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

BY

DAVID MAPHUTI MATLALA

Volume Two

CHAPTER 7

The question of *bona vacantia*

7 1 INTRODUCTION

Apart from the consequences of deregistration and dissolution discussed in the previous chapter, a further consequence of these processes is that any property whether movable, immovable or incorporeal, which belongs to the company and which has not been disposed of as at the time of deregistration or dissolution, as the case may be, belongs to the State as *bona vacantia*.[847] It is said that the vesting of the erstwhile property of the deregistered or dissolved company in the State is automatic[848] with the result that there is no need for its delivery, transfer or cession to the State. As Binns-Ward J put it in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*:[849]

> "The effect of the deregistration [and dissolution] 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." [850]

It should be too obvious that the automatic vesting of the company's property in the State runs contrary to the well-known principles relating to passing of ownership and has accordingly been described as an "unfair expropriation of the right of creditors to be paid if

---

847 The general rule is that as soon as the company ceases to exist its property vests in the State as *bona vacantia*, which principle applies to all property of the company. See *Ex parte Minister of Irrigation* 1984 2 SA 779 (C) 780; *Ex parte Sprawson (In re Hebron Diamond Syndicate)* 1914 TPD 458; *Ex parte Wemmer Gold Mining Co Ltd* 1906 TH 172; *Ex parte National Bank of SA Ltd (In re Meintjies Ltd)* 1924 WLD 64; *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402; *Ex parte White, Smit* 1942 CPD 458; *Ex parte Garwood* 1948 1 SA 483 (W); *Ex parte Yelland and Co (Pty) Ltd* 1934 NPD 158; *Antares International Ltd v Louw Coetzee & Malan Inc* [2011] ZAWCHC 366 (2 September 2011)) para 33, 35-38.

848 As indicated by Pillay J in *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) 298A-B para 9 after deregistration (or dissolution) the assets of the company vest "automatically in the state represented by the Minister of Finance".

849 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

850 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6.

they do not have a right to recover their claims".[851] It is common-cause that in the case of movable property the law requires that there be delivery of the property from one person, with the intention to pass ownership, to another who receives it with the intention to acquire ownership.[852] Such delivery can take any one of the various forms thereof.[853] If the property in question is incorporeal, that is a right, cession by the company, as cedent, to the State as cessionary, would be expected to effect passing of ownership. However, in the case of *bona vacantia* no cession is required at all. The passing of ownership is automatic, so it is said.[854]

Again, automatic transfer of ownership of immovable property to the State as *bona vacantia* runs contrary to the positive system of transfer of ownership. The positive system of transfer of ownership provides that a person in whose name the property is registered is the owner thereof and that registration provides "irrefutable proof of ownership".[855]

The settled common law principle concerning automatic transfer of ownership of property belonging to a deregistered or dissolved company is in fact traceable to the law of intestate succession. Having enjoyed judicial sanction for over a century by the courts the rule almost received statutory recognition in South African law.[856] However, like its predecessor, the present Companies Act of 2008 does not deal with the question of *bona*

851 *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) 311G para 65.

852 *Klerck v Van Zyl and Maritz* 1989 4 SA 263 (SE) 274C-D, 273J-274A; *Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 3 SA 930 (A) 933B-C; *Bank Windhoek Bpk v Rajie* 1994 1 SA 115 (A) 141C-D; *Mvusi v Mvusi* 1995 4 SA 994 (TkSC) 999E; *Info Plus v Scheelke* 1998 3 SA 184 (SCA) 189E-F; *AXZS Industries v AF Dreyer (Pty) Ltd* 2004 4 SA 186 (W) 196D-E; *Chong Sun Wood Products PTE Ltd v K&T Trading* 2001 2 SA 651 (D) 656J; *ABSA Bank t/a Bankfin v Jordashe Auto CC* 2003 1 SA 401 (SCA) para 16; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 73.

853 The various form of delivery such as physical or actual delivery (*traditio vera*), constructive delivery in such form as symbolical delivery (*traditio symbolica*), delivery with the long hand (*tradito longa manu*), delivery with the short hand (*tradition brevi manu*) *constitutum possessorium* and attornment are discussed among others by Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 180 – 200.

854 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A) 12G, 15A-D; *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 6; *Kanderson (Pty) Ltd v The Registrar of Companies* 1987 2 PH E7 (T) 27.

855 *Knysna Hotel CC v Coetzee* 1998 2 SA 743 (SCA) 753C, [1998] 1 All SA 261 (A), [1997] ZASCA 114 (1 December 1997).

856 Clause 82(4) of the Companies Bill 2008 [B61 – 2008], the precursor to the present Companies Act of 2008 made provision for property of a deregistered company which was not dealt with to vest in the State as *bona vacantia*. However, the provision has since been dropped and does not form part of the Companies Act of 2008.

vacantia, let alone mention it. As a result the doctrine remains a common-law issue to be dealt with accordingly. As Pillay J correctly observed in *Nulandis (Pty) Ltd v Minister of Finance*[857] "Although neither the old [Companies Act of 1973] nor the new [Companies] Act [of 2008] mentions '*bona vacantia*' our common law imports this concept into our jurisprudence."[858]

By failing to attend to the issue the legislature left many unanswered questions hanging. For example, it is not clear how *bona vacantia* property should and is being dealt with, what happens when the property is not dealt with by the State as well as what happens to the property if registration of the company is restored or dissolution is declared void[859] and particularly so if in the meantime the property has been disposed of by the State and is thus no longer available for restoration to the company.

Given the contempt with which the Companies Act of 2008, like its predecessor, treats the *bona vacantia* question, it is submitted that it will be helpful to look at how the same is dealt with in the comparable jurisdictions of New Zealand, Australia, Canada and the United Kingdom as these may provide useful guidance as to what needs to be done in South African law in order to provide clarity on a number of unanswered questions. Although a number of other Commonwealth jurisdictions[860] also have statutory provisions dealing with the *bona vacantia* principle, it is considered that for present purposes reference to the above-mentioned jurisdictions would be sufficient to demonstrate the direction which South African law should ideally follow.

857 2013 5 SA 294 (KZP).
858 *Nulandis (Pty) Ltd v Minister of Finance* 307E para 49.
859 Section 82(4) of the Companies Act of 2008 makes provision for reinstatement of registration by the Companies and Intellectual Property Commission while in terms of section 83(4) application may be made to court for a court order declaring the dissolution of a company void.
860 A few examples which may be mentioned include the Botswana Companies Act of 2003 (s 337(1)); the Zimbabwe Companies Act of 2003 (Chap 24:03) (s 321); the Tanzanian Companies Act of 2002 (s 401); the Mauritius Companies Act of 2001 (s 315(2)) and the Hong Kong Companies Ordinance of 2012 (s 752).

7 2 ROMAN LAW

The concept *bona vacantia* was well-known in Roman law. However, it applied to the law of intestate succession and not company law. Needless to say that company law as is known today was not there during Roman times since the modern company is very much a creature of English law which developed many centuries after the Roman Empire era.

In Roman law the rule of intestate succession was that if a deceased estate did not have an heir the assets went to the imperial treasury, the *fiscus*, as *bona vacantia*.[861] The issue was dealt with by De Villiers CJ in *Ex parte Spangenberg*[862] where he said:

> "Under Roman law there could have been no doubt on the point, for it was expressly provided that the estates of deceased persons shall only be transferred to the *fiscus* as *bona vacantia* if the intestate has left no heir of either the paternal or maternal line."[863]

In later Roman law the application of the rule was extended to treasure lying in the ground.[864]

7 3 ROMAN-DUTCH LAW

The Roman law principle of intestate succession in terms of which property passed to the *fiscus* if there was no heir to inherit it also found place in Roman-Dutch law.[865] This principle, which was well-established in South Holland, was reiterated by Maasdorp J in *Ex parte Leeuw*[866] as follows: "Upon a total failure of blood relations, the Crown is entitled to

---

861 Modderman *Handboek voor het Romeincshe Recht* 5 ed (2010): Part 3 248 – 249; Van Oven *Leerboek van Romeinsch Privaatrecht* 3 ed (1946) 530; Thomas *Textbook on Roman Law* (1976) 178 who says "... in the early imperial period there appeared the rule that treasure, like other ownerless property (*bona vacantia*), went to the imperial treasury ..."

862 (1907) 24 SC 288.

863 *Ex parte Spangenberg* 289.

864 Such property was known as "*thesauri inventio*" – see *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1994 3 SA 1 (A) 4A-B.

865 Voet *Commentarius ad Pandectas (*1902) 38.17.27 (Gane's translation no 5 591); Grotius *Inleiding tot de Hollansche Rechtwetenschap* (1631) 2.30.3.

866 1905 22 SC 340.

claim a vacant inheritance."[867] However, as Voet[868] indicated, provision was also made to the effect that where the *fiscus* had taken possession of anyone's effects, and thereafter relatives appeared and proved that they were entitled to succeed as heirs *ab intestatio* the inheritance had to be restored to them. That was so as no mortal could be deprived of his rights by the sovereign.[869]

7 4 ENGLISH LAW

Two principles applied in English law and had the result that property would become *bona vacantia*, namely the prerogative of the Crown doctrine and the derelict property theory. These principles were dealt with in a number of cases.[870] For example, in *Ex parte the Government,*[871] Mason J dealt with, among others, English law and indicated that entitlement to property as *bona vacantia* was substantially a prerogative of the Crown. His Lordship continued to say: "... the doctrine of *bona vacantia* applies to all 'derelict property' and some of the instances given ... show the general application of the principle, namely that the Crown is apparently entitled to property to which no one else can establish a title or is likely to be able to establish a title."[872]

The "derelict property" theory which formed the basis of the prerogative[873] of the Crown principle applied mostly in the law of intestate succession and provided that the Crown became owner of the property to which there was no heir.[874] The principle was later

867 *Ex parte Leeuw* 341.
868 *Commentarius ad Pandectas (*Gain's translation) (1902) 38.17.29.
869 Voet 38.17.29.
870 The *bona vacantia* principle applied both in the law of intestate succession on failure of the next of kin (*Re Barnett's Trust* [1902] 1 Ch 847, 71 LJ Ch 408, 86 LT 346; *Dykes v Walford* [1846] 5 Moore PC 434, 13 ER 557; *Middleton v Spicer* [1783] Bro. C.C. 201, 28 ER 1083) as well as on dissolution of a company which had assets that had not been dealt with (*Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* [1933] Ch 29 43-44; *In re Higginson and Dean: Ex parte the Attorney General* [1895] 1 QB 325).
871 1914 TPD 596.
872 *Ex parte the Government* 597.
873 In *Re Barnett's Trusts* [1902] 86 LT 346 Kekewick J used the phrase "sovereign right" of the Crown, in the exercise of which the Crown was entitled to take as *bona vacantia* the sum of consols (movables) in England belonging to an intestate who died leaving no heirs.
874 *Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* [1933] Ch 29.

extended to property of a dissolved company which was not dealt with before dissolution. In the *Sir Thomas Spencer*[875] case Lawrence LJ dealt with the issue saying:

> "The right of the Crown to succeed to the personal estate vested in a company at the time of its dissolution does not ... differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next of kin. In both cases the title of the Crown arises because the property has no other owner; such property must not, of course, be confused with the property the owner of which is unknown."[876]

The principle that the property of a dissolved company, and of necessity also of a defunct company, belongs to the Crown has for years now been granted statutory recognition in English law. Section 296 of the English Companies Act 1929 specifically made provision to that effect, which provisions were repeated in section 354 of the Companies Act 1948 and provided as follows:

> "Where a company is dissolved, all property and rights whatsoever vested in or held in trust for the company immediately before its dissolution ... shall subject to and without prejudice to any order which may at any time be made by the Court ... be deemed to be *bona vacantia* and shall accordingly belong to the Crown ... and shall vest and may be dealt with in the same manner as other *bona vacantia* accruing to the Crown ..."

The *bona vacantia* provisions have since become a permanent feature of English law and are currently found in section 1012 of the UK Companies Act of 2006.

7 5 SOUTH AFRICAN LAW OF INTESTATE SUCCESSION

South African law of intestate succession is governed by the Intestate Succession Act of 1987.[877] According to its long title, the Act was passed to "regulate anew the law relating to intestate succession; and to provide for matters connected therewith". Therefore, the purpose of the Act is to regulate anew that which has hitherto been regulated by the common law. It

875 *Ibid.*
876 *Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* 50. See also *Estate Baker v Estate Baker* (1908) 25 SC 234 240 - 241.
877 Act 81 of 1987.

should be noted that the Act applies only if the deceased dies intestate, either wholly or in part, and is survived by an heir.[878] The Act deals with the order in which the heirs rank and provides for example that if the deceased is survived by a spouse, but not by a descendant, such spouse shall inherit the whole intestate estate.[879] If, on the other hand, the deceased is survived by a descendant, but not by a spouse, such descendant shall inherit the whole intestate estate.[880] In the case where the deceased is survived by both a spouse and descendant(s), the spouse comes first to inherit the greater of a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed by the Minister of Justice and Constitutional Development by notice in the Government Gazette.[881] After the surviving spouse has taken his / her share, the remainder of the intestate estate, if any, is inherited by the descendants.[882]

The Act goes on to provide for succession where the deceased is not survived by spouse or descendants and accordingly provides for succession by the deceased's parents, failing whom the deceased's siblings.[883] The farthest that the Act goes is to provide that if the deceased is not survived by a spouse, descendant, parent or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him or her nearest in degree shall inherit the intestate estate in equal shares.[884] In other words the Intestate Succession Act of 1987 governs intestate succession to the estate of a deceased who has an heir. If, on the other hand, there is total failure of blood relations who can inherit the estate, the position is governed by the common law which was briefly stated by Maasdorp J in *Ex parte Leeuw*[885] as follows: "Upon a total failure of blood relations, the Crown [State] is entitled to claim a vacant inheritance."[886] It should be noted that in these circumstances the State is not an "heir" and that it does not "inherit" the estate. The estate merely accrues to the State in terms of the *bona vacantia* principle.[887] This principle is in line with Roman-Dutch law which South African law follows and cannot be queried.

878 Section 1(1).
879 Section 1(1)(a).
880 Section 1(1)(b).
881 Section 1(1)(c)(i). That amount is currently R125 000,00.
882 Section 1(1)(c)(ii).
883 Section 1(1)(d) - (e).
884 Section 1(1)(f).
885 (1905) 22 SC 340.
886 *Ex parte Leeuw* 341. See also *Estate Baker v Estate Baker* (1908) 25 SC 234.
887 http://en.wikipedia.org/wiki/Law_of_succession_in_South_Africa (accessed 16-07-2014). Wikipedia's

It should also be noted that the Administration of Estates Act of 1965[888] delays the vesting of property in the State in terms of the *bona vacantia* principle for a period of thirty years.[889] This is so as in terms of section 35(13) of that Act the executor is required to pay to the Master of the High Court for deposit in the Guardian's Fund all moneys which he / she has for any reason been unable to distribute in accordance with the liquidation and distribution account. In terms of s 92 any money in the Guardian's Fund which has remained unclaimed for a period of thirty years shall be forfeited to the State, obviously as *bona vacantia*. Therefore, unclaimed property belonging to a deceased estate in respect of which there is no heir does not vest in the State without "further ado" [890] but only after a lapse of thirty years of lying in the Guardian's Fund.

7 6 SOUTH AFRICAN COMPANY LAW

When South African company law inherited English company law it also took over, and that without critical analysis as to the correctness of the rule, the *bona vacantia* principle in terms of which property belonging to a dissolved or deregistered company vested in the Crown. There are currently just too many cases dealing with vesting of property of a dissolved or deregistered company in the State as *bona vacantia*.[891]

discussion of the Law of succession in South Africa is based on Jamneck, Rautenbach, Paleker, Van den Linde and Wood-Bodley *The Law of Succession in South Africa* (2009).

888 Act 66 of 1965.

889 See Meyer *An Overview on the Distribution of an Estate of a Person Dying without or with a Will* (2011) also available at http://www.justice.gov.za/juscol/.../201106_intestate_and_testate_succession.pdf (accessed 16-07-2014); "Law of Succession in South Africa" at http://en.wikipedia.org/wiki/Law_of_succession_in_South _Africa (accessed 16-07-2014).

890 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A) 14E-F; *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6; *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) 298B para 9.

891 See for example *Ex parte Minister of Irrigation* 1948 2 SA 779 (C); *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1982 3 SA 474 (T); *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

The general rule was stated among others in *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Limited)*[892] where Bristowe J said the "general rule is that as soon as a corporation ceases to exist, all its movable property goes as *bona vacantia* to the Crown".[893] There the court specifically mentioned "movable property" as that was the kind of property which was being dealt with, namely funds. Needless to say that if property were to vest in the Crown[894] it did not have to be movable as any property would do.[895] *Ex parte the Government*[896] is the case in point. There Mason J had no hesitation in pointing out that the *bona vacantia* principle also applied to immovable property. While indicating the difference existing between English and South African law of the time concerning the treatment of landed property, in that in the former if landed property were to become *bona vacantia* the right of the grantor, if any, was revived,[897] and in which case the property did not escheat[898] to the Crown, the court explained the position in South African law saying:

> "... the land being situate in the Transvaal, the rights of individuals to the land would have to be determined by Transvaal law. But there apparently being no individual, even under Transvaal law, who is entitled to the land, it becomes *bona vacantia*."[899]

This being the case it follows therefore that upon deregistration or dissolution of a company the position is similar to that when, on a failure of all blood relations in the case of intestate succession the property belonging to the deceased estate, as *bona vacantia*, becomes State property.[900] As Binns-Ward J quite correctly indicated in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[901] the effect of the

892 1914 TPD 458.
893 *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Limited)* 461.
894 In the place of the Crown, that is, the British Crown, it is now the State.
895 In *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6 the court quite correctly referred to vesting in the State of "all its property" that is the company's property.
896 1914 TPD 596.
897 "Revival" of the right of a grantor would be difficult to understand unless it is put in a proper context. For example, in *Ex parte Marchini* 1964 1 SA 147 (T) the owner of land having minerals (the cedent) ceded his right to the minerals to R, a company. Some years after dissolution of R it was contended that on such dissolution the rights reverted to their original owner (the cedent). The court rejected the contention, holding that there was ample authority to the effect that the mineral rights in question should be regarded as *bona vacantia* which vested in the State.
898 The word "escheat" is not used in South Africa. It refers to the vesting of property in the Crown / State by virtue of it not belonging to anyone else or by operation of law.
899 *Ex parte the Government* 1914 TPD 596 597.
900 *Ex parte Marchini* 1964 1 SA 147 (T) 151A.
901 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

deregistration, and one should add, also of dissolution, is that "all its property", including any claims it might have against third parties, thereupon vest in the State as *bona vacantia*.[902]

7 7 AUTOMATIC VESTING OF PROPERTY IN THE STATE

The application of the *bona vacantia* principle results in the immediate and automatic vesting of property of a deregistered or dissolved company in the State without "further ado".[903] In endorsing this approach in *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy*[904] the Appellate Division was confirming the pronouncement of the Transvaal Provincial Division (TPD) in *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate)*[905] where the court held that property of a dissolved company vested in the Crown (State) as *bona vacantia* "as soon as a corporation ceases to exist".[906]

In the *Rainbow Diamonds* case, the Appellate Division criticised and rejected the approach of the Transvaal Provincial Division in *Ex parte Montrose Exploration Co Ltd*[907] where it was held that even on the assumption that the Crown had some interest in the property as *bona vacantia*, that was merely an interest of the same quality as the interest held by a person who claimed to have been the owner of the property in question. As Bristowe J put it:

> "There was no *dominium* in the Crown, and if the Crown claims to be entitled to the property as *bona vacantia* it must come to this Court to get an order ... So that even assuming that the property has passed to the Crown as *bona vacantia*, the Crown is in exactly the same position as the [applicant who claimed ownership of the property]."[908]

902 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6.
903 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A) 14E-F; *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6; *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) 298B para 9.
904 1984 3 SA 1 (A).
905 1914 TPD 458.
906 *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Limited)* 461. That essentially means immediately on deregistration or dissolution of the company.
907 1918 TPD 179.
908 *Ex parte Montrose Exploration Co Ltd* 182.

The Appellate Division reiterated the practice which started in *Ex parte the Government*[909] in terms of which a court order was given confirming that the property had indeed vested in the State as *bona vacantia*. There the Registrar of Deeds was authorised to pass transfer of the property to the government. Galgut AJA indicated that the approach in *Montrose Exploration* was not acceptable because in the first place ownership in property was not transferred through court orders; secondly, at best court orders could only declare who the owner was; and thirdly a court could order a person to effect transfer of ownership in property.[910] Moreover, if the *Montrose Exploration* approach were to prevail, it would have the unacceptable result that from the date of dissolution or deregistration of the company and until transfer is effected in favour of the State in terms of a court order the property in question would be *res nullius*, being property which is without an owner.[911] The *Rainbow Diamonds* approach was followed in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[912] where Binns-Ward J held that without any need for an act of cession or anything of the like, the State had the right, if it so decided, to prosecute the action which the deregistered company had against the defendant.[913]

7 8 NECESSITY OF COURT ORDERS

Even though property of a dissolved or deregistered company becomes State-owned as *bona vacantia* "immediately" and without "further ado" in the *Rainbow Diamonds* case the Appellate Division expressly accepted the role played by the courts in declaring property as one belonging to the State. As it was there indicated, the role of the court is not to pass transfer of ownership in the property to the State but to declare that as a result of dissolution or deregistration of the company, as the case may be, the property has indeed vested in the State as *bona vacantia*.[914]

909 1914 TPD 596.
910 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 12D.
911 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 12E.
912 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).
913 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 6. See also *Kanderson (Pty) Ltd v The Registrar of Companies* 1987 2 PH E7 (T) 27.
914 Such declaration was also made in *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T). See also *Kanderson (Pty) Ltd v The Registrar of Companies* 1987 2 PH E7 (T) 27 for the general principle.

It is submitted that there is a very good reason for obtaining a court order declaring that the property has duly vested in the State as *bona vacantia* and also for authorising the Registrar of Deeds to effect transfer thereof to the State as new owner, as was done in *Ex parte the Government*[915] and other cases.[916] While doing this might perhaps not be particularly necessary in every case, this takes special significance in those cases in which it is a requirement of the law that the property be registered in the name of the owner. A classic example here is ownership of landed property. If all along a particular piece of land has been registered in the name of a company, which of course has since been deregistered or dissolved, one wonders if it would be sufficient for the State to seek registration of the property in the name of one of its departments by virtue only of the dissolution or deregistration of the company.

The practice of the State, and for this it deserves much credit, is to seek a court order declaring it entitled to the property and also authorising the Registrar of Deeds to transfer it into its name as was done in such cases as *Ex parte the Government*.[917] The procedure is to first seek a rule *nisi*, and after giving potentially interested parties the opportunity to be heard, to have the rule confirmed on the return day if there is no successful opposition.

The role of the court in matters of this nature cannot be overemphasised. For example, in *Ex parte Minister of Irrigation*,[918] the court was approached for orders, which it granted, to the effect that the property which belonged to a statutory board[919] which had since been dissolved vested in the government as *bona vacantia*, and that the government had acquired all rights and privileges of ownership in the property. Furthermore, the government was also declared a successor-in-title to the servitudes which the board enjoyed during its existence.

915 1914 TPD 596.
916 Such as *Ex parte Minister of Irrigation* 1948 2 SA 779 (C); *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T); *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T).
917 1914 TPD 596.
918 1948 2 SA 779 (C).
919 Maraisburg Irrigation Board established in terms of the Irrigation Board Act 8 of 1912.

Another helpful case in this respect is *Government of the Republic of South Africa* v *Oceana Development Investment Trust plc*[920] where, on the return day of a rule *nisi* calling interested persons to show cause why certain mineral rights should not be declared *bona vacantia* and thus to have vested in the State, it appeared that the rights in question were registered in the name of a certain company which had since been liquidated, wound up and dissolved and thus ceased to exist. On the extended return day, the court confirmed the rule *nisi* and accordingly declared the mineral rights to be *bona vacantia*.

The above cases, and many others in which court orders were granted, raise one important question, namely whether if the property of a deregistered or dissolved company indeed becomes *bona vacantia* "immediately" and without "further ado" there is still a need for a court order making such declaration, seeing that such an order can only follow in due course and not immediately? And if such order is not granted, whether because it was not sought in the first place or, even though it was sought, there were certain issues that had to be attended to such as, for example, procedural ones, to whom then does the property of a now non-existent company belong? As it was pointed out in the *Rainbow Diamond* case the court can only declare who the rightful owner of the property is. But the question still remains - is it really necessary to get a court order declaring who the automatic owner of the property is after the dissolution or deregistration of a company? One gets the impression that the system of automatic passing of ownership of the property of a dissolved or deregistered company to the State as *bona vacantia* needs closer examination. As Brusser puts it: "These questions, and many others point to somewhat of an anomaly which requires closer scrutiny of the fate of property which 'belongs' to a deregistered company."[921]

920 1989 1 SA 35 (T).
921 Brusser "The status of a deregistered company" 1985 *The South African Company Law Journal* 9.

7 9 THEORIES ON PASSING OF OWNERSHIP IN IMMOVABLE PROPERTY

7 9 1 General

There are four theories relating to the system of transfer of a real right of ownership in immovable property, even though not all find favour with the courts. The theories concerned are, in no particular order of significance, positive, negative, causal and abstract system.

7 9 2 Positive system theory

Not much reference is made to the positive system of transfer of ownership in South African law. On a few occasions where reference was made to the theory it was merely by way of distinguishing it from its opposite, namely the "negative" system theory. One of those few occasions on which mention was made of the system was in *Knysna Hotel CC v Coetzee*[922] where Eksteen JA explained the theory to be a "system where registration was irrefutable proof of ownership".[923] In terms of the theory a person or entity in whose name the property is registered has unchallengeable (irrefutable) right of ownership to it. The theory runs contrary to the negative and abstract theories.

7 9 3 Negative system theory

The "negative system theory" is obviously the opposite of the "positive system theory". The theory was explained in the *Knysna Hotel* case as one having the effect that it could not simply be said that the person in whose name the property was registered was necessarily the owner thereof. That had to be so as somebody else could, for example, have become owner of

922 1998 2 SA 743 (SCA), [1998] 1 All SA 261 (A), [1997] ZASCA 114 (1 December 1997).

923 *Knysna Hotel CC v Coetzee* 753C. In this respect the court referred among others to Van der Merwe *Sakereg* 2 ed (1989) 341; Badenhorst, Pienaar & Mostert 232 para 10 5 2 2.

the property such as by way of prescription without being reflected as the owner in the Deeds Office. Such person would then, on proof of prescription, be able to challenge the registration of the property in the name of the current owner and have such registration amended accordingly.[924] Nevertheless, until such registration is successfully challenged and a court order is granted to the contrary, it stands for what it purports to be.[925]

This position was reiterated by Streicher JA who in *Cape Explosives Works Ltd v Denel (Pty) Ltd*[926] said: "We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon".[927] Should the contrary be proved, a court order would be granted for rectification of the deeds registry.[928] After all, mere registration does not afford proof of ownership.[929] As a result the owner can trump a *bona fide* possessor who acquired the property from the person registered as owner in the deeds registry[930] where such ownership, registered as it is, is nevertheless assailable, for example, having been acquired fraudulently. This has to be so as mere registration is not proof of ownership nor is it sufficient to acquire ownership.[931] Therefore registration, while providing proof of the present registered owner of the property, is no guarantee of title and is subject to correction.[932]

924 *Knysna Hotel CC v Coetzee* 753B-C. Apart from prescription the person could have acquired ownership by expropriation or any other mode as Shongwe JA explained in *Meintjes v Coetzer* [2010] 4 All SA 34 (SCA), 2010 5 SA 186 (SCA), [2010] ZASCA 32 (29 March 2010) para 9.

