the directors to show that the company had "no assets or liabilities". The only conceivable way in which a company which at some stage had assets and liabilities and was in fact carrying on business could reach that happy stage where it had "no assets or liabilities" was through the liquidation of its assets and payment of liabilities. Liquidation in this instance of course referred to some "informal backyard liquidation" done other than in accordance with the provisions of the Companies Act of 1973. While it is true that the method was more expeditious and cheaper,[622] it must also be borne in mind that it was an unorthodox as well as irregular method of winding-up a company.[623] A proper and regular method of winding-up a company was one done in terms of the Act. There was also the question of reduction of the capital of the company, this time to a zero level, having been done other than in compliance with the Act.[624]

619 Form CM27 made in terms of Government Notice No.R.1491 of 30 June 1978 and section 216(2).

620 The information was provided at an interview with members of staff of the Registrar of Companies in Pretoria in July 2010.

621 Which was done under section 73(6)(a).

622 *Income Tax Case* 1306 (1980) 42 SATC 139 143.

623 *Commissioner of Taxes v "T" Company* 1957 (4) SA 90 95H.

624 The capital of a company could be reduced in terms of section 83 without the involvement of the court but the Registrar had be to informed or in terms of section 84 in which case confirmation by the court was required.

Apart from the company itself through its directors, the other main source of the Registrar's reasonable cause to believe that a company was not carrying on business or in operation was the Receiver of Revenue, who incidentally happened to have been the main if not the only informer.[625] As the company failed to render tax returns the local Receiver of Revenue would start making enquiries and when it eventually transpired that the company was defunct, the Registrar of Companies was notified. To verify if that was indeed the case and for the sake of compliance with the Companies Act the Registrar would then commence the procedure specified in section 73.

There is nothing new with the Receiver of Revenue acting as a primary informer. To take one example, in the case of *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd*[626] the events which took place were described by the court as follows:

> "On 25th November, 1948, the Receiver of Revenue requested the Registrar of Companies to remove the company from the register. A notice pursuant to sec. 199(6) of the Companies Act, 46 of 1926, as amended, was thereupon, on 29th November, 1948, served on the company at 9, Barkley Arcade, Market and Diagonal Streets, Johannesburg, the registered office of the company. No reply was received. A further notice was served on the company on 25 May, 1949, and again there was no response. The name of the company was consequently, on 28th October, 1949, placed on a preliminary list of companies to be struck off, which list was published in Government Gazette 936 of 1949. After the expiration of three months the name of the company was struck from the register on 27th January, 1950, which fact was published in Government Gazette 56 of 1950."[627]

During its days the Office of the Registrar indicated that apart from those two sources of information, namely the company itself through its directors and the Receiver of Revenue, it

625 It will be of interest to note that as far as mutual banks are concerned, section 31 of the Mutual Banks Act 124 of 1993 specifically provides that a mutual bank shall obtain from the receiver of revenue of the district in which its head office is situated a mutual bank licence in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fee. Far from being used for the collection of income tax the licence is used for exemption from it - s 10(1) (d) of the Income Tax Act 58 of 1962. Thus the Receiver of Revenue has a reliable source of information from which to establish the status of a mutual bank.

626 1964 3 SA 469 (T).

627 1964 3 SA 469 (T) 469G-H.

had no other way of knowing if the company was not carrying on business or in operation.[628] This unfortunate position in which the Registrar found himself or herself did not come as a surprise as the machinery for monitoring business activities of companies or lack thereof was removed in 1986 when the obligation to file an annual return and pay annual duty was terminated.[629] While the demise of annual duty was not lamented,[630] the removal of the duty to file annual return, in the absence of alternative monitoring mechanisms by the Registrar, particularly as far as private companies were concerned, proved to have been an unfortunate decision. With the abolition of the annual returns it became "necessary to find an alternative way of assisting the Registrar in determining whether a company is still operating or not" for the purposes of setting in motion the deregistration procedure.[631] It was decided that the most practical way was to extend the duties of the auditor of a company and to require him to report to the Registrar in this regard.[632] The result was the amendment of section 300 of the Companies Act of 1973 by the insertion of a paragraph (jA)[633] which required an auditor of a company:

> "... when he gets to know, or has reason to believe, that the company is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future, to report forthwith accordingly by certified post to the Registrar."[634]

It will be seen that because of the amendment and the new duty which fell on the auditor of a company the Registrar had a way of finding out if a company was not carrying on business or in operation. It has to be pointed out though that the new verification mechanism was not always going to be effective. First, an auditor was able to report only if he was there. It would be appreciated that a company which was not carrying on business or in operation was unlikely to have an auditor or other office bearers for that matter. After all, the company

628 This information was given at an interview with an officer in the Office of the Registrar in Pretoria in July 2010.
629 By sections 7 and 8 respectively the Companies Amendment Act 31 of 1986.
630 The loss of revenue resulting from the abolition of annual duty was compensated for by raising the fee payable on the incorporation of a company and on any increases in the share capital of a company, provision for which was made in sections 4 and 6 of the Companies Amendment 31 of 1986, which amended sections 63 and 75 respectively, of the Companies Act 61 of 1973. See Larkin "Company Law (including Close Corporations)" 1986 *Annual Survey of South African Law* 279.
631 Larkin 280; House of Assembly Debates 17 March 1986 cl 2039.
632 Larkin 280.
633 Inserted by section 10 of the Companies Amendment Act 31 of 1986.
634 A similar provision is found in s 62(3) of the Close Corporations Act 69 of 1984, subject to the necessary adjustment that the "auditor" becomes the "accounting officer" and the "Registrar" means the "Registrar of Close Corporations".

would be defunct with everyone else having gone their separate ways. Secondly, the duty to lodge interim report and annual financial statements, both provisional and final, was confined to public companies.[635] Yet it was private companies and especially small private companies that were most likely to disappear without trace.

The only two occasions on which a private company had to lodge annual financial statements with the Registrar were firstly when it had not sent them to its members before the date of the annual general meeting as required in terms of section 302(1) of the 1973 Act. Were such a problem to arise a member could apply to the Registrar who would request the company to lodge with him provisional annual financial statements.[636] In the absence of application to the Registrar by a member, the need to lodge provisional annual financial statements with the Registrar did not arise. It will again be appreciated that if a private company had not been carrying on business or in operation for some time, all the members being aware of this, and in some cases the members having disappeared, the question of sending annual financial statements to members, and requests therefore in the event of default, would normally not arise. In the event section 304(2) became irrelevant. The other situation in which a private company had a duty to lodge annual financial statements with the Registrar was of its own making by failing to comply with the restrictions which were required to be contained in its articles of association[637] and then acting upon them as provided for in section 20(4) of the Companies Act of 1973.[638]

635 See sections 302 (4), 303, 304(1) and 306.

636 Section 304(2).

637 Section 20(1) defined a "private company" as, in very broad terms, a company having a share capital and which by its articles restricted the right to transfer its shares; limited the number of its members to fifty, exclusive of employees and former employees who were members; and prohibited any offer to the public for the subscription of any shares or debentures of the company. Subsection (4) provided that if a private company failed to comply with the restrictions required in terms of subsection (1) while they were included in the articles of association, it forthwith became subject to the provisions of sections 302(4), 303 and 304(1) as if it were a public company. Nevertheless, application could be made by the company itself or any interested person for relief from the obligation to furnish members, debenture holders and the Registrar with interim, provisional annual financial statements and annual financial statements, which relief could be granted if the court was satisfied that failure to comply with the restrictions was unintentional or was due to some other sufficient cause or was on other grounds just and equitable.

638 It should be noted that s 20(4) has since been deleted by s 5 of Corporate Laws Amendment Act 24 of 2006.

It is submitted that the Registrar could have had a very cheap and effective means of knowing if any company, private or public, was not carrying on business or in operation. This could have been done by requiring all companies, whether private or public, to file annual financial statements with him. By way of concession to private companies which did not have to lodge financial statements except in the two situations indicated above, the Companies Act of 1973 could have been amended in such a way that private companies did not have to file interim reports or provisional annual financial statements but final annual financial statements only. This would not have been a difficult exercise as all that had to be done was the deletion of the word "public" from section 302(4) so that it read "a company" instead of "a public company" as was the case. Moreover, providing the Registrar with a copy of financial statements meant, in this computer age, generating one extra copy of the statements or perhaps just making an additional photocopy. It is submitted that requiring this would not have been asking too much.

Had the amendment indicated above been effected, the Registrar would have been in a better position to monitor companies which were carrying on business or were in operation, thus easily identifying those that were not. The Receiver of Revenue would then have been relieved of the duty of acting as an informer and rather concentrate on his primary duty of effective collection of revenue. If one may ask: Why was the position not such that the Registrar reciprocated on the business of acting as an informer by informing the Receiver of Revenue of companies which were not carrying on business or in operation and were therefore not in a position to possibly render tax returns? This would have left the decision up to the Receiver of Revenue to do verification on the tax status and compliance duty of companies.

Eventually the problem was solved with the re-introduction of annual duty payment and the duty to lodge annual return, which was done in terms of the Corporate Laws Amendment of 2002[639] and is now also required in terms of section 33 of the Companies Act of 2008. This has the result that currently the Commission has a reliable way of establishing

639 Act 39 of 2002.

which companies are not carrying on business or lodging annual returns so as to be able to initiate the deregistration process where desirable.

5 8 6 Inactivity for at least seven years

It is a ground for deregistration of a company if the Commission has determined in the prescribed manner that the company appears to have been inactive for at least seven years while no person has demonstrated a reasonable interest in or reason for the company's continued existence.[640] This is a new ground for deregistration which was not found in either the Companies Act of 1973 or any of its predecessors. It is a very flexible ground which the Commission may use once it has determined in the prescribed manner that the company appears to have been inactive for at least the minimum period specified in the section. Even then deregistration may be done only if no person has demonstrated a reasonable interest in the company or reason for the company's continued existence. Thus, depending on the circumstances of each case, the Commission may still opt to leave the company alone even though it has been inactive for at least seven or more years if an interested person such as for example a member, director, creditor etc shows reasonable interest in the company or its continued existence.

It is submitted that the prescribed manner of determining if the company has been inactive for at least seven years refers to the procedural aspects of deregistration in which the Commission sends a letter by registered mail or other verified communication to find out from the company if that is indeed the position. Confirmation of such state of affairs could then be positive or by default if no response is forthcoming.[641]

It is not so apparent why the magic number of "seven years" was chosen as the criterion. It could be that the legislature chose it as a reasonable time after which it could

640 Section 82(3)(b)(i) of the Companies Act of 2008.

641 This would be more like the procedure which is followed in trying to have a company comply with its annual return filing obligation which is found in regulations 30 and 40 of the Companies Regulations, 2011.

generally be accepted that a company had adequate opportunity during which it could have redeemed itself from lack of activity in order to stave off possible deregistration. After all that period is only one of the considerations as the Commission is in that situation still required to take into account whether there is a person demonstrating reasonable interest in or reason for the company's continued existence.

It is further submitted that this ground for deregistration can best be looked at as an aspect of the company "not being in operation", a ground for deregistration under the Companies Act of 1973 but which has since been omitted from the present Companies Act of 2008.[642] For if an interested person were to demonstrate reasonable interest in the company itself and especially a reason, obviously a good reason, for the continued existence of a company, that would go a long way towards showing that there is unfinished business on the part of the company, a sufficient reason to find in such circumstances that a company is still "in operation" even though perhaps not particularly active. After all that is what "in operation" is meant to cater for, more so that a company may be deregistered if it fails, on demand by the Commission, to show satisfactory cause for it to remain registered.[643]

5 8 7 Deregistration on request

The Companies and Intellectual Property Commission may deregister a company on request which is presented in the prescribed manner and form.[644] The "prescribed manner and form" refers to that contained in regulation 40(2) – (4) of the Companies Regulations, 2011 subject to the necessary adjustments.[645]

Deregistration on request, which is otherwise required to be in the prescribed manner and form, will only be granted if the Commission has determined that the company has

642 See the discussion under para 5 8 4 above.
643 Section 82(3)(a)(ii)(bb) of the Companies Act of 2008.
644 Section 82(3)(a)(ii).
645 Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (2011) 327. As a matter of fact regulation 40(2) and (3)(b) refer to s 82(3)(a)(ii) in particular.

ceased to carry on business and has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.[646] This too is a new ground for deregistration in South African law which was not there in previous legislation. However, in practice and as an informal and therefore illegal manner of liquidation of a company, it has been there for years.[647]

In comparable jurisdictions this mode of termination of the life of a company has been in operation for years and is apparently encouraged to be used when dealing with a "single dollar company" where insisting on formal winding-up would be seen as asking too much of a small company with very little resources and not having much to offer.[648] After all the standard practice would be to pay all the company's debts, distribute a liquidation dividend, whether in cash or as a dividend in *specie* and thereafter inform the relevant company law authorities that the company had ceased carrying on business and has no assets or liabilities.[649] After verification that this is indeed so, registration of the company would be duly terminated.