925 *Knysna Hotel CC v Coetzee* 753C-D.

926 2001 3 SA 569 (SCA), [2001] 3 All SA 321 (SCA), [2001] ZASCA 28 (19 March 2001).

927 *Cape Explosives Works Ltd v Denel (Pty) Ltd* 579F para 16. See also *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T); *Standard Bank van SA Bpk v Breitenbach* 1977 1 SA 151 (T) 156C-E; Van der Merwe 342 who says that the negative system of transfer does not guarantee that the information contained in the deeds registry is correct. Therefore, the deeds registry does not guarantee that the information therein contained is correct and can therefore be relied on by third parties for what it purports to be.

928 *Meintjes v Coetzer* [2010] 4 All SA 34 (SCA), 2010 5 SA 186 (SCA), [2010] ZASCA 32 (29 March 2010) para 9.

929 *Meintjes v Coetzer* para 9.

930 *Ibid.*

931 *Meintjes v Coetzer* paras 13, 15 and 16.

932 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA), 2011 2 SA 508 (SCA) para 13.

7 9 4 Causal system theory

The causal theory of transfer of ownership in property provides that the right of ownership does not pass to the transferee if a valid preceding *causa* is absent.[933] The theory does not look only at the fact of transfer of ownership but also takes into account the reason for such transfer. It accordingly requires that there should be a reason for the transfer, which reason must be valid,[934] for example, a valid contract of sale. Therefore, under the causal system of transfer, a valid cause (*iusta causa*) giving rise to the transfer is a *sine qua non* for the transfer of ownership. In other words, if the cause is invalid, for example for non-compliance with formal requirements, the transfer of ownership would also be void.[935] The application of the theory was reiterated by Brand JA in the more recent decision of the Supreme Court of Appeal in *Legator McKenna Inc v Shea*[936] where he said: "The causal theory ... requires a valid underlying legal transaction or *iusta causa* as a prerequisite for the valid transfer of ownership ..."[937]

The application of the theory has the result that absent a valid preceding *causa* a real right in the property, such as a right of ownership, would not pass to the transferee despite registration in his name having taken place. The "acquirer" (transferee) in that case would have no right which he can transfer to another person. Any attempt by the transferee to pass on the right to another, even if in favour of a *bona fide* third party, would be abortive.[938] Consequently, should the transferee attempt to sell the property in order to thereafter effect transfer of ownership to a *bona fide* third party, the *nemo plus juris*[939] rule would apply to

933 *Rasi v Madaza* [2001] 1 All SA 498 (Tk).
934 *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 4 SA 281 (A) 301H, [1978] 4 All SA 654 (A); Van der Merwe 305-306.
935 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA) 177b, 2011 2 SA 508 (SCA) para 12; Miller "Transfer of Ownership" in Feenstra & Zimmerman *Das Romisch-Hollandische Recht* (1992) 537; Miller "Transfer of Ownership" in Zimmerman & Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 727 735-739.
936 [2009] 2 All SA 45 (SCA), 2010 1 SA 35 (SCA), [2008] ZASCA 144 (27 November 2008).
937 *Legator McKenna Inc v Shea* 53d para 20.
938 *Rasi v Madaza* [2001] 1 All SA 498 (Tk) 511a.
939 *Nemo plus iuris ad alium transferre potest quam ipse haberet*. Freely translated the adage means that no one may transfer rights in a thing to another than he himself has – see Badenhorst, Pienaar & Mostert 73.

frustrate such attempt. The result would be that the transferor, never having lost his right of ownership, would be able to recover his property from a third party.[940]

The theory has not found favour with the courts and has, as a matter of fact, since been "jettisoned in favour of the abstract theory".[941]

7 9 5 Abstract system theory

The abstract theory is the opposite of the causal theory. It is trite that South African law has adopted the abstract system of transfer as opposed to the causal system which has since been jettisoned.[942] According to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction[943] such as a contract of sale. Therefore, there is no need for a formally valid underlying transaction provided that the parties are *ad idem* regarding the passing of ownership.[944] With regard to the transfer of movable property the courts have long accepted that the abstract theory, as opposed to the causal theory, applies.[945]

Initially there was some doubt regarding the application of the theory to immovable property. Eventually though the High Court accepted that the theory applied to both movables as well as immovables.[946] That approach enjoyed much academic support.[947]

940 *Rasi v Madaza* 511d-e.
941 *Legator McKenna Inc v Shea* 54e-f para 23.
942 *Legator McKenna Inc v Shea* 54e-f para 23; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA), 2011 2 SA 508 (SCA); *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 3 SA 96 (SCA) para 24.
943 *Legator McKenna Inc v Shea* 53d.
944 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA) 177c, 2011 2 SA 508 (SCA) para 12.
945 *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369 398-399; *Dreyer v AXZS Industries (Pty) Ltd* 2006 5 SA 548 (SCA), [2006] 3 All SA 219 (SCA) para 17;
946 *Brits v Eaton* 1984 4 SA 263 (SE) 273D-274C, [1989] 1 All SA 219 (SE); *Kriel v Terblanche* 2002 6 SA 132 (NC), 2002 JOL 9887 (NC) paras 28 – 29.
947 Miller *The Acquisition and Protection of Ownership* (1990) 128-130 and 168; Van der Merwe 305–310; Badenhorst, Pienaar & Mostert 76; Van der Merwe and Pienaar "Property" (2002) *Annual Survey of SA Law* 466 481.

The Supreme Court of Appeal has since proclaimed that the time has come for it to "add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well".[948] Consistent with this approach the court in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC*[949] held that while most of the cases deal with transfer of ownership of movables, there was no reason in principle for the abstract system of transfer not to apply to immovable property as well and as a result it applies to both.[950] According to the theory the requirements for the passing of ownership are twofold, namely delivery, which in the case of immovable property is effected by registration of transfer in the Deeds Office, and the requirement of the so-called "real agreement".[951] The essential requirements for the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.[952] Under the abstract system the most important point is that there is no need for a formally valid underlying transaction provided that the parties are in agreement regarding the passing of ownership.[953]

It should be noted though that the principles applicable to agreements in general also apply to real agreements.[954] This has the result that although the abstract theory does not

---

948 *Legator McKenna Inc v Shea* 53j-54a para 22. See also *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 3 SA 96 (SCA) para 24.

949 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA), 2011 2 SA 508 (SCA), [2010] ZASCA 166 (1 December 2010) para 12; *Meintjes v Coetzer* 2010 5 SA 186 (SCA), [2010] 4 All SA 34 (SCA), [2010] ZASCA 32 (29 March 2010).

950 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 177g para 14; *Klerck v Van Zyl and Maritz* 1989 4 SA 263 (SE) 273; *Apostoliese Geloofsending van SA (Maitland Gemeente) v Capes* 1978 4 SA 48 (C); *Dreyer v AXZS Industries (Pty) Ltd* 2006 5 SA 548 (SCA); Miller and Pope *Land Title in South Africa* (2000) 51.

951 *Legator McKenna Inc v Shea* 53i para 22; *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 3 SA 96 (SCA) para 24. The "real agreement" is known as "saaklike ooreenkoms" in Afrikaans.

952 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 176h para 9; *Legator McKenna Inc v Shea* 53j-54a para 22; *Airtel-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 3 SA 971 (A) 922E-F; *Dreyer v AXZS Industries (Pty) Ltd* 2006 5 SA 548 (SCA) para 17; *Trust Bank van Afrika v Western Bank* 1978 4 SA 281 (A) 302A-F; *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369 397-398. The *Legator McKenna* case was quoted with approval by Ponnan JA in *Du Plessis v Prophitius* [2009] 4 All SA 302 (SCA) 305b-d, 2010 1 SA 49 (SCA), [2009] ZASCA 79 (3 June 2009) para 10 and by Shongwe JA in *Meintjes v Coetzer* [2010] 4 All SA 34 (SCA), 2010 5 SA 186 (SCA), [2010] ZASCA 32 (29 March 2010) para 8 and 21; Wille, Du bois, Bradfield *Wille's Principles of South African Law* (2007) 520-521.

953 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [2011] 3 All SA 173 (SCA), 2011 2 SA 508 (SCA); *Mathenja v Magudu Game Company (Pty) Ltd* [2009] 4 All SA 15 (SCA); *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 3 SA 96 (SCA) paras 24 – 25.

954 *Legator McKenna Inc v Shea* 53j-54a para 22.

require a valid underlying contract, for example, a contract of sale, it is so that despite registration of transfer if there is a defect in the real agreement as distinguished from the underlying agreement, ownership in the property would not pass[955] and the property could be vindicated from the *bona fide* purchaser and possessor notwithstanding registration thereof in his name where the real agreement is defective,[956] irrespective of the validity of the underlying transaction.[957] Therefore, while the purpose of the abstract theory of transfer of ownership is to introduce greater certainty regarding the ownership of property, the theory does not and cannot serve as a guarantee of ownership.[958] The application of the principle was dealt with very briefly in the *Oriental Products* case where Harms DP said that although there was a basis on which transfer of ownership could be validly challenged, as the person who registered property in the name of a third party did not have authority to do so, nevertheless such could not be done in that case as the true owner of the property had waited too long before seeking a remedy against unlawful sale and transfer of the property and was thus estopped from assailing the transfer.[959]

7 9 6 Relationship between negative system theory and the abstract system theory

The law relating to transfer of immovable property apply both the "negative system" and "abstract system" theories. The two are complimentary of each other rather than mutually destructive. This must be so as the abstract theory deals with the requirements for transfer of ownership while negative system theory deals with the consequences thereof, namely that registration of property in the name of a person or entity is not irrefutable and can therefore be challenged.[960]

955 *Legator McKenna Inc v Shea* 54b para 22. *Preller v Jordaan* 1956 1 SA 483 (A) 496; *Klerck v Van Zyl and Maritz* 1989 4 SA 263 (SE) 273D-E, [1989] 1 All SA 23 (SE); *Du Plessis v Prophitius* 2010 1 SA 49 (SCA), [2009] ZASCA 79 (3 June 2009); *Meintjes v Coetzer* [2010] 4 All SA 34 (SCA), 2010 5 SA 186 (SCA), [2010] ZASCA 32 (29 March 2010) para 13 and 16; Badenhorst *et al* 79-80.

956 Property registered in the name of the new owner was recovered by way of vindicatory action (*rei vindicatio*) in *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 3 SA 96 (SCA) as the underlying agreement was tainted by fraud.

957 *Knox v Mofokeng* 2013 4 SA 46 (GSJ) 57F-G para 22.

958 *Ibid.*

959 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 181e para 28.

960 *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA), [2001] 3 All SA 321 (SCA), [2001] ZASCA 28 (19 March 2001); *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal* 1975 4 SA 936 (T); *Standard Bank van SA Bpk v Breitenbach* 1977 1 SA 151 (T) 156C-E;

7 9 7 Exception: Statute may provide to the contrary

The various theories relating to transfer of ownership of property as outlined above notwithstanding, the legislature may in a statute make provision to the contrary. Recognition of this was made in *Union Government (Minister of Irrigation) v Bolam*[961] where the Appellate Division held that even though the land in question was registered in the name of Maraisburg Irrigation Board that did not affect ownership since "where a statute regulates ownership of land, registration must give way to the provisions of the statute."[962] The principle was reiterated in yet another Appellate Division decision in *De Villiers v Delta Cables (Pty) Ltd*[963] where Van Heerden JA held:

> "... if the Legislature has provided that on the happening of an event the property of a person – including property registered in his name – will pass to another, effect must, of course, be given thereto. Now [in the instant case] the Legislature has clearly provided that on the sequestration of an estate the property of each spouse vests in the trustee."[964]

Section 21(1) of the Insolvency Act of 1936[965] is a classic example of this situation in that it provides that upon sequestration of an estate all property of the insolvent, registered or unregistered, vest in the trustee of the insolvent estate. Such vesting has the result that ownership of the property vests in the trustee (in whom it is not registered) even though it would still be registered in the name of the insolvent as was the case in *De Villiers v Delta Cables (Pty) Ltd.*[966]

It follows therefore that the various theories relating to transfer of ownership must be looked at in the light of any applicable statutory provisions, should there be such provisions.

Van der Merwe 342.
961 1992 1 SA 9 (A).
962 *Union Government (Minister of Irrigation) v Bolam* 467. The *Bolam* case was quoted at length and with approval in *Ex parte Minister of Irrigation* 1948 2 SA 779 (C) 781-782.
963 1992 1 SA 9 (A).
964 *De Villiers v Delta Cables (Pty) Ltd* 16E.
965 Act 24 of 1936.
966 1992 1 SA 9 (A).

7 10 BASIS OF THE *BONA VACANTIA* PRINCIPLE

7 10 1 General

Various bases have been put forward as justification for the application of the *bona vacantia* principle. Some of them have their origin in Roman and Roman-Dutch law while others come from English law. It would seem, however, that not all of them are entirely satisfactory.

7 10 2 Royal prerogative principle

Because of its system of government, history and traditions, there developed in the United Kingdom the royal prerogative principle in terms of which the doctrine of *bona vacantia* applied to all derelict property.[967] In terms of the principle the Crown was entitled to property to which no one could establish a title or was likely to be able to do so.[968] The principle of vesting of property in the Crown was particularly strong during the feudal system in that, as Megarry and Wade-Harpum explain, land was the "object of feudal tenure; the sovereign remains the lord paramount of all land within the realm; every parcel of land is still held by some lord ... feudal principles still underlie our land law." [969] The authors continue to say: "English law still retains its original basis, that all land in England is owned by the Crown ... and allodial land (ie land owned independently and not 'held of' some lord) is unknown."[970]

From being a rule applicable to land, the royal prerogative principle was later extended to unowned property in general and eventually to the law of intestate succession on

967 Instances of "derelict property" included property which had been abandoned, property taken from thieves and property taken from persons who had been denominated (*indigni*). See *Ex parte the Government* 1914 TPD 596 597-598.

968 *Ex parte the Government* 598.

969 Megarry, Wade, Harpum *The Law of Real Property* (2000) 36.

970 Megarry and Wade-Harpum 12. This work is also quoted by Sonnekus "Grondeise en die klassifikassie van grond as *res nullius* of as staatsgrond" 2001 *TSAR* 82 98.

total failure of succession to a deceased estate and finally to the property of a defunct or dissolved company.[971] In the context of the law of succession, the Crown's ownership of *bona vacantia* was regarded in English law not as a rule of succession but as a Crown prerogative.[972] This being the case, it came as no surprise that in *Ex parte the Government*[973] Mason J said: "Now this right of *bona vacantia* seems ... substantially a prerogative of the Crown ... that prerogative must be determined in accordance with the law of England."[974]

7 10 3 State sovereignty

The English law principle relating to ownership of all land, which is not in private hands, by the Crown (the royal prerogative principle) did not form part of South African law.[975] However, the rule of intestate succession that upon total failure of heirs property of the deceased vested in the Crown / State as *bona vacantia*, which principle was also part of Roman-Dutch law, was accepted as part of South African law. Also forming part of South African law is the rule that on dissolution or deregistration of a company its property as of that date vests in the State as *bona vacantia*.[976] The rationale for such vesting is State sovereignty.[977]

7 10 4 Derelict property

The doctrine of *bona vacantia* is said to apply to all "derelict property", being property to which the State is entitled as no-one else can establish a title or is likely to be able to establish

971 See paras 7 4 – 7 6 above.

972 *Antares International Ltd v Louw Coetzee & Malan Inc* 2011 ZAWCHC 366 (2 September 2011) para 36.

973 1914 TPD 596.

974 *Ex parte the Government* 597.

975 Sonnekus 102-103 where reference is made to such cases as *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A); *Sheba Gold Mining Co v Vautin Millbourne and Steers* (1889) Barker 16; *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359; *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 623.

976 See paras 7 3, 7 5 and 7 6 above.

977 In the past the Crown stood for what is now the State and was said to be exercising its "sovereign right" in taking the property as *bona vacantia*. See *Re Barnett's Trusts* [1902] 1 Ch 847, 71 LJ Ch 408, 86 TL 346; *Estate Baker v Estate Baker* (1908) 25 SC 234 242.

a title thereto.[978] As it is commonly put, any property which the company owned at the time of its "death" by way of deregistration or dissolution vests in the State as *res derelicta*.[979] That is what happened in among others *Ex parte Auckland Park Racing Club Ltd*[980] where after the company was struck off the register of companies, Wessels J described it as a company that had "ceased to exist" and referred to its property as "derelict, because it belongs to a company which does not exist..."[981]

Derelict property refers to abandoned property, which abandonment would require the owner to give up his *animus possidendi* and also preferably relinquish physical *detention*, all this with the intention of no longer remaining the owner thereof.[982] In this respect one would share the views of Wunsh who says: "One could not say that in all cases a company which became deregistered [or dissolved] intended to abandon its property. The circumstances of each case would have to be examined."[983]

It cannot be denied though that there may well be instances in which a company, considering the property to be valueless, could in fact abandon it and never bother to deal therewith before deregistration or dissolution.[984] The onus is on the person alleging abandonment of the property to prove it,[985] bearing in mind that it is inherently improbable that a person would lightly abandon the right of ownership in valuable property.[986]

Normally the problem would be that the property having been registered in the name of the company, nothing was done to change such registration. Nevertheless in the majority

978 *Ex parte the Government* 1914 TPD 596 597-598 which was quoted with approval in *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A) 11H.

979 *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859D-E; *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458; *Re Jacobson* 1927 TPD 857; *Ex parte Pillay & Sons* 1951 1 SA 229 (T); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 476F.

980 1918 TPD 37.

981 *Ex parte Auckland Park Racing Club Ltd* 39.

982 *Reck v Mills* 1990 1 SA 751 (A) 757C-E.

983 Wunsh "Are the assets of a deregistered company *bona vacantia*?" 1983 (August) *De Rebus* 393.

984 As happened in *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) (mineral rights) and *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Lewensassuransiemaatskappy* 1984 3 SA 1 (A) (shares).

985 *Staegemann v Langehoven* 2011 5 SA 648 (WCC) 655F-G para 31. *Laws v Rutherford* 1924 AD 261 263.

986 *Meintjes v Coetzee* 2010 5 SA 186 (SCA) 195A.

of the cases the position is simply that the company was deregistered or dissolved without abandoning the property. In such an event to label the property as *res derelicta* would of course be a misnomer. This notwithstanding, some cases consider the property to have been abandoned,[987] albeit incorrectly so.

7 10 5 *Res nullius*

A corporeal asset can only be classified as *res nullius* if it was never previously owned or if its owner has voluntarily abandoned ownership.[988] One of the reasons advanced for having property of a deregistered or dissolved company vesting in the State as *bona vacantia* is allegedly by virtue of its being *res nullius*, meaning property which does not belong to anyone. This much was said in among others *Ex parte the Government*[989] where Mason J said "the Crown is ... entitled to property to which no one else can establish a title or is likely to be able to establish a title."[990]

There is a very strong English law link to the *res nullius* doctrine. *In re Sir Thomas Spencer Wells, Swinburne-Hanham v Howard*[991] Lawrence LJ indicated that the title of the Crown arose because the property had "no other owner".[992] Such property had to be distinguished from one which had an owner although his / her identity could not be verified. The doctrine was also known in both Roman law[993] and Roman-Dutch law.[994]

---

987 See for example *Norton District Tobacco Warehouse (Pvt) Ltd v Skea* 1963 1 SA 856 (FC) 859D-E; *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458; *Re Jacobson* 1927 TPD 857; *Ex parte Pillay and Sons* 1951 1 SA 229 (T); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 476F.

988 *Antares International Ltd v Louw Coetzee & Malan Inc* 2011 ZAWCHC 366 (2 September 2011) para 35.

989 1914 TPD 596.

990 *Ex parte the Government* 598.

991 1933 Ch 39.

992 *In re Sir Thomas Spencer Wells, Swinburne-Hanham v Howard* 50.

993 See para 7 2 above.

994 See para 7 3 above and *Ex parte the Government* 1914 TPD 596 598.

7 11 THE SONNEKUS THEORY

The views of Sonnekus[995] on the doctrines of *bona vacantia*, *res nullius* and the prerogative of the Crown are well-articulated in his thoroughly researched publications.[996] Tracing the history and development of *bona vacantia* and *res nullius* through Roman law, Roman-Dutch law as well as English law he concludes that as applied in South African law the concepts are those that were known in the old English feudal system which is not part of South African law and are accordingly alien to the South African legal system. In particular he refers to *bona vacantia* as a "diabolic concept".[997] He argues that the importation of the doctrines into South African law was done by lawyers and judges who studied law in England and were thus only happy to follow English decisions and transplant English law concepts into South African law without critical analysis.

His submission is that starting with *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Limited)*[998] up to *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy*[999] South African courts readily followed English decisions without critical analysis and thus erred. In his view the correct approach lies in *Ex parte Montrose Exploration Co Ltd*[1000] where Bristowe J said:

> "... even assuming that the Crown has some interest in this property as *bona vacantia*, that is merely an interest of the same quality as the interest held by the applicant company and the other companies

995 J C Sonnekus, Professor in Private Law, University of Johannesburg.

996 Sonnekus "Enkele opmerkings na aanleiding van die aanspraak op *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 ground as *res nullius* of as staatsgrond" 2001 *TSAR* 82; Sonnekus "Persoonlike Diensbaarhede en die herregistrasie van 'n deregistreerde Maatskappy as Reghebbende op gespanne voet" 2008 *TSAR* 130.

997 The term he uses is the Afrikaans word "towerbegrip" – see 1985 TSAR 121 142. Literal translation of "tower" into English is "witch", while "begrip" is "concept". Such literal translation, if used, would render the word meaningless in English and should rather be avoided.

998 1914 TPD 458.

999 1984 3 SA 1 (A).

1000 1918 TPD 179.

1001 *Ex parte Montrose Exploration Co Ltd* 182.

which were dissolved. There is no *dominium* in the Crown, and if the Crown claims to be entitled to the property as *bona vacantia* it must come to this Court to get an order ..."[1001]

Sonnekus therefore concludes that on deregistration or dissolution of a company its property that has not been dealt with does not vest in the State as *bona vacantia* but instead remains an ownerless property, a *res nullius* in the Roman law and Roman-Dutch law sense whose ownership is capable of being acquired through acquisitive prescription by anyone who satisfies the requirements thereof, the primary one being, in this context, *occupatio*. Like anybody else, the State can then be one of those meeting the requirements of acquisitive prescription and accordingly become the owner of the property.

It is submitted that the views of Sonnekus are not correct and should not be followed. Moreover, they are not workable as they create a much bigger problem for a dissolved or deregistered company should the dissolution be declared void or registration be reinstated. Furthermore, as indicated elsewhere[1002] the courts have long accepted that the effect of deregistration and dissolution on the existence of the company is the same, namely that in either case the company "ceases to exist"[1003] and must be assumed to be "completely dead".[1004] Moreover, as indicated by Van Dijkhorst J in the *Sengol Investments*[1005] there is a "formidable list of authorities" dealing with these issues, stretching over many decades and including such decisions of the Appellate Division as *Rainbow Diamonds.*[1006]

It should be noted that if the views of Sonnekus were to prevail, that would have the result that third parties would acquire ownership of the property of the dissolved or deregistered company, as he argues that this should be the case, with the result that the property could be consumed or disposed of, and that much to the detriment of the company were it to be subsequently revived through reinstatement of registration or voidance of

1001 *Ex parte Montrose Exploration Co Ltd* 182.
1002 Chapter 4 para 4 2.
1003 See for example *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458 461.
1004 *Ex parte Ziman* 1970 1 SA 164 (T) 173D-E.
1005 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T).
1006 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A).

dissolution. This should be contrasted with the position of the State which, once the property has vested in it as *bona vacantia*, takes the view that it should not be enriched at the expense of interested parties.[1007] On reinstatement of registration or voidance of dissolution, traditionally the State does not oppose the application for the re-vesting of *bona vacantia* property in the company, for the very same reason of not seeking to be enriched at the expense of interested parties, this being a much applauded approach. One should contrast this attitude with what could be expected of third parties who would have acquired ownership of such property had it not vested in the State. In all likelihood, they would go a long way in asserting their "rights" in the property.

7 12 BRUSSER'S CONCERNS

The application of the principle that on the dissolution or deregistration of the company its property vests in the State as *bona vacantia* without "further ado"[1008] is not without its own problems. In the *Rainbow Diamonds* case the court acknowledged that while it was not the role of the court to pass ownership in property there was nevertheless a role that it could play, namely to declare who the owner of the property was and also where necessary to order a specified person to pass ownership in the property to a person entitled thereto.[1009]

It would appear that notwithstanding the fact that property might have vested in the State without "further ado", there is after all room, and in fact a necessity, for a court order. It is submitted that there is merit in the statement of Bristowe J in *Ex parte Montrose Exploration Co Ltd*[1010] that if the State claims to be entitled to the property as *bona vacantia* it must come to court to get an order to that effect.[1011] For without a court order how else could it be verified that the State has officially become the owner of property which all along

1007 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 15B.
1008 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A).
1009 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 12D-E.
1010 1918 TPD 179.
1011 *Ex parte Montrose Exploration Co Ltd* 182.

belonged to someone else, particularly if the property in question is registered in somebody's name, namely a company?

It is further submitted that Erasmus[1012] correctly captures the essence of the application of the *bona vacantia* principle when he says:

> "... 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 this power, notwithstanding that the general common law requirements of delivery or registration may not have been fulfilled."[1013]

There is therefore this anomaly that by operation of law the property belongs to the State while at the same time it is registered in the name of a defunct company. This notwithstanding, the courts take the view that no court order is necessary to clarify what is on the face of it a case of obvious contradiction. It is against this background that Brusser,[1014] commenting on *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd*,[1015] raises a few concerns and questions saying:

> "There are certain rather interesting questions which could be posed (but not answered in the course of this case note) arising out of the conclusion by the court that any remaining property of a deregistered company automatically becomes *bona vacantia* and vests with the State. For example, if the property owned by the deregistered company comprises shares, is the State, as newly found owner of these shares, a member of the company whose shares they are? Does any formal transfer of shares and change in name of the member with the transfer secretaries have to occur? What if the property consists of real estate, land, is a formal change of ownership at the deeds office necessary? Furthermore, what would the situation be if, while the deregistration is still in force, an issue arises in the company which is holding shares 'belonging' to the deregistered company, which required the shareholders to case [*sic*] their vote. Would the State, be in a fiduciary position *vis-a-vis* a person who successfully petitions the court for the reinstatement of the registration of the company? After all, in terms of s 73(6)[1016] the company is deemed to have been in existence as if the registration of its memorandum and articles had not been cancelled. Does this deeming provision result in the Minister acquiring a new position as director of the deregistered company? These questions, and many others, point to somewhat of an

1012 Erasmus *Expropriation and the social contract with reference to the relation between citizens and the property* (LLM-thesis, University of Natal, 1983).
1013 Erasmus 81-82.
1014 Brusser "The status of a deregistered company" 1985 *The South African Company Law Journal* 9.
1015 1984 2 SA 372 (W).
1016 This is a reference to s 73(6) of the repealed Companies Act of 1973. Its equivalent is now s 82(4) of the Companies Act of 2008.

anomaly which requires closer scrutiny of the fate of property which 'belongs' to a deregistered company".[1017]

It should be mentioned though that unsound as automatic vesting in the State of property of a dissolved or deregistered company may seem, it nevertheless serves a very useful purpose of protecting the property against potential raiders were such property to be considered as not belonging to anyone and thus be eligible for grabbing by any interested person. Worse of all, it could very well be that in some instances the same persons who, during the existence of a company, had a duty to take care of the company and look after its interests, including its property, become the number one group of raiders.[1018] That does not seem right. Accordingly, the *bona vacantia* principle should be appreciated for the good that it does, deficient as its philosophical foundation might seem.