In this respect section 82(3)(b)(ii) goes further than just providing that a company may be deregistered on request if it has no assets by providing that even if the company does in fact have assets, it may still be deregistered if because of the inadequacy of its assets, there is no reasonable probability of it being liquidated, which is to say if the value of the assets does not justify the process of liquidation which can otherwise be expensive. It will be noted that the section does have a *lacuna* though in that it does not require that whatever little assets

646 Section 82(3)(b)(ii).

647 See, for example, *Commissioner of Taxes (SR) v "T" Company* 1957 4 SA 90 (SR), 21 *SATC* 335.

648 In terms of Form H15 made pursuant to s 311 of the Irish Companies Act 1963 a company may be struck off the register on request if the amount of its assets does not exceed 150 Euros or the amount of its liabilities, including both contingent and prospective liabilities, does not exceed 150 Euros.

649 For example, section 331(2) of the Botswana Companies Act of 2003 provides that a request that a company be removed from the register may be made on the grounds that the company has ceased to carry on business, has discharged in full its liabilities to all its known creditors and has distributed its surplus assets in accordance with its constitution and this Act or that the company, after paying its debts in full or in part, has no surplus assets and no creditor has applied to the court for an order putting it into liquidation. The position is the same in New Zealand in terms of s 318(2) of the Companies Act of 1993 and in Mauritius in terms of s 309(2) of the Companies Act of 2001. In Hong Kong though, the same result is achieved but for different reasons. Section 748(1) of the Hong Kong Companies Ordinance of 2012 provides that if on application by the Registrar, it appears to the court that a company should be dissolved but, having regard to the company's assets or for other reasons, it would not be appropriate to wind up the company, the court may order that the company's name be struck off the register and the company be dissolved.

the company could still be having must be dealt with first, for example, by being used to pay the creditors, if any, or be distributed to the members as a liquidation dividend or a dividend in *specie*, as the case may be.

More troublesome though is the total lack of reference to the liabilities of the company. The section mentions lack of assets or inadequacy thereof as a requirement for deregistration on request but says nothing about insisting that the company should also not have liabilities before such deregistration could be considered. Perhaps one should assume that the Commission would in any event require confirmation that apart from the assets the company does in fact also not have liabilities before its deregistration request may be granted. The alternative would no doubt be sanctioning the unreasonable, an unhealthy state of affairs were this to be the case. To the extent that the subsection does not require confirmation that apart from not having assets the company to be deregistered should also not have liabilities, this is a significant departure from, among others, section 73(5) of the Companies Act of 1973 which required that before a company could be deregistered for not carrying on business or being in operation the Registrar had to receive from the company a "written statement signed by every director thereof to the effect that the company has ceased to carry on business and has no assets or liabilities".

The concerns indicated above would not arise in Australia though. Section 601AA(2) of the Australian Corporations Act of 2001 provides that a person may apply to ASIC for deregistration of a company if among others the company's assets are worth less than 1 000 Australian dollars, the company has paid all fees and penalties payable under the Act, it has no outstanding liabilities and is not a party to any legal proceedings. All these safeguards are missing from the South African Companies Act of 2008, this having the result that a company may possibly be deregistered in circumstances where one or more of these issues ought to have been attended to first but were not.

Deregistration on request is subject to a *caveat* in the UK and is therefore treated somewhat differently. This is so since provision is made for exclusion of deregistration on request if in the recent past, the period given being a mere three months, the company has done some activity, in which case deregistration on request would not be allowed. In this respect section 1004(1) of the UK Companies Act of 2006 provides that application for voluntary striking off of the company from the register shall not be made if the company has, in the previous three months, changed its name, traded or otherwise carried on business, made a disposal of property or rights that immediately before ceasing to trade or otherwise carry on business was held for the purpose of disposal for gain in the normal course of trading or otherwise carrying on business or if the company was otherwise engaged in other business activity. In a follow-up provision section 1009(2) provides that a person who, at the end of a day on which any of the above-mentioned events occurs, is a director of the company must ensure that the company's application for voluntary striking off is withdrawn.

Deregistration on request is also not allowed in the UK when a company is undergoing some process such as a compromise or arrangement, administration, is being wound up or in receivership or if the company's estate is being administered by a judicial factor.[650] The request for deregistration can only be made after the process is finally concluded such as when it has been withdrawn, has been sanctioned by the court or was fully carried out.[651] Furthermore, it is an offence for a person to make application for deregistration of a company on request if the company is subject to any of the processes indicated above.[652] Although the above provisions do not find a direct equivalent in the South African Companies Act of 2008 it is submitted that the position is very much the same. For example, section 1005(1)(e) of the UK Companies Act of 2006 provides that a request for voluntary striking off must not be made if the company is being wound up. In this respect the South African Companies Act of 2008 provides in section 82(1) that the Master must file a certificate of winding-up when the affairs of the company have been "completely wound up", which certificate will be used as a basis for dissolution and deregistration of the company.[653] It follows that it cannot be in order that while a company is being wound up there is at the same time a request to the Companies and Intellectual Property Commission in the prescribed manner and form for it to be deregistered since to grant such request the Commission must be

650 Section 1005(1) of the UK Companies Act of 2006. More or less similar provisions are also found in s 305(1) of the Mauritius Companies Act of 2001 which deals with deregistration as a result of transfer of registration to a foreign jurisdiction in terms of which, should any of those processes occur, deregistration would not be allowed.

651 Section 1005(2) of the UK Companies Act of 2006.

652 Section 1005(4) of the UK Companies Act of 2006.

653 Section 82(2) of the Companies Act of 2008.

satisfied that the company has no assets or that because of the inadequacy of its assets there is no reasonable probability of the company being liquidated.[654] Reference may also be made to section 115 of the Companies Act of 2008 in terms of which application may be made to court for dissolution of a company after successful implementation of an agreement for the disposal of the assets or undertaking of a company or amalgamation, merger or scheme of arrangement. Only after dissolution of the company will deregistration follow as only then will the affairs of the company have been "completely wound up" and not before. It is submitted therefore that what is expressly provided for in section 1005(1) of the UK Companies Act of 2006 is tacitly built into the various provisions of the South African Companies Act of 2008.

5 8 8 Deregistration after transfer of registration of a company to a foreign jurisdiction

The Companies and Intellectual Property Commission may remove the name of a company from the companies register if the company has transferred its registration to a foreign jurisdiction.[655] In terms of section 82(5) of the Companies Act of 2008 a company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction if the shareholders have adopted a special resolution approving such an application and transfer of registration and the company has satisfied the prescribed requirements for doing so. In terms of subsection (6) the Minister is given the power to prescribe the criteria and procedural requirements which must be satisfied by a company before it may be deregistered on this ground.

The Minister has since prescribed the criteria and procedural requirements to be complied with before transfer of registration of a company to a foreign jurisdiction can take place, which are found in regulation 40(8).[656] If there were to be any amazing aspect of such criteria and procedural requirements, it is their simplicity and brevity. Regulation 40(8)

654 Section 82(3)(b)(ii)(bb) of the Companies Act of 2008.
655 Section 82(3)(a) of the Companies Act of 2008.
656 For a discussion of the regulation see Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (2011) 327.

briefly provides that a notice by a company to transfer its registration to a jurisdiction outside of the country, as contemplated in section 82(5), must be filed in Form CoR 40.2. and should be accompanied by-

- a copy of a special resolution approving the transfer of the company's registration to that jurisdiction;
- satisfactory evidence that the company satisfies the requirements to register in that jurisdiction; and
- the fee set out in Table CR 1.[657]

Once the above criteria and procedural requirements are satisfied, deregistration will be granted. It should be noted that the main issue is the requirement that the company should produce satisfactory evidence that it satisfies the requirements to register in that intended foreign jurisdiction. Any company embarking on this exercise would be well-advised to first obtain approval to register in that foreign jurisdiction or better still, to actually first register in that foreign jurisdiction before seeking cancellation of local registration, this being done to avoid possible unpleasant surprises and disappointment.[658]

5 8 9 External company ceasing to have a place of business in the country

In terms of section 332 of the Companies Act of 1973 an external company could be deregistered if it ceased to have a place of business in the country. A "place of business" was defined in section 1 of the Act to mean any place where the company transacted or held itself

657 That fee, which is to be reviewed from time to time, is currently R250.00.

658 It should be noted that deregistration of a company in South Africa with a hope that it would be registered in another country is not without problems. For if the anticipated registration in a foreign jurisdiction were not to materialise those would deregistered the company in South African on the basis of that hope would face serious embarrassment. Surprisingly, this superficial view is also taken in Mauritius where section 302(1)(d) of the Companies Act of 2001 requires "documentary evidence which satisfies the Registrar that the company is to be incorporated under the law in force in another country ..." The problem with this approach is that it does not address the central issue of what happens if notwithstanding good intentions such hoped for foreign incorporation does not materialise. It is submitted that the more acceptable dispensation is that found in New Zealand where section 351(d) of the Companies Act of 1993 provides that an application by a company for removal from the register in connection with becoming incorporated under the law in force in another country must be in the prescribed form and must be accompanied by evidence acceptable to the Registrar that the company is "incorporated under that law", which is to say that it has already been incorporated rather that it would hopefully be incorporated.

out as transacting business and included a share transfer or share registration office. It should be noted that the Companies Act of 2008 does not deal with deregistration of an external company save where it fails to lodge an annual return, in which case it is treated just like any local company in terms of regulation 40 which, dealing with failure to lodge annual return for two years in succession, refers to "the company or external company". Although section 332 of the Companies Act of 1973 has, as is the whole of the Act, been repealed in South Africa, its equivalent provisions are very much alive in Namibia where section 338 of the Companies Act of 2004[659] provides that an external company may be deregistered if it ceases to have a place of business in Namibia.[660]

In Australia, section 601CL(1) – (3) of the Corporations Act of 2001 goes a little bit further by providing that a foreign company would be deregistered in Australia if ASIC has reasonable cause to believe that it is not carrying on business in Australia or if it has been dissolved or deregistered in its country of origin.

It is submitted that in South Africa an external company could be treated like a local company for the purposes of deregistration as failure to do so would lead to that absurd situation in which a local company could be deregistered while an external company may not for no reason other than lack of statutory provisions dealing with deregistration of an external company. This is not a satisfactory position and needs legislative attention.

659 Act 28 of 2004.

660 In Swaziland the equivalent provisions are found in s 154(2) of the Companies Act 8 of 2009. In Lesotho the law does not only deal with the aftermath of cessation of business by an external company but also prescribes the requirements that must be complied with before the external company may cease to have a place of business. Section 154(1) of the Lesotho Companies Act 18 of 2011 provides that an external company that intends to cease to have a place of business in Lesotho is required to give public notice of that intention, which notice shall be published in three consecutive editions of a newspaper widely circulating in the country as well as through the electronic media including through a radio station having national coverage during prime time for at least three consecutive days. Thereafter, not later than three months after giving the required notice, the company shall notify the registrar of companies, in accordance with the manner prescribed in Form 15 of the Schedule, stating the date on which the company intends to cease carrying on business in Lesotho. In terms of subsection (2) the Registrar shall remove the company from the register immediately after receipt of the notice given as described above.

5 8 10 Deregistration as a result of winding-up

The UK Companies Act of 2006 has provisions which find no equivalent in the South African Companies Act of 2008. Section 1000(7)(b) of the UK Companies Act of 2006 provides that nothing in the whole of section 1000[661] affects the power of the court to wind up a company the name of which has been struck off the register. This section would seem awkward to the South African legal fraternity as it suggests that notwithstanding deregistration of a company it can, without more, be wound up. In terms of South African law a deregistered company will have to be reinstated to the register first before its winding-up may start.[662] This is also the position in Australia.[663]

The more acceptable and preferable provisions are those found in the Australian Corporations Act 2001 which are a reverse of section 1000(7)(b) the UK Companies Act 2006 and which provide that a company may be deregistered after winding-up if that process, having been initiated, is not taken to finality. Thus in terms of the Australian Corporations Act a company which is wound up may be deregistered to finalise what had been left partially done through winding-up. Section 601AB(2) of the Australian Corporations Act 2001 provides that ASIC may decide to deregister a company if it is being wound up and ASIC has reason to believe that the liquidator is no longer acting or the company's affairs have been fully wound up and a return that the liquidator should have lodged is at least six months late or the company's affairs have been fully wound up as a result of which the company has no property or not enough property to cover the costs of obtaining a court order for its deregistration. The South African Companies Act of 1926 had more or less similar provisions

661 Section 1000 deals with the grounds on which and the procedure to be followed when the Registrar strikes off a company from the register of companies, that is when deregistering it. It is the equivalent of s 82 of the South African Companies Act of 2008, and better still, s 73 of the repealed Companies Act of 1973.

662 This must be so as a deregistered company is non-existent. As Van Oosten J reiterated in *Fintech (Pty) v Awake Solutions Ltd* 2013 1 SA 570 (GSJ) 575C-D para 12 it is now "settled law that deregistration puts an end to the existence of a company". See also *Miller v Nafcoc Investment Holding Co Ltd* 2010 6 SA 390 (SCA) para 11 and *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549C. Therefore, until it is brought back to life, there cannot be activity by it or on its behalf, which activity would obviously be invalid.

663 *Payne v Australian Securities Commission* (1997) 15 ACLC 1, 019 (WA Sup Ct) where the Supreme Court of Western Australia held that in circumstances where winding-up was to take place it was preferable to have the corporation reinstated to allow winding-up to proceed in the usual way. That was particularly so as the need for uniformity of approach by liquidators was a compelling reason for reinstatement in such circumstances.

in that section 199(4) provided that from time to time, and at least once a year, the Master had to send the Registrar a return of every company which was in the course of being wound up and in regard to which the Master had reason to believe that no liquidator was acting or that the liquidator had failed to lay before the Master the accounts showing how winding-up had been conducted if the Master had reason to believe that the affairs of the company had been fully wound up. Armed with that return the Registrar could publish in the Gazette and send to the company a notice to the effect that unless cause was shown to the contrary the name of the company would be struck off the register at the end of a period of three months from the date of publication of the notice.

Currently, sections 1000(7)(b) of the UK Companies Act of 2006, 601AB(2) of the Australian Corporations Act 2001 and 199(4) of the South African Companies Act of 1926 find no equivalent in the South African Companies Act of 2008. The closest provisions with which they can be compared are found in section 82(3)(b)(ii) of the Companies Act of 2008 which provides that the Commission may remove a company from the companies register if it has received a request in the prescribed manner and form and has determined that the company has ceased to carry on business and has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated. It should be noted at once that there being no reasonable probability that a company would be liquidated is nowhere near being the same thing as saying that the affairs of the company "have been fully wound up" as section 601AB(2) of the Australian Corporations Act requires before it can come into operation. Moreover, in terms of section 601AC ASIC is required to deregister (must deregister) a company if a court orders the deregistration of the company in terms of a reconstruction and amalgamation scheme, when a liquidator is released after completion of winding-up or after lodgment of the liquidator's return following winding-up. Furthermore, ASIC must deregister a company if three months have passed since the liquidator lodged a return and no court order was made during that period contradicting the return.[664]

664 Section 601AC(2) of the Australian Corporations Act 2001. More or less similar provisions are also found in s 331(1)(c) of the Botswana Companies Act of 2003; section 318(1) of the New Zealand Companies Act of 1993; section 309(1)(c) of the Mauritius Companies Act 2001 and section 747(1) of Hong Kong Companies Ordinance of 2012.

5 9 GROUNDS FOR DISSOLUTION

5 9 1 Dissolution under the Companies Act of 1973

Like the Companies Act of 1973, the present Companies Act of 2008 deals with the dissolution of a company, albeit slightly differently. In terms of the 1973 Act dissolution was a final product and an end in itself whereas under the 2008 Act it is just one step leading to the final result. Therefore, in terms of the 2008 Act dissolution, together with two other steps, the one preceding it while the other follows it, brings about finality to the life of a company.

Under the Companies Act of 1973 a company could be dissolved as a result of the winding-up of its affairs or without winding-up if there was a scheme of compromise / arrangement or that of reconstruction / amalgamation. If there was a winding-up section 419 provided that when the affairs of a company had been completely wound-up, the Master had to transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator. The Registrar was required to "record" the dissolution of the company and publish notice thereof in the Government Gazette, the date of recording the dissolution becoming the date of dissolution.[665] However, after an amendment introduced by the Corporate Laws Amendment Act of 2006[666] the section required publication of the notice of dissolution in the "prescribed manner" instead of in the Government Gazette. Therefore, the ground for dissolution in terms of section 419 was a complete winding-up of the affairs of the company.

Even if there was no winding-up a company could still be dissolved as a result of any scheme of compromise or arrangement effected between the company and its creditors (or any class of the creditors) or between the company and its members (or any class of members) as provided for in the Companies Act of 1973.[667] It was possible for the scheme to

665 Section 419(1) - (3).
666 Act 24 of 2006 which came into effect on 14 December 2007.
667 Section 311(1).

provide for the dissolution of the company without winding-up,[668] in which case it would be dissolved accordingly. Alternatively, the scheme of compromise or arrangement could not be an end in itself but a part of the reconstruction of any company or companies or perhaps a part of the amalgamation of any two or more companies. It could happen that as part of the reconstruction or amalgamation the undertaking or property of the company was transferred to another company. In those circumstances the court sanctioning the compromise or arrangement had the power to make provision for the dissolution, without winding-up of the transferor company, if after the scheme it remained an empty shell without assets, liabilities or undertaking.[669] Before the transferor could be dissolved without winding-up, the assets, liabilities and undertaking of the transferor company had to be transferred to the transferee company.[670]

5 9 2 Dissolution under the Companies Act of 2008

The Companies Act of 2008 deals with dissolution of a company very much like the Companies Act of 1973 did save that it adds another element which was not there in the 1973 Act. Like its predecessor section 82 of the Companies Act of 2008 provides that the Master of the High Court must file a certificate of winding-up of a company in the prescribed form when the affairs of the company have been completely wound up.[671] Upon receiving a winding-up certificate the Companies and Intellectual Property Commission is required to record the dissolution of the company in the prescribed manner and remove the company's name from the companies register.[672] Removal of the company's name from the companies register is of course its deregistration. Therefore, dissolution of a company under section 82 of the Companies Act of 2008 leads to its deregistration rather than serve as an alternative to it. Under section 419 of the Companies Act of 1973 recording the dissolution by the Registrar and publication of notice thereof in the prescribed manner, the date of recording of which became that of dissolution, marked the final end of the life of a company as nothing more was required. Under section 82 of the Companies Act of 2008 if the Commission were, for

668 Section 311(4).
669 Section 313(1).
670 Section 313(1) proviso.
671 Section 82(1).
672 Section 82(2).

example, to record the dissolution of the company in the prescribed manner but omit to remove the company's name from the companies register, as required by the section, the company would very much remain alive notwithstanding a complete winding-up of its affairs as the critical step of removing its name from the companies register would not have been done. After all section 83 of the Act is very specific and provides that 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).[673] Accordingly, the significance of removal of the name of the company from the companies register cannot be over-emphasised.

5 9 3 Dissolution of close corporations

The Close Corporations Act of 1984 does not make provision for a scheme of compromise / arrangement or that of reconstruction / amalgamation. It follows therefore that there can be no dissolution of a close corporation without winding-up. Accordingly, the dissolution of a close corporation always comes as a result of a complete winding-up of its affairs.[674] After all section 66(1) of the Close Corporations of 1984 made the dissolution provisions of the Companies Act of 1973 as contained in section 419 applicable to close corporations. The only dissolution provisions of the Companies Act of 1973 which did not apply to close corporations were those found in section 419(4) which provided that in the case of any other body corporate the certificate of the Master under subsection (1) constituted the dissolution of the body corporate, thus disposing of the need to record the dissolution by the Registrar and publish notice thereof in the prescribed manner. With the repeal of the Companies Act of 1973 dissolution of close corporations is now governed by the winding-up and dissolution provisions of the Companies Act of 2008 as provided for in terms of sections 66 and 67 of the latter Act.

673 Section 83(1).
674 Section 66(1) of the Close Corporation Act 69 of 1984.

5 10 SUMMARY

Like its predecessor, the Companies Act of 2008 has provisions dealing with both deregistration and dissolution. Whereas the Companies Act of 1973 confined deregistration to just three grounds, that is not so under the Companies Act of 2008 which contains seven grounds on which a company may be deregistered. Moreover, under the Companies Act of 2008 the Companies and Intellectual Property Commission appears to enjoy sufficient flexibility when it comes to the circumstances in which a company may be deregistered, a very laudable approach indeed. It is so that a company may just as well be deregistered on request for no reason other than having ceased to carry on business while its remaining assets do not warrant incurring the cost of formal liquidation. Still on the issue of deregistration on request, the point has already been made though that failure to require that the company making such a request should also confirm that it does not have outstanding liabilities appears to have been an oversight which needs legislative attention.

The Companies Act of 1973 was somewhat fairly elaborate on the procedure to be followed before deregistering a company but very thin on the grounds for doing so. However, the Companies Act of 2008 seems to be going in the opposite direction by being very generous on the grounds but not particularly impressive on the procedure to be followed, which procedure is hidden in the midst of enquiries which the Commission has to make when a company fails to lodge its annual returns as required. Moreover, in relation to a company whose deregistration is based on its intention to transfer registration to a foreign jurisdiction, the Companies Act of 2008 proceeds on the premise that if such registration can potentially be granted the company will definitely be successfully registered in that jurisdiction. It is submitted that a company will run into unnecessary trouble and inconvenience were the assumed foreign transfer turn out to have been misplaced as by then the company would have been removed from the local companies register.

CHAPTER 6

General and procedural consequences of deregistration and dissolution

6 1 INTRODUCTION

This chapter examines the consequences of deregistration and dissolution. While it would have been more convenient and logical to discuss all the consequences of the two processes here it is considered expedient to refrain, at least for the time being, from looking at two very important consequences, namely *bona vacantia*[675] and liability both after deregistration[676] and dissolution.[677] If anything, the decision to exclude these consequences from this chapter, to which they legitimately belong, has been motivated largely by the magnitude and complexity of the issues they raise. It is hoped that this approach is nevertheless justifiable. The purpose of the two processes is discussed elsewhere[678] and will accordingly not be repeated here.

6 2 DEREGISTRATION DISTINQUISHED FROM DISSOLUTION

Unlike the Companies Act of 1973 which defined deregistration,[679] but not dissolution, the Companies Act of 2008 does not define either. This notwithstanding, there is nevertheless a

675 Which is discussed in Chapter 7.

676 Discussed in Chapter 8.

677 Discussed in Chapter 8.

678 Chapter 4 para 4.2.

679 Section 1(1) defined "deregistration" in relation to a company to mean the "cancellation by the Registrar of the registration of the memorandum and articles of the company and, in relation to an external company, the cancellation by the Registrar of the registration of the memorandum of the external company" while "deregister" had a corresponding meaning.

world of difference between the two concepts even though their effect on the existence of a company as a legal entity, as well as some of their consequences, although not all, may be the same.[680] It is trite that there is a difference between deregistration and dissolution.[681] The difference between the two was discussed among others in *Income Tax Case 1306*[682] where Melamet J, referring to the provisions of the Companies Act of 1973, said:

> "Dissolution and deregistration, in company law in South Africa, are two different concepts, with different procedures and different results. Deregistration is defined in s 1 of Act 61 of 1973 and the procedure in regard thereto is contained in s 73 of the Act. The various methods of winding-up a company are set out in s 343 of the Act and the result of such a winding-up is dealt with in ss 419 and 420 of the Act. After winding-up, the company's existence is terminated for all purposes, while on deregistration the company ceases to exist as a corporation."[683]

The difference between the two is also dealt with in Henochsberg where, with reference to the Companies Act of 1973, it is said:

> "Deregistration in terms of s 73 is to be distinguished from dissolution of a company following its winding-up in terms of s 419 (although each leads to cessation of the existence of the company as a legal *persona* ...) and dissolution by order of the Court in the context of a reconstruction or an amalgamation ... As was pointed out in *R Miller v Nafcoc Investment Holding Company Ltd* [2010] 4 All SA 44 (SCA) at para 11, the deregistration of a company in winding-up in terms of s 73 is not competent since 'the consequence of a winding-up is not deregistration but a dissolution in terms of s 419 of the Companies Act ...'"[684]

It should be noted that it is much easier to distinguish between deregistration and dissolution with reference to the Companies Act of 1973 than the Companies Act of 2008. This must be so as to a very large extent the latter Act has blurred the distinction between the two with the

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680 Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 part 3 First Reissue (1996) 125 para 88.

681 *Absa Bank Limited v Companies and Intellectual Property Commission of South Africa; Absa Bank Limited v Voigro Investments* 19 CC [2013] 2 All SA 137 (WCC) para 38.

682 (1980) 42 SATC 139 (The names of the parties are not given in the Income Tax Court, nor is information provided which would make it possible to identify the parties).

683 *Income Tax Case* 1306 145.