7 13 THE FATE OF *BONA VACANTIA* PROPERTY

It is very good and convenient to say that the property belongs to the State as *bona vacantia*. However, the problem with the State is that it consists of various organs, ministries and agencies. Primarily it is the Department of Finance that has the overall co-ordination of assets, funds, revenue and expenditure and allocation of State resources. There is also the Department of Land Affairs and Rural Development which is in charge of landed property while the Department of Public Works is in charge of urban properties and buildings. In very broad terms section 216 of the Constitution[1019] makes provision for national legislation to establish a national treasury. Such national legislation has in fact been passed and is known as the Public Finance Management Act.[1020] In terms of section 5 of the Act, a National Treasury is established, consisting of the Minister of Finance as its head and national department(s) responsible for financial and fiscal matters. The Minister, as head of the National Treasury,

1017 Brusser 10.

1018 A similar concern was raised by Schutz JA in *Mouton v Boland Bank Ltd* 2001 3 SA 877 (SCA) 881 para 9 who said: "Frequently, if a corporation is deregistered, its premises and goods will be abandoned or neglected, a prey to all, and its records destroyed or lost."

1019 Constitution of the Republic of South Africa, 1996.

1020 Act 1 of 1999 as amended by the Public Finance Management Act 29 of 1999. The Act repeals the Exchequer Act 66 of 1975 and other Acts mentioned in Schedule 6. The bulk of the Act came into operation on 1 April 2000 (s 95).

takes policy and other decisions of the Treasury, except those decisions which have been delegated to the head of a department forming part of the National Treasury or Provincial Treasury.[1021] The power delegated to the head of a department may in turn be sub-delegated to another official in the National Treasury or the holder of a specific post in the Treasury or an accounting officer of a constitutional institution or department or the accounting authority for a public entity.[1022] In the case of provincial treasury power may be sub-delegated to an official in that treasury or holder of a specific post in the provincial treasury or the accounting officer for a provincial department or the accounting authority for a provincial public entity.[1023] The delegation notwithstanding, the Minister of Finance is not divested of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.[1024]

The functions and powers of the National Treasury include among others the promotion and enforcement of transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions[1025] and to this end the Treasury may do anything further that is necessary to fulfil its responsibilities effectively.[1026] This is in line with the long title which indicates the purposes of the Act as being "to regulate financial management in the national government and provincial governments, to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively..."

If property that has become *bona vacantia* is funds, especially funds lying in the Guardian's Fund, the Treasury shall, after complying with the required procedure for claiming the funds and on their release, pay the same into the National Revenue Fund. Section 11 of the Public Finance Management Act requires all money received by the national government to be paid into the National Revenue Fund.[1027] The money is paid into

1021 Section 5(2) and 10(1) read together.
1022 Section 10(2)(b)(i).
1023 Section 10(2)(c)(i).
1024 Section 10(2)(d).
1025 Section 6(1)(g).
1026 Section 6(2)(g).
1027 Section 11(1)(a). This does not include money excluded by this Act or another Act of Parliament.

the Fund by depositing it into a bank account of the Fund in accordance with any requirements that may be prescribed.[1028]

There is no doubt that corporeal movable and immovable property create a dilemma. As already indicated the National Treasury as such does not and is not required to keep any assets of the State. Its role is to promote and enforce effective management in respect of among others the assets and liabilities of departments, public entities and constitutional institutions.[1029] After appropriation, however that may be done, if at all, the Treasury will then allocate the particular property to the appropriate department, public entity or constitutional institution, as the case may be. Logically, if logic does apply after all, property like rural land should be allocated to the Department of Land Affairs while urban land and buildings should go to the Department of Public Works. Accordingly, property that could be of use to the defence force should go to the Department of Defence while other equipment may, again according to the use to which it could be put, for example, go to the Department of Police and so forth.

It is, however, incorporeal property that may prove even more difficult to deal with. That intellectual property such as copyrights, trademarks, designs and patents, like any other property, also vests in the State as *bona vacantia*, cannot be doubted. But that is one thing. However, exercising the right of ownership and performing all the obligations attaching to some of that kind of property is another matter. There is therefore an obvious practical problem of exercising these rights by the State. It could be that it would be expecting too much to require State departments to exploit very technical designs and patents if there is, for example, nobody in the government department with the necessary expertise. After all, some of the intellectual property rights are not only an asset but are also a liability[1030] in that they require regular payment of renewal fees failing which they lapse. For example, section 22(2) of the Designs Act[1031] states that the registration of a design shall lapse at the end of the period prescribed for the payment of any prescribed renewal fee if it is not paid within that

1028 Section 11(3).
1029 Section 6(1)(g).
1030 For example, any person claiming to be owner of copyright in cinematograph film must, on application for registration as owner, pay the prescribed fee - s 6(1) of the Registration of Copyright in Cinematograph Act 62 of 1977.
1031 Act 195 of 1993.

period. If the design that has lapsed has to be restored, the outstanding fee must first be paid.[1032] Thus, unless the incorporeal property in question is exploited to generate income or is disposed of it could be that far from being an asset it is but a liability since renewal fees must be paid for its continued existence. In the case of a trade mark, it can be removed from the register on the basis of non-use.[1033] The State must therefore exploit the trade mark lest it be removed from the register. As a matter of fact after two years or more following upon a dissolution, and also deregistration it is submitted, an interested person may apply to court for the removal of the trade mark, which may be granted unless it is shown that the trade mark is used or proposed to be used in relation to the goods or services it covers, by a successor-in-title of the registered proprietor.[1034] Perhaps the easiest option for the State would be disposing of those rights or licensing them to interested parties.

7 14 DISPOSAL OF *BONA VACANTIA* PROPERTY BY THE STATE

The State, acting through an appropriate department, agency, institution or public enterprise may retain and make use of *bona vacantia* property as would be the case with any other state-owned property. Many a times it may, however, prove more beneficial to realise the property and rather deal with the proceeds of the sale than the property itself. Doing this will make things very easy for the National Treasury as the proceeds of the property will then be paid into the National Revenue Fund by depositing it into a bank account of the Fund.[1035]

As already indicated, apart from funds the National Treasury itself does not and is not required to keep assets for the State. It simply oversees and assists various state departments, agencies, institutions and public entities in the management of their financial affairs. *Bona*

1032 Section 23(5). Similar provisions relating to patents are found in s 46 of the Patents Act 57 of 1978.

1033 Section 27(1) of the Trade Marks Act 194 of 1993. An interested person may make application to court for the removal of the trade mark. The issue of removal of a trade mark from the register on this ground was dealt with in *Twin Products (Pty) Ltd v Hollywood Curl (Pty) Ltd* 1986 4 SA 392 (T).

1034 Section 27(1)(c) and (2) read together.

1035 As required by s 11(3) of the Public Finance Management Act 1 of 1999. In terms of s 13, however, not all moneys need be paid into the National Revenue Fund, for example, money received by a national public entity or national department. The money can simply be paid into the bank account of the institution concerned – s 13(5).

vacantia property other than money cannot therefore be expected to be found under the control and administration of the Treasury. It should ordinarily be passed on to an appropriate department, agency, institution or public entity which will then use or dispose of the property, depending on what may prove beneficial. In any event, according to officials in the Department of Finance *bona vacantia* property is normally disposed of by way of a public auction.[1036]

In terms of the Public Finance Management Act, the National Treasury is required to make regulations or issue instructions applicable to departments concerning the alienation or other disposal of State assets.[1037] Furthermore the Treasury may make regulations or issue instructions applicable to departments concerning "assets which accrue to the state by operation of any law".[1038] As a matter fact such regulations have indeed been made[1039] and provide among others that where any money, property or right accrues to the State by operation of law (*bona vacantia*), the relevant treasury may exercise all powers, authority and prerogatives, and fulfil any obligation on behalf of the State.[1040] It should be noted though that reference to the "relevant treasury" raises more questions than answers as already alluded to. Furthermore, the regulations provide very briefly that disposal of movable assets must be at market-related value or by tender or auction, whichever is most advantageous to the State, unless determined otherwise by the relevant treasury.[1041] In the case of immovable property its sale must be at market-related value unless the relevant treasury approves otherwise.[1042] The letting of immovable State property, excluding State housing for officials and political office bearers, is required to be at market related tariffs, unless the relevant treasury approves otherwise. The regulations emphasise that State property may not be let free of charge without the prior approval of the relevant treasury.[1043]

1036 The information was provided by officials in the Department of Finance at an interview in Pretoria in July 2000.
1037 Section 76(1)(k).
1038 Section 76 (2)(i).
1039 Treasury Regulations for Departments, Constitutional Institutions and Public Entities Issued in terms of the Public Finance Management Act, 1999 (April 2001).
1040 Regulation 10.3.1.
1041 Regulation 10.2.1.
1042 Regulation 10.2.2.
1043 Regulation 10.2.3.

Fairly recently, new draft regulations were issued in November 2012 and were indicated as coming into effect on 1 April 2013.[1044] April 1st being notoriously known as a "fool's day", one would hope that nobody is making a fool of himself or herself through these regulations. A hallmark of these new regulations is that they do not deal with *bona vacantia* property in particular, let alone mention it. Essentially, they are meant to deal with disposal and letting of State property as their predecessors did, and provide that assets should be disposed of at fair market value and that reasonable efforts should be made to ensure that an appropriately competitive process for disposal is adopted.[1045] Furthermore, the regulations provide that the accounting officer or accounting authority of the relevant treasury must make a decision on the method and options of disposal to follow prior to issuing State assets for disposal.[1046] The disposal management system of an institution is required to provide for various disposal options required by the categories of assets of the institution which may include public auction, public tender, transfer to another institution, sale to another institution, letting, sale to employees, trade-in and controlled dumping.[1047] In instances where assets are sold or leased by means of advertised competitive bids or written price quotations or by auctions the award must be made to the bidder with the highest price.[1048] These then are in very broad terms the provisions of the regulations which do not, after all, deal with *bona vacantia* in particular.

7 15 LACK OF TRANSPARENCY IN THE HANDLING OF *BONA VACANTIA* PROPERTY

Contrary to section 6(1) of the Public Finance Management Act which among others provides that the National Treasury must "promote and enforce transparency", it has not been an easy task finding out exactly how the Treasury handles *bona vacantia* property. Attempts to find someone or a team dealing with this kind of property did not yield a ready answer as officials were either "not familiar" with the process, or it was not particularly their line of duty even

1044 Public Finance Management Act, 1999: Draft Treasury Regulations published in Notice 1005 of 2012 contained in Government Gazette No. 35939 of 30 November 2012.
1045 Regulation 26.1.2(d).
1046 Regulation 26.2.1.
1047 Regulation 26.2.2.
1048 Regulation 26.3.2.

though the matter was otherwise dealt with by "people on the ground".[1049] Quite surprisingly it was also said that the property is dealt with "at magisterial level", by which it was understood that the property was to be dealt with by officials in the area in which it was located, this being possible in the case of corporeal property. It is very interesting to note that nobody at the top, middle or other level was able to give ready answers to specific questions.[1050]

In response to a letter accompanied by a questionnaire the reply was: "the Department of Finance is unfortunately not in a position to assist you in answering the questions". However, the Department advised that it had forwarded the questionnaire to the Department of Justice as well as the Department of Trade and Industry for their attention. No response was to be forthcoming from the two departments mentioned. At long last during an interview[1051] with officials in the Department of Trade and Industry invaluable assistance and information was given concerning deregistration and dissolution of companies. It was also indicated that the role of the Registrar of Companies, whose office fell under the Department of Trade and Industry, did not extend to *bona vacantia* as that was a matter belonging to the National Treasury, that is, the Department of Finance. Although unable to answer specific questions asked in the questionnaire the latter department did nevertheless give much assistance concerning the general scheme of things and also by providing a much appreciated free copy of the Public Finance Management Act of 1999.

It is hoped that as provided for in section 76 of the Public Finance Management Act the National Treasury will in the very near future make regulations or issue instructions applicable to departments, concerning the alienation, letting or other disposal of State assets and also make regulations or issue instructions applicable to departments concerning assets which accrue to the State by operation of any law in more detail than is currently the case. In the case of regulations, since they will be published in the Government Gazette,[1052] their accessibility should not prove a problem but in the case of instructions it is hoped that they

1049 This was indicated by officials in the office of the Registrar of Companies in Pretoria during an interview in July 2010.

1050 A visit to the office of the National Treasury in Pretoria was made in July 2010.

1051 In Pretoria in July 2010.

1052 Or better still, in the "prescribed manner", meaning posting same on the Department of Finance's website.

would be made available to interested members of the public, the easiest way of doing this being their publication in the Government Gazette rather than considering them privileged internal instructions which are not available for public consumption.

By and large what is very clear is that upon deregistration or dissolution of a company, as well as a close corporation and presumably a number of other legal entities, property which immediately prior to deregistration or dissolution belonged to it and was not dealt with becomes *bona vacantia* and therefore vests in the State. It is also now known that the Department of Public Works, through a company called State Property Holdings Ltd, plays an important role in assessing the merits and demerits of appropriating any given *bona vacantia* property. If the company decides that a particular property is worth taking, the court would be approached for an order declaring the State to be entitled to the property. However, the fate of *bona vacantia* property which the Department is not interested in and does not appropriate is not known. Presumably the property would eventually be acquired by an interested person in terms of acquisitive prescription if the requirements thereof are satisfied.

It does, however, appear that the State Property Holdings Ltd is mostly interested in valuable immovable property. Movables and incorporeal property which may not have much value do not seem to enjoy much attention. The question which arises is what happens to the thus mostly neglected property? Perhaps the attitude of the Treasury that *bona vacantia* property is normally sold at a public auction should be accepted without much scrutiny. Unless this be so there must of necessity be many *bona vacantia* assets which the State has no use of lying idle in many parts of the country. This may raise the question whether the argument of Sonnekus[1053] that property of a dissolved / deregistered company should not become *bona vacantia* but a *res nullius* whose ownership can be acquired by prescription should not be given serious attention. It should be noted though that if the rights in property belonging to the State are not asserted and exercised they could, like any other rights, be acquired by interested parties in terms of acquisitive prescription.

1053 Sonnekus "Enkele opmerkings na aanleiding van die aanspraak on *bona vacantia* as sogenaamde regale reg" 1985 TSAR 121 143. See para 7 11 above for a summary of his approach.

It should be noted that although according to the *Rainbow Diamonds* case the property of a dissolved, and obviously also of a deregistered company, vests in the State "without further ado", the practice of the State is still to approach the court for an order declaring it entitled to the property. This practice is consistent with the decision in *Ex parte Montrose Exploration Co Ltd*,[1054] which was rejected by the Appellate Division in the *Rainbow Diamonds* case, which is to the effect that "if the Crown [State] claims to be entitled to the property as *bona vacantia* it must come to Court to get an order ..."[1055]

As to what exactly happens to the property which is not appropriated by the State in terms of a court order, especially if there is no restoration of registration or setting aside of a dissolution order, remains a mystery. It is self-evident that there are quite a few serious anomalies. This is a very regrettable state of affairs as most of the problems could be solved relatively easily if transparency were to be promoted and practised and regulations giving details of how *bona vacantia* property is to be dealt with were published. The summary of the matter is therefore that there is a framework for dealing with *bona vacantia* property but that is lacking in details. As it is commonly said the devil is in the details. For now though South African law is lacking that devil.

7 16 COMPARATIVE ANALYSIS

7 16 1 General

There are no statutory provisions dealing with the *bona vacantia* principle in South African law. As it were, the courts rely on the common law to pronounce on the fate of property belonging to a dissolved or deregistered company. However, this faces the problem that a court can only declare who the owner is rather than regulate the position in broad terms.[1056] As courts do not have legislative powers, one encounters this unsatisfactory situation that

1054 1918 TPD 179.
1055 *Ex parte Montrose Exploration Co Ltd* 182.
1056 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 1 SA 1 (A).

whatever little jurisprudence there is in South African law relating to the *bona vacantia* doctrine, it is no more than casuistic utterances of the courts. There is therefore no systematic, comprehensive and thus satisfactory dispensation dealing with the doctrine and its full implications. One would venture to suggest that statutory intervention is this respect is long overdue.

Against this background it is considered that it would be a worthwhile exercise to give a brief overview of statutory provisions dealing with this matter in a few selected jurisdictions having a more or less comparable company law dispensation.

7 16 2 Canada

Section 228(1) of the Canada Business Corporations Act of 1985 provides among others that property of a body corporate[1057] that has not been disposed of at the date of its dissolution vests in Her Majesty in right of Canada.[1058] The effect of this provision is that the property belongs to the federal government and will as such be dealt with like any other government property. In terms of section 227(1) of the Act property vesting in Her Majesty does not include the portion thereof which is distributable to a creditor or shareholder who cannot be found. Such portion is required to be converted into money and paid to the Receiver General.[1059] Payment to the Receiver General is deemed to be in satisfaction of a debt or claim of such creditor or shareholder.[1060] Any person establishing entitlement to such money will receive an equivalent amount paid by the Receiver General out of the Consolidated Revenue Fund.[1061]

Section 228 further deals with the fate of property which has vested in Her Majesty in the event of revival of the body corporate. Should a dissolved corporation be revived, section

1057 A "body corporate" refers to a "legal entity", being the corporation.
1058 That would be the Treasury, that is, the Department of Finance in the South African context.
1059 That would be the "State" in the South African context.
1060 Section 227(2).
1061 Section 227(3).

228(2) provides that any property, other than money, that vested in Her Majesty on dissolution of the corporation, shall be returned to the corporation. If the property was money, there shall be paid to the corporation, and out of the Consolidated Revenue Fund, an amount equal to any money received by Her Majesty on the dissolution of the corporation.[1062] If the property that vested in Her Majesty was property other than money, the same shall be returned to the corporation on its revival, provided that there has not been disposal thereof. Where the property has been disposed of, with the result that its return to the corporation is no longer possible, there shall be returned to the corporation an amount equal to the lesser of the value of any such property at the date of its vesting in Her Majesty and the amount realised by Her Majesty from the disposition of that property.[1063]

7 16 3 New Zealand

7 16 3 1 Vesting of property in the Crown

The *bona vacantia* principle enjoys statutory recognition in New Zealand. Section 324(1) of the Companies Act of 1993[1064] provides among others that property which immediately before the removal of a company from the register had not been distributed, vests in the Crown with effect from removal of the company from the register.[1065] An obligation is put on the Secretary of the Treasury, on becoming aware of the vesting of the property, to give public notice[1066] of the vesting, setting out the nature of the company and the particulars of the property.[1067]

1062 Section 228(2)(a).

1063 Section 228(2)(b).

1064 Act 105 of 1993. The law of New Zealand was taken almost *verbatim* by the Botswana Companies Act of 2003 (ss 337-338) and the Mauritius Companies Act 15 of 2001 (ss 315 – 316).

1065 For the purposes of vesting, "property" of the company bears an extended meaning to include leasehold property and all other rights vested in or held on trust for the company but does not include property held by the company on trust for any other person – section 324(2).

1066 Giving public notice would presumably mean publishing such notice in the gazette and /or newspapers.

1067 Section 324(3).

7 16 3 2 Accommodating interested persons

After vesting of the property in the Crown any person who would have been entitled to receive all or part of the property, or payment from the proceeds of its realisation, if it had been in the hands of the company immediately before its removal from the register, or any person claiming through that person, may apply to court for an order vesting all or part of the property in that person.[1068] Instead of claiming the property itself, an interested person may ask for payment by the Crown of compensation in any amount not greater than the value of the property.[1069]

The court deciding the claim of an interested person is given the power to determine related issues of the value of the property, entitlement of that person to the property or compensation as well as the division of the property or compensation among two or more interested persons.[1070] If an interested person is entitled to receive payment, the payment is made out of the Crown Bank Account directly without the need for further appropriation in terms of an Act of Parliament.[1071]

1068 Section 324(4). A classic example of such person is a creditor, and especially a secured creditor. More problematic though is the position of shareholders of the company. For if a company had been wound up the shareholders would have received the net value of the assets after payment of the company's debts, in the form of a dividend or at least dividend *in specie*. Does it then mean that in all cases of removing a company from the register its net asset value belongs to the shareholders? One suspects that this might not be the case as that would negate the idea of property vesting in the Crown in *toto*.

1069 Section 325(4)(b).

1070 Section 324(5)(a).

1071 Section 324(5)(6).

7 16 3 3 Disclaimer of property by the Crown

The Secretary to the Treasury is allowed, by way of a notice in writing, to disclaim the Crown's title to the property if such property is onerous.[1072] To this end the Secretary is required to give public notice of the disclaimer.[1073] Once the Crown's title to the property is disclaimed, the property is deemed not to have vested in the Crown.[1074] The Act specifies that where disclaimer takes place, it must be done within twelve months after the vesting of the property in the Crown first came to the notice of the Secretary.[1075]

It should be noted that the disclaimer of property will satisfy the argument of Sonnekus[1076] that property of a deregistered or dissolved company is a *res nullius* whose ownership can be acquired by a person meeting the requirements of *occupatio*. However, it cannot be over-emphasised that in New Zealand the property becomes *res nullius* only if there is a disclaimer and not otherwise.

1072 The phrase "onerous property" is defined in s 269(2)(a) of the Act to mean-

(i) An unprofitable contract; or

(ii) Property of the company that is unsaleable or that may give rise to a liability to pay money or perform an onerous act; or

(iii) A litigation right that, in the opinion of the liquidator, has no reasonable prospect of success or cannot reasonably be funded from the assets of the company.

1073 Section 325(2).

1074 Section 325(3). In terms of s 269(3) a disclaimer brings to an end on, and from the date of the disclaimer, the rights, interests and liabilities of the Crown in relation to the property disclaimed.

1075 Section 325(5)(a).

1076 See para 7 11 above.

7 16 3 4 Re-vesting of the property in the company

Should it happen that registration of a company that has been removed from the register is restored, the property of the company which vested in the Crown shall vest in the company as if there had not been removal of such company from the register.[1077]

7 16 4 Australia

7 16 4 1 Vesting of property in ASIC or the Commonwealth

In terms of section 601AD(2) of the Australian Corporations Act of 2001 the position is that on deregistration[1078] of a company all its property (other than property held by it on trust) vests in the Australian Securities and Investments Commission (ASIC).[1079] The Act specifies that ASIC has all the powers of an owner over vested property[1080] and grants it power to fulfil outstanding obligations of the deregistered company.[1081]

However, if property was held by the company in trust for another person, it vests not in ASIC but the Commonwealth[1082] which, like ASIC, has all the powers of an owner over the property[1083] and is required to fulfil the outstanding obligations of the deregistered

1077 Section 331(1).

1078 For the purposes of the Australian Corporations Act of 2001 "deregistration" includes dissolution. This must be so as deregistration is the end result of a process and comes not only as a result of the company not carrying on business but also if all the members of the company agree to it, as well as on a host of other grounds – see ss 601AA and 601AB. A company is also deregistered after completion of reconstruction and amalgamation or winding-up (s 601AC).

1079 ASIC is a juristic entity established under the Australian Securities and Investments Commission Act of 2001, an equivalent of the South African Companies and Intellectual Property Commission.

1080 Section 601AD(4).

1081 Section 601AF.

1082 Section 601AD(1A). The "Commonwealth" is the Federal Government of Australia.

1083 Section 601AD(3A).

company.[1084] Like ASIC the Commonwealth has all the powers that flow automatically from the vesting which it may exercise whether or not the company was bound to do so.[1085] Moreover, both the Commonwealth and ASIC take only the same property rights which the company itself held. This has the result that if the company held a particular property subject to security, other interest or claim, the Commonwealth or ASIC takes the property subject to that interest or claim.[1086]

7 16 4 2 Fate of vested property

If property has vested in the Commonwealth in its capacity as a trustee, it can continue holding and acting as such or alternatively apply to court for the appointment of a new trustee.[1087] If it prefers to continue acting as trustee the Commonwealth not only has to discharge the obligations of a trustee in respect of the property but must, in the case of money, credit the amount thereof to a Special Account.[1088] In the case of property the Commonwealth may (not must) sell or dispose of it as it thinks fit and thereafter credit the amount of the money to a Special Account.[1089]

Property vesting in ASIC is dealt with largely along the same lines as that vesting in the Commonwealth. ASIC is allowed to dispose of the property or deal with it as it sees fit and thereafter apply the money received to defray expenses incurred in exercising its powers in relation to the company.[1090]

1084 Section 601AF.
1085 This is contained in a note to s 601AF.
1086 Section 601AD(3).
1087 Section 601AE(1).
1088 Section 601AE(1A). The Special Account is created in terms of the Australian Management and Accounting Act 1997.
1089 Section 601AE(1A)(b).
1090 Section 601AE(2).

7 16 4 3 Obligations attaching to property

Property vesting in the Commonwealth or ASIC remains subject to all liabilities imposed on it by law and does not have the benefit of any exemption merely because of the vesting.[1091] Liability on the property includes but is not confined to among others, a charge or claim on the property as well as rates, taxes or other charges.[1092] Nevertheless liability of the Commonwealth or ASIC is limited to the extent that the property is properly available to satisfy the obligations.[1093]

Both the Commonwealth and ASIC, as the case may be, are allowed to do an act on behalf of the company or its liquidator if satisfied that the company or its liquidator would have been bound to do the act had the company not been deregistered.[1094] The power to so act on behalf of the deregistered company is a general one and is not confined to acts in relation to the vested property.[1095] The vesting of the property in the Commonwealth or ASIC does nevertheless put an even heavier responsibility to act where necessary.

7 16 4 4 Duty to keep records

The Commonwealth or ASIC, as the case may be, is required to keep a record of the property that has vested in it as well as of all its dealings with the property and account for all money received from the dealings which must be accompanied by accounts, vouchers, receipts and papers relating to both the property and the money.[1096]

1091 Section 601AE(2A) and (3).
1092 Section 601AE(3).
1093 Section 601AE(4).
1094 Section 601AF.
1095 As per the note to s 601AF.
1096 Section 601AE(5).