684 Kunst, Delport and Vorster (eds) *Henochsberg on the Companies Act* vol 1 (2011) 140.

result that the completion of the one process leads to the other. For example, in terms of section 82 of the Companies Act of 2008, a company must first be wound up before it can be dissolved and deregistered while in terms of section 83(1) a company is dissolved as of the date its name is removed from the companies register.[685] This led the full bench of the Western Cape High Court to take the confusion to its logical conclusion, namely that under the Companies Act of 2008 there is not much difference between deregistration and dissolution, this having the result that a close corporation which had been deregistered in terms of the Close Corporations Act of 1984 could have its dissolution declared void by the court in terms of section 83(4) of the Companies Act of 2008 instead of being confined to reinstatement of registration by the Companies and Intellectual Property Commission in terms of section 82(4) of the Act, something which was done in *Absa Bank Ltd v Companies and Intellectual Property Commission*.[686]

Blurring the distinction between the two processes, if anything, only shows the extent to which the two are interrelated and the common ground which exists between them even though they are nevertheless separate and distinct, each having to some extent its own special features and consequences which do not obtain in the other. It is submitted that treating the two processes as if they are one and the same thing is wrong, as some three decades ago Goldstone J (as he then was) emphasised in Ex *parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd*[687] that "it is not possible to equate dissolution or winding-up of a company with deregistration".[688]

685 Removal of the name of a company from the companies register is nothing other than its deregistration.

686 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).

687 1984 2 SA 372 (W).

688 *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 375F.

6 3 THE EFFECT OF DEREGISTRATION AND DISSOLUTION ON THE EXISTENCE OF A COMPANY

In terms of the Companies Act of 1973 registration of the memorandum and articles of a company resulted in the incorporation of the company.[689] Therefore, cancellation of registration of the memorandum and articles of the company (deregistration) could only have the opposite effect, that is, the company's corporate personality duly came to an end.[690] That meant no more or less than that the company ceased to exist.[691] The Act also dealt with dissolution of a company which obviously had significant effect on the existence of a company as a legal person.[692]

Under the Companies Act of 2008 the position is still the same although the procedure is somewhat different. Under the Act, a company comes into existence as a legal entity after registration of a Memorandum of Incorporation and Notice of Incorporation.[693] Termination of the existence of a company as a legal entity is brought about by cancellation of registration of the above two documents which is usually done as a result of dissolution followed by deregistration, if there is winding-up, but sometimes only by way of deregistration or dissolution alone, to the exclusion of the other process. Differences and similarities between two processes have already been dealt with.[694]

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689 Sections 64 and 65 of the Companies Act of 1973. See also Ex *parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 378H.

690 As per definition of "deregistration" in s 1 of the Companies Act of 1973. See also *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 377A and *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 7. Dissolution put an end to the existence of a company, so it was argued, and quite successfully so, in *Ex parte the Government* 1914 TPD 596.

691 *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 377B; *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 36C and 37C; *Kanderson (Pty) Ltd v The Registrar of Companies* 1987 2 PH ET (T); *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 733j; *Coxon v Gorst* [1891] 2 Ch 73 76. This makes the company "non-existent" as per *HL Hall and Sons Group Services Ltd v Wilsnach* 1997 3 SA 116 (T) 118I-119E.

692 Dissolution was dealt with in s 419 and took place after the affairs of the company had been "completely wound up".

693 Section 13(1).

694 See Chapter 5 above.

Termination of the existence of a company as a legal person has been compared with the death of a human being,[695] subject to the proviso that in the case of a company it can be resurrected and thus brought back to life once again, something which human beings are not able to do in the case of a natural person.[696] However, the alleged similarity between the death of a human being and a company has been queried. In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd,*[697] Labuschagne J expressed the view that it would be incorrect to say that on dissolution a company "died" in the same manner as a natural person did. However, the learned Judge did not explain the basis of his query.

It is the very fact of the death of the company that brings about significant consequences. Being as it were "dead" any purported act by or on behalf of such dead company can only be an act of mere usurpation[698] and therefore a nullity. As Labuschagne J put it in *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[699] "any steps or proceedings taken on behalf of the plaintiff, after its dissolution, are null and void".[700] Nullity also extends to activities and steps against such a company.[701]

695 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 7. According to *Willow Green Development Ltd v Lucas Anderson Construction (1993) Co Ltd* 1998 CanLII 4518 (BC) para 13, a decision of the Supreme Court of British Columbia, Canada, a deregistered company is "moribund, non-existent, non-entity lacking any capacity, no longer exists, like a dead man".

696 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty)* Ltd 2006 5 SA 306 (W), [2005] ZAGHC 107 (18 April 2006); *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ) para 14; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 5.

697 1991 3 SA 846 (W).

698 *Bowman v Sacks* 1986 4 459 (W) 463H; *Morris v Harris* [1927] AC 252 268.

699 1991 3 SA 846 (W).

700 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W) 849A-B; *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) paras 43, 49 and 50.

701 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R), *Pieterse v Kramer* 1977 1 SA 589 (A); *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 4 SA 154 (D).

It is said that both deregistration and dissolution put an end to the legal existence of a company even though their purposes and certain of their consequences are different.[702] The exact effect of these processes, and especially deregistration, on the very existence of a company itself is a matter of some controversy and is, happily for present purposes, not something to be entertained in detail here.[703] While it is without doubt true that the processes of deregistration and dissolution are not one and the same thing it cannot be denied though that there is much area of common ground, this being more evident as regards the effect of these processes on the very existence of the company itself as well as some of their consequences.

The effect of these processes on the very existence of the company is accepted to be the same. As a matter of fact the courts have on several occasions equated the two. In the case of *Bowman v Sacks*[704] Flemming J did the same saying:

> "Of particular importance here is the consideration that upon *dissolution or deregistration*[705] of a company, the legal person concerned disappears from the legal scene (and from the doing of any act as its own transaction) just as a natural person who came to die."[706]

702 *Lawsa* vol 4 part 3 par 88. The proposition that deregistration terminates the existence of a company finds particular favour with Professor Blackman who contributed this section of *Lawsa*. There is indeed a formidable list of authorities to support the point, the leading case on the subject being *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W). That dissolution terminates the existence of a company (to all intents and purposes) as a legal person would appear to be universally accepted. Another case to state the principle is *Standard Bank of South Africa Ltd v The Master and Others* 1997 3 SA 178 (C) 185I-J.

703 A full analysis of the issues, authorities and debates involved can be found in Chapter 4 above.

704 1986 4 SA 459 (W).

705 My emphasis.

706 *Bowman v Sacks* 1986 4 SA 459 (W) 462A-B. In *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309B De Vos J said the "removal of the company from the register [deregistration] is tantamount to its dissolution."

6 4 NO CORPORATE ACTIVITY DURING DEREGISTRATION OR DISSOLUTION PERIOD

Because of deregistration or dissolution the legal personality of a company is destroyed with the result that it disappears as a legal entity.[707] With cessation of legal existence comes an end to corporate activity. Transactions and other activities thereafter purportedly done by or on behalf of the company are "acts of mere usurpation".[708] This is unavoidable as there can be no legitimate corporate activity after either deregistration or dissolution.[709]

The company being as it were non-existent[710] it is not capable of acting through any of its organs or functionaries such as a general meeting of shareholders or board of directors. It follows therefore that the passing of a resolution by the shareholders or performance by the directors of any activity, such as authorising an attorney to act for the company, is a nullity.[711] For example, in *Miller v Nafcoc Investment Holdings Company Ltd*[712] notices requiring persons who at some stage were members or employees of the company were authorised by the Commissioner appointed in terms of section 418 of the Companies Act of 1973 to enquire into the affairs of the company at a time when it was deregistered. The Supreme Court of Appeal held that as the company in question was deregistered the notices

707 *Bowman v* Sacks 1986 4 SA 459 (W) 463G; *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 377A-B. In *Re C W Dixon Ltd* [1947] 1 All ER 279 280B it was held that as a result of dissolution a company "disappeared and ceased to exist".

708 *Bowman v* Sacks 1986 4 SA 459 (W) 463H, referring to the terminology of Lord Blanesburgh (whose judgment was read by Viscount Dunedin) in *Morris v Harris* [1926] All ER Rep 15 (HL) 24, [1927] AC 252, 96 LJ CH 253, 136 LT 587, [1927 B & C.R. 65].

709 *Bowman v Sacks* 1986 4 SA 459 (W) 462A-B & 463H; *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC); *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 8, as per contention. See also *Pieterse v Kramer NO* 1977 1 SA 589 (A) 601E and *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012).

710 *Ex parte Ziman* 1970 1 SA 164 (T) 170B; *H L Hall and Sons (Group Services) Ltd v Wilsnach* 1997 3 SA 116 (T) 119E; *Tymans Ltd v Craven* [1952] 1 All ER 613 (CA); *Re C W Dixon Ltd* [1947] 1 All ER 279 280A; *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) paras 48 and 49.

711 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (T); *Lawsa* para 90.

712 [2010] 4 All SA 44 (SCA), 2010 6 SA 390 (SCA), [2010] ZASCA 25 (25 March 2010).

were for that reason void.[713] Very much the same happened in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd*[714] where Snyman J described the events which took place as follows:

> "I am therefore confronted with this position that when the plaintiff company purported to pass the resolution ... authorising one ... Rall, who was its director, to institute action against the defendant company, and when Rall signed the power of attorney authorising the attorney to institute the action, this amounted to a nullity."[715]

Equally, a person who after the date of dissolution of a company acquires shares in it or takes an assignment of its debts would not qualify as a member or creditor of that company.[716] In the same way the authority of an agent appointed to act on behalf of the company terminates on deregistration or dissolution,[717] as the case may be, just as Flemming J indicated in *Bowman v Sacks*[718] " ... when a continuing relationship is involved such as authority to represent, that ceases with cessation of the existence of the principle [*sic*]". In the case of legal proceedings in which a company is involved, such cannot proceed after deregistration or dissolution of the company as one of the parties would have ceased to exist.[719]

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713 *Miller v Nafcoc Investment Holdings Company Ltd* [2010] 4 All SA 44 (SCA), 2010 6 SA 390 (SCA), [2010] ZASCA 25 (25 March 2010) para 12.

714 1973 3 SA 548 (W).

715 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 549C.

716 *Re Test Holdings (Clifton), Ltd; Re General Issue and Investment Co., Ltd* [1969 3 All ER 517 520B; *Re New Timbiqui Gold Mines, Ltd* [1961] 1 All ER 865, [1961] Ch 319.

717 *Salton v New Beeston Cycle Company* [1900] 1 Ch 43; *Tymans Ltd v Craven* [1952] 1 All ER613 (CA).

718 *Bowman v Sacks* 1986 4 SA 459 (W) 462C.

719 *Ebrahim v Evans* 1990 4 SA 424 (D); *Foster Yates & Thom Ltd v NW Edge-Hill Equipment Ltd* [1978] 122 Sol J 860.

6 5 VALID PRE-DEREGISTRATION OR PRE-DISSOLUTION ACTIVITY NOT AFFECTED

It could happen that before deregistration or dissolution a company might have entered into some transactions or taken certain steps or measures which were entirely valid. The question which arises is the effect of supervening deregistration or dissolution on same. It should be noted that in such a case, but for deregistration or dissolution, the question of the status of such transactions or activity would not have arisen in the first place. The answer to this tricky question is found in *Miller v Nafcoc Investment Holdings Company Ltd* [720] where Cloete JA held:

> "I reject the submission on behalf of the applicants [respondents] that the authority of the joint liquidators, the Master and the Commissioner – all of which was conferred before the deregistration – did not survive the deregistration for the simple reason that all such authority was conferred before Serveco was deregistered, and there is no warrant for holding that events that occurred before that event are in any way affected by it."[721]

The significance of the above approach becomes even more apparent should registration of the company be restored or dissolution declared void since in that event the validity of such pre-deregistration or dissolution activities would not be seriously challenged.

6 6 TERMINATION OF RIGHTS AND OBLIGATIONS OF A DEREGISTERED OR DISSOLVED COMPANY

Deregistration or dissolution of a company brings to an end its rights and obligations.[722] This has the result that because of the very fact of deregistration or dissolution third parties may acquire rights they could not have acquired but for that fact. A classic example is acquisition

720 [2010] 4 All SA 44 (SCA), 2010 6 SA 390 (SCA), ZASCA 25 (25 March 2010).

721 *Miller v Nafcoc Investment Holdings Co Ltd* para 12.

722 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) para 50.

by the State of the right of ownership to property which belonged to a deregistered or dissolved company which had not been dealt with, which property is referred to as *bona vacantia*[723] and vests in the State "without further ado".[724] This means that the right of ownership in the property concerned which until deregistration or dissolution vested in the company comes to an end while at the same time the State automatically and without "further ado" becomes the new owner thereof. Similarly, a host of other rights and obligations which the company had come to an end while at the same time new ones may be created in favour of third parties.

The issue was mentioned, albeit very briefly, in *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd*[725] where De Vos J, dealing with restoration of registration of a company in terms of section 199(7) of the Companies Act of 1926, indicated that if a restoration order were to be granted it would result in the "revival of a pre-existing relationship which may have been terminated by the action of the Registrar in securing the removal [of the company] from the register".[726] The *Varvarian* dictum was quoted with apparent approval by Blieden J in *Insamcor (Pty) Limited v Dorbyl Light and General Engineering (Pty) Limited*,[727] although the case was overruled on appeal on the issue of giving notice of restoration of registration to interested parties. The question of termination of obligations was also dealt with on appeal to the Supreme Court of Appeal in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[728] where Brand JA held that through the operation of a restoration order "obligations towards the company, which were *extinguished because of deregistration*" would revive.[729] The court held further that as a result of deregistration "third parties may have acquired or lost rights, or they may have

723 This is the subject of the next chapter.

724 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A).

725 1965 4 SA 306 (W).

726 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309E-F.

727 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006).

728 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

729 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007) para 23. (My emphasis).

decided not to exercise their rights against the company [as they could not] – precisely because the company did not exist."[730]

The issue was also dealt with in broad terms, and as is almost always the case, in the context of restoration of registration, in *Ex parte Sengol Investments (Pty) Ltd*[731] where Van Dijkhorst J said:

> "The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become *bona vacantia* and as such accrued to the State. Likewise debtors and creditors of the company at the time of deregistration may upon restoration find their obligations or rights resuscitated."[732]

6 7 CESSATION OF AUTHORITY TO REPRESENT THE COMPANY

Upon dissolution or deregistration of a company, the legal person concerned disappears from the legal scene, and from the doing of any act as its own transaction, just as a natural person who came to die.[733] Therefore, when a continuing relationship is involved such as authority to represent, such comes to an end with cessation of existence of the principal.[734] This has among others the result that with dissolution of the company following completion of winding-up of its affairs, and after his release, the authority of a liquidator to act on behalf of the dissolved company ceases.[735]

730 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 23.

731 1982 3 SA 474 (T).

732 *Ex parte Sengol Investments (Pty) Ltd* 477C-D. The passage was quoted with approval in *Weichelt v Triponza Trading 276 CC* [2008] ZAGPHC 201 (15 May 2008) para 14.

733 *Bowman v Sacks* 1986 4 SA 459 (W).

734 *Bowman v Sacks* 1986 4 SA 459 (W) 462C.

735 *Bowman v Sacks* 1986 4 SA 459 (W) 462C. After completion of his duties the liquidator would be discharged and released from his duties in terms of s 385 of the Companies Act 1973.

With cessation of the existence of a company because of deregistration or dissolution, there is also an end to any corporate activity with the result that acts thereafter done on behalf of the company would be "acts of mere usurpation"[736] since no act can be transacted for the company as an entity which had independent legal existence.[737] A person, such as a legal representative or any other person, who purports to represent a deregistered or dissolved company in legal proceedings would have no means of obtaining authority to represent it while it remained so deregistered or dissolved.[738] Moreover, dissolution of a company revokes the authority of its attorneys to represent it.[739] Thus in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd*[740] where counsel for the plaintiff company only found out a day before the hearing of the matter that the company had been deregistered, the court held that such company could not authorise him to act for it. Accordingly, the court allowed him to address it on the basis of *amicus curiae*. Moreover, when the company purported to pass a resolution authorising its director to institute the proceedings and when the said director signed a power of attorney authorising the attorney to institute the action, that act amounted to a nullity as the company had already been deregistered by that time.[741]

6 8 TERMINATION OF LEGAL PROCEEDINGS UNDERWAY AT THE TIME OF DEREGISTRATION OR DISSOLUTION

Legal proceedings which may have been instituted by the company terminate upon its subsequent dissolution and would not be revived by a court order declaring the dissolution to

736 *Bowman v Sacks* 1986 4 SA 459 (W) 463H.

737 *Ibid.*

738 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 27.

739 *Salton v New Beeston Cycle Company* [1900] 1 Ch 43.

740 1973 3 SA 548 (W).

741 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549A-C.

have been void, as they would have died a natural death upon dissolution.[742] Any proceedings underway are swept away by dissolution, come to an end and have to start afresh if the dissolution is subsequently declared void, for proceedings which come to an end upon dissolution are not revived by its voidance.[743] In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[744] Labuschagne J disagreed with the view that pending proceedings are not revived by a voidance order. In *Pieterse v The Master*[745] while the company was in liquidation the liquidator instituted legal proceedings against a third party for damages. The Master was duly informed of the proceedings but before they were finalised the Master erroneously issued a certificate of completion of duty by the liquidator and cancellation of security in terms of the provisions of section 385(1) of the Companies Act of 1973. As a result the Registrar of Companies duly dissolved the company in terms of section 419 of the Act. In the course of setting aside the dissolution of the company as not having been properly effected, Waglay AJ held that as the company had been dissolved, and for the duration of such dissolution, the action instituted by it could not be proceeded with.[746] That had to be so since any action pending at the time of dissolution of the company terminates or lapses because of dissolution.[747]

6 9 NO NEW LEGAL PROCESSES DURING DEREGISTRATION OR DISSOLUTION PERIOD

Deregistration or dissolution of a company has profound effect on legal processes and proceedings in which the company is involved. Starting with a letter of demand where applicable, right through the various stages of the proceedings including the granting of judgment and its execution, be it in favour of or against a deregistered or dissolved company,

742 *Bowman v Sacks* 1986 4 SA 459 (W) 464A & 465G.

743 *Ebrahim v Evans* 1990 4 SA 424 (D) 428B-D; *Morris v Harris* [1926] All ER Rep 15 (HL), [1927] AC 252.

744 1991 3 SA 846 (W).

745 2004 3 SA 593 (C).

746 *Pieterse v The Master* 2004 3 SA 593 (C) 596F para 8.

747 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W) 849I-J.

the prevailing general view is that whatever has been done against or in favour of such a company is null and void.[748] Thus in B*roughton v Manicaland Air Services (Pvt) Ltd*[749] it was held that a demand for security for costs which was served on the company's legal representative after its dissolution was a nullity.[750]

Unless and until dissolution is set aside or registration is restored no legal proceedings may be taken by, on behalf of or against the company.[751] Any such proceedings are a nullity. "All pending suits and actions by and against a corporation are abated by a dissolution of the corporation ..." declared the Supreme Court of Missouri in *Bruun v Katz Drug Co Inc.*[752] Proceedings which are underway die a natural death in the event of supervening deregistration or dissolution.[753] It follows therefore that the issue or service of a summons by, on behalf of or against such a company is null and void.[754] Moreover, abatement of proceedings in which a company is involved is not confined to legal proceedings but also includes arbitration proceedings[755] since as an ostensible party in those proceedings the company would not be in existence by virtue of deregistration or dissolution.[756]

748 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) paras 37, 43 and 49; *Willow Green Developments Ltd v Lucas Anderson Construction (1993) Co Ltd* 1998 CanLII 4518 (BC). See also *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) which while not laying down such sweeping principle is nevertheless indicative of the generality of the effect of deregistration. *A fortiori* dissolution should stand on an even stronger ground.

749 1972 4 SA 458 (R).

750 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R) 459D-E.

751 *Pieterse v Kramer* 1977 1 SA 589 (A).

752 173 SWR 2nd Series 906 909 and authorities there referred to.

753 *Bowman v Sacks* 1986 4 459 (W) 461G.

754 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R); *Pieterse v Kramer* 1977 1 SA 589 (A); *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 4 SA 154 (D) (dealing with a voluntary association which had ceased to exist after having converted into an association not for gain established in terms of s 21 of the Companies Act of 1973).

755 *Morris v Harris* [1926] All ER Rep 15 (HL) 19D and 24D, [1927] AC 252, 96 LJ Ch 256.

756 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) paras 20 and 22; *Pieterse v Kramer* 1977 1 SA 589 (A); *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); *Ebrahim v Evans* 1990 4 SA 424 (D); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W); *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W); *Pieterse v The Master* 2004 3 SA 593 (C); *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5

It is trite that a summons issued by a company after deregistration is a nullity.[757] The person described in the summons (the plaintiff) not being in *existence* at the time of the issue of summons, such remains a nullity which cannot by the process of substitution of the plaintiff be revived to the date of its issue.[758] Moreover, it is not only the summons issued after deregistration or dissolution that is a nullity since any steps or proceedings taken on behalf of such company are null and void.[759] This must be so as "pleadings that may have been drawn while the company was dissolved cannot be allowed to stand. Steps taken while the company was dissolved need to be retaken, if the parties ... cannot agree on a simpler manner to deal therewith"[760] should dissolution be declared to have been void.

6 10 NO EXERCISE OF RIGHTS OR ENFORCEMENT OF OBLIGATIONS

During deregistration or dissolution period rights cannot be exercised by or against the company nor may obligations be enforced, obviously because of non-existence of the company.[761] In most instances the issue arises and is dealt with indirectly in the context of voidance of dissolution or restoration of registration and in some cases in the context of setting aside dissolution or deregistration. It is mostly in that context that a court would comment on what the position was or in some cases would be without voidance of dissolution

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SA 14 (WCC).

757 *Village Freezer t/a Ashmel Spar v C A Focus CC* 2012 6 SA 80 (ECG) para 26; *Broughton v Manicaland Air Service (Pvt) Ltd* 1972 4 SA 458 (R) 459E; *Silver Sands Transport SA (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549C-E; *Pieterse v Kramer* 1977 1 SA 589 (A) 597H and 601H; *Berrange v Registrar of Companies* [2007] ZAKZHC 35 (5 December 2007), 2008 JOL 21225 (N) para 17.

758 *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 4 SA 154 (D) 157F – 158A; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 2 SA 363 (C); *Van Heerden v Du Plessis* 1969 3 SA 298 (O) 304A – 304C.

759 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W) 849A-B; *Pieterse v Kramer* 1977 1 SA 589(A).

760 Per Waglay AJ in *Pieterse v The Master* 2004 3 SA 593 (C) 598C para 19.

761 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 78 (WCC) paras 42 and 43; *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA).

or restoration of registration. For example, in *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd,*[762] the Western Cape High Court dealt with restoration of registration of a close corporation in respect of which section 26(7) of the Close Corporations Act of 1984 provided that if a restoration order was granted the corporation would be "deemed to have continued in existence as from the date of deregistration as if it were not deregistered". Saba AJ held that the effect of the deeming provision was to ensure that the obligations of a close corporation were revived on restoration and could be enforced.[763] The court held further that the purpose and object of the deeming provision was to "validate agreements concluded on behalf of a close corporation while it had been deregistered".[764] Therefore, without such restoration of registration, and by virtue of deregistration the obligations would lapse and as such would not be enforceable.

In *Insamcor (Pty) Limited v Dorbyl Light and General Engineering (Pty) Limited*[765] Blieden J, commenting on the effect of a restoration order, pointed out that obligations which had not existed prior to the restoration order were deemed recreated by such order. That meant that until such time as a restoration order was granted, any obligations as the company might have had until its deregistration would not avail as they needed a restoration order to be recreated. Very much the same was said in E*x parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd*[766] where De Vos J indicated that if restoration of registration of a company was granted, the effect thereof would be the "revival of a pre-existing relationship which may have been terminated by the action of the Registrar in securing the removal [of the company] from the register."[767]

762 [2012] ZAWCHC 36 (24 April 2012).

763 *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* [2012] ZAWCHC 36 (24 April 2012) para 22.

764 *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* [2012] ZAWCHC 36 (24 April 2012) para 23.

765 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006).

766 1965 4 SA 306 (W).

767 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309E-F.

6 11 THE POSITION WHEN THE COMPANY IS THE PLAINTIFF

As already indicated,[768] it is trite that where a summons is issued in the name of a person who at the time does not exist, such as a deregistered or dissolved company, such is a nullity and the court will not by substitution revive it to the date of issue.[769] Accordingly, the position is straight forward if proceedings are instituted in the name of a company after deregistration or dissolution. However, that does not address the status of proceedings already underway at the time of the company's demise. Needless to say that on the date of the hearing when the matter is called nobody will have authority to appear on behalf of the company, which raises the question of the fate of such proceedings.

In this respect reference may be had to rule 15(1) of the Uniform Rules of Court which provides that no proceedings shall terminate by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished. Rule 15(3) goes on to provide that whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar of the court intimate that he desires in his capacity as such to be substituted for such party, and unless the court orders otherwise, he shall thereafter for all purposes be deemed to have been so substituted. It should be noted that the rule deals essentially with substitution of a party who is no longer able to continue with the proceedings and for whom another person must take over and deals largely with a person who has lost legal capacity and should accordingly be represented by another. As the rule stands it does not seem to cover the case of a deregistered or dissolved company since such a company simply does not exist and cannot have some person or entity representing it in proceedings. It simply cannot be a party to legal proceedings.[770]

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768 Para 6 9 above.