7 16 4 5 Vested property is unclaimed property

While this seems to be a slippery terrain which is probably not free from controversy, it would appear that property which vests in ASIC is, after all, unclaimed property. One would wish to leave room for the legal fraternity familiar with Australian corporate law to demonstrate that the opposite is in fact the case.

Section 9 of the Australian Corporations Act of 2001 defines "unclaimed property" to mean among others "property that vests in ASIC under section 1404". However, section 1404 does not deal with vesting. Instead, it deals with transitional matters. It is in fact section 601AD which provides for property of a deregistered company to vest in ASIC.[1097] One would assume that a reference to vesting in terms of section 1404 was an oversight on the part of the draftsman.

7 16 4 6 Dealing with unclaimed property

The Securities and Investments Commission Act of 2001[1098] provides that unclaimed property is held by ASIC for and on behalf of the Commonwealth.[1099] If the property is in the form of money, the Corporations Act requires it to be credited to the Companies and Unclaimed Moneys Special Account.[1100] If, on the other hand, the property is other than money, the Corporations Act requires it to be converted into money by selling or disposing of it as ASIC thinks fit and thereafter credit the amount of the proceeds in the Companies and Unclaimed Moneys Special Account.[1101]

1097 See para 7 16 4 1 above.
1098 It is very easy to confuse the Corporations Act of 2001 and the Securities and Investments Commission Act 2001 because they were passed in the same year and do overlap to a very great extent. However, they are two separate pieces of legislation.
1099 Section 8(3) and (4).
1100 Section 1339(2)(a) of the Corporations Act of 2001. The account was established in terms of s 133 of the Securities and Investments Commission Act of 2001.
1101 Section 1339(2)(b).

7 16 4 7 No liability to pay calls on shares

It may happen that unclaimed property of a deregistered company which vested in the Commonwealth or ASIC consists of shares in another company. In such an event the Corporations Act provides that neither the Commonwealth nor ASIC is subject to any obligation to pay any calls on shares, make contribution to the debts and liabilities of the company, discharge any liability or do any other act or thing in respect of the shares.[1102] In this way the Corporations Act protects the Commonwealth and ASIC from liability to pay calls on shares which vested in them as a result of deregistration of a company.

7 16 4 8 Debiting the Companies and Unclaimed Moneys Special Account

Money credited to the Companies and Unclaimed Moneys Special Account is not intended to be in that account forever. The Corporations Act provides that if the money has not been debited within six years, after expiry of that period, it must be debited[1103] and become part of the Consolidated Revenue Fund which is used for government purposes.

Provision is made for payment to a third party in respect of whom ASIC is satisfied that his / her claim to entitlement to the money is justified. To that end the amount claimed by that person would be debited from the Companies and Unclaimed Moneys Special Account.[1104] If the account has already been debited by the time a claim is made by a third party, the money to satisfy such claim would come from money appropriated by Parliament for that purpose.[1105]

To protect the Commonwealth and ASIC from claims after debiting the Companies and Unclaimed Moneys Special Account to pay a party claiming to be entitled thereto, it is

1102 Section 1340.
1103 Section 1341(1).
1104 Section 1341(2).
1105 Section 1341(2)(d).

provided that once such payment is made, neither the Commonwealth nor ASIC is under liability to a subsequent claimant. In that event it is the duty of the subsequent claimant to take steps to recover that money from the person who received it from the Commonwealth or ASIC.[1106] Further protection is provided by section 1342 which provides that neither the Commonwealth nor ASIC is liable for any loss or damage suffered by a person arising out of the exercise or failure to exercise any of the powers which are conferred on ASIC under the Act or which ASIC has in relation to unclaimed property.

7 16 5 United Kingdom

7 16 5 1 Vesting of property as bona vacantia

Section 1012 of the UK Companies Act of 2006 provides that when a company is dissolved,[1107] all property[1108] and rights whatsoever vested in or held in trust for it immediately before its dissolution are deemed to be *bona vacantia* and accordingly belong to the Crown.[1109] As a result of the vesting the property may be dealt with in the same manner as other *bona vacantia* accruing to the Crown.[1110]

1106 Section 1341(4).

1107 Dissolution of a company may come about as a result of a number of processes such as striking off the company from the register (deregistration), winding-up, amalgamation etc. In this way the Act blurs the distinction between dissolution and striking off as a result of which, in either case, the final result is dissolution. See for example ss 1003(4) and (5) which treat the two processes the same way.

1108 In terms of s 1012(1) "property" includes leasehold property but excludes property held by the company in trust for another person.

1109 In the case of property situated in Wales it vests in the Duke of Cornwall while property situated in Lancashire, a county in the North West of England, vests in the Duchy of Lancaster – s 1012(1)(a) and (b).

1110 Section 1012(1)(b). The UK Companies Act of 2006 is closely followed in Hong Kong in terms of ss 752-755 of the Companies Ordinance of 2012. The main difference between the two is that the Hong Kong Ordinance does not deal with what happens if a company is revived or another person claims to be entitled to the property after its disposal by the Government.

7 16 5 2 Disclaimer of property

The Crown is given the right to disclaim property of a dissolved company that has vested in it. The Crown's title to the vested property may be disclaimed by a notice signed by the Crown's representative, this being the Treasury Solicitor.[1111]

To be effective the notice of disclaimer is required to be executed within three years after the date on which the Crown's representative became aware of the vesting or could reasonably have established the existence of such vesting.[1112] The time within which a notice of disclaimer has to be given is reduced to 12 months should a written application be made to the Crown's representative by a person interested in the vested property. If such an interested person requests the Crown's representative to advise whether he / she will or will not disclaim, a notice of disclaimer must be made within 12 months of receipt of such a request.[1113] A notice of disclaimer which is executed after the expiry of the required period is of no effect.[1114]

A notice of disclaimer is required to be delivered to the Registrar of Companies where it is registered and retained.[1115]

7 16 5 3 Effect of disclaimer

Where notice of disclaimer is executed as respects any property, that property is deemed not to have vested in the Crown.[1116] Furthermore, the Crown's disclaimer operates so as to

1111 Section 1013(1). In the case of property situated in Scotland, the Crown's representative is the Queen's and Lord Treasurer's Remembrancer.

1112 Section 1013(3). Thus the Act accepts that in some instances the Crown may not be aware of the vesting even though such knowledge could have come to its attention had investigations been done on the basis of available information.

1113 Section 1013(4).

1114 Section 1013(5).

1115 Section 1013(6). Copies of the notice are required to be published in the Gazette and sent to any person who has given the Crown's representative notice claiming to be interested in the property – s 1013(7).

terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed.[1117] It is, however, specifically provided that the disclaimer does not, except so far as is necessary for the purposes of releasing the property from any liability, affect the rights or liabilities of any other person.[1118]

Interestingly, the Act does not indicate where ownership of disclaimed property lies. It is submitted that the property is without an owner (*res nullius*) and as such is capable of acquisition of ownership through *occupation* or court order.

7 16 5 4 Vesting by court order

A person who claims interest in disclaimed property or who is under a liability in respect of the disclaimed property, which liability has not been discharged by the disclaimer, may apply to court for an order in respect of the property.[1119] The court may grant an order vesting the disclaimed property in the person entitled to it or for the delivery thereof to such person.[1120] The vesting or delivery of the property may also be made in favour of a person who is subject to a liability in respect of the property, should such person be the applicant,[1121] which may only be done where it appears to the court that making such an order would be just for the purpose of compensating such person.[1122] In this respect the court has a wide discretion to make the order on such terms as may be deemed fit.[1123]

A person in whose favour a court order is granted becomes the owner of the property immediately without the need for conveyance, assignment or transfer.[1124]

1116 Section 1014(1).
1117 Section 1015(1). See also s 1020(1).
1118 Section 1015(2).
1119 Section 1017(1).
1120 Section 1017(2)(a).
1121 Section 1017(2)(b).
1122 Section 1017(3).
1123 Section 1017(4).
1124 Section 1017(5).

7 16 5 5 Fate of bona vacantia *property*

If property vesting in the Crown is not disclaimed, it will be dealt with in the same manner as other *bona vacantia* accruing to the Crown. In other words, the property is as much Crown property as any other property and will be dealt with accordingly. In this respect the Crown is given power to dispose of the property, or an interest therein, notwithstanding the fact that registration of the company may be restored at a later stage.[1125]

Should registration of the company be restored, that fact does not affect the validity of any transaction entered into in respect of the property.[1126] Although the transaction will stand, the Crown is nevertheless required to compensate the company in an amount equal to the amount of any consideration received for the property, right or interest therein.[1127] Alternatively, the Crown shall pay to the company an amount equal to the value of any such consideration at the time of the disposition.[1128] If on the other hand no consideration was received on disposal of the property, the Crown shall pay to the company an amount equal to the value of the property, right or interest which had been disposed, as at the date of the disposition.[1129]

The Crown is allowed to deduct from any payment it makes to the company reasonable costs of the Crown representative incurred in connection with the disposition.[1130]

1125 Section 1034(1).
1126 Section 1034(2)(a).
1127 Section 1034(2)(b)(i).
1128 Section 1034(2)(b)(ii).
1129 Section 1034(2).
1130 Section 1034(3). The costs will be deducted to the extent that they have not been paid as a condition of administrative restoration or pursuant to a court order for restoration.

7 16 6 South African Companies Act of 2008

Like its predecessor, the Companies Act of 2008 does not deal with, let alone mention, the phrase *bona vacantia* in the first place. Therefore the position is, like it was before the passing of the Act, still governed by the common law.

In this respect the Act constitutes a significant departure from the Bill[1131] which in clause 82 provided as follows:

(4) If the Commission[1132] 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 forfeited 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 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).

1131 Companies Bill 2008 [B61-2008].

1132 Which is defined in s 1 to mean the Companies and Intellectual Property Commission established in terms of s 185 of the Act.

The above provisions were excluded from the Act and do not form part thereof. It is not apparently clear why the legislature moved away from such a courageous step in the right direction. While not solving all problems, the provisions were an encouraging step forward, an important milestone from which much progress would have been expected in the years to come as courts would be pronouncing on such issues as would arise in due course and thus set the scene for future amendment and development of the law in this respect. Regretably, as things stand now, South African company law has not yet started addressing the problem.

Exclusion of the tentative provisions of the Bill from the Act is regrettable as statutes in comparable jurisdictions like Canada, New Zealand, Australia and the United Kingdom, as discussed above, have provisions dealing with the matter. What is more disconcerting though is that legislation in all these jurisdictions preceded the South African Companies Act of 2008 and thus provided a ready source from which much could have been borrowed, subject to such adjustments as were found desirable to suit local circumstances and conditions. After all, it should not be forgotten that the first company law legislation to declare that the property of a deregistered or dissolved company vested in the authorities was the Companies Act of 1928 of the United Kingdom. This has the unfortunate consequence that the new South African Companies Act of 2008 is in this respect some 86 years behind the legal position obtaining in the United Kingdom, notwithstanding the fact that since 1928 every consolidating UK Companies Act contained those provisions, including the current Companies Act of 2006 of that country.

Had clause 82(4) of the Companies Bill 2008 been enacted into law, it would have introduced the concept of delayed vesting of *bona vacantia* in the State as it had a five-year waiting period, during which time the property was held in trust by the Companies and Intellectual Property Commission on behalf of the State, any interested person as well as the deregistered company itself. To hold the property in trust on behalf of a deregistered and thus non-existent company was no doubt awkward. Furthermore, the Bill did not deal with property of a dissolved company that had not been dealt with during dissolution. However, all this is history now.

South African company law, unfortunately, faces the same old problem of unattended and unanswered concerns as well as questions raised among others by Brusser[1133] and related queries. Thus the Companies Act of 2008 lost the golden opportunity to attend to a long standing omission. Given that the Act consists of some two hundred and twenty five sections and five schedules while that of the United Kingdom has some 1 300 sections and some 1 400 sections in the case of the Australian statute, it should be obvious that there are simply too many matters that the Companies Act of 2008 does not cover either at all or which are only mentioned in passing in some instances. It is submitted that this is not the way to go. It cannot be that South African company law is left behind and nothing is done to catch up. Definitely not in the cyberspace age, the period during which lack of information can no longer be given as an excuse at all since information is readily available to help do the obvious.

7 17 ADVANTAGES OF A STATUTORILY REGULATED *BONA VACANTIA*

Currently there are no statutory provisions dealing with the *bona vacantia* principle in South African law. This creates a number of problems. For a start, one thing about which there is no doubt is lack of transparency as to how *bona vacantia* is dealt with by the authorities as most of the events take place behind closed doors. Clear statutory provisions as to how the property has to be dealt with would remove any element of doubt.

The fate of the property notwithstanding, and how it is dealt with for that matter, there is the further issue of an interest which affected persons may have in the property that has vested in the State in terms of the principle. At the moment any person or entity claiming an interest in the property that has vested in the State in terms of the principle has no choice but to seek the revival of the defunct company first. In terms of the Companies Act of 1973 restoration of registration[1134] and voidance of dissolution[1135] always needed a court order,

1133 See para 7 12 above.

1134 Which was done in terms of s 73(6). Section 73(6A) of the Act, which was inserted by s 15(b) of the Corporate Laws Amendment Act 24 of 2006, made provision for restoration of registration by the Registrar but only if the company had been deregistered for failure to pay annual duty. Therefore, in any other instance of deregistration, restoration of registration thus entailing costs of time and money in the process. However, the position has since been ameliorated by section 82(4) of the Companies Act of 2008 in terms of which a court order is no longer required to reinstate a company. All that is required to reinstate a company these days is an application by an interested person, to be made in the prescribed manner and form, to the Companies and Intellectual Property Commission. Nevertheless, all this is subject to *Absa Bank Ltd v Companies and Intellectual Property Commission*[1136] and *Nulandis (Pty) Ltd v Minister of Finance*[1137] where it was held that since the Companies Act of 2008 conflates deregistration and dissolution, a deregistered company includes a dissolved company. Therefore, after dissolution followed by deregistration of a company, a court could declare such dissolution void in terms of section 83(4) of the Act. No doubt the approach blurs the distinction between deregistration and dissolution.

The problem though is that revival of a company can often have unintended consequences as the process invariably opens, as it were, a can of worms. Bringing a company back to life, albeit for a good purpose of dealing with a seemingly minor asset which had not been dealt with before deregistration or dissolution, is nevertheless revival of the company for all purposes. Revival of a defunct company does not just end there. Unfortunately, it also revives other obligations of the company itself as well as those of its management and officers to comply with the requirements of the law, being those required by the Companies Act and other laws.

Clause 82(4)(b) of the Companies Bill of 2008, which as indicated above is not part of the Act, tried to deal with *bona vacantia* property. However, had it been enacted into law, far from making things better it would have made the position much worse. That was so as it required a two-stage approach. First, the clause required application to the Commission to restore registration of the company.[1138] Only after restoration of registration, if it was granted in the first place, could an interested person apply to court for an order transferring *bona*

needed a court order.

1135 Section 420.

1136 2013 4 SA 194 (WCC), 2013 3 All SA 34 (WCC), 2013 ZAWCHC 57 (19 April 2013).

1137 2013 5 SA 294 (KZP).

1138 Clause 82(4)(b)(i).

vacantia property to the company.[1139] All this had to be done within a period of five years of deregistration of the company after which the door was to be shut.[1140]

What South African company law has to offer should be compared with the position in English law.[1141] In terms of section 1017 of the UK Companies Act of 2006, if *bona vacantia* property has been disclaimed it is not necessary to get a court order reviving a defunct company before an interested person can lay claim to such property. All that is required is a court order declaring that the person is entitled to the property or an interest therein. Moreover, the section provides that a person in whose favour a court order is granted becomes the owner of the property without the need for conveyance, assignment or transfer.[1142] It should be mentioned though that this special dispensation is confined to disclaimed property only. Therefore, as far as property which has not been disclaimed is concerned, the position appears to be the same as in South African law, namely that to deal with *bona vacantia* property, first and foremost, an interested person has to obtain a court order reviving the company. However, as indicated above, in Canada, New Zealand and Australia, if all that a third party (creditor) seeks is payment, such would be made out of funds into which the property would have been converted without the need to revive the company. The position is in fact much better in New Zealand where an interested person may apply to court for an order vesting all or part of the property in him or her rather than being confined to the proceeds, that is, if the property itself is still available.

It is submitted that there are no compelling reasons for not amending the present Companies Act of 2008 to make provision for treatment of *bona vacantia* property. It is submitted further that making detailed provisions dealing with the issue would bring about transparency and certainty. It would be more beneficial if provision were to be made to accommodate a situation where property could be dealt with in favour of an interested person without the need to revive the company itself if interest in the property was the only issue at stake, there being no interest in the company itself or any of its other assets. For solution of one problem should not necessarily lead to the creation of a host of other issues as would

1139 Clause 82(4)(b)(ii).
1140 Clause 82(4)(b).
1141 Discussed in para 7 16 5 4 above.
1142 Section 1017(5).

arise when a company is resuscitated, albeit only for the purpose of dealing with its *bona vacantia* property.

7 18 SUMMARY

Through the Companies Act of 2008 the legislator has rejected the concept of statutory regulation of the *bona vacantia* principle. As a result South African company law is still governed by the old common law with all its attendant problems. Needless to say that in this respect the new Companies Act of 2008 is already outdated and needs to be amended without further delay. Unfortunately, with respect to the regulation of deregistration and dissolution of companies in general, and *bona fide* property in particular, the law needs to be updated. In short, an amendment of the Companies Act of 2008 is obviously overdue.

CHAPTER 8

ɩiability after deregistration and dissolution of a company

8 1 INTRODUCTION

Both deregistration and dissolution of a company have implications regarding liability which has arisen or may arise. A few aspects of such liability were dealt with in Chapter 6 which looked at general and procedural consequences of both processes as well as their effect on litigation and possible orders which a court could make regarding a company which has since been dissolved or deregistered. This chapter looks at prominent aspects of liability not dealt with in that chapter.

Some instances of liability arise only in the context of deregistration of a company while others are peculiar to dissolution. In some situations though the same liability would arise irrespective of whether a company has been deregistered or dissolved, it making no difference which process had been used. Nevertheless, the position is not made any easier by blurring the distinction between deregistration and dissolution brought about by the Companies Act of 2008 which in so doing creates a problem which did not arise under the Companies Act of 1973. This notwithstanding, an attempt will be made to highlight the main areas of liability commonly encountered, be it either because a company has been deregistered or dissolved or, as the Companies Act of 2008 would have it, it has been both dissolved and deregistered.

It cannot be over-emphasised though that it may perhaps not be feasible to discuss every conceivable aspect of liability which may possibly arise. Accordingly, not every possible trivial and remote incidence of liability which could be triggered by either deregistration or dissolution will be discussed, the intention here being to focus on the more prominent issues of liability that are commonly encountered.

8 2 NO COURT ORDER AGAINST OR IN FAVOUR OF A DEREGISTERED OR DISSOLVED COMPANY

Both deregistration and dissolution put an end to the existence of a company.[1143] It follows therefore that after deregistration or dissolution a company cannot sue or be sued[1144] and if it is deregistered or dissolved while having outstanding liabilities which were overlooked or simply not dealt with, creditors cannot recover payment of their debts from it.[1145] Accordingly, after deregistration the court, acting under its inherent powers, will dismiss an action instituted by the company before its deregistration[1146] while an action purportedly instituted on the company's behalf after deregistration or dissolution will be struck off the roll.[1147] Judgment given against or in favour of a company after its deregistration or dissolution is null and void.[1148] Therefore the court cannot make an order against a dissolved or deregistered company.[1149] A person who purports to authorise the institution of an action on behalf of a company after its deregistration or dissolution could, if fault lies with him, be personally held liable for the defendant's costs.[1150] Before making such order against any person, the court would however first afford him the opportunity to be heard.[1151] Both deregistration and dissolution terminate the authority of a person who was an agent of the company prior to its deregistration or dissolution. Therefore an attorney who continues to act for the company is personally liable for the costs of the action from the date of dissolution or deregistration.[1152]

1143 This issue was discussed at length in chapter 4 above.

1144 *Ex parte Jacobson: in re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W) 376 – 377; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R) 459; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W) 549; *Boland Bank Ltd v Mouton* 1997 4 All SA 67 (C) 73d.

1145 *Boland Bank Ltd v Mouton* 73d.

1146 *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).

1147 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 Part 3 (1997) para 90 (Lawsa).

1148 *Salton v New Beeston Cycle Company* 1900 1 Ch 43; *Lawsa* para 90.

1149 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W); *Lawsa* para 90 note 11. This is a clear contradiction of *Broughton v Manicaland Air Services (Pvt) Ltd* where the court held that it had inherent jurisdiction to dismiss an action instituted by a company which had since been dissolved.

1150 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 3 SA 548 (W).

1151 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 549H.

1152 *Salton v New Beeston Cycle Co* 1900 1 Ch 43; *Lawsa* para 90.

8 3 LIABILITY AFTER DEREGISTRATION

8 3 1 Existing liability of directors, officers and members of the company is not affected by deregistration

Section 73(5) of the Companies Act of 1973 had a proviso to the effect that upon 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. It has been held that liability contemplated in the proviso was that which existed prior to deregistration. Accordingly, the proviso preserved existing liability rather than created one which was not there at the time of deregistration. As De Villiers J put it in *Akromed Products (Pty) Ltd v Suliman*:[1153]

> "The proviso was clearly not intended to create any liability in respect of acts performed in the name of the deregistered company subsequent to its deregistration. It pertinently provides for the continuation of any liability of a director, officer and member which may have existed prior to deregistration."[1154]

Interpreting section 26(4) of the Close Corporations Act of 1984, which was the equivalent of section 73(5) of the Companies Act, the court in *Boland Bank Ltd v Mouton*[1155] held that the provisions made it clear that the legislature had in mind that the liability of a member for his personal debts in relation to the corporation, for example as a co-debtor with the corporation in terms of a contract, or as a surety for the corporation, which at common law was unaffected by the corporation's ceasing to exist, was not intended to be altered by the Act.[1156] This decision was followed in *Absa Bank Ltd v Hlathini Safaris CC*[1157] where Moshidi J reiterated that section 26(4) clearly stipulated that the corporation's deregistration did not

1153 1994 1 SA 673 (T).
1154 *Akromed Products (Pty) Ltd Suliman* 675E - F. See also Van Wyk "What happens to the unsettled liabilities of a company or close corporation upon its deregistration?" http://www.vvd.co.za/index.php?view...deregistration (accessed 28-01-2013)
1155 1997 4 All SA 67 (C).
1156 *Boland Bank Ltd v Mouton* 77f.
1157 [2012] ZAGPJHC 176 (17 August 2012).

affect any liability of a member to a third party and that such liability could be enforced as if the corporation was not deregistered.[1158]

Provisions to the same effect are currently found in section 83(2) and (3) of the Companies Act of 2008. In very express terms section 83(2) provides that the removal of a company's name from the companies register (deregistration) does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register. Subsection (3) adds that any such liability continues and may be enforced as if the company had not been removed from the register.[1159]

8 3 2 Liability of a surety is not affected by deregistration

A debt due by a company which has since been deregistered is not extinguished. The debt is merely rendered unenforceable while the company is deregistered.[1160] Deregistration does not therefore detract from liability of a surety for a debt of the company.[1161] As the Appellate Division per Botha JA put it in *Traub v Barclays National Bank: Kalk v Barclays National Bank Ltd:* [1162]

> "It is not the law that a surety is freed from liability to the creditor when the principal debtor ceases to exist. If the principal debtor is a natural person and he dies, his surety remains liable to his creditor, and a surety for a company remains liable to its creditor if it is liquidated and dissolved under s 419 of the Companies Act. In short, there is no foundation for the argument that [the company's] deregistration released the appellants from liability to the Bank."[1163]

1158 *Absa Bank Ltd v Hlathini Safaris CC* para 10.

1159 These provisions were noted, albeit very briefly, in *Absa Bank Ltd v Hlathini Safaris CC* para 8.

1160 *Barclays National Bank Ltd v Traub : Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 295 D; *Boland Bank Ltd v Mouton* 73f; *Absa Bank Ltd v Hlathini Safaris CC* paras 9 and 11; *Lawsa* para 90; Van Wyk "What happens to the unsettled liabilities of a company or close corporation upon its deregistration?" http://www.vvd.co.za/index.php?view...deregistration (accessed 28-01-2013)

1161 *Barclays National Bank Ltd v Traub: Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 295D; *Absa Bank Ltd v Hlathini Safaris CC* para 11.

1162 1983 3 SA 619 (A).

1163 *Barclays National Bank Ltd v Traub: Barclays National Bank Ltd v Kalk* 633H-634A. It

8 3 3 Liability arising after deregistration

8 3 3 1 Recommendation of the Van Wyk de Vries Commission

The Van Wyk de Vries Commission (Van Wyk Commission) was in favour of personal liability of members of a deregistered company should they continue business after deregistration. It did not, however, go as far as recommending automatic personal liability on the part of the members for pre-deregistration debts. In its view it was continuation of the business of the defunct company that attracted liability. As soon as there was business activity on the part of the deregistered company liability for its debts was to arise without making distinction between pre-deregistration and post-deregistration debts. As it was indicated:

> "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 ... It furthermore seems evident that if there is a de-registration and a loss of legal personality, the members of the 'company' will during the time of de-registration be personally liable for the debts of the company. This consequence seems to be logical and justified."[1164]

This approach did not, however, find legislative recognition. Nowhere in section 73 of the Companies Act of 1973, sections 82 and 83 of the Companies Act of 2008, or anywhere else for that matter, was there to be found provision for personal liability of the members, directors or anybody else for the debts of the company merely because of its deregistration. Nevertheless a few sources, the most prominent one being Cilliers, Benade *et al*,[1165] do

---

should be noted though that *Lawsa* para 90 fn 4 quite correctly points out the difficulty with the analogy between a deceased natural person and a deregistered company as being that in the case of a deregistered company there would be no estate against which the rights that existed against the company before its deregistration would vest.

1164 Para 50.20.

1165 Cilliers, Benade, Henning, Du Plessis, Delport, De Koker, Pretorius *Corporate Law* (2000) para 30.06. Their sentiments are shared by 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/NesPublications/Newsarticle.aspx? (accessed 16-09-2012).

entertain such liability but that is as far as the issue can go. Surprisingly though, a very recent decision of the High Court has endorsed the "association of members" theory, holding that after deregistration of a company, but before its dissolution, the erstwhile company becomes an "association of members". It is submitted that in endorsing this theory, the court in *Nulandis (Pty) Ltd v Minister of Finance*[1166] erred. After all, this is a single-judge decision going against all existing authority and therefore falls to be rejected. Going through the case carefully, one also picks up a host of other utterances which are not correct, this not adding credibility to the case at all.

8 3 3 2 The Van Wyk Commission's view not accepted

Relying on the proposition of the Van Wyk Commission an attempt was made in *Akromed Products (Pty) Ltd v Suliman*[1167] to have a member of a deregistered company declared personally liable for a debt arising from a contract concluded for and on behalf of the company after its deregistration. The court resisted the attempt and held that the member was not personally liable. It was pointed out that no authority had been referred to in support of the proposition.[1168] The court suggested that the Van Wyk Commission proposition was based on *Kelner v Baxter*[1169] and concluded that at best:

> "The proposition stated in the Commission's report may be correct if both contracting parties are aware that the company has been deregistered. It is, however, not a general principle. It is, to my mind, clearly not applicable to the facts of this case."[1170]

It can therefore be said with much confidence that members, directors and officers of a deregistered company are not personally liable for its debts by reason only of their membership, directorship or holding of office. If they are to be held personally liable for the debts of a deregistered company an established basis for such liability would have to be set out. Deregistration alone, and without more, is not sufficient for that purpose.

1166 2013 5 SA 294 (KZP).
1167 1994 1 SA 673 (T).
1168 *Akromed Products (Pty) Ltd v Suliman* 674I.
1169 [1886] LR 2 CP 174.
1170 *Akromed Products (Pty) Ltd v Suliman* 676F.

8 3 4 Exception: Members of a deregistered close corporation are liable for its debts

The Close Corporations Act of 1984 had a provision which made serious inroad into the well-established principle of limited liability of members of juristic persons. Contrary to section 2(3) which provides that subject to the provisions of the Act, members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation, section 26(5) provided as follows:

> "If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities."

Perhaps these provisions did not deserve to be viewed with too serious a critical eye. After all, by the express wording of section 2(3) limited liability of the members of a corporation is "subject to the provisions of this Act", of which section 26(5) was just one. Moreover, section 26(5) was very clear on liabilities for which members of a deregistered corporation were jointly and severally liable. It was only outstanding liabilities at the time of deregistration that became the burden of the members. The provision did not therefore cover liability which was not there at that time, namely liability which purportedly arose only after deregistration such as that arising in terms of a contract concluded for and on behalf of a since deregistered close corporation.

The leading case dealing which liability of members of a close corporation for its debts after deregistration is *Boland Bank Ltd v Mouton*[1171] where the two defendants were members of a close corporation which at the time of its deregistration was indebted to the plaintiff bank, Boland Bank, in certain specified amounts in respect of overdraft facilities provided. The action against the second defendant was settled and thus dropped. The bank wanted to recover from the first defendant, Mouton, on the basis of section 26(5). The problem was, however, compounded by the fact that after the institution of the action but before it reached finality registration of the corporation was restored, that is as the court put

1171 [1997] 4 All SA 67 (C).

it, the "corporation was reregistered".[1172] The first defendant contended that as a result of restoration of registration of the corporation his liability was extinguished since the corporation was back to life and recovery could therefore be sought from it. The question before the court was therefore whether liability of a member of a close corporation for any liabilities of the corporation at the time of its deregistration was or was not extinguished upon restoration of registration.

To answer the above question the court followed a two-stage enquiry. First, the court looked at the effect of section 26(5), that is, the effect of deregistration of a corporation on its outstanding liabilities and, secondly, the effect of restoration of registration on outstanding liabilities at the time of deregistration. Regarding the first stage of the enquiry it was held that the corporation's outstanding liabilities upon deregistration were not extinguished but were instead transmitted in terms of the subsection to persons who were members of the corporation at the time of its deregistration. In the words of Rose Innes J:

> "There is no conceptual difficulty whatsoever in the proposition that a close corporation ceases to exist as a juristic person upon its deregistration, but that any outstanding debts that it may have had at the time of deregistration are not thereby extinguished. Because the corporation ceases to exist, its debts become unenforceable against it, but are not discharged. In terms of s 26(5) the corporations [*sic*] outstanding liabilities upon deregistration are not extinguished, they are transmitted in terms of the sub-section to the persons who are members of the corporation at the time of its deregistration. Although members of the corporation were not liable for its debts while the corporation existed, s 26(5) enacts that if a corporation is deregistered while having outstanding liabilities, the members at the time of deregistration shall be jointly and severally liable for such liabilities. The wording of the subsection is clear, unambiguous and the liability which it imposes upon members is unqualified by any reference as to the duration of their liability or as to any later contingency ... Section 26(5) was a new provision in corporate law introduced by the Act of 1984."[1173]

The second stage of the enquiry which dealt with the effect of restoration of registration on outstanding liabilities of the corporation at the time of deregistration will be considered at a later stage when restoration of registration is looked at. Suffice it to say for present purposes that an appeal against the decision of the High Court was dismissed by the Supreme Court of

1172 *Boland Bank Ltd v Mouton* 69d – e.
1173 *Boland Bank Ltd v Mouton* 73i – 74c.

Appeal in *Mouton v Boland Bank Beperk.*[1174] The *Mouton* case has since been followed in a number of subsequent decisions, and that without exception, all of which confirm the principle of personal liability of members of a close corporation for debts outstanding at the time of its deregistration.[1175]

It should be noted though that the whole of section 26 of the Close Corporations Act of 1984 which dealt with deregistration of close corporations has since been repealed by the Companies Act of 2008. In its place deregistration of close corporations is now governed by sections 82 and 83 of the Companies Act of 2008 which apply to both close corporations and companies and make no provision for personal liability for debts of a close corporation or company on its deregistration. The summary of this issue is correctly stated by Smith Tabata Buchanan Boyes thus:

> "Section 26 of the Close Corporations Act, dealing with de-registration of close corporations, is repealed and the provisions of the Companies Act [of 2008] now govern de-registration of close corporations. A consequence of this amendment is that **the members of a de-registered close corporation are no longer jointly and severally liable for the de-registered close corporation's debts** that exist at the date of de-registration. **If you are therefore dealing with a close corporation, it is more important than ever to obtain suretyships from the members** because, as a result of this amendment, they will, in the absence of such syretyships, not be liable for the debts of the close corporation should that close corporation be de-registered."[1176]

1174 2001 3 SA 877 (SCA), [2001] 3 All 485 (SCA), [2001] ZASCA 58 (10 May 2001).

1175 See for example *Commissioner for SARS v Mendes* [2001] 2 All SA 316 (SE); *Edward Street Property Investments CC v Lambrechts* [2010] ZAWCHC 218 (1 December 2010); *Boseme v Rogers* [2011] ZAGPJHC 174 (23 November 2011); *Absa Bank Ltd v Hlathini Safaris CC* [2012] ZAGPJHC 176 (17 August 2012); *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) para 13. See also 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); Bregman "Personal liability as a member of a deregistered CC" http://www.bregmans.co.za/personal-liability-as-a-member-of-a-deregistered-cc (accessed 11-05-2011).

1176 Smith Tabata Buchanan Boyes "Impact of the new Companies Act on the Close Corporations Act" http://www.stbb.co.za/upload/stbb_lu1-2013_s2.pdf (accessed 02-11-2013). Original emphasis.

8 3 5 Contracts concluded after deregistration

8 3 5 1 Van Wyk de Vries Commission's position

As already indicated the view of the Van Wyk de Vries Commission was very simple and straight forward, it being that if the business of the company was continued after deregistration it was no longer the company which conducted the business but the persons who made up the "association" of the erstwhile body corporate. For this reason, it was proposed that members of the "association" should during the period of deregistration be personally liable for its debts, including the debts contracted after deregistration. The "association of members"[1177] theory relating to the status of a deregistered company was also entertained by Pillay J in *Nulandis (Pty) Ltd v Minister of Finance*.[1178] It should be noted at once that this was the farthest that the proposition of the Van Wyk de Vries Commission could go.

8 3 5 2 A deregistered company is a non-existent principal

It is settled law that deregistration puts to an end the existence of a company as a legal person. If a director, officer etc of a deregistered company performs a juristic act for and on its behalf, for example, concludes a contract, he is essentially acting as an agent for a non-existent principal. Because of the non-existence of the principal, namely the deregistered company, the intended contractual relationship between the company and the third party does not come into being.[1179] There being no contract between the third party and the deregistered company and consequently no claim against the company, the question is whether it is

1177 Explaining this theory in *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) para 42 Pillay J said that when a company was deregistered but not dissolved it existed as an "association of members", adding that the same position would also obtain after the granting of a voidance order but before reinstatement of registration of the company.

1178 2013 5 SA 294 (KZP).

1179 *Lawsa* 110; *O' Leary v Harbord* 1888 5 HCG 1 18; *Rand Trading Co Ltd v Lewkewish* 1908 TS 108; *McCullogh v Fernwood Estate Ltd* 1920 AD 204 217; *Sentrale Kunsimis Korporasie (Edms) Bpk v NKP Kunsmisverspeiders (Edms) Bpk* 1970 3 SA 367 (A) 384 390; *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D).

possible for the third party to recover from the agent, if at all. If it is possible to recover from the agent, it can only be fair to establish the precise basis for such recovery.

In *Kelner v Baxter*[1180] an agent who concluded a contract on behalf of a non-existent company, that is a company which was not yet incorporated, was held to have contracted in his personal capacity. The court per Willes J said :

> "If the company should not be formed, who is to pay? That is to be tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants ... Construing this document *ut regis magis valeat quam pareat*, we must assume that the persons signing it would be personally liable."[1181]

The court held that it was the intention of the parties that someone had to pay for the purchased and delivered stock. That someone could only have been the defendants.[1182] The decision seems to have been influenced by the fact that both parties were well aware that the principal was non-existent. The decision has been followed in a number of cases[1183] and quoted with approval in others.[1184] But the rule in *Kelner v Baxter*[1185] is said not to be acceptable[1186] if it is a rule at all.[1187]

Relying on this important case there have been several attempts in South African law to hold persons personally liable in terms of a contract concluded for and on behalf of a company that had since been deregistered. It is interesting to note that in all the cases the action failed. The cases of *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac,*[1188]

1180 [1866] LR 2 CP 174.
1181 *Kelner v Baxter* 174.
1182 For comment on and criticism of the case see Williams "An Agent's Liability When Acting For A Non-existent Principal" 1990 *SALJ* 203 205.
1183 *London & SA Exploration Co Ltd v Murphy* (1887) 4 HCG 322; *Wolhuter v Smith* (1896) 8 HCG 109.
1184 *Gompels v Skodawerke of Praque* 1942 TPD 167; *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48.
1185 [1866] LR 2 CP 174.
1186 *Lawsa* para 110.
1187 Williams 205 sees the case not as stating a "rule" but only raising a "rebuttable presumption" as to the intention of the parties.
1188 1972 2 SA 535 (D).

Terblanche v Nothnagel,[1189] *Indrieri v Du Preez*[1190] and *Akromed Products (Pty) Ltd v Suliman*[1191] have much in common and as a matter of fact state the same principle. In all four the company was non-existent in that it was deregistered in the last two cases while it was not yet incorporated in the first two. In all four the agents and third parties were not aware of the non-existence of the company. The court held in all these cases that the agents were not personally liable in terms of the contract since the "intention" of the so-called agent and the third party was not to create a contractual relationship between the two but between the third party and the company. In that situation, to hold the defendant (agent) personally liable on such a contract would be to make a new contract for the parties which neither of them ever intended. There could be no justification for construing the agreement in such a way,[1192] so it was reasoned.

It can therefore be accepted as settled law that a person who concludes a contract for and on behalf of a deregistered company while unaware of its deregistration is not personally liable in terms of the contract because that would not be the intention of the parties. Nevertheless *Kelner v Baxter*[1193] is taken to be a case decided on the facts rather than stating the general principle of the law.[1194] Moreover, there the parties were well aware that the company was not in existence. Nevertheless delivery of the stock was made, this being done on the understanding that payment would be made. As a result "if payment was not made by the company, it must, if by anybody, be by the defendants".[1195]

1189 1975 4 SA 405 (C).
1190 1989 2 SA 721 (C).
1191 1994 1 SA 673 (T).
1192 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D) 545H.
1193 [1866] LR 2 CP 174.
1194 Williams 205.
1195 *Kelner v Baxter* 174.

8 3 6 Liability of the agent may arise on other grounds

8 3 6 1 General

Although persons such as directors, officers or shareholders of a deregistered company are not personally liable in terms of a contract concluded on behalf of such a company for lack of the necessary intention to bind the company, it does not follow, however, that the third party is totally without a remedy. It may so happen, for example, that the contract makes provision for personal liability of the agent or the agent may have made a representation that the company was in existence or may have warranted that his principal, the company, was in existence, which warranty may have since been breached.

8 3 6 2 Contractual provision

There is nothing preventing a third party and the person acting on behalf of a company to provide in the contract that should the company, for whatever reason, fail to perform as stated in the contract, the agent would be personally liable to perform. Such a contractual provision can be express or implied. It is said that the decision in *Kelner v Baxter*[1196] to impose personal liability on the defendants was based on the intention of the parties as deduced from the "contract" and the surrounding facts.[1197]

As far back as 1909 South African courts accepted that an agent could by a contractual provision become personally liable to the third party. In *Blower v Van Noorden*[1198] Innes CJ accepted this saying:

1196 [1866] LR 2 CP 174.
1197 Williams 205.
1198 1909 TS 890.

"This view of the position of a modern agent is now so firmly established, and so generally recognised, that no person dealing with an agent, as such, can be held to have intended to contract with him personally *unless the terms of the contract itself make it clear that he did.*"[1199]

8 3 7 Liability for misrepresentation

8 3 7 1 General

It is difficult to conceive of a case in which a "would-be-agent" who purports to act on behalf of an existing but in truth a non-existent principal would not have acted either negligently or fraudulently, said Scott AJ in *Indrieri v Du Preez.*[1200] In the absence of fraudulent or negligent representation the agent would then have acted innocently. All these kinds of representations are actionable although the remedies are different.

8 3 7 2 Fraudulent misrepresentation

Fraud is a delict, and it is no less a delict because it is connected with the making of a contract or takes the form of a fraudulent misrepresentation inducing a contract.[1201] A claim for damages for fraudulent misrepresentation is therefore a claim in delict and not in contract.[1202] It follows from the delictual nature of the claim that an action lies against a third party who fraudulently induced the conclusion of the contract but was not a party to it[1203] and may be brought by a person to whom a fraudulent misrepresentation was made and who was

1199 *Blower v Van Noorden* 899 (My emphasis).
1200 1989 2 SA 721 (C) 728F.
1201 *Trotman v Edwick* 1951 1 SA 443 (A); *De Jager v Grunder* 1964 1 SA 446 (A); *Ranger v Wykerd* 1977 2 SA 976 (A); *Lawsa* para 147; Christie and Bradfield *Christie's The Law of Contract in South Africa* (2011) 307.
1202 Christie and Bradfield 307; *Caxton Printing Works (Pty) Ltd v Tvl Advertising Contractors Ltd* 1936 TPD 209 215; *Claassens v Pretorius* 1950 1 SA 37 (O) 42; *Trotman v Edwick* 1951 1 SA 443 (A) 449B; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1952 4 SA 307 (T) 310F.
1203 Christie and Bradfield 307; *Lippert & Co v Smit* (1878) Buch 95; *Tait v Wicht* (1890) 7 SC 158 168; *Frenkel and Co v Freisman and Shapiro* (1897) 4 OR 227.

induced by it to commit himself financially to another party.[1204] The plaintiff is required to prove that the delict, in the form of fraudulent misrepresentation, caused the loss suffered.[1205]

An agent acting for a deregistered company commits this delict if with knowledge of its deregistration informs the third party that the company still exists or fails to inform that party of the deregistration, which conduct would amount to fraudulent non-disclosure.[1206] It is simply a matter of commission or omission. In the latter situation the duty of care (wrongfulness) definitely exists for unless the third party is warned of the non-existence of the company he suffers harm by entering into a contract that is void *ab initio* and which offers him no chance of receiving its expected benefits or compensation in the event of breach.[1207]

A contracting party who has been injured by a fraudulent misrepresentation has an election either to abide by the contract or to rescind it and claim *restitutio in integrum.*[1208] It will however be appreciated that the remedies of an election to abide by the contract and rescission are not applicable in the context of a deregistered company for the simple reason that there is no contract to start with, due of course to the non-existence of the other party to the contract. But not so with *restitutio in integrum.* If the third party has performed, the non-existence of the company is the very reason for him to be granted *restitutio in integrum.*

In addition, and irrespective of whether he upholds or rescinds the contract, the third party has an action in delict for the recovery of damages for such patrimonial loss as he might have suffered.[1209] The measure of the third party's damages against the agent is the normal delictual yardstick which is the difference between his present financial position and the

---

1204 Christie and Bradfield 307.

1205 *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 378-379; *Beukes v Bekker* 1924 EDL 4 13; *Trotman v Edwick* 1951 1 SA 443 (A) 450; *Ranger v Wykerd* 1977 2 SA 976 (A) 991F; *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* 1985 1 SA 479 (A) 485A.

1206 *Presidency Property Investments (Pty) Ltd v Patel* 2011 5 SA 432 (SCA), [2011] ZASCA 73 (25 May 2011).

1207 *Lawsa* para 148.

1208 *Lawsa* para 148; Christie and Bradfield 307; *Claassens v Pretorius* 1950 1 SA 37 (O) 42.

1209 *Lawsa* para 148; Christie and Bradfield 307; *Claassens v Pretorius* 1950 1 SA 37 (O) 42.

financial position he would have been in had the delict (misrepresentation) not been committed. He is therefore entitled to his negative and not his positive interest.[1210] The question to be decided is always: how much worse off is the third party (plaintiff) financially as a result of the misrepresentation?[1211] As Van den Heever JA put it in *Trotman v Edwick*[1212] the approach is:

> "The litigant who sues in delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."[1213]

8 3 7 3 Negligent misrepresentation

The agent may have carelessly and negligently represented a deregistered company as an existing one in circumstances where a reasonable person would have taken steps to verify if the company did in fact exist. For example, the agent could have concluded a contract for a company in circumstances which suggested its possible non-existence, such as a very inordinate period of non-activity on the part of the company, without taking steps to verify the actual position.

A negligent misstatement inducing a contract is now actionable. The obstacle created by an *obiter dictum* of Wessels J A in *Hamman v Moolman*[1214] which was queried in *Kern Trust (Edms) Bpk v Hurter*[1215] has since been removed. In *Bayer South Africa (Pty) Ltd v Frost*[1216] the Appellate Division held that a negligent misstatement inducing a contract should, depending on the circumstances of each case, and subject to satisfying the usual requirements of delictual liability, in principle be actionable. In allowing such liability the court per Corbett CJ said:

1210 *Trotman v Edwick* 1951 1 SA 443 (A); *De Jager v Grunder* 1964 1 SA 446 (A); *Ranger v Wykerd* 1977 2 SA 976 (A).
1211 *Lawsa* para 148 and especially note 11.
1212 1951 1 SA 443 (A).
1213 *Trotman v Edwick* 449B.
1214 1968 4 SA 340 (A).
1215 1981 3 SA 607 (C).
1216 1991 4 SA 559 (A).

> "... I hold that in principle a negligent misstatement may, depending on the circumstances, give rise to a delictual claim for damages at the suit of the person to whom it was made, even though the misstatement induced such person to enter into a contract with the party who made it. The circumstances will determine the vital issues of unlawfulness and whether there is a causal connection between the making of the misstatement and the loss suffered by the plaintiff. There is no ready formula for determining unlawfulness. Each case must be decided on its own facts in the light of the principles discussed in the *Administrateur, Natal* case[1217] *supra* at 833D - 834E."[1218]

In principle there is therefore no reason for a person who suffers loss as a result of entering into a contract with a deregistered and therefore non-existent company not to be able to claim delictual damages from the person who negligently misrepresented such a company as one in existence. It is submitted that provided that all the requirements for delictual liability are satisfied, an innocent third party, the plaintiff, should not be non-suited for negligent misrepresentation relating to the non-existence of a company.

8 3 7 4 Innocent misrepresentation

Many a times a person enters into a contract for and on behalf of a company firmly but mistakenly believing it to be in existence whereas the truth of the matter is that the company has since been deregistered. If the circumstances surrounding the conclusion of the contract do not suggest the presence of intentional or negligent misstatement on the part of that person, it being a situation of innocent misrepresentation, the question which arises is the nature of liability, if any, which should be imposed on such person. Regrettably, as the law currently stands the position is correctly summarised by Christie and Bradfield as follows: "No action lies for an entirely innocent (ie non-fraudulent and non-negligent) misrepresentation inducing a contract."[1219]

1217 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A).
1218 *Bayer South Africa (Pty) Ltd v Frost* 570 D-F.
1219 Christie and Bradfield 311.

There is, however, a remedy, although not the very best for that matter. The answer to a plaintiff's predicament is apparently a very simple one which as stated in *Indrieri v Du Preez*[1220] says:

> "An innocent (non-negligent) misrepresentation is not a delict. A party induced by such a misrepresentation to enter into a contract may, however, sue for rescission and restitution ... an innocent misrepresentation does not entitle the representee to damages." [1221]

While not offering adequate protection in the sense of positive or negative interest as the third party would have hoped for, it is submitted that the availability of *restitutio in integrum* is nevertheless some small consolation which the victim of innocent misrepresentation should accept. After all, it is better than nothing.

In the present context though *restitutio in integrum* is not without problems. Restitution seeks recovery of what has been performed. If the company were in existence recovery would be sought from it while if performance had been rendered to the representee recovery would be sought from same. But if performance had been rendered to the company, non-existent as it were, for example by depositing funds into its banking account, the challenge of restitution would doubtless be enormous.

In order to recover performance from a deregistered company there would of necessity first have to be reinstatement of registration of the company in terms of section 82(4) of the Companies Act of 2008. However, obtaining such reinstatement is always a challenge as only the Companies and Intellectual Property Commission can do so, and even then, only after lodgement of an annual return which needs the co-operation of directors of the company, or members in the case of a close corporation, should the reason for deregistration have been failure to lodge same. Because of the difficulty of lodging an annual return where the directors of a company are not co-operative, the courts have, at least a few occasions, shifted reinstatement of registration to voidance of dissolution in what was

1220 1989 2 SA 721 (C).
1221 *Indrieri v Du Preez* 728J – 729A.

essentially a question of deregistration rather than dissolution.[1222] Although the approach was not ideal it nevertheless solved the problem.

8 3 8 Liability for breach of implied warranty

8 3 8 1 General

It is generally said that an agent who concludes a contract on behalf of a principal but without authority to do so is personally liable to the other party to the contract on the basis of breach of implied warranty.[1223] While this statement may apparently be true as far as English law[1224] is concerned the same, it is submitted, cannot be said of South African law.

There have been many attempts in the past, all which were unfortunately unsuccessful, to hold the agent personally liable after concluding a contract for which there was no authority and as a result of which the principal was absolved from liability. Some of the cases dealt with pure principles of agency where even though the principal was in existence, authority of the agent to conclude the contract was lacking.[1225] Others dealt with instances of lack of authority caused by the non-existence of the principal, such as where a contract was concluded for a company which was not yet formed at the time or which had been deregistered.[1226]

1222 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

1223 *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48 50; *Blower v Van Noorden* 1909 TS 890 901; *Wright v Williams* (1891) 8 SC 166.

1224 See for example *Lewis v Nicholson* [1852] 18 QB 503, 21 LJ QB 311; *Collen v Wright* [1857] 120 ER 241, 27 LJ QB 215.

1225 *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48 50; *Blower v Van Noorden* 1909 TS 890 901; *Wright v Williams* (1891) 8 SC 166.

1226 *Terblanche v Nothnagel* 1975 4 SA 405 (C); *Indrieri v Du Preez* 1989 2 SA 721 (C); *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D).

Initially South African courts were very accommodative of a third party who had suffered loss as a result of a contract concluded by an agent who acted without authority. Under very heavy influence of English law the Transvaal Supreme Court in *Blower v Van Noorden*[1227] made very important statements which, had they been accepted and followed in later cases, would have put South African law on the same footing as English law as it was then and is now.

According to Innes CJ in *Blower v Van Noorden*[1228] when an agent concludes a contract without the authority of the principal:

> "What takes place is this: the agent in effect represents to the other contracting party that he has authority to bind his principal; and within the limits of that authority he consents to the terms of the agreement on his principal's behalf. There is a representation by the agent personally, and a contract by him in his capacity as agent. The representation is in respect of a matter which is peculiarly within his knowledge, and of which the other knows nothing at all. But the latter enters into the contract on the faith of that representation, and the agent intends that he shall do so; it forms the basis of the whole agreement. Under those circumstances we are surely justified in implying, on the part of the agent, a personal undertaking that his principal shall be bound by the contract, and if not he will place the other party in as good a position as if the principal were bound."[1229]

The basis of the agent's liability is therefore the impression he creates in the mind of the third party that he has authority which he otherwise lacks. In the *Blower* case instead of proceeding along the lines of a representation and then determining if it was fraudulent, negligent or innocent, the court, as was the case in English law, decided the matter on the basis that such a representation was in fact a warranty that there was authority to act. Since the warranty, if that was indeed the case, was not expressed in the contract or anywhere else, it had to be implied. The implied warranty theory became very clear from the later explanation as the Chief Justice further said:

1227 1909 TS 890.
1228 1909 TS 890.
1229 *Blower v Van Noorden* 900 - 901.

"... I am of opinion that we should hold that an agent who exceeded his authority in contracting for a named principal is liable in damages to the other contracting party on the ground that, from his representation of authority, a personal undertaking on his part is to be implied that his principal will be bound, and that, if not, the other party will be placed in as good a position as if he were."[1230]

8 3 8 3 Problems of breach of implied warranty theory

8 3 8 3 1 No general acceptance of the principle

The breach of implied warranty principle has not found general acceptance. It has been rejected and does not therefore form part of South African law. In *Blower v Van Noorden*[1231] the court indicated that the principle was limited in its application to an existing principal and further that it applied only if the third party was not aware of the agent's lack of authority.[1232] Therefore, if there were factors pointing to the agent's lack of authority the third party could rely on the agent's representation as a warrant of authority.

Although in *Blower's* case the court was dealing with an agent who acted on behalf of an existing principal, since then unsuccessful attempts have been made to extend the application of the principle to agents who acted for a non-existing principal and in particular an unincorporated company as well as a deregistered one. An attempt to extend the principle to a non-existent principal should not appear too strange since in *Peak Lode Gold Mining Co Ltd v Union Government*[1233] the court accepted that the breach of implied warranty doctrine applied both in the case of an existing principal as well as in that of a non-existent one and consistent with *Blower v Van Noorden*[1234] said:

"The position of an unauthorised agent is now the same whether the alleged principal was or was not in existence at the time of the contract and that such an agent is not liable as a party to the contract, nor is

1230 *Blower v Van Noorden* 906.
1231 1909 TS 890.
1232 *Blower v Van Noorden* 906 – 907. See also *Peak Lode Gold Mining Co Ltd v Union Government* 1932 TPD 48 51; *Indrieri v Du Preez* 1989 2 SA 721 (C).
1233 1932 TPD 48.
1234 1909 TS 890.

he liable under a warranty of authority if the other contracting party *knew* at the time of the contract that he had no authority."[1235]

8 3 8 3 2 Breach of implied warranty does not apply to a non-existent principal

Even if the breach of implied warranty principle had found general acceptance, which it has not, there would still be the problem that it is yet to be applied to an agent who acted on behalf of a non-existent principal, especially a non-existent company. There have been several attempts to do this but all of them proved in vain.