769 Van Loggerenberg, Bishop & Brickhill *Erasmus Superior Court Practice* (2012) B1-119; *Van Heerden v Du Plessis* 1969 3 SA 298 (O); *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd intervening*) 1994 2 SA 363 (C) 369J-370A; *Friends of the Sick Association v Commercial Properties (Pty) Ltd* 1996 4 SA 154 (D).

770 Commenting on the rule Van Loggerenberg, Bishop & Brickhill (B1-118) say that it regulates the procedure only where substitution becomes necessary by reason of change of status. Previously when a party died, married, became insolvent, attained majority, was placed under curatorship or suffered any

Nevertheless the rule does find application upon deregistration or dissolution, albeit for different reasons. It is not that somebody would be substituted for the company in order to represent it. On the contrary the opposite is the case. In terms of the *bona vacantia* principle, the State becomes the successor in title to any property, corporeal or incorporeal, left behind by a deregistered or dissolved company and which had not been disposed of. For that reason, the State will have to take over the proceedings, not as a representative of the company but to protect its own interests in whatever property the defunct company would have left behind. This issue was dealt with in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[771] where Binns-Ward J said:

> "The effect of the deregistration of a company is that all its property, including any claims … it might have against third parties, thereupon vest in the state as *bona vacantia* … Thus, without any need for an act of cession or anything of the like, the state has the right, should it so decide, to prosecute the action against the defendant.
>
> Needless to say, however, in the nature of things, the state is probably ignorant of its right in respect of the current action, or even the existence of the proceedings. In my view rule 15 of the uniform rules has a role to play in the current circumstances. It provides, insofar as currently relevant, (i) that no proceedings shall terminate solely by reason of the death or other change of status of any party thereto unless the cause of such proceedings is thereby terminated and (ii) that whenever by reason of an event falling under (i) it is necessary or proper to introduce a further party, whether in addition to or in substitution for the party to whom such proceedings relate, any other party to the proceedings may add or substitute such person by notice to such party and other persons who are already parties in the proceedings. The addition or substitution so effected is *ipso facto* effective, subject to the court's powers in terms of rule 15(4).
>
> When application for the restoration of the registration of a company was made under the 1973 Companies Act it was required as a matter of practice that notice of the application be given to the Minister of Finance and the head of any other department which might have any interest by virtue of the vesting of the company's assets in the state as *bona vacantia* upon the company's deregistration ... If a defendant in the position of the defendant in the current case wishes to bring matters to finality it seems to me that it would be proper to give notice in terms of rule 15 to the Minister of Finance and, if appropriate, any other minister with sufficient interest. If in such a case the state fails to take action to prosecute the action when the matter is called for trial an order for absolution from the instance might

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other change in status, it was necessary to apply to court to substitute some person in his place. The purpose of the rule is to make such application unnecessary.

771 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

> properly be sought in terms of rule 39(3). The state would not incur liability for any costs in the proceedings unless it actively prosecuted them in place of the deregistered corporation."[772]

Rule 39(3) referred to in the *Walker Engineering* case provides that if, when a trial is called, the defendant appears and the plaintiff does not, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment. It should be noted that the rule envisages the granting of judgment against the plaintiff, be it one of absolution from the instance with costs or, after leading evidence by the defendant, a final judgment. It has been held that the section applies to an existing plaintiff who does not appear when the matter is called and not against a non-existent plaintiff such as a deregistered or dissolved company.[773] In *Broughton v Manicaland Air Services (Pvt) Ltd*[774] Greenfield J held that he could "not see how it is possible to make an order against a company which *ex hypothesi* does not exist".[775] The application of the section was specifically dealt with in the *Walker Engineering* case where the court said:

> "In my view rule 39(3) finds application when there is a plaintiff in existence who is in default of appearance. A non-existent person cannot be in default of appearance, nor could the defendant in the circumstances seek judgment in terms of the second part of the sub-rule."[776]

It is submitted that an order of absolution from the instance should not be granted against a deregistered or dissolved company since to a certain extent it operates in favour of the plaintiff as the matter may be started afresh at a later stage.[777]

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772 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental Pty) Ltd (Cape)* paras 6 – 8.

773 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental Pty) Ltd (Cape)* para 7.

774 1972 4 SA 458 (R).

775 *Broughton v Manicaland Air Services (Pvt) Ltd* 459E.

776 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

777 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549F.

6 12 THE POSITION WHEN THE COMPANY IS THE DEFENDANT

Most of the problems concerning litigation in which a deregistered or dissolved company is involved appear in the context of such a company being the plaintiff as the defendant who appears at the hearing of the matter would like to have a ruling made. On the other hand, if it is the defendant company that has been deregistered or dissolved, it is submitted that it would not be asking too much for the plaintiff to accept that the person against whom he is seeking relief is no more there and that obtaining judgment against such a person would be an exercise in futility since if granted the order could not be capable of enforcement and would therefore be of no effect. This notwithstanding, in the case of non-appearance of the defendant, the position is governed by rule 39(1) which provides that if, when the trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. The rule has a proviso to the effect that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court orders otherwise. In the context of a deregistered or dissolved company the application of the rule would mean proceeding against a non-existent company and taking judgment against it, something which is not allowed as the general rule which is to the effect that such proceedings and judgment are a nullity still applies. Granting default judgment against a non-existent company is not allowed.[778] In the event the appropriate course would be to simply remove the matter from the roll.

6 13 DISMISSAL OF THE CLAIM

It is settled law that as a general rule the court will not make an order in favour of or against a person who does not exist and who is therefore not a party to the proceedings. This principle

778 *Ex parte the Government* 1914 TPD 596; *Salton v New Beeston Cycling Co* [1900] 1 Ch 43; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA (R); *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

can be gathered from a number of authorities. For example in *Ex parte the Government,*[779] it was established on the return day of the rule *nisi* that the company which was the registered owner of the affected property had been dissolved some years earlier. The court declined to make an order as there was no party against whom such could be made, this being a result of the application of the rule that dissolution puts an end to the existence of a company.

The court cannot therefore give judgment in favour of or against a dissolved[780] or deregistered[781] company. In this respect the case of *Whiteley Exerciser Ltd v Gamage*[782] constitutes a very notable exception which, it is submitted, may not be repeated in modern times. There the plaintiff's action was dismissed with costs, this resulting in the defendant taxing his costs. The taxing Master prepared his certificate but owing to the backlog in the court a summons taken out by the defendant to vary the certificate of costs did not come before the court until some five months later. In the meantime the plaintiff company was dissolved. The court per North J held that the summons could be proceeded upon and accordingly made an order against the company. The decision was based on the fact that the delay in finalising the matter was entirely due to the state of the business in the court. It is submitted that the decision should be treated with caution as the validity of a court order depends on the existence of the company against which or in whose favour the order is made and not the reason for the late delivery of judgment.

Another case in which a dismissal order was granted against a non-existent company is *Broughton v Manicaland Air Services (Pvt) Ltd*[783] where the court held that it had, in the absence of any specific rule of court to that effect, inherent power to dismiss the action. The effect of a dismissal order was, however, that it amounted to an order of absolution from the

779 1914 TPD 596.

780 *Salton v New Beeston Cycle Company* [1900] 1 Ch 43.

781 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R); *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W).

782 [1898] 2 Ch 405.

783 1972 4 SA 460 (R).

instance.[784] Accordingly, the action was dismissed with no order as to costs, the court explaining that the dismissal order amounted to no more than an order for absolution from the instance.[785]

Because a dismissal order is said to amount to an order of absolution from the instance a new problem arises if the company is the plaintiff. Therefore, it came as no surprise that a request for an order of absolution from the instance was rejected in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd*[786] and that for a good reason. The court pointed out the problem in the following way:

> "I cannot give an order of absolution from the instance because such an order operates in favour of the plaintiff to a limited extent,[787] that is to say in favour of the non-existent company. It does not seem to me that I can make such an order. The order I make is that the matter is struck off the roll."[788]

It should be noted that even though there is some kind of overlapping, if not confusion, between a dismissal order and order of absolution from the instance, the former is particularly

784 This was pointed out by Greenfield J in *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 2 SA 458 (R) 460B, referring to *Municipality of Christiana v Victor* 1908 TS 1117 and *Becker v Wertheim, Becker and Leveson* 1943 1 PH F34 A. The list of cases stating this point is a little longer and includes the following: *Sebastian v Brummer* 1929 TPD 679; *Miller v Larter* 1941 EDL 98; *Van Rensberg v Reid* 1958 2 249 (E); *Bulford v Bob White's Service Station (Pvt) Ltd* 1973 1 SA 188 (RA) 193; *Van Rensberg v Coetzer* 1977 3 SA 130 (T) 136; *De Wet v Western Bank Ltd* 1977 2 SA 1033 (W) 1035; *Regering van die RSA v SA Eagle Versekeringsmaatskappy Bpk* 1985 2 SA 42 (O) 56-57; *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 4 SA 392 (T) 394. See also Erasmus & Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa* vol 1 (2012) 194.

785 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R) 460A-C. On the principle that a dismissal order amounted to absolution from the instance the court referred to *Municipality of Christina v Victor* 1908 TS 1117 and *Becker v Wertheim, Becker and Leveson* 1943 PH F34 (AD). The same was also done in *Twins Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 4 SA 391 (T) 394D where reference was made to *De Wet v Western Bank Ltd* 1977 2 SA 1033 (W) 1035F.

786 1973 3 SA 548 (W).

787 This has to be so since according to Erasmus & Van Loggerenberg 194 the effect of absolution from the instance "is to leave the parties in the same position as if the case had never been brought, for a judgment of absolution from the instance does not amount to *res judicata* and the plaintiff [non-existent company] is entitled to proceed afresh."

788 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 549F. As pointed out in *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R) the problem is that dismissal of the action does in a way amount to absolution from the instance, this being the very thing which the court would like to avoid.

inappropriate when dealing with a deregistered or dissolved company as such order is final and amounts to *res judicata*, something which does not occur in the case of absolution from the instance which otherwise entitles the plaintiff to proceed afresh.[789]

When dismissing the case the court will not make an order for costs[790] either in the main action or the application for dismissal.[791] Equally the court will not accede to a request for the furnishing of security for costs by or on behalf of a non-existent company.[792]

The *Broughton* case was discussed and criticised by Binns-Ward J in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[793] where it was held that before absolution from the instance could be granted against a deregistered company, the State, as successor in title in terms of the *bona vacantia* rule, has to be given the opportunity, by way of service of the papers on it, to defend its interests if so minded. Only then could a proper absolution from the instance be granted, and not an indirect absolution in the form of dismissal of the action.

The action was dismissed with costs in *Friends of the Sick Association v Commercial Property (Pty) Ltd.*[794] However, in that case the issue was citation of the correct plaintiff more than anything else. There the plaintiff was cited as 'Friends of the Sick Association', a voluntary association. As it turned out the voluntary association had by that time long ceased to exist after having converted into an association not for gain registered in terms of section

789 *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuizen* (1888) 6 SC 259; *Corbridge v Welch* (1892) 9 SC 277 279; *Van Rensberg v Reid* 1958 2 SA 249 (E); *Minister of Police v Gasa* 1980 3 SA 387 (N) 389. Erasmus & Van Loggerenberg 194.

790 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R).

791 *Broughton v Manicaland Air Services (Pvt) Ltd* 460C.

792 *Silver Sands Transport (Pty) v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); *Broughton v Manicaland Air Services (Pty) Ltd* 1972 4 SA 458 (R).

793 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

794 1996 4 SA 154 (D).

21 of the Companies Act of 1926. The court held that the case before it was not one of a mere misnomer and that if an amendment were to be allowed to cite the correct plaintiff that would be allowing the introduction of a new person in law as the plaintiff. Accordingly, the summons was a nullity which could not be revived by substitution of a new plaintiff. The citation of a wrong party warranted dismissal of the action with costs. That had the effect that the order was made against an existing company, namely an association not for gain which was registered in terms of section 21 of the Companies Act of 1926, instead of a non-existent company as would be the case if the order was made against a deregistered or dissolved company and in the instant case, a voluntary association which had long ceased to exist.