In *Terblanche v Nothnagel*[1236] the issue was the liability of an agent who concluded a contract for and on behalf of a company which was not incorporated. Rejecting the existence of liability of the agent which was alleged to have been grounded on implied breach of warranty the court held that the so-called agent of a non-existent principal was liable *ex contractu* only if it could be shown as a matter of construction of the contract that the agent was in fact a party to that contract. In reaching this decision the court followed *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac.*[1237]

Personal liability of a person who concluded a contract on behalf of a deregistered and therefore non-existent company arose in *Indrieri v Du Preez*[1238] where an attempt to introduce the extended breach of implied warranty was rejected. This extended breach of implied warranty is a fiction introduced by Kerr[1239] who says that where an agent acts on behalf of a non-existent principal, the latter must be deemed to exist so that when the third party recovers from the agent on the basis of implied breach of warranty he should recover what he could have recovered from the principal himself had he been in existence.

1235 *Peak Lode Gold Mining Co Ltd v Union Government* 51. My emphasis.
1236 1975 4 SA 405 (C).
1237 1972 2 SA 535 (D).
1238 1989 2 SA 721 (C).
1239 Kerr *The Law of Agency* 4 ed (2006) 247.

The position is therefore that a person who concludes a contract on behalf of a deregistered company does not incur personal liability on the basis of an implied breach of warranty. No such liability exists in South African law.

8 3 8 3 3 The quantum of damages under implied breach of warranty

Another factor which renders breach of implied warranty of authority an ineffective basis of trying to recover from a person who concluded a contract on behalf of a non-existent company is the problem of the quantum of damages, assuming of course, that there is in fact a basis for such liability. The availability of a basis for such liability would indeed be purely academic since as Williams puts it "even if the agent for a non-existent principal were so liable, the measure of damages on this cause of action is the amount that could have been recovered from the principal had he been bound. Axiomatically this is zero where the principal is non-existent ..." [1240]

Williams' conclusion is based among others on the cases of *Blower v Van Noorden*[1241] and *Indrieri v Du Preez.*[1242] In *Blower's* case the court indicated the nature of the problem by quoting from an earlier judgment of the Cape Supreme Court where the court in *Wright v Williams*[1243] said:

> "... in estimating damages which the other contracting party can claim, the court cannot lose sight of the fact that he intended to give credit to the principal and not the agent. If the principal is able, but not liable, to pay, the agent must make good the loss, but if the principal is neither able nor liable to pay there is no loss to make good." [1244]

A deregistered company, being as it were non-existent, falls squarely within the description of a principal that is neither able nor liable to pay. Rejecting the agent's liability in the event

1240 Williams 206 referring to *Indrieri v Du Preez* 1989 2 SA 721 (C) 727 D-E.
1241 1909 TS 890 900.
1242 1989 2 SA 721 (C) 727D and 728E.
1243 (1891) 8 SC 166.
1244 *Wright v Williams* 166.

of him having concluded a contract on behalf of a non-existent principal, the court in *Indrieri v Du* Preez[1245] held that to find for such liability would be "clearly inappropriate" because "any attempt to determine what a non-existent party would have been able to pay had he existed is not possible".[1246]

8 3 8 3 4 Breach of implied warranty is essentially an English law doctrine

While clouded by controversy and doubt both as to its acceptance and application in South African law, the breach of implied warranty doctrine is well-entrenched in English law where it enjoys approval and application in both old and recent decisions. In *Blower v Van Noorden*[1247] the court referred to two old English decisions in which the doctrine was applied.[1248] Summarising the English law position as laid down in *Lewis v Nicholson*[1249] Innes CJ in *Blower v Van Noorden*[1250] said where an agent acted on behalf of a non-existent principal or an existing principal but without authority so to act he:

> "... impliedly warranted his authority, and that, if he had no authority, he was bound by such implied contract to make good what the other contracting party had lost by reason of the non-existence of the authority. That decision has been followed in a large number of later cases, and the principle which it embodies may now be regarded as settled law in England."[1251]

In a fairly recent English case the Court of Appeal applied the implied breach of warranty doctrine to hold an attorney liable in damages to the other parties to the contract, namely the buyer of a house and the building society that had financed the contract of sale. This happened in *Penn v Bristol and West Building Society*[1252] where the husband who had forged his wife's signature lied to his attorney, saying that the couple had consented to the sale of their house. The attorney negotiated and concluded the contract with another attorney who

1245 1989 2 SA 721 (C).
1246 *Indrieri v Du Preez* 728E-F.
1247 1909 TS 890.
1248 *Collen v Wright* [1857] 120 ER 241, 27 LJ QB 215; *Lewis v Nicholson* [1852] 18 QB 503, 21 LJ QB 311.
1249 [1852] 18 QB 503, 21 LJ QB 311.
1250 1909 TS 890.
1251 *Blower v Van Noorden* 902.
1252 [1997] 3 All ER 470 (CA).

was acting for both the purchaser and building society and the proceeds of the sale were duly handed over to the husband. Upon discovery of the fraud the wife successfully instituted proceedings against the husband and his collaborator in the fraudulent scheme, the attorney for the purchaser, and building society and recovered the house. In a counterclaim by the building society the court held that the attorney was liable to the building society in that he had impliedly warranted that he had the authority of both the husband and wife to sell the house whereas he only had the authority of the husband, even though he was not aware of this. It was held that the attorney had given an implied warranty to the building society that he was authorised to act for both husband and wife and since his failure to have that authority caused the building society the loss it suffered he was liable to it for breach of warranty in respect of that loss. The court quoted with approval the following statement from a leading textbook[1253] as a correct reflection of the applicable general principle, this being a paragraph which says:

> " (1) Where a person by words or conduct, represents that he has authority to act on behalf of another, and a third party is induced by such representation to act in a manner in which he would not have acted if that representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third party by a breach of that implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority."[1254]

It should be observed that liability of an attorney in particular, for acting on behalf of a client without authority, is nothing new in English law. As far back as the year 1900 the court held in *Salton v New Beeston Cycle Company*[1255] that a solicitor was an agent of a special kind and that by entering an appearance on behalf of his client he represented or warranted to the opposite party that he had authority to do so and that should it turn out that he had no authority he would be held liable. This principle, said the court in the *New Beeston Cycle* case, was well established and had been decided in a number of cases.

1253 Watts (ed) *Bowstead and Reynolds on Agency* 19 ed (2014).
1254 Para 9-057.
1255 [1900] 1 Ch 43 49.

8 4 LIABILITY AFTER DISSOLUTION

8 4 1 General

Because of a very close relationship and overlap existing between deregistration and dissolution, both historically and in their present context, it does so happen that some aspects of liability encountered after deregistration also occur after dissolution, for example, liability for breach of implied warranty. The matter having been considered under deregistration, it is considered inappropriate to repeat same here.

The discussion that follows is confined to a few leadings aspects of liability not already discussed under deregistration. Furthermore, minor aspects of liability arising after dissolution, being as it were of very little consequence, have been left out.

8 4 2 Dissolution terminates liability of a company

Dissolution puts an end to the existence of a company.[1256] The demise of the company brings with it termination of debts due by or to it. Accordingly, a creditor cannot prove or enforce a claim against a company after dissolution.[1257] A creditor will therefore always have to first apply to court for an order declaring the dissolution to have been void before steps can be taken against the company.[1258]

1256 *Salton v New Beeston Cycle Co* 1900 1 Ch 43; *Pieterse v Kramer* 1977 1 SA 598 (A); *Bowman v Sacks* 1986 4 SA 459 (W); *Lawsa* para 338.

1257 *Re Westbourne Grove Drapery Co Ltd* [1878] 39 LJ 30.

1258 *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R); *Lawsa* para 338. Voidance could be sought under s 420 of the Companies Act of 1973 and can now be granted under s 83(4) of the Companies Act of 2008.

8 4 3 Liability of delinquent promoters, directors and officers comes to an end

Section 423 of the Companies Act of 1973 made it possible for a company to recover from a promoter, director or officer of the company who had misapplied, retained or become liable or accountable for any money or property of the company or who had been guilty of any breach of good faith or trust in relation to the company. However, liability in terms of this section fell away after dissolution because of the explicit wording thereof which confined its operation to the "course of the winding-up or judicial management". As the authors of Henochsberg put it: "upon dissolution proceedings under s 423 are no longer possible".[1259]

Another factor which militated against the continued availability of the section after dissolution was the purpose which it was meant to serve. The clear purpose of the section was to enable the company to recover money or property or part thereof or receive compensation for a wrong done against it. Since dissolution terminates the existence of a company, it would no longer be there to receive the intended benefit. A non-existent entity cannot obtain ownership[1260] or any benefit.

It should be noted that the section finds no direct equivalent in the Companies Act of 2008. While some sections of the Companies Act of 2008, such as section 76, provide for fiduciary and other duties of directors, breach of which is visited with liability as elaborated in such sections as 77 and 218, upon closer scrutiny it becomes evident that there is no equivalent to section 423 of the Companies Act of 1973 in the new Act. To some extent though some of the provisions of the Companies Act of 2008 have a resemblance to aspects of section 423 of the 1973 Act. For example, section 77(2) provides that a director of a company may be held liable in accordance with the principles of the common law relating to breach of fiduciary duty for any loss, damage or costs sustained by the company as a consequence of any breach of any of the duties contemplated in section 75 or 76.[1261] A director may also be held liable in accordance with the principles of the common law relating

1259 Kunst, Delport and Vorster (eds) *Henochsberg on the Companies Act* vol 1 (2011) 897.
1260 *Bowman v Sacks* 1986 4 SA 459 (W) 465F.
1261 Section 77(2)(a).

to delict for loss, damage or costs sustained by the company as a consequence of any breach of any provision of the Act or the company's Memorandum of Incorporation.[1262] The provisions appear intended to deal with the situation of an existing company and not otherwise.

8 4 4 Liability for fraudulent, reckless or grossly negligent trading

Section 424(1) of the Companies Act of 1973 provided that when it appeared that any business of the company was being carried on recklessly or for any fraudulent purpose the court could on application of the Master of the High Court, the liquidator, judicial manager, any creditor, member or contributory of the company declare that any person who was knowingly a party to the carrying on of the business in that manner would be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

Unlike section 423 which was confined to a company which was in winding-up or under judicial management, section 424(1) applied to a company "whether it be in a winding-up, judicial management or otherwise". The addition of the phrase "or otherwise" was undoubtedly intended to extend the application of the section to a company which was not in winding-up or under judicial management, that is a company which was in a healthy financial position. On the face of it there was a case, albeit possibly dubious, for arguing that the section was still applicable even after dissolution. After all such a company was not in winding-up or under judicial management. There was, however, an apparently insurmountable obstacle in that while not in winding-up or under judicial management, the company was not in any condition other than non-existence. It was simply not there.

The availability of section 424(1) after the dissolution of a company apparently depended on the person making the application to court as well as the purpose sought to be

1262 Section 77(2)(b).

achieved. If the application was made (it mattered not whether it was launched by the Master, liquidator, judicial manager, creditor, member or contributory) for the purpose of recovering a benefit that would vest in the company estate to benefit the creditors as a whole,[1263] the case of *Bowman v Sacks*[1264] was definitely against the operation of the section after the dissolution of the company. If it was, in particular, the liquidator who was making the application this case did not allow it. As the court per Flemming J explained:

> "The legislation in its broad pattern confirms that, 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."[1265]

If, on the other hand, an application was made by a creditor for the recovery of payment from a particular promoter, director or officer of the company, the application not being intended to recover money which was to be dealt with as part of the general assets of the company concerned for the benefit of creditors as a whole but purely to declare the promoter, director or officer liable to the specific creditor, in a determined amount, with the result that the creditor would recover payment from that promoter, director or officer, it is submitted that there were no compelling reasons for rejecting the application of section 424(1) after dissolution of the company. A good example would be the case of a creditor who instituted proceedings against a director in the scenario outlined above. If the proceedings were to drag on a little, it could happen that in the meantime winding-up of the affairs of the company was completed with the result that it was dissolved. Would it mean that the proceedings should be dismissed because of the non-existence of a company which was brought about by the dissolution? It should be noted at once that the proceedings were instituted not by or against the since dissolved company but by a creditor against a promoter, director or officer of the company, as the case may be.

1263 It did not matter whether the application was launched by the Master, liquidator, judicial manager, member or contributory as the purpose sought to be achieved would still remain the same.

1264 1986 4 SA 459 (W).

1265 *Bowman v Sacks* 464E - G.

Notwithstanding the initial rejection of this approach by Eve J in *In re William C Leitch Brothers Ltd (No.2),*[1266] it is now settled law in England that a creditor can before the dissolution of the company recover directly from a director because of fraudulent or reckless trading. The matter was resolved by the Court of Appeal in *In re Cyona Distributors Ltd,*[1267] which approach as was endorsed by Templeman J in *In re Gerald Cooper Chemicals Ltd.*[1268] It is submitted that South African law can be developed along these lines. The wording of section 424(1) was sufficiently wide to cover this situation. South African courts have already acknowledged this, as the statement of Flemming J (as he then was) in *Bowman v Sacks*[1269] indicates. His Lordship said:

> "It is true that the wording of the section allows the court, on an application of a creditor, properly to declare a director liable to the specific creditor, in a determined amount, with a resultant right for the creditor to exact payment from a director."[1270]

The right of a creditor to recover from a promoter, director or officer of a company after its dissolution is, however, not a simple matter. For now though the odds are heavily against the existence of such liability. After all, a creditor trying to recover directly from a director, promoter or officer of the company would be seeking to circumvent the order of payment of claims in insolvency as provided for in the Companies Act and the Insolvency Act of 1936,[1271] something which was not allowed if that order was sought before dissolution. However, after dissolution the process of *concursus creditorium* comes to an end, this dispensing with the need to consider the body of creditors. This then raises a question, namely whether a creditor could still be allowed to prosecute a claim after finalisation of the liquidation and distribution process. One would suggest that the answer should be an emphatic no, and this for very good reasons.

Under the Companies Act of 2008 equivalent provisions are scattered over several sections although they are predominantly found in sections 22,[1272] 77(3)[1273] and 218.[1274] The

1266 [1933] Ch 261.
1267 [1967] Ch 889 (CA), [1967] 1 All ER 281.
1268 [1978] Ch 262, [1978] 2 All ER 49.
1269 1986 4 SA 459 (W).
1270 *Bowman v Sacks* 464H.
1271 Act 24 of 1936.
1272 In terms of s 22(1) a company is not allowed to carry on its business recklessly, with gross

identical sections were dealt with in *Rabinowitz v Van Graan*[1275] but as the company in that case was still in existence, the question of whether the sections would apply after dissolution of the company did not arise. It is submitted that the result is the same as under the Companies Act of 1973 and that liability arising under the Companies Act of 2008 comes to an end on dissolution of the company. After all the company itself invariably features significantly in these provisions.

8 4 5 Liability of directors for capital wrongfully paid out

It may happen that the directors of a company wrongfully pay out a dividend to shareholders without due regard to the capital maintenance rules. The action of the directors being manifestly wrongful the question arises whether a creditor who receives no or less payment than would have been the case but for that payout to shareholders should be able to recover from the directors after the dissolution of the company.

---

negligence, with intent to defraud any person or for any fraudulent purpose. Should such happen, persons who run the business of the company in such fashion will attract criminal liability in terms of s 214(1)(c) and (3) and civil liability in terms of s 77(3)(b), (c) as well as s 218(2) and (3).

1273 In terms of s 77(3) a director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having-

(a) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by s 22(1);

(b) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company or that it had another fraudulent purpose.

1274 Section 218(2) provides that any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. In subsection (3) it is provided that the provisions of the section do not affect the right to any remedy that a person may otherwise have, thus preserving whatever other remedies a person may have.

1275 2013 5 SA 315 (GSJ).

In *Coxon v Gorst*[1276] the court held that a creditor could not claim from the directors without making the company a party to the proceedings. The existence of a company having been put to an end by dissolution, a creditor could therefore not sue the directors. Once again a creditor would first have to apply to court for an order declaring the dissolution to have been void before instituting such proceedings.[1277]

8 4 6 Liability of the liquidator

The authority of the liquidator of a company to act on its behalf terminates on its dissolution.[1278] Under the Companies Act of 1973 a liquidator no longer had *locus standi* to act for a company under the provisions which conferred standing on a liquidator except where the Act made it clear that it was referring to the person who was the liquidator of the company before its dissolution.[1279]

After dissolution the liquidator no longer owes any statutory duties towards the creditors or members of the company. He does, however, remain liable to any creditor in damages if he has committed a breach of his statutory duty to that creditor by distributing the assets without complying with the statutory requirements.[1280] The English Court of Appeal accepted the existence of liability of a liquidator on this basis in the case of *James Smith & Sons Norwood Ltd v Goodman*[1281] where it was stated per Lord Hanworth MR:

> "... if a creditor has been injured by the failure of the liquidator to take the steps that he ought to have taken and has suffered damage, he can 'succeed in the action on the case' as Farwell J put it in *Pulsworth v Devenish*[1282] ... in establishing a liability against the liquidator."[1283]

1276 [1891] 2 Ch 73.
1277 *Lawsa* para 338; Section 420; *Broughton v Manicaland Air Services (Pvt) Ltd* 1972 4 SA 458 (R).
1278 *Bowman v Sacks* 1986 4 SA 459 (W); *Lawsa* 338.
1279 Such as was done in the case of section 420 which allowed "the liquidator of the company" to apply to court for an order declaring the dissolution to have been void, this being a classic example. See *Lawsa* 338.
1280 *Lawsa* 338.
1281 [1936] Ch 216, [1935] All ER 697 (CA).
1282 [1903] 2 Ch 625.
1283 *James Smith and Sons Norwood Ltd v Goodman* [1935] All ER 697 (CA) 701B-C.

8 4 7 Liability of shareholders

Because of the separate legal existence of a company as an entity in its own name and right it is liable for its debts. In the normal course of events and unless they have participated in the management of the affairs of the company as promoters, directors or other officers, shareholders would not be held liable for the debts of the company, for example, on the basis of section 424(1) of the Companies Act of 1973 or perhaps even on the basis of section 423 of the Act.

It is possible though that shareholders may receive more money from the company by way of dividend than would have been the case had the directors or liquidator, as the case may be, acted carefully to comply with the duty of protecting the interests of the creditors by settling their claims first before making a dividend payout to shareholders. Admittedly in receiving more dividend than would have been the case had the claims of the creditors been met shareholders would not have committed a wrong against the creditors concerned. Thus the issue of delictual liability on the part of the shareholders is out of the question.

In *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd*[1284] a creditor sought to recover from a shareholder a proportionate share of the dividend which was received from a company on winding-up, to the extent that the dividend was in excess of what it would have been had the claim of the creditor been paid. The claim was based on the *condictio indebiti* and it was alleged that the shareholder had been enriched at the expense of the creditor. Rejecting the creditor's claim the court pointed out that while it was established under the common law that an action would lie at the instance of an unpaid creditor of a deceased person against an heir or legatee who has been paid more than he should have been paid out

1284 1972 3 SA 835 (T).

of the assets of the estate, it making no difference whether the action was described as a *condictio indebiti*[1285] or whether it was based on the principle of unjust enrichment since the action was granted by the common law, the problem was that, as Galgut J (as he then was) put it:

> "There is no such common law action available to an unpaid creditor of a company against a shareholder who has received more on dissolution of the company than he would have received had the creditor been paid. Secondly it has been held that there is no general action for enrichment in our law. Before a plaintiff can succeed on a claim based on unjust enrichment he must show that his cause of action falls within the scope of one of the recognised actions for enrichment in our law."[1286]

In a subsequent decision the Appellate Division[1287] overruled the second point stated in *Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd.*[1288] The court held in *Kommisaris van BinnelandseInkomste v Willers*[1289] that it was not precluded from accepting liability for enrichment in a particular case merely because liability had not previously been recognised in the same or even similar circumstances. Therefore, attention would have to be given to the question whether the extension or new development was necessary or desirable, and in addition consideration would have to be given to existing precedents, both old and new. In this respect contributions of academic writers who have devised proposals of general criteria for the establishment and limitation of liability would be considered. The court was very careful to point out though that whether in any given case the creditor ought to succeed would depend on the facts of the case as substantiated by evidence.

1285 The *condictio indebiti* is a common law enrichment remedy by means of which the plaintiff recovers from the defendant money paid or property transferred in payment or performance of a debt that is non-existent and is therefore not due. It usually happens in the case of mistaken payment which is made to B (the wrong party) instead of C (the right party). The payment or transfer must have been *indebiti* in the widest sense, that is, there must have been no legal or natural obligation to pay or perform. The payment or performance must have been made in the mistaken belief that the debt was due. Generally, if the plaintiff knew that the debt was not due or doubted whether it was due, recovery of money or property may be excluded. See *Nelson Mandela Municipality v Ngonyama Okpanum Hewitt-Coleman* [2012] ZASCA 11 (14 March 2012) para 47; *B & H Engineering v First National Bank of SA Ltd* 1995 2 SA 279 (A) 284G-I; *Frame v Palmer* 1950 3 SA 340 (C) 346D-G; *Le Riche v Hamman* 1946 AD 648 656; *First National Bank v Leeuw* Case No: A251/2005, unreported judgment of the Orange Free State Provincial Division dated 29 March 2007.

1286 *Rapp and Maister Holdings v Ruflex Holdings (Pty) Ltd* 837F-H.

1287 Which is now the Supreme Court of Appeal.

1288 1972 3 SA 835 (T).

1289 1994 3 SA 283 (A).

The significance of the *Willers* case is that the door is now open and it is accordingly possible for a creditor to recover from a shareholder who receives more dividend from a company than would have been the case had the claim of the creditor been paid. What is even more important is the fact that this claim could be prosecuted after dissolution of the company. What is needed is for the creditor to gather evidence and establish a case for unjust enrichment based on the *condictio indebiti*.

8 4 8 Liability for costs in general

It is a mute point whether a person who purported to authorise the institution of legal proceedings on behalf of a company after its dissolution can be held personally liable for the defendant's costs. Although the matter is unlikely to arise in practice since the affairs of a company which is being wound up are under the control of the liquidator, who is also in charge of all litigation involving the company, it is nevertheless submitted that the position of a dissolved company is similar to that of a deregistered company. The prevailing view as far as a deregistered company is concerned is that a person who purported to authorise the institution of proceedings on behalf of a company after its deregistration may, if the fault lies with him, be personally liable for the defendant's costs.[1290]

8 4 9 Liability of an attorney for costs

According to Blackman[1291] an attorney who acts for a company after its dissolution is personally liable for the costs of the action from the date of dissolution. As authority for this liability reference is made to *Salton v New Beeston Cycle Co.*[1292] This statement should be read with caution since the case dealt with liability of an attorney for acting without authority, in which case English law, and not South African law, applies the breach of implied warranty principle to hold such attorney liable. It will be recalled that in that case Stirling J said:

1290 *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* (Pty) Ltd 1973 3 SA 548 (W) 549H; *Lawsa* para 90. See also para 8 2 above.
1291 *Lawsa* para 90.
1292 [1900] 1 Ch 43.

"A solicitor is an agent of a special kind. By entering an appearance on behalf of his client he represents or warrants to the opposite party that he has authority so to do, if it turns out that he has not he is liable."[1293]

For lack of sufficient legal basis on which to hold an attorney liable for acting on behalf of a dissolved company, it is respectfully submitted that he is not personally liable for the costs unless there was fraudulent or negligent misrepresentation on his part. Breach of implied warranty on its own is not a basis of liability in South African law.[1294]

8 5 SUMMARY

Many a times litigants do take a courageous but erroneous decision of trying to recover from the wrong person on a wrong basis and accordingly, as far as they are concerned, get a wrong result. It is not that the law does not provide remedies for parties wishing to recover from certain persons consequent to a contract having been concluded on behalf of the since non-existent company. It is a question of claiming from the right party and on a correct basis.

What is not permissible though is seeking to recover from a member, director, manager, agent etc of a company which was non-existent at the time of the conclusion of the contract or which although in existence at the time, has since ceased to exist because of deregistration or dissolution. For as much as there is no contractual liability, in the absence of agreement that the party acting for the company would be personally liable, there is equally no liability based on breach of implied warranty, at any rate not in South African law. Any attempt to hold somebody personally liable in the circumstances is, to use the phraseology of Scott AJ in *Indrieri v Du Preez*,[1295] "clearly inappropriate".

1293 *Salton v New Beeston Cycle Company* 49.
1294 See para 8 3 8 above.
1295 1989 2 SA 721 (C) 728E.

It does not follow however that a party seeking to recover from a person who concluded a contract on behalf of a non-existent company is totally without a remedy. There is the possibility of delictual liability founded on fraudulent or negligent misstatement. As Scott AJ put it in *Indrieri v Du Preez*[1296] "... it is difficult to conceive of a case in which a would be agent who purports to act on behalf of an existent, in truth non-existent, principal would not have acted either negligently or fraudulently." No doubt the amount of damages awarded would not match the positive interest that could have been recovered had there been a contract but still this is better than nothing. It is also interesting to note that even in the absence of delictual liability emanating from fraudulent or negligent misrepresentation there is still the possibility of liability for innocent misrepresentation which, although not giving rise to damages, nevertheless gives the aggrieved party rescission of contract and restitution of performance rendered.[1297]

Against this background of no general liability, section 26(5) of the Close Corporations Act of 1984 constituted a notable exception by providing for the joint and several liability of members of the corporation for its liabilities where it was deregistered while having outstanding liabilities. Looking at the ease with which a company, and especially a largely passive small private company, could be inadvertently deregistered, it is submitted that a provision such as the one which was contained in section 26(5) of the Close Corporations Act is what is most needed under section 83 of the Companies Act of 2008. For the sake of creditor protection, it is submitted that the time is right for an amendment of section 83 of the Companies Act. It is further submitted that the easiest way of effecting the amendment would be by creating a new section 83(2) which provides:

> "If a company is removed from the companies register while having outstanding liabilities, the persons who are its directors at the time of deregistration shall be jointly and severally liable for such liabilities."

The remaining subsections of the section would then be renumbered accordingly. This provision, it is submitted, would be radical but is nevertheless necessary. After all that would be nothing new since it would be a re-enactment of section 26(5) of the Close Corporations

1296 1989 2 SA 721 (C) 728F-G.
1297 *Indrieri v Du Preez* 728J - 729C.

Act of 1984. Moreover, once introduced, it will serve a very useful purpose of protecting creditors. Another radical but also necessary change to the Companies Act is the need for the introduction of a new section 83(4) whose purpose would be to hold persons acting on behalf of a deregistered company personally liable for the resulting contractual obligations. The new provision could be worded as follows:

> "Any person who concludes a contract for or on behalf of a deregistered company shall be personally liable for the obligations arising in connection with or in terms of that contract."

As a result of the proposed amendment the present section 83(4) would become section 83(5). If accepted and implemented the two amendments would take care of the plight of members of the public, customers and other creditors who thus far have nobody to recover from as soon as the company is deregistered.

Because dissolution of a company, and that of a close corporation for that matter, only takes place after its affairs have been completely wound up the problem of possible liability arising is otherwise rare and relatively less controversial. The general principles outlined above being in the main a broad reflection of the current legal position and they appearing to be generally satisfactory, it is submitted that there is no urgent need for radical changes creating personal liability for directors after dissolution of a company.

Since in principle it is now theoretically possible for creditors to recover from shareholders a dividend received in excess of what they should have received had the claims of the creditors being paid,[1298] it is submitted that no harm would be done by allowing the law to evolve gradually over the years without the need for legislative intervention.