Application for dismissal of the plaintiff's claim was sought but dismissed in *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd.*[795] There the respondent company, Sandown Extension 2, had instituted proceedings against the applicant municipality. Just before the trial date it was established that the company had been dissolved. As a result an application was made for voidance of its dissolution while the applicant applied for dismissal of the claim. Finding it just and equitable to do so, the court granted an order declaring the dissolution of the company to have been void and dismissed the dismissal application with costs.[796]

6 14 STRIKING MATTER OFF THE ROLL

When in any proceedings that have been brought before the court it eventually transpires that one of the parties is a company that has been deregistered or dissolved, the court is faced with a serious dilemma. This must be so since whatever decision the court makes will invariably, in a direct or indirect way, have a bearing on the company. The problem is, however, that one way or the other the proceedings before the court must be disposed of and this, of necessity, calls for a court ruling. The courts find the solution in disposing of the proceedings by way of

795 1991 3 SA 846 (W).

796 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 850D-E.

striking the matter off the roll.[797] Striking the matter off the roll is nevertheless not without problems. As counsel correctly pointed out in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[798] the disadvantage to the other party to the proceedings is that the defendant would be "held indefinitely under a sword of Damocles constituted by the effect of the possible re-registration of the plaintiff corporation by the registrar" and after which the matter could be re-enrolled for hearing.[799] This must be so as striking the matter from the roll does not mean its final disposal and is only a way of dealing with the matter on the day in question.

Ordinarily a matter is struck off the roll when neither party shows up when the matter is called, this showing the court's disapproval of the behaviour of both parties. The court may seek the parties' explanation for non-appearance on the day when its re-enrolment is sought. An alternative to striking off the matter is its removal from the roll. However, both remedies carry the risk of re-enrolment of the matter at a later stage.

In *Broughton v Manicaland Air Services (Pvt) Ltd,*[800] an order for striking the matter off the roll was sought but not granted. That is the case where the court, in the exercise of its inherent powers, dismissed the action. The order was considered in the *Walker Engineering* case where it was found appropriate but was not granted as the court preferred giving the State, because of the *bona vacantia* principle, the opportunity to receive the papers and respond. The order was, however, granted in *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd.*[801] It was also granted in *Smit v Scania South Africa (Pty) Ltd*[802] which dealt with a different set of facts. There the appellant Smit, a natural person, gave notice that he would not turn up to prosecute the appeal, and in fact did not attend the hearing, not because of his

797 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 846 (W).

798 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

799 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 3.

800 1972 4 SA 460 (R).

801 1973 3 SA 548 (W) 549E-F.

802 [2004] ZASCA 2 (27 February 2004), 2004 4 SA 628 (SCA) para 7.

death, and he was very much alive, but only because the appeal had no merit and should not have been lodged in the first place. The Supreme Court of Appeal held that the matter should be struck off the roll rather than be dismissed for non-prosecution due to non-appearance of the appellant.

6 15 POSTPONEMENT

In some instances the court may find it advisable to postpone the matter to a later stage instead of making a definitive decision. The purpose of postponement would normally be to give the State the opportunity to be served with the papers so that it can take steps to protect its *bona vacantia* right. Postponement was granted in *Walker v Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[803] precisely for that purpose, the court holding that only after service of the papers on the Minister of Finance and any other ministers having sufficient interest in the matter would it be in a position to grant absolution from the instance in terms of rule 39(3) of the Uniform Rules of Court should there be no appearance for the relevant Minister.

6 16 ISSUING OF A RULE *NISI*

To solve the problem of non-appearance by the plaintiff, being a company that has since been deregistered or dissolved, the defendant would be well-advised to ask for an order that would bring in the State to vindicate its *bona vacantia* rights. It was against this background that in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[804] the defendant asked for an order that a rule *nisi* be issued calling upon interested parties to show cause on the return date why the action should not be dismissed and that the rule should be published in a local newspaper and in the Government Gazette as well as served on the Minister of Finance and the Minister of Trade and Industry. The court held that

803 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

804 *Ibid.*

while the proposed order would no doubt afford a practicable solution, the expense entailed in the service and publication of the rule as proposed would impose unduly onerous burden on the defendant.

The intended result could be achieved effectively and more cheaply by postponing the matter and giving a direction to the defendant, if it wished in the event of non-appearance by or on behalf of the Ministers concerned on the new date, to seek absolution from the instance or dismissal of the action, to give reasonable notice to the Ministers before that date. In that notice the Ministers concerned would have to be substituted as plaintiffs in the place of the deregistered corporation. The notice had to be served by the sheriff and accompanied by copies of the pleadings and any other relevant documents required for the purposes of rule 15(2) of the Uniform Rules of Court.[805]

In *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd*[806] a rule *nisi* was granted but for a different reason. As the deregistered company's claim against the defendant had been struck off the roll, the purpose of the rule *nisi* was to give the director who had signed a power of attorney authorising the institution of the claim, the opportunity to show cause why he should not be ordered to pay the defendant's wasted costs.

6 17 LIABILITY FOR COSTS

It is trite that an order for payment of costs cannot be made against a company which does not exist.[807] Accordingly, in *Broughton v Manicaland Air Sevices (Pvt) Ltd*[808] the court, in the exercise of its inherent jurisdiction, dismissed a dissolved company's action but made no

805 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011) para 9.

806 1973 3 SA 548 (W).

807 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R) 459F.

808 1972 4 SA 458 (R).

order as to costs against the company as it did not exist. It follows therefore that when a deregistered or dissolved company's proceedings fail and a costs order has to be made, it will be against somebody, if anyone, and not the company itself. In *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd*[809] two related applications were heard together. The first was for declaration of the property of the company, which had been deregistered, to be declared *bona vacantia* while the second was by the company itself, and its shareholders, for restoration of its registration. The restoration application failed with the result that the property was declared *bona vacantia*. Viljoen J held that as the company was no longer in existence, the second and third applicants, that is the two shareholders who took part in the application, had to pay the costs of opposing the *bona vacantia* application.[810]

In the same way an attorney who litigates on behalf of a company which no longer exists or who initially litigated on its behalf while it was still in existence but continued doing so even after its deregistration or dissolution, will be mulcted for costs. This was done in *Salton v New Beeston Cycle Company*[811] where the court held an attorney liable for costs incurred by the other party from the date when, had he used due diligence, he would have ascertained that the company had been dissolved and would accordingly not have continued acting on its behalf.[812]

In *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd,*[813] it was the director who had to bear the costs incurred in defending an action instituted by a company which had been deregistered. Before granting a costs order the court issued a rule *nisi* calling upon the director to show cause why he should not be ordered to pay the costs incurred by the defendant in answering the case brought against it by a company which was non-existent. In

809 1964 3 SA 469 (T).

810 *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 472H – 473A.

811 [1900] 1 Ch 43.

812 *Salton v New Beeston Cycle Company* 50.

813 1973 3 SA 548 (W).

Bowman v Sacks[814] it was the liquidator who had to pay the costs of an unsuccessful application for an order declaring the directors of the company personally liable for its debts in terms of section 424(1) of the Companies Act of 1973, which proceedings the liquidator instituted after dissolution of the company.

In *Friends of the Sick Association v Commercial Properties (Pty) Ltd*[815] a voluntary association instituted an action against the defendant Commercial Properties for transfer of property in its name. However, at the time of initiating the proceedings the voluntary association in question had long ceased to exist as it had been converted into an association not for gain established in terms of section 21 of the Companies Act of 1926. That was the association that should have instituted proceedings and not the former voluntary association. The claim was dismissed with costs as the plaintiff, the voluntary association, had ceased to exist. It should be noted that the dismissal and costs order was not against the voluntary association, which had ceased to exist, but against the association not for gain which was in existence and had been incorrectly cited a non-existent voluntary association.

6 18 POSITION OF THE LIQUIDATOR

The Companies Act of 2008 has very few provisions dealing with winding-up of companies. As a matter of fact sections 79 - 81 deal with winding-up of solvent companies while sections 82 and 83 deal with deregistration and dissolution. For the rest, it is the Companies Act of 1973 that applies. In this respect item 9 of schedule 5 to the Companies Act of 2008 provides that despite the repeal of the Companies Act of 1973, until the date determined in terms of sub-item (4), Chapter 14[816] of the Companies Act of 1973 continues to apply with respect to the winding-up and liquidation of companies under the 2008 Act as if it had not been

814 1986 4 SA 459 (W).

815 1996 4 SA 154 (D).

816 Chapter 14 deals with winding-up of companies and covers ss 337 – 426 of the Companies Act of 1973.

repealed. The result is that the appointment, functions, powers and release of the liquidator from office is governed by the Companies Act of 1973.

Section 385(1) of the Companies Act of 1973 provides that when a liquidator of a company has performed all the duties prescribed by the Act and complied with all the requirements of the Master, he may apply in writing to the Master for a certificate to that effect. In subsection (2) it is provided that the Master shall, when he issues the certificate, additionally state therein that he consents to the reduction of the security given by the liquidator to a stated amount or to its cancellation. The essence of section 385 is that after performing "all the duties" prescribed by the Act and "all the requirements" of the Master, the liquidator may be given a certificate of completion of his duties and discharged from office as such. Once the liquidator is so released the question becomes whether he can still perform any of the duties pertaining to that office such as seeking an order in terms of section 424(1) of the Companies Act of 1973 declaring the directors of the company personally liable for its debts on the basis of reckless, fraudulent or grossly negligent trading. In *Bowman v Sacks*[817] the court held that this is not the case. Flemming J summarised the position as follows:

> "... once the liquidation and consequent distribution has been completed, the liquidator is to disappear from the scene. He has no further function and may therefore have his security discharged and obtain his release. It would be alien to the pattern if the liquidator was to retain some authority to act not on behalf of the company or for the benefit of creditors or members, in fact in no way related to the process of liquidation-distribution, after the official end of the process of administration."[818]

As a result any proceedings instituted or continued by the liquidator after dissolution of the company are null and void and have no effect. A subsequent court order declaring the dissolution to have been void does not revive the proceedings instituted by the liquidator during the dissolution period.[819]

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817 1986 4 SA 459 (W).

818 *Bowman v Sacks* 464E-F.

819 *Pieterse v Kramer* 1977 1 SA 589 (A) 601H.

6 19 THE EXTERNAL COMPANY

The Companies Act of 2008 defines and deals with both a "foreign company" and "external company". Section 1 defines a "foreign company" as an "entity incorporated outside the Republic[820] irrespective of whether it is-

(a) a profit, or non-profit, entity; or
(b) carrying on business or non-profit activities, as the case may be, within the Republic".

The section defines an "external company" as "a foreign company that is carrying on business, or non-profit activities, if any, within the Republic, subject to section 23(2)". Section 32(1) requires an external company to register with the Companies and Intellectual Property Commission within twenty business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic. Section 32(2) compliments section 32(1) by defining the circumstances in which an external company will be considered to be conducting business in the country and as a result, will be required to register with the Commission to be able to do so lawfully.

The upshot of these definitions is that an external company is a foreign company that conducts business in this country and must therefore register with the Commission. The question which arises is whether after registration a foreign company continues being one company as before or turns into two companies, namely a foreign company and an external company. In *Sackstein v Proudfoot SA (Pty) Ltd*[821] the Supreme Court of Appeal held that a foreign company that registers as an external company remains one legal entity that is registered in two countries. Stating this principle Olivier JA said:

820 Republic of South Africa. The Act does not define the "Republic" as some statutes would do in the past although it does specify that it has been enacted by Parliament of the Republic of South Africa.

821 2003 4 SA 348 (SCA), [2003] 2 All SA 59 (SCA), [2003] ZASCA 8 (7 March 2003).

> "... it must be accepted that the registration in the RSA[822] of an external company does not result in there being two separate legal *personae*, registered respectively in two countries ... There is only one legal *persona*, registered in two countries."[823]

However, the two-in-one approach is not without problems. South African courts, both in the *Sackstein* case and others, have held that there could be winding-up and dissolution on the one company to the exclusion of the other and further that there may be two simultaneous and concurrent winding-up of both the foreign company and external company, this obviously showing that the two are not necessarily one and the same, for how can one be treated separately from the other if the two are one? The question of two simultaneous and concurrent liquidation processes was explained in the *Sackstein* case as follows:

> "... as clearly appears from the judgment of this Court in *Ward v Smit* [*sic*][824] *and Others: In re Gurr v Zambia Airways Ltd*[825] ... there may be two simultaneous and concurrent processes in respect of the company, one in its original country of incorporation (in this instance Namibia) and another in the country in which it is registered as an external company (here South Africa). In such a case each liquidator may deal independently with the assets and liabilities of the company in respect of which he or she is the liquidator..."[826]

Even though the company is one legal entity and not two, dissolution, and obviously also deregistration, of a foreign company or external company, as the case may be, does not result in the automatic dissolution or deregistration of the other. As a matter of fact, dissolution or deregistration of one of them has no bearing on the other. That means that each one of them, if there are two of them in the first place, must be dissolved or deregistered in accordance with the law of the country of its registration. This would be consistent with section 344(g) of

822 "RSA" stands for the "Republic of South Africa".

823 *Sackstein v Proudfoot* para 15.

824 Although the case was cited as *Ward v Smit*, that was incorrect as the "Smit" was in fact "Suit".

825 [1998] 2 All SA 479 (A), 1998 3 SA 175 (SCA), [1998] ZASCA 16 (23 March 1998).

826 *Sackstein v Proudfoot* para 14.

the Companies Act of 1973[827] which provides that a company may be wound up by the court if:

> "in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs."

Dealing with the above provisions in *Ward v Suit: In re Gurr v Zambia Airways Corporation Limited*[828] the court held "dissolved" referred to dissolution of the company in terms of section 419(1) of the Companies Act of 1973 which followed after completion of a winding-up of the affairs of the company. In that case the Supreme Court of Appeal added that a South African court had jurisdiction in terms of section 344(g) to grant a winding-up order in respect of an external company notwithstanding that it was the subject of a voluntary or compulsory winding-up in the country of its incorporation[829] and further that a foreign winding-up order of a foreign company has no application in South Africa until it has been recognised by an order of a South African court.

However, to make things easier it is permissible, after getting a winding-up order in the one jurisdiction, to apply for recognition of that status in the other jurisdiction. The application should ordinarily be made by the liquidator for recognition as a liquidator of the company in the other jurisdiction so that he can also perform the duties of a liquidator relating to the company in that other jurisdiction. This is what happened in the *Sackstein* case. There the Tsumeb Corporation (Tsumeb Namibia) was a foreign company which was incorporated in Namibia. It thereafter registered as an external company in South Africa under the same name Tsumeb SA. Subsequently both companies were wound up separately in terms of the laws of their respective countries. However, the liquidator of Tsumeb SA wanted to impeach payment made by Tsumeb Namibia to a third party, the respondent

827 The section still applies even after the repeal of the Act by virtue of item 9 of Schedule 5 of the Companies Act of 2006.

828 [1998] 2 All SA 479 (A), 1998 3 SA 175 (SCA), [1998] ZASCA 16 (23 March 1998).

829 Just as happened in *In re Commercial Bank of India* [1886] Law Rep 6 Eq 517 where an English court wound up an external company which was subject to voluntary winding-up in India.

Proudfoot, as a voidable disposition in terms of South African law, the purpose being to recover payment thus made. The Supreme Court of Appeal held that he could impeach the transaction in South Africa and thereafter apply to a Namibian court for recognition of the South African court's impeachment order or alternatively he could institute impeachment proceedings in Namibia in terms of Namibian law. Explaining this principle Olivier JA said:

> "In the case of voidable transactions, he [the liquidator] must take steps that are necessary for the impeachment of the transaction. This he can do in the Republic of South Africa, irrespective of where the property is situate. If he succeeds in impeaching the transaction, and if the property is in fact siuate outside the Republic, he has by virtue of the common law ... no extra-territorial powers of recovering such property in a foreign country. The correct procedure is then to seek the recognition of the court order obtained in South Africa, setting the transaction aside, in the applicable foreign country ... There is authority for the view that impeaching a transaction and the subsequent vindication of the property concerned are two distinct steps in the process of recovery of the relevant assets."[830]

It should be accepted, it is submitted, that the law relating to foreign and external companies is full of contradictions, especially regarding general principles applying to deregistration and dissolution of companies. It is thus obvious that the well-established principles governing deregistration and dissolution of companies are, if one could say this, simply flouted. It is, however, not so apparent why this has to be so.

Manitoba Investment Holdings Ltd v Lipchin[831] is a good illustration of contradictions encountered in this area of the law. There the applicant company, Manitoba, was a foreign company duly incorporated in the British Virgin Islands. As the company wanted to do business in South Africa it registered as an external company in terms of section 332 of the Companies Act of 1973 and proceeded to purchase immovable property in 2008. After allegedly breaching the contract by failing to make the required payment, the seller sought to institute legal proceedings to enforce its rights in terms of the contract. However, it turned out

830 *Sackstein v Proudfoot* paras 22 – 23. A court order recognising the appointment of a liquidator in another jurisdiction would be granted upon considerations of comity, convenience and equity – see *Re African Farms Ltd* 1906 TS 373 377; *Moolman v Builders and Developers (Pty) Ltd* 1990 1 SA 954 (A). However, the recognition order could be refused if there are circumstances which render it undesirable to do so – see *Re African Farms Ltd* 382; *B Z Stegmann* 1902 TS 40 55.

831 2010 2 SA 612 (GNP), [2009] ZAGPPHC 157 (8 October 2009)

that at the time of conclusion of the contract the company had been deregistered in 2005. As a result the company approached the court for an order declaring that the deed of sale concluded with the seller at the time when it was deregistered was null and void *ab initio* and also sought refund of the deposit paid. The application was dismissed.

Prinsloo J held that there was no merit in the argument that legal capacity was lost to the company through deregistration saying:

> " ... I fail to see how the de-registration of the external company, in terms of s 332, could have any effect on the capacity of the applicant which was still a duly registered foreign company and legal *persona* at the time when the deed of sale was entered into."[832]

It was accordingly held that a foreign company, not yet registered (in fact deregistered) locally in terms of the Companies Act of 1973, could acquire immovable property in order to establish a place of business and thus register locally as an external company. That was what happened in the instant case since when the company entered into the sale agreement, it was not registered locally, having deregistered in 2005. Therefore, where an external company has been deregistered in South Africa but is still registered in its country of origin it does not lose legal capacity to enter into contracts in this country.

A further corollary of this unsatisfactory dispensation is that a foreign company which becomes deregistered in the foreign jurisdiction of incorporation, but not here in South Africa, remains a legal entity in this country as if nothing has happened to it in the foreign country of incorporation. The issue was dealt with in *B and P Group Financial Services (Pty) Ltd: Pather v Kaltecha*[833] where it was held that as long as an external company remained registered as such under the Companies Act of 1973, legal effect and recognition had to be given to such registration regardless of the fact that the company was deregistered in its country of origin (incorporation). For purposes of its economic activity an external company

832 *Manitoba Investment Holdings Ltd v Lipchin* para 38.

833 [2007] JOL 19260 (T). The case was dealt with in *Manitoba Investment Holdings Ltd v Lipchin* para 39.

registered as such in South Africa did not derive its legal capacity from its registration in its country of origin but from its registration as an external company under the Companies Act of 1973.

§ 20 REMOVAL OF TRADE MARK FROM TRADE MARKS REGISTER

Dissolution of a company may lead to the removal from the register of trade marks of any trade marks that the company might have. Section 27(1)(c) of the Trade Marks Act of 1993[834] provides among others that an interested person may apply to court or the Registrar of Trade Marks for removal of a trade mark from the register of trade marks in respect of any of the goods or services for which it has been registered, if the trade mark is registered in the name of a body corporate which has since been dissolved not less than two years prior to the making of the application. Such removal is allowed if no application for registration of assignment of the trade mark to another person has been made. Given the manner in which the Companies Act of 2008 uses the words dissolution and deregistration interchangeably, and the decision of the court in *Absa Bank Ltd v Companies and Intellectual Property Commission,*[835] it is submitted that removal of a trade mark from the register is not confined to dissolution of the body corporate but also extends to its deregistration.

An interested person who may apply for such removal would invariably be one who is interested in having the trade mark registered in his or her name. Given the interest of the State in the property of a dissolved or deregistered company in terms of the *bona vacantia* principle, it stands to reason that it should be cited as a party to the application so that it may have the opportunity to vindicate its attitude. It should be mentioned though that an application for removal of the trade mark in terms of the equivalent provisions under the Trade Marks Act of 1963[836] was made and led to the application for restoration of registration

834 Act 194 of 1993.

835 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

836 Act 62 of 1963.

of the deregistered company in *Ex parte Ziman.*[837] Incidentally, application for removal of the trade mark in that case was made after deregistration, as opposed to dissolution, of the company which was the registered owner of the trade marks in question.

6 21 CONSEQUENCES PECULIAR TO DEREGISTRATION

While it is true that deregistration and dissolution have the same effect on the existence of a company as a legal person and that most of their consequences are the same, this is not necessarily so in all respects. There are a few consequences peculiar to the one process which are not applicable to the other.

As far as deregistration is concerned the most noticeable peculiar consequence is the one relating to the liability of the company in respect of which it is said that a debt due by a company which has been deregistered is not extinguished but is merely rendered unenforceable for as long as the company remains deregistered.[838] Furthermore, the liability of every director, officer or member of the company continues and may be enforced as if the company had not been deregistered.[839] It should be noted that these principles do not apply to a dissolved company.

6 22 CONSEQUENCES PECULIAR TO DISSOLUTION

One consequence of dissolution of a company is discharge of the liquidator, after written application to the Master for a certificate to the effect that he has performed all the duties prescribed by the Companies Act and has complied with all the requirements of the

837 1970 1 SA 164 (T).

838 *Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk* 1981 4 SA 291(W); *Traub v Barclays National Bank; Kalk v Barclays National Bank Ltd* 1983 3 SA 619 (A).

839 Section 73(5) of the Companies Act of 1973 and now s 83(2) and (3) of the Companies Act of 2008.

Master,[840] and the resulting termination of his authority to act on behalf of the company. When dissolution of a company takes place, the statutory duties of the liquidator towards the creditors and contributories come to an end[841] and so does his authority to act on behalf of the company except where the Companies Act or some other statute, if any, makes the contrary very clear.[842]

In a few odd cases the liquidator was found to have acted on behalf of the company after its dissolution. Without doubt the liquidator does not have a legal basis for doing so but the courts have found a convenient justification for tolerating such behaviour. In *Ex parte Liquidators Lime Products (Pty) Ltd*[843] the liquidators successfully negotiated with a mortgagor, after dissolution of the company, for settlement of a mortgage bond. They were at the time acting *functus officio* as liquidators since the company was non-existent. It was only after completion of negotiations that they sought a court order declaring the dissolution to have been void and their reinstatement as liquidators. The court did not query "negotiations" conducted after the dissolution. After all the liquidators had the wisdom and understanding that for the further step of dealing with the money secured from the mortgagor the dissolution had to be declared void first.

In the case of *Ex parte Garwood*[844] the liquidator sought and was granted a court order, after the dissolution of the company, authorising him to sign and execute on behalf of the company formal cessions and all necessary documents in order to effect transfer and delivery of property, including certain claims, to purchasers. The contracts were concluded before the dissolution of the company but because of oversight the cessions of claims, together with the transfer and delivery of certain property, were not effected. In giving the

840 Section 385 of the Companies Act of 1973.

841 *Bowman v Sacks* 1986 4 SA 459 (W) 464B; *Pieterse v Kramer* 1977 1 SA 589 (A) 601G.

842 *Bowman v Sacks* 464F. Such contrary provisions appeared for example in s 420 of the Companies Act of 1973 which allowed a liquidator of a dissolved company to act on its behalf, namely to make application to the court for an order declaring the dissolution to have been void. Equivalent provisions are now found in s 83(4) of the Companies Act of 2008.

843 1942 CPD 402.

844 1948 1 SA 483 (W).

liquidator the necessary authority to effect the cessions and transfer, the court took into account the fact that the Master and the Treasury offered no objection to the application. Thus the court showed much generosity since the proper course was to have applied for an order declaring the dissolution to have been void, provided this was still possible.[845]

Even if the need to do so arises the Master will not appoint a liquidator to a dissolved and therefore a non-existent company until such time that the dissolution is declared void. If made such appointment is illegal and should be set aside.[846]

6 23 SUMMARY

Although they do not come about the same way nevertheless, once completed, both deregistration and dissolution have this one thing in common, namely the fact that the company's existence as a legal entity terminates. Most of the consequences of these two processes are the same although there are a few exceptions. This chapter dealt with the consequences of both deregistration and dissolution and should ideally have covered all of them. However, two important consequences of these processes, namely the question of *bona vacantia* and liability which arises as a result of deregistration or dissolution were left out and that for a good reason. Because of the issues they raise it was decided that the question of *bona vacantia* and liability which arises after deregistration or dissolution of a company should be treated separately elsewhere. In this chapter a quick reference was also made to the law relating to deregistration and dissolution of an external company but as this is a thesis on its own, it was considered that not much detail should be given, if anything, for the sake of limiting the size of this study. In brief, the chapter dealt with the more general and procedural consequences of both deregistration and dissolution. In the next chapter one specific consequence of both processes, namely the question of *bona vacantia*, which is to say, the fate of the property of a deregistered or dissolved company, will be looked at.

845 In terms of s 191(1) of the Companies Act of 1926 the application for such an order had to be made within two years. As the case does not indicate the date on which the company was dissolved it is not possible to determine this point. That was, however, not the issue before the court in any event.

846 *H L Hall and Sons (Group Services) Ltd v Wisnach* 1997 3 SA 116 (T).