1298 *Kommissaris van Binnelandse Inkomste v Willers* 1994 3 SA 283 (A).

CHAPTER 9

Restoration of registration of a company

9 1 INTRODUCTION

Deregistration brings to an end the existence of a company just like death terminates the life of a human being.[1299] However, unlike a human being, the life of a company is amenable to resurrection through restoration of registration.[1300] If instead of deregistration the company had been dissolved, revival of its life would be by way of a court order declaring the dissolution to have been void, a matter which is discussed in the next chapter.

In terms of the Companies Act of 1973 restoration of registration of a company was mostly done pursuant to a court order, subject of course to this one exception that in terms of an amendment introduced in 2006[1301] the Registrar of Companies was given the power to restore registration of a company which had been deregistered due to its failure to lodge an annual return but that could be done only after compliance with lodgement of the outstanding annual return and payment of annual duty.[1302] In the case of a close corporation restoration of registration was always done by the Registrar of Companies[1303] and never the court.[1304]

1299 *Fintech (Pty) Ltd v Awake Solutions* [2014] 3 All SA 664 (SCA) para 7.

1300 *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; *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ) para 14.

1301 Section 73(6A) of the Companies Act of 1973 was inserted by s 15 of Corporate Laws Amendment Act 24 of 2006.

1302 Section 73(6A) of the Companies Act of 1973.

1303 Section 1(1) of the Close Corporations Act of 1984 defined "Registrar" as the "Registrar of Close Corporations" appointed under s 4 of the Act. Since no separate Registrar of Close Corporations was appointed that effectively referred to the Registrar of Companies. After the coming into operation of the Companies Act of 2008, s 1(1) of the Close Corporations Act was amended to define the "Registrar" to mean the "Commissioner of the Companies and Intellectual Property Commission appointed in terms of s 189" of the Companies Act of 2008.

1304 Section 26(6) of the Close Corporations Act of 1984.

The Companies Act of 2008 has brought about great confusion regarding the treatment of deregistration and dissolution as well as their reversal. Whereas under the Companies Act of 1973 the distinction between deregistration and dissolution was clear cut, this is not the case under the Companies Act of 2008. Confusion stems from sections 82(2) and 83(1) of the 2008 Companies Act. Section 82(2) provides that after receiving a certificate of winding-up of a company from the Master, the Companies and Intellectual Property Commission must "record" the dissolution of the company in the prescribed manner, which is to say that the company should be dissolved after which its name would be "removed from the companies register", by which it is meant that the company would be "deregistered". Similarly, section 83(1) 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 name has been transferred to a foreign jurisdiction as contemplated in section 82(5). Therefore, according to these sections a company which is "dissolved" must invariably be "deregistered" while a company is also dissolved when it is deregistered. As a result distinguishing deregistration from dissolution under the Companies Act of 2008 is a serious challenge.[1305] This problem also translates into the difficulty of drawing the line of demarcation between restoration of registration and voidance of dissolution.

9 2 TERMINOLOGY

Section 82(4) of the Companies Act of 2008 uses the phrase "reinstatement of registration", the key word being "reinstatement". As against this, section 73(6) of the Companies Act of 1973 referred to registration of the company as having been "restored", the key word being "restoration" (of registration of course). The word "re-registration" is not used in either section 82 or 83 of the Companies Act of 2008 and only appears in the context of the definition of a company in section 1 of the Act. Section 1(1)(c) of the Companies Act of 2008 defines a "company" to mean a juristic person incorporated in terms of the Act, a domestic

1305 The language used by Muller AJ in *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 confirms this. There, in para 12, the court said: "Notwithstanding the difference in terminology used in s 82(1) and s 82(3) [of the Companies Act of 2008] the effect is the *ex lege* dissolution of a company by deregistration of that company in terms of s 82(3) by virtue of the provisions of s 83(1). The result in both instances is similar."

company or a juristic person that, immediately before the effective date was deregistered in terms of the Companies Act of 1973 and has subsequently been "re-registered" in terms of the Companies Act of 2008. Dealing with the word "reregistration" in *Absa Bank Ltd v Companies and Intellectual Property Commission*,[1306] Rogers J held that the notion of "reregistration" was more applicable to the "reinstatement" of a company to the register by the Companies and Intellectual Property Commission in terms of section 82(4) of the Companies Act of 2008 than to a declaration by the court that the company's dissolution was void in terms of section 83(4).[1307] Therefore, although section 82(4) uses the word "reinstatement", there is in fact also room for the word "reregistration" although it does not appear in the section. Moreover, it is not uncommon to come across the word when reading judgments.[1308]

In some instances though one comes across usage of the words "cancellation of registration". In *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1309] an allegation was made that deregistration of the company had been cancelled after its registration was revived in terms of section 82(4) of the Companies Act of 2008, which occurrence would normally have amounted to reinstatement of registration. Van Oosten J dealt with the difference between "cancellation of deregistration" and "reinstatement of registration" as follows:

> "... the cancellation of the process [of deregistration] connotes an elimination of the entire process, including the initial deregistration, as if it had never occurred whereas reinstatement [of registration] implies putting it [the company] back in its former position prior to deregistration. On this construction I am driven to conclude that, by cancellation of the deregistration process, [the company] at all times remained a corporate entity ..."[1310]

Therefore, according to the *Fintech* case "cancellation of deregistration" amounts to a complete denial of deregistration ever having taken place and would thus attach no consequences at all to the fact that it did at some stage occur. This approach was endorsed by

1306 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).
1307 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 56.
1308 See for example *Weichelt v Triponza Trading 276 CC* [2008] ZAGPHC 201 (15 May 200) para 13 and *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD, [2014] ZAKZDHC 6 (20 March 2014) paras 6, 10 and 20.
1309 2013 1 SA 570 (GSJ).
1310 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 11.

the Supreme Court of Appeal.[1311] For the purposes of deciding the case though Van Oosten J assumed that his interpretation of the meaning of "cancellation of registration" could have been incorrect and proceeded to deal with the matter on the basis that there had been "reinstatement of registration" rather than "cancellation of deregistration" as alleged.[1312]

For present purposes, although this is somewhat outdated as it was the terminology used in section 73(6) of the Companies Act of 1973, reference would be made to "restoration of registration" rather than "reinstatement of registration", the latter being the phrase used in section 82(4) of the Companies Act of 2008. However, nothing special turns on the phraseology used as both mean exactly the same thing. Perhaps this is just a question of personal preference and of course a long tradition attached to usage of the words "restoration of registration".[1313]

9 3 RESTORATION OF REGISTRATION VERSUS VOIDANCE OF DISSOLUTION

Section 73 of the Companies Act of 1973 made provision for deregistration of a company, specifying the grounds and procedure to be followed. In section 73(6)(a) provision was made for restoration of registration were the need for it to arise. The same pattern, albeit in a somewhat abridged form, was also provided for deregistration and restoration of registration of a close corporation in terms of the Close Corporations Act of 1984, although there were some differences with the provisions of the Companies Act.

1311 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) paras 9 and 18.

1312 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 12.

1313 The same preference was expressed by Rogers J who, reading a unanimous judgment of the full court in *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), used the word "restore" rather than "reinstate", the latter appearing in section 82(4) of the Companies Act of 2008. The court said (para 59): "… I am reluctant to use the word 'reinstate' (the word used in s 82(4) [of the Companies Act of 2008] in case it should be thought to imply some effect not intended by the court order. I would rather use 'restore'".

Section 313(1)(d) of the Companies Act of 1973 dealt with dissolution of a company as a result of merger, amalgamation, reconstruction and the like which resulted in dissolution of one or more of the companies involved, without there being a winding-up of any of them. If there was winding-up of a company after finalisation of such process the company would be dissolved in terms of section 419. If the need were to arise for voidance of dissolution, that was done in terms of section 420. It may be mentioned in passing though that most of the winding-up, dissolution and voidance of dissolution provisions for companies also applied to close corporations except in respect of those matters provision for which was made in the Close Corporations Act or if provisions of the Companies Act of 1973 were specifically excluded.[1314] Section 420 of the Companies Act of 1973, which dealt with voidance of dissolution, was one of the sections not excluded from application to close corporations.

The treatment of deregistration and reinstatement of registration, as well as that of dissolution and voidance thereof, in terms of the Companies Act of 2008 can at best be described in just one word, namely "conflated', which word was used repeatedly by Pillay J in *Nulandis (Pty) Ltd v Minister of Finance.*[1315] It is submitted that Pillay J was correct to say in the *Nulandis* case that although "conceptually distinct, deregistration is fused with dissolution in the clear text of section 83(1)"[1316] of the Companies Act of 2008. This must be so since in terms of section 82(2) provision is made to the effect that upon receiving a certificate of winding-up of a company in terms of section 82(1) the Companies and Intellectual Property Commission must record the dissolution of the company and remove its name from the companies register, which process amounts to deregistration. Furthermore, in terms of section 83(1) a company is dissolved (dissolution) as of the date its name is removed from the companies register (deregistration) except, of course, if the reason for the removal is

1314 Section 66 of the Close Corporations Act of 1984.

1315 2013 5 SA 294 (KZP) paras 20, 23, 24, 47, 58. See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 12 where Binns-Ward J described certain aspects of s 82(4) of the Companies Act of 2008, namely failure to require that notice of the application for reinstatement be given to interested third parties such as the Treasury, as a "curious omission". The issue of a "mix-up" between deregistration and dissolution was also dealt with by Muller AJ in *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2015 para 12.

1316 *Nulandis (Pty) Ltd v Minister of Finance* para 23. See also *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014) paras 33(a) and (g), 35 and 41 where the words "deregistration" and "dissolution" were used interchangeably.

that the company's registration has been transferred to a foreign jurisdiction as contemplated in section 82(5).

In terms of section 82(4) if the Companies and Intellectual Property Commission deregisters a company on any of the grounds specified in the subsection ie where there was no winding-up of the company, any interested person may apply to the Commission to reinstate the registration of the company (reinstatement of registration). On the other hand section 83(4) provides that at any time after a company has been dissolved the liquidator of the company or any other person with an interest in the company may apply to court for an order declaring the dissolution to have been void or any other order that is "just and equitable" in the circumstances. On the face of it one would have thought that if the company had been deregistered in terms of section 82(3) on anyone of the grounds there specified, which exclude deregistration after winding-up, the only permissible way of reviving it would be by way of application to the Commission for reinstatement of its registration in terms of section 82(4). Furthermore, one would also have expected that if there was winding-up, dissolution and removal of the company's name from the register in terms of section 82(2), its revival should be sought by way of voidance of dissolution in terms of section 83(4). If that were to be done a clear line of demarcation between deregistration and dissolution would be maintained rather than blurred, as appears to be the case at the moment. However, the distinction between reinstatement of registration and voidance of dissolution is not always made as the discussion which follows will demonstrate.

Consistent with the express provisions of section 82(4) Henney J held in *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa; Absa Bank Ltd v Voigro Investments 19 CC*[1317] that a close corporation that had been deregistered in terms of the Close Corporations Act of 1984 for failure to file annual return and pay annual duty, those provisions finding their current equivalent in section 82(3)(a)(i) of the Companies Act of 2008, could only have its registration reinstated in terms of section 82(4) and on application to the Companies and Intellectual Property Commission instead of seeking a

1317 [2013] 2 All SA 137 (WCC).

voidance of dissolution order granted by the court in terms of section 83(4). In this regard the court held:

> "... if a close corporation has been deregistered for failing to file its annual returns, the registration thereof can be reinstated only by the commissioner and only in terms of section 82(4) of the Companies Act of 2008 ... there is no other manner in which re-instatement can occur. No provision is made for the restoration of a deregistered company, or in this case deregistered close corporation, by order, on application to court."[1318]

Henney J's decision was reversed on appeal to the Full Court in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1319] where Rogers J followed a different approach holding that section 83(4) applied as much to a company or close corporation dissolved pursuant to administrative deregistration as to one dissolved pursuant to its liquidation as a solvent company. Liquidation of solvent companies and administrative deregistration of companies were dealt with together in part G of Chapter 2 of the Companies Act of 2008. Deregistration and removal of a company's name from the register were used interchangeably and meant the same thing. If section 83(1) applied to all companies dissolved by the removal of their names from the register, there was no reason that section 83(4) which formed part of the same section and applied at any time after a company had been dissolved, should not apply to a company dissolved by the removal of its name from the register pursuant to section 82(3). In particular the court held:

> "... the court *a quo* erred in concluding that s 83(4) did not apply to a company or close corporation deregistered for reasons other than liquidation. In my opinion, s 83(4) applies in all cases where a company or corporation's name has been removed from the register in terms of part G of ch 2 and where the company or corporation has as a result been dissolved. This includes deregistration on any of the grounds set out in s 82(3). Where a company or corporation has been deregistered by the CIPC[1320] in terms of s 82(3) rather than in terms of s 82(2)(b), an interested party may either apply to the CIPC for restoration in terms of s 82(4) or to the court in terms of s 83(4). Particularly where the interested party finds it impossible or practically difficult to comply with the prescribed requirements relating to restoration in terms of s 82(4), an application to court in terms of s 83(4) is available as an alternative."[1321]

1318 *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa: Absa Bank Ltd v Voigro Investments 19 CC* para 34.

1319 2013 4 SA 194 (WCC), [2013] 3 All SA 347 (WCC).

1320 "CIPC" stands for the Companies and Intellectual Property Commission.

1321 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 52.

The approach of the full bench is in line with a decision of the North Gauteng High Court in the case of *Du Rand v Companies and Intellectual Property Commission*[1322] and has since been followed in *Nulandis (Pty) Ltd v Minister of Finance*[1323] where Pillay J said:

> "To summarise my analysis of the new Act:[1324] with conflation of deregistration and dissolution in s 83(1) and the clear text of ss 82(2), (3) and (4) and s 83(4) I cannot … agree with the opinion in *Absa Bank*[1325] para 42 that s 83(4) of the new Act is reserved for voiding dissolution following a winding-up in terms of ss 82(1) and (2) and not deregistration as contemplated in s 82(3) when a company has failed to file its annual returns."[1326]

However, in a very recent decision of the KwaZulu-Natal Local Division, Koen J seemed to take the view that as deregistration and dissolution are two distinct and separate processes there would be instances where restoration of registration only would be appropriate while in others voidance of dissolution, to the exclusion of restoration of registration, would be the appropriate remedy. In this respect the court held in *Missouri Trading CC v Absa Bank Ltd*[1327] that if a close corporation had been deregistered for failing to render annual returns as required by the Companies Act of 2008:

> "… it would be difficult to contend that such a dissolution had been void. Clearly the act of deregistration would have been lawful and justified. Section 83 could not find application. In those circumstances reinstatement revives the corporation prospectively but only after it had cured its default."[1328]

1322 Case No 71624/2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013. There the court reiterated (para 21) that there was no reason for making a distinction between dissolution of a company in terms of s 82(3) read with section 83(1) and dissolution for any other reason for the purposes of voidance of dissolution under s 83(4). In the instant case the applicants turned to s 83(4) to have dissolution declared void as they were "faced with the impossible task to comply with the requirements for the reinstatement of the companies in terms of s 82(4)" (para 15).

1323 2013 5 SA 294 (KZP).

1324 Companies Act of 2008.

1325 The decision of Henney J in the court *a quo* in *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa; Absa Bank v Voigro Investments 19 CC* [2013] 2 All SA 137 (WCC).

1326 *Nulandis (Pty) Ltd v Minister of Finance* para 58.

1327 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014).

1328 *Missouri Trading CC v Absa Bank Ltd* para 41.

It should be noted that the approach of Koen J raises a few problems while the judgment also seems to contain some contradictions.[1329] First, the statement quoted above, together with a few other paragraphs,[1330] accepts that deregistration of a company also amounts to its dissolution. Secondly, it presupposes that voidance of dissolution requires illegality as would be the case when an unlawful action falls to be held invalid and set aside,[1331] an approach that does not apply to voidance of dissolution. In this respect the court said when a third party seeks revival of a company:

> "... it must decide whether it has grounds only to apply for reinstatement in terms of s 82(4) or whether the original deregistration and its removal of the company's name from the register resulting in a dissolution was void, in which case it should proceed in terms of s 83(4). These are two separate and distinct remedies providing for widely disparaging factual scenarios. If the act of removing the name of the corporation was not justified in the first place, then the act of deregistration is required to be declared void, which would require proceeding in terms of s 83 with a court application on notice for such relief, either with or without any relief that might 'be just and equitable in the circumstances'."[1332]

Thirdly, such an approach would be contrary to such cases as *Nulandis (Pty) Ltd v Minister of Finance*[1333] and *Absa Bank Ltd v Companies and Intellectual Property Commission*[1334] which specifically held that a deregistered company, having been dissolved, can be revived by way of a voidance order granted in terms of section 83(4), both of which were dealt with, albeit very briefly.[1335] Moreover, such a voidance order is mostly necessitated by the difficulty of obtaining reinstatement which is required to be done by the Companies and Intellectual Property Commission, should such be sought by a third party such as a creditor who is not able to comply with the requirements for filing annual returns, a very common problem indeed.

1329 For example, while in para 39 the court held that deregistration and dissolution were "two very separate and distinct remedies providing for widely disparaging factual scenarios", it nevertheless granted a "just and equitable" order in terms of s 83(4) even though the company had been deregistered and was thereafter reinstated to the companies register by the Companies and Intellectual Property Commission in terms of s 82(4).

1330 *Missouri Trading CC v Absa Bank Ltd* paras 33(a) and (g), 35, 36 and 39.

1331 In this respect the court in *Missouri Trading CC v Absa Bank Ltd* para 36 said: "If the necessary allegations can be advanced to show that the initial act of deregistration resulting in the company being dissolved was void, then obviously the dissolution of the company would fall away, as there was no valid deregistration, which would mean that the company would have continued in existence from the date of purported dissolution until the dissolution was declared to have been void, and continue to exist thereafter."

1332 *Missouri Trading CC v Absa Bank Ltd* para 39.

1333 2013 5 SA 294 (KZP).

1334 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).

1335 *Missouri Trading CC v Absa Bank Ltd* para 30.

The purpose of the blurring the distinction between restoration of registration and voidance of dissolution, said Rogers J in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1336] was to avoid "absurd and unjust results"[1337] that would follow if voidance of dissolution of a company that had been deregistered was not granted since creditors and other interested parties would have no way of resuscitating such a company. As the *Nulandis* case also demonstrates, creditors and other interested parties seeking to reinstate registration of a deregistered company or close corporation in terms of section 82(4) of the Companies Act of 2008 face a very difficult, if not impossible, challenge of first having to file outstanding annual returns which require information that they would not be able to provide such as certified copies of identity documents of directors or members of the company or corporation as at the time of deregistration.[1338] It should be noted that if the Koen J approach as suggested in the *Missouri Trading* case were to prevail it would not be possible to avoid "absurd and unjust results" which would result. It is submitted that such would not be a satisfactory state of affairs and should accordingly be avoided.

The position in South African law is therefore the same as in English law in that if a company has been deregistered, the applicant has a choice as to the manner of reviving it, namely either by way of reinstatement of registration in terms of section 82(4) of the Companies Act of 2008 or by way of voidance of dissolution in terms of section 83(4). As the *Absa Bank* and *Nulandis* cases frankly acknowledge, this choice was not available under section 73(6) of the Companies Act of 1973 although it has all along been there in English

1336 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).

1337 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 57.

1338 As required by Regulation 40(7) of the Companies Regulations, 2011 found in GNR.351 of 26 April 2011, published in Government Gazette No. 34239 of same date which was supplemented by Practice Note 6 of 2012 which came into effect on 1 November 2012 and which requires an application for reinstatement of registration to be made on Form CoR40.5. In this respect an allegation was made in *Du Rand v Companies and Intellectual Property Commission of South Africa* para 4 that the shareholders or directors of the deregistered companies who had the information required when lodging annual returns, had neither the intention to render annual returns nor to pay the required annual duty. Thus the shareholders or directors had no wish to reinstate the companies, their intention being to leave creditors without any recourse. Reinstatement of the companies was sought to enable the applicants to institute and pursue winding-up proceedings as well as any other remedies in consequence of such an order.

law because of statutory provisions which required that there be "dissolution" of a company which had been "struck off the register", that is, which had been deregistered.[1339]

9 4 THE APPLICANT FOR RESTORATION OF REGISTRATION

9 4 1 General

Under the Companies Act of 1973 restoration of registration of a company to the register of companies was achieved by making application to the court having jurisdiction. According to section 73(6)(a) of the Act application for restoration of registration could be made by the Registrar of Companies or any interested person. In this respect the Act constituted a notable departure from the Companies Act of 1926 which provided that application for restoration of registration could be made by the company itself, its member or creditor who felt aggrieved by the company having been struck off the register of companies.[1340] As a matter of fact this was also the position under the Companies Act of 1973 until section 73(6) was amended in 1978.[1341]

However, under section 82(4) of the Companies Act of 2008 the position is different. The section provides that if the Companies and Intellectual Property Commission deregisters a company as contemplated in subsection (3), that is, other than as a result of winding-up of the company, any interested person may apply in the "prescribed manner and form" to the

1339 Under the UK Companies Act of 2006 dissolution of companies which have been struck off the register of companies is dealt with in sections 1000(6), 1001(4) and 1003(5). In the UK Companies Act of 1948 similar provisions were found in s 353(6) and in the UK Companies Act of 1985 they were found in s 651. English cases dealing with the choice as to the manner of revival of a defunct (deregistered) company include *Re Belmont and Co Ltd* [1951] 2 All ER 898 (Ch); *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517 (Ch); *Re Thompson & Riches Ltd* [1981] 2 All ER 477 (Ch); *Allied Dunbar Assurance plc v Fowle* [1994] 2 BCLC 197. The above cases and provisions were discussed in *Absa Bank Ltd v Commission and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC) para 49 and *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) paras 46 – 57.

1340 Section 199(7) of the Companies Act of 1926. The curiosity of the company itself being able to apply for its restoration of registration at a time when it ceased to exist by virtue of its striking off was noted by Slomowitz AJ in *Ex parte Stubbs: In re Wit Extensions Ltd* 1982 1 SA 526 (W) 528F-G.

1341 Section 73(6) was amended by 5(f) of the Companies Amendment Act 59 of 1978.

Commission to reinstate registration of the company. Therefore, in terms of section 82(4) it is an "interested person" only who may apply to the Companies and Intellectual Property Commission, and not the court, for reinstatement of registration.

9 4 2 Any interested person

Like its predecessor the Companies Act of 1973, the present Companies Act of 2008 does not define "any interested person" who may make application for restoration of registration or, according to the language of section 82(4), who may apply for reinstatement of registration of the company. It should be noted in passing though that section 83(4) of the Act, which deals with application to court for an order declaring the dissolution of a company to have been void, uses a slightly different wording by describing the person who can make the application as either the liquidator of the company or "other person with an interest in the company". Notwithstanding the apparent difference of the wording used in the two sections it is submitted that the essence of both is the same and that "any interested person" means the same thing as "other person with an interest in the company". Accordingly, a discussion of "an interested person" includes that of "other person with an interest in the company" with the result that the latter will be mentioned briefly without much discussion when voidance of dissolution is examined in the next chapter.

As used in the phrase "any interested person", the word "interest" is said to be susceptible of more meanings than one and, like so much of the English language, its meaning often has to be discerned from the context.[1342] The courts take the view that the words "interested person" should be given the widest possible connotation.[1343] Moreover, they are words of great amplitude.[1344] In relation to making an order for the revival of a defunct company, a deregistered company being indeed defunct, the interest mentioned is said to refer to a pecuniary or proprietary interest rather than embrace all matters of curiosity

1342 *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661 665E.
1343 *Ex parte Stubbs: In re Wit Extentions Ltd* 531B.
1344 *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517 519I.

or concern.[1345] The whole field of restoration of deregistered companies is after all mostly dominated by financial and proprietary interests more than anything else.[1346] To use the exact words of Megarry J in *Re Roehampton Swimming Pool Ltd:*[1347]

> "In relation to making an order for the revival of a defunct company, it seems to me to be more probable that the word [interest] refers to a pecuniary or proprietary interest than that it embraces all matters of curiosity or concern. After all, those who are interested in companies are nearly always interested financially or in a proprietary way, the whole field is dominated by finance."[1348]

In introducing the words "interested person who feels aggrieved" into section 73(6)(a) of the Companies Act of 1973, and now section 82(4) of the Companies Act of 2008, as opposed to the "company, member or creditor" who feels aggrieved by the deregistration, as section 199(7) of the Companies Act of 1926 did, the legislature seems to have had in mind a person other than a member or creditor and thereby intended to widen substantially the class of persons who could make the application for restoration of registration.[1349] Accordingly the words "interested person" should be given the widest possible connotation so as to include any person who has a financial interest of any sort, whether actual or contingent, in or against a company, or relating to it, or with which interest the company might be concerned provided however that the financial interest in question is not negligible.[1350] In *Buttar v Ault*[1351] the application for restoration failed, among others, on the ground that the applicant had a negligible interest in the deregistered company. The alleged interest was found negligible in that the applicant held one share only in the company, which share was worth between one pound sterling and one pound sterling and five shillings.[1352]

1345 *Re Roehampton Swimming Pool Ltd* 665E.

1346 *Re Roehampton Swimming Pool Ltd* 664E.

1347 [1968] 3 All ER 661.

1348 *Re Roehampton Swimming Pool Ltd* 665E.

1349 *Ex parte Stubbs: In re Wit Extensions Ltd* 529A.

1350 *Ex parte Stubbs: In re Wit Extensions Ltd* 531B. That the words "or any other person with an interest in the company" which are used in s 83(4) of the Companies act of 2008 should be given the "widest possible interpretation to include any person with financial interest in the company" was reiterated in the recent decision of *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 para 19.

1351 1950 4 SA 229 (T).

1352 Out of a share capital of over 25 000 shares worth *f*1 each the applicant held a single share worth a mere *f*1 or *f*1 5s. The court per Murray J said (236): "... to enforce this negligible interest I am not prepared to replace the company on the Register. In consequence she is not, in my view, 'aggrieved' in her own right within the meaning of s 199(7) of Act 46 of 1926 ..."

Because a company may be deregistered even though it is carrying on business and incurring obligations, and since this could be to the prejudice of third parties and others who deal with it, it is submitted that it must have been the intention of the legislature to give the court a discretion to come to the aid of such persons in appropriate cases even though they might not be creditors in the strict sense of the word.[1353] After all because of deregistration third parties could have acquired or lost rights or they could have decided not to exercise their rights against the company precisely because as a result of deregistration the company did not exist. Such parties would be interested persons and therefore qualify for restoration of registration of the company.[1354] An interest of the applicant, while not required to be firmly established or highly likely to prevail, must nevertheless not be merely shadowy.[1355]

A creditor or member of the company is admittedly an interested person and can accordingly apply for the restoration of registration of the company.[1356] The word "creditor" is construed widely so as to include a contingent creditor.[1357] A person who after the date of deregistration acquired shares in a company or took an assignment of one of its debts is not a member or creditor of the company and would accordingly not be accorded *locus standi* to apply for restoration of its registration.[1358] Such a person is however probably an interested person and should on that basis be allowed to make the application.[1359] A person who prior to the date of deregistration purchased from the company property owned by it but which was not delivered by such a date is undeniably an interested person.[1360] A few other examples of interested persons include a person who after deregistration purports to purchase from the company property still owned by it, any representative shareholder referred to in section 103(3) of the Companies Act of 1973, which in very broad terms is now section 37(9) of the

1353 Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 Part 1 First Reissue (1997) para 93.
1354 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 (SCA) para 23.
1355 *Lawsa* para 93; *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 736a; *Ex parte Stubbs: In re Wit Extensions Ltd* 533H.
1356 *Lawsa* para 93; *Ex parte Stubbs: In re Wit Extensions Ltd* 529A. It should be noted that a creditor or member essentially refers to former creditor or member as deregistration causes the company to disappear thus making it impossible for it to have creditors or members.
1357 *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517 520A; *Re Harvest Lane Motor Bodies Ltd* [1968] 2 All ER 1012.
1358 *Re New Timbiqui Gold Mines Ltd* [1961] 1 All ER 865, 1961 Ch 319.
1359 *Re Test Holdings (Clifton) Ltd* 520A; *Lawsa* para 93.
1360 Henochsberg 332(5) citing the case of *Ex parte Cook* 1957 1 SA 367 (N).

Companies Act of 2008, whose appointment as such occurs after the date of deregistration of the company and any such representative whose appointment as such occurred prior to the deregistration but who omitted by that date to procure such registration.[1361]

An attorney is not an interested person and cannot therefore apply for restoration. This must be so since though an attorney is interested in his or her clients and in the success of their litigation he does not have proprietary or financial interest in the claim that the client may have against a deregistered company.[1362] A director of a company (that is a former director) is not without more, a person having *locus standi* to make the application for restoration of registration.[1363] This is so in that unless he also happens to have been a creditor or member of the company he has no proprietary or pecuniary interest in the company. His interest, if any, can only be in retaining the services that he would render to the client, something which does not seem to have been contemplated by the legislature when it enacted section 82(4) of the Companies Act of 2008. Nor can a director bring the application in a representative capacity since with the cessation of the existence of the company which is brought about by deregistration, he ceases to be its representative.[1364]

A person with a contingent right in the company or its affairs, such as a contingent fideicommissary right to shares registered in the name of a trustee, unless the right had vested in that person before the deregistration of the company, is not an interested person for the purposes of application for restoration of registration.[1365] It follows therefore that such person cannot make the application for restoration of registration. In *Buttar v Ault*[1366] it was held that a person who was neither a shareholder nor creditor at the time of deregistration was not allowed to apply for restoration of registration of the company so as to enable him to register as a shareholder and thereafter take steps for the company's recovery of the assets and rights alleged to have been misappropriated from the company. That was so as the applicable section 199(7) of the Companies Act of 1926 required the applicant to be the company itself, a shareholder or creditor, the applicant being none of them. It is submitted, however, that in

1361 See Henochsberg 332(5) and Blackman 4-176.
1362 *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661.
1363 *Ex parte Stubbs: In re Wit Extensions Ltd* 532G.
1364 *Ex parte Stubbs: In re Wit Extensions Ltd* 533H - 534A.
1365 *Buttar v Ault* 1950 4 SA 229 (T).
1366 1950 4 SA 229 (T).

terms of the present law such person would qualify to apply for reinstatement of registration as an interested person.

While under the Companies Act of 1926 there was provision for the company itself to apply for its own restoration to the register, no such provision is to be found in the Companies Act of 2008. It is submitted that it is no longer possible for the company to apply for restoration of its own registration.[1367] Somebody else, who qualifies as an interested person, must apply for reinstatement of registration.

9 4 3 The forum and procedure

In terms of section 73(6)(a) of the Companies Act of 1973 application for restoration of registration had to be made to court. However, in terms of section 82(4) of the Companies Act of 2008 application for reinstatement of registration is required to be made to the Companies and Intellectual Property Commission. The courts have emphasised that in terms of the Companies Act of 2008 they do not have jurisdiction to decide reinstatement applications.[1368] Therefore, reinstatement of registration of a company is an administrative act and not a judicial function.[1369] Nevertheless the courts have been able to decide what were essentially reinstatement applications under the pretex of voidance of dissolution which they are empowered to do in terms of section 83(4). That was done precisely because of the difficulty of obtaining reinstatement of registration in terms of section 82(4) as in that case the Companies and Intellectual Property Commission is by regulation 40(6) of the Companies Regulations, 2011 allowed to insist on compliance with annual returns lodgement, which requirement is sometimes almost impossible to satisfy.[1370]

1367 Even at that time there was this anomaly that the company had to make application to court at a time when it did not exist - *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517.

1368 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) paras 25 and 26; *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa: Absa Bank Ltd v Voigro Investments 19 CC* [2013] 2 All SA 137 (WCC) para 43; *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC) para 37(f); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) paras 32 and 71.

1369 *Fintech (Pty) Ltd v Awake Solutions (Pty)* Ltd [2014] 3 All SA 664 (SCA) para 18.

1370 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC)

Section 82(4) requires an application for reinstatement of registration to the Companies and Intellectual Property Commission to be made in the "prescribed manner and form". In essence this amounts to compliance with lodgement of outstanding annual returns, if any and of course compliance with a few other requirements. Moreover, in terms of Practice Note 6 of 2012 the Companies and Intellectual Property Commission has directed that as from 1 November 2012 a reinstatement application should be made on Form CoR40.5 and, regardless of the cause or date of deregistration, the documents to be submitted together with the application should include:

- Certified identity copies of directors of the company and the applicant;
- Certified identity of the customer filing the application;
- Deed-search reports to prove ownership or otherwise of immovable property;[1371]
- An affidavit explaining the reasons for non-filing of annual returns, if the reason for deregistration was failure to file annual returns;
- Sufficient documentary proof that the company was in business or that it had outstanding assets or liabilities at the time of deregistration.[1372]
- If the company owned immovable property, there should be a letter from each of the Treasury[1373] and Department of Public Works confirming that they do not oppose the application;
- Affidavit indicating the reason for the original request for deregistration, if the company or close corporation itself applied for deregistration;
- Copy of an extract from a local newspaper giving a 21 clear day notice that

para 52; *Nulandis (Pty) Ltd v Minister of Finance* para 70; *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 para 15.

1371 The deed search is required to cover the whole country in the form of all the ten deed registry regions (offices) – see Companies and Intellectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq1/ (accessed 14-08-2014).

1372 See *Nulandis (Pty) Ltd v Minister of Finance* para 35.

1373 The Department of National Treasury "Registration or Restoration of Deregistered Companies" http://www.treasury.gov.za/restorations/ (accessed 20-08-2014) has indicated that a request for its consent to reinstatement of registration of a company should be in writing and signed on an official letrerhead of the company. The request is required to include a postal address to which correspondence should be forwarded; the date on which the request was made; the reason/s for deregistration of the company; copy of the applicant's identity document; company registration number and electronic version of the signed document. Should the applicant not be the owner (ie director / shareholder) of the company, he/she is required to attach written confirmation of the owner to the effect that he/she is authorised to make the request for reinstatement of registration of the company.

application for reincorporation would be made;[1374] and

- Payment of a filing fee of R200.00.[1375]

9 5 RESTORATION OF REGISTRATION VERSUS SETTING ASIDE DEREGISTRATION

It could happen that deregistration of a company was not properly done, such as when it was done contrary to section 73 of the Companies Act of 1973 or, in the case of a close corporation, contrary to section 26 of the Close Corporations Act of 1984, by not following the procedure therein specified. In such a case, deregistration not having been properly done, there would strictly speaking be no need to have registration of the company, or close corporation, restored to the register as the purported deregistration would, truly speaking, not be valid. As the Supreme Court of Appeal indicated in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1376] there are circumstances in which once there would be no need for a court order directing reinstatement or re-registration of the company, a good example being the case where deregistration had been cancelled.[1377] More so that in the case of a company, application for restoration had to be made to court which always had discretion and the power to decline restoration of registration even if all the requirements were met.[1378] Therefore, obtaining a restoration of registration order could not be taken for granted. Nevertheless, there is this contradiction that an administrative action, whether correctly or incorrectly taken, remains valid and binding until it is set aside and cannot simply be disregarded.[1379]

1374 See *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), 2012 3 All SA 183 (WCC) para 15. The purpose of publishing such intended application in a local newspaper is said to be to give notice to any possible interested party the opportunity to object to reinstatement of registration – see Companies and Intellectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq1/ (accessed 14-08-2014).

1375 See *Du Rand v Companies and Intellectual Property Commission of South Africa* para 14 and *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014) para 12 note 10.

1376 [2014] 3 All SA 664 (SCA).

1377 *Fintech (Pty) Ltd v Awake Solutions* para 18.

1378 *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust* 1964 3 SA 409 (T) 471A.

1379 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA), [2004] 3 All SA 1 (SCA); *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC).

The main advantage of setting aside deregistration, as opposed to restoration of registration, is that it "wipes out the unregistered past" [1380] with the result that none of the consequences of deregistration, such as personal liability on the part of members of a close corporation arising in terms of section 26(5) of the Close Corporations Act of 1984 or invalidity of the company's acts during the period of deregistration and many others, would follow.[1381] Ordinarily, the setting aside of deregistration would mean that the *status quo ante* would have been restored thus removing any possible argument about the company having lost its corporate status at any stage.[1382] Moreover, once set aside deregistration would be invalid with the result that there would be no need for reinstatement or re-registration of the company.[1383]

Deregistration of a close corporation was set aside in *Firstrand Bank Ltd v Davis*[1384] on the ground that the Registrar had failed, before effecting deregistration, to follow the procedure specified in section 26(1) of the Close Corporations Act by notifying the corporation and its members by "certified mail" as required in terms of the law of that time. Instead the Registrar had simply notified them using ordinary mail, and after a dispute arose as to whether such mail had in fact been received, the court assumed for the purposes of judgment that the mail had not been so received, this making the resulting deregistration other than one in compliance with the Close Corporations Act of 1984 and therefore

1380 "Wiping out the unregistered past" argument was raised, albeit unsuccessfully, in *Kadoma Trading 15 (Pty) v Noble Crest CC* 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA) paras 9 and 17 in the context of reinstatement of registration. In essence it was nevertheless successfully raised in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ) and *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA). Setting aside of deregistration is therefore one instance where the court can effectively "actually recall time passed", the happening of which was hotly disputed in the context of restoration of registration in such cases as *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2013] 3 All SA 183 (WCC) para 23 and *Mouton v Boland Bank Ltd* 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA) paras 12 – 13.

1381 *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) paras 29 and 32.

1382 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 18.

1383 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 18.

1384 2004 1 SA 31 (N). In *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) deregistration of a close corporation was set aside on the ground that the letter which was sent to the corporation did not advise it or its members that deregistration could be avoided by informing the Registrar that the corporation was carrying on business or was in operation. Therefore, the letter sent by the Registrar was inadequate as it failed to convey accurately and properly the information to place the members in a position to ward off impending deregistration (para 17).

irregular. The same result followed in *Boseme v Rogers*[1385] where, once again, a close corporation was deregistered without giving a section 26(1) notification letter. As a result of the corporation's deregistration the respondent obtained summary judgment against members of the close corporation who were held personally liable for the debts of the corporation in terms of section 26(5) of the Close Corporations Act of 1984. On appeal to the full bench the South Gauteng High Court set aside both deregistration of the corporation and summary judgment given against members of the corporation as a result of such deregistration. A very similar decision was arrived at in *Dasarath v Hulett Aluminium (Pty) Ltd*[1386] where the Registrar sent a letter to the company advising of the intended deregistration only after effecting such deregistration, a step contrary to section 73(1) of the Companies Act of 1973 which required an advisory letter to be sent to the company before deregistration and not after it, for then such letter would serve no purpose.

When the court sets aside deregistration of a company or close corporation it will order that registration of the company or close corporation be restored to the register although that would not have the effect of making a restoration order but simply one setting aside deregistration which had not been properly done.[1387] However, to avoid confusion the better and preferred approach, it is submitted, is that which was followed in *Firstrand Bank Ltd v Davis*[1388] in terms of which the purported deregistration of the close corporation was declared invalid for want of compliance with the provisions of section 26(1) of the Close Corporations Act of 1984 and accordingly set aside.[1389]

Deregistration of a company by the Companies and Intellectual Property Commission in terms of section 82 of the Companies Act of 2008 is equally amenable to setting aside if it was not done properly, for example, by observing the required "due process". This was hinted in *Du Rand v Companies and Intellectual Property Commission of South Africa*[1390] where Muller AJ reiterated that the Companies Act of 2008 provided for an administrative

1385 [2011] ZAGPJHC 174 (23 November 2011).
1386 [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008).
1387 See for example *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008) para 25C.
1388 2004 1 SA 31 (N).
1389 *Firstrand Bank Ltd v Davis* 35B-C.
1390 Case No: 71624 / 2012, an unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013.

process to reinstate a company to the register of companies if it was deregistered "after due process" had been followed by the Commission. Obviously, it is failure to observe the "due process" in deregistering a company which would lead to the setting aside of deregistration. In brief, setting aside of deregistration requires some unlawful act in the manner in which deregistration was done.[1391]

9 6 CANCELLATION OF REGISTRATION

Neither the Companies Act of 2008 nor regulations made thereunder provide for cancellation of registration of a company.[1392] Section 82(4) merely provides for reinstatement of registration of a deregistered company and nothing more. This notwithstanding the Companies and Intellectual Property Commission does on occasion cancel deregistration of a company. However, it is not clear on what authority and grounds deregistration could be cancelled rather than have registration reinstated. What appears very clear though is the fact that deregistration is cancelled on exactly the same those on which registration could have been reinstated, such as for example where deregistration was the result of failure to file annual returns.

The issue of cancellation of registration was dealt with in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1393] where one W, being the sole shareholder and director of the company, alleged that as soon as he found out that his company had been deregistered for failure to file annual returns, he immediately took steps to apply for cancellation of deregistration and also filed outstanding annual returns. As a result of his efforts deregistration was cancelled in two stages, namely provisionally and then finally. The South Gauteng High Court held, per Van Oosten J, that there was a difference between reinstatement of registration and cancellation of registration saying:

1391 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 17.

1392 The validiy of cancellation of deregistration of a company was challenged, albeit unsuccessfully, precisely for this reason in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 8.

1393 2013 1 SA 570 (GSJ).

> "… cancellation of the process [of deregistration] connotes an elimination of the entire process, including the initial deregistration, as if it had never occurred, whereas re-instatement implies putting it back in its former position, prior to deregistration. On this construction I am driven to conclude that by the cancellation of the deregistration process [the company], at all times, remained a corporate entity

As a safeguard, the court in the *Fintech* case also proceeded on the assumption that registration of the company had been reinstated, in which event it used its "inherent jurisdcition" to validate anything done by or against the company between deregistration and its reinstatement and to make such order it considered appropriate.[1395] Accordingly, the court declared that all acts done by or against the company from the date of its deregistration until the date of its reinstatement were validly done and were of full force and effect.[1396]

The approach of the High Court relating to cancellation of registration was approved on appeal to the Supreme Court of Appeal in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1397] where Mpati P held:

> "But the deregistration is now no more because the process of deregistration has been cancelled and [the company's] name has been restored to the companies register. There is thus no admistrative act of deregistration that can be set aside."[1398]

Therefore, although the legal basis and grounds on which cancellation of deregistration may be granted seem wanting, and that for obvious reasons, nevertheless once done, cancellation of deregistration of a company by the Companies and Intellectual Property Commission is as good as a court order setting aside deregistration of a company or any appropriate court order as dictated by the circumstances of the case.[1399] It thus revives the existence of a hitherto deregistered company with retrospective effect.

1394 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 11.
1395 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 14.
1396 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 16.
1397 [2014] 3 All SA 664 (SCA).
1398 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 18.
1399 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 18.

9 7 GROUNDS FOR SEEKING RESTORATION OF REGISTRATION

9 7 1 Summary of the various grounds

In terms of section 73(6)(a) of the Companies Act of 1973 there were three grounds on which restoration of registration of a deregistered company could be sought. The first one was if at the time of deregistration the company was "carrying on business", the second being if at the time of deregistration the company was "in operation" while the third one was if it was "just" that registration of the company should be restored. Each one of these grounds was independent of the others as the coupling was disjunctive.[1400] Moreover, because of use of the word "may" instead of "shall" for example, the court had discretion whether or not to grant the order for restoration. Not surprisingly in *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust*[1401] the court held that because of the use of the word "may", it had discretion and was therefore not bound to restore the company to the register even if any or all three grounds were satisfied. It is nevertheless submitted that it would be an arbitrary exercise of the discretion given by the legislature not to grant an order whose requirements were otherwise fully met. After all it is a basic tenet of the law that where discretion is given, it must be exercised judicially, having regard to the facts and circumstances of the case, and not arbitrarily.[1402]

Under section 82(4) of the Companies Act of 2008 the position is different. The section provides that if the Companies and Intellectual Property Commission deregisters a company as contemplated in subsection (3), any interested person may apply to the Commission to reinstate registration of the company. It will be evident therefore that unlike section 73(6)(a) of the Companies Act of 1973 the section does not specify the grounds on

1400 *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust* 1964 3 SA 409 (T) 470H.
1401 1964 3 SA 409 (T).
1402 *Du Rand v Companies and Intellectual Property Commission of South* Africa para 20; *Moosa v Mavjee Bhamwan (Pty) Ltd* 1967 3 SA 131 (T) 137H.

which application for reinstatement of registration may be made. It is nevertheless submitted that by making reference to subsection (3), the section gives a hint as to the grounds on which reinstatement of registration may be sought.

It is further submitted that reinstatement of registration may be granted on the opposite of the exact grounds for deregistering the company in the first place. The various grounds on which a company may be deregistered were discussed in chapter 5 above, which discussion will not be repeated here. Suffice it for present purposes to say that the grounds for deregistration of a company as contained in section 82(3) are:

- Transferring registration of a company to a foreign jurisdiction;
- Failure to file an annual return for two or more years in succession;
- Failure to show satisfactory cause for the company to remain registered;
- Inactivity on the part of the company for at least seven years and failure to demonstrate reason for the company's continued existence; and
- Request for deregistration due to the company having ceased to carry on business.

It was argued in chapter 5 above that apart from transferring registration of the company to a foreign jurisdiction and failure to show satisfactory cause for the company to remain registered, there is nothing new in section 82(3) which was not contained in section 73(1) of the Companies Act of 1973 as a ground for deregistration of a company. For example, inactivity on the part of the company and failure to demonstrate reason for the company's continued existence are a disguised version of the old "not in operation" ground while failure to show "satisfactory cause for the company to remain registered" is nothing other than the "just" ground for restoration of registration.

It is further submitted that reinstatement of registration of a company may be sought precisely because the ground for deregistration of a company no longer exists, for example, that an attempt to transfer registration of a company to a foreign jurisdiction has failed or that outstanding annual returns have been filed, that there is satisfactory cause for the company to remain registered, that the company is or will soon become active or that it has not ceased carrying on business or will start doing so soon. It is also submitted that precisely the same grounds on which restoration of registration could be granted in terms of section 73(6)(a) of the Companies Act of 1973 namely, the company carrying on business or being in operation or that it is otherwise just that registration be restored, still apply under section 82(4) of the Companies Act of 2008 as they are all built-in into section 82(3). Therefore, reinstatement of registration of a company in terms of section 82(4) may be granted on the opposite of any of the grounds for deregistration mentioned in section 82(3) as well as on any of the grounds which used to be available in terms of section 73(6)(a) of the Companies Act of 1973 for the reasons given above.

9 7 2 The just ground

The third and last ground on which registration of a company could be restored to the register in terms of section 73(6)(a) of the Companies Act of 1973 was on the basis that it was "just" to do so. This was probably the widest and most flexible ground on which a company could be revived in a variety of circumstances. It would seem, however, that in both South African and English law the wide range of this otherwise fluid ground has not been fully explored.

The onus was on the applicant for restoration to demonstrate to the court the circumstances which made it "just" to have the company restored to the register. All relevant facts were called for to come to that conclusion. Facts and information relating to the position and activities, if any, of the company before, during and after both deregistration and restoration would be of assistance to the court in understanding the justice of the reason for restoration of registration. As Roper J put it in *Ex parte Pillay & Sons Ltd:*[1403]

> "But the sub-section[1404] provides that restoration may be made if it appears otherwise that it is just that the company be restored. This seems to me to contemplate the position that the company was in fact not carrying on business and was not in operation but for special reasons it is just that, notwithstanding

1403 1951 1 SA 229 (T).

1404 Section 199(7) of the Companies Act of 1926, the predecessor of s 73(6) of the Companies Act of 1973, and now s 82(4) of the Companies Act of 2008.

that fact, the company should be restored to the register. In my view before the Court makes an order under this sub-section it should be placed in possession of all the facts relating to the position of the company at the time when the order of striking it off was made, it should be informed whether the company was in fact carrying on business or was in operation and, if it was not, what special reason there is why it should be regarded as just that it should be restored to the register."[1405]

Although this is but just one example it nevertheless appears that the most common reason for seeking restoration of registration on the just ground was the need to deal with assets belonging to the since deregistered company. The usual allegation was that assets then thought to be worthless had since appreciated in value while in some cases the issue was the discovery of assets which had been overlooked at the time of deregistration. There is no doubt there would be a few other examples such as the need by the company to give transfer of property to the purchaser who had bought but had not taken transfer before deregistration. The list of examples is not exhaustive but the central theme seems to have been the need to deal with the assets of the since deregistered company.[1406]

Section 82(4) of the Companies Act of 2008 does not mention the just ground or any ground for that matter, as a basis for seeking reinstatement of registration. As indicated above, it is nevertheless submitted that by making a cross-reference to subsection (3) as a ground on which deregistration should have been based in order to trigger the operation of section 82(4), the legislature has impliedly incorporated the just ground as a reason for seeking reinstatement of registration. This must be so as section 82(3) has a built-in "just" ground for reinstatement of registration. This can be gathered from such grounds for deregistration as failure to "show satisfactory cause for the company to remain registered" and failure to demonstrate a "reasonable interest in, or reason for, its [company's] continued existence". It is submitted that an interested person who can show satisfactory cause for the company to remain registered or reason for its continued existence would have shown that it was "just" for registration of the company to be reinstated.

1405 *Ex parte Pillay & Sons Ltd* 231A-B.

1406 *Ex parte Reid M F* 1982 1 PH E5 (N); *Re Donald Kenyon Ltd* [1956] 3 All ER 596; *Re Vickers and Bott Ltd* [1968] 2 All ER 264.

9 8 DISCRETION OF THE COURT

Section 73(6)(a) of the Companies Act of 1973 conferred discretionary powers on the court to grant a restoration order. The section provided that the court "may" rather than "shall" order that registration be restored if the necessary requirements had been met. It was for this reason that Viljoen J held in *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust*[1407] that even if any or all three grounds were present the court still had discretion and was not bound to restore the company to the register. In other words, the application for restoration of registration could still fail notwithstanding the apparent compliance with all the necessary requirements.[1408] It is nevertheless submitted that in the absence of some justification for dismissing the application it would be an undue and arbitrary exercise of discretion to reject a request which otherwise satisfied both the spirit and letter of the law. For what else then would need to be done to achieve that which the law provided for other than comply with the stipulated requirements, if one may ask? After all, this point has since been clarified. The position is therefore that where a court is given discretion, such should be exercised judicially having regard to the facts and circumstances of the case before it and not arbitrarily.[1409]

Stating the principle in very broad terms the court in *Ex parte Ziman*[1410] indicated an example of a situation in which it would be appropriate to exercise the discretion in favour of granting a restoration order. The court said:

> "I can conceive of many circumstances, completely unrelated to the Company's carrying on business or its being in operation, which may render it just for the Company to be restored to the register. The present circumstances provide, in my view, a good example. The Company may not be carrying on business or be in operation in the usual sense of these terms, but in order to carry out its obligations towards the second and third applicants [third parties], it is imperative that the company should remain in existence. If the company went, one contracting party would be gone and there would be no *persona* against whom the other contracting parties could have recourse. Not only, therefore, from a

1407 1964 3 SA 469 (T).

1408 See *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 477B where the court said: "The restoration of a company on the basis that it is just that the company be restored to the register is not automatic. The court has a discretion."

1409 *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013; *Moosa v Mavjee Bhanwan (Pty) Ltd* 1967 3 SA 131 (T) 137H.

1410 1970 1 SA 164 (T).

point of view of the Company itself, but also from a point of view of the interests of the other contracting parties, is it necessary that the Company should remain in existence. This presupposes, of course, that the second and third applicants have valid interests which should justly be protected."[1411]

In *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust*[1412] the company was neither carrying on business nor in operation. It was, however, alleged to have been just that the company be restored to the register so that it could deal with its property which had otherwise become *bona vacantia*. The court took into account the fact that the property had been illegally[1413] held by the company and exercised its discretion against granting a restoration order.

The circumstances surrounding deregistration are a relevant factor to take into account. In a case where the company or its directors deliberately asked for deregistration the court could, in the absence of compelling reasons justifying restoration of registration, comfortably exercise its discretion against granting restoration.[1414] The time that it took before the application for restoration of registration was made was also a point to consider. The longer it took the more difficult it became to get a restoration order.[1415] Van Dijkhorst J commented on the issue of seeking restoration of registration of a company many years after deregistration, saying in *Ex parte Sengol Investments (Pty) Ltd*[1416] the following:

"I have some doubt whether it would be inequitable or unjust to refuse the registration of a company, which 15 years ago deliberately elected to abandon its rights and cause[d] its own demise, merely because it now transpires that the rights then abandoned have now become of some value."[1417]

Unlike section 73(6)(a) of the Companies Act of 1973 which gave the court discretion to restore registration of the company, section 82(4) of the Companies Act of 2008 does not

1411 *Ex parte Ziman* 172A-D.
1412 1964 3 SA 409 (T).
1413 Ownership of the property by the company was outlawed by the Group Areas Act 36 of 1966 which has since been repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.
1414 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T).
1415 *Ex parte Sengol Investments (Pty) Ltd* 477A; *Re Thompson and Riches Ltd* [1981] 2 All ER 447.
1416 1982 3 SA 474 (T).
1417 *Ex parte Sengol Investments (Pty) Ltd* 477A-B.

give the Companies and Intellectual Property Commission discretion to reinstate registration of a company. The word "may" as used in the section merely relates to an interested person who may apply for reinstatement rather whether the Companies and Intellectual Property Commission has discretion to grant the application or not. Therefore, on the face of it the Commission does not seem to have that discretion and should consequently grant every application made if it appears to satisfy the requirements of the section. It is submitted that notwithstanding the apparent lack of discretion the Companies and Intellectual Property Commission does in fact have it and would decline the application for reinstatement in an appropriate case. For unless it has such discretion the Commission would not be seen as being in a position to consider applications for reinstatement of registration properly and each one on its merits. After all, an application for reinstatement of registration is required to comply with such conditions as the Companies and Intellectual Property Commission may determine, this giving the Commission the necessary authority to determine if the application does in fact satisfy the necessary requirements.[1418] In *Nulandis (Pty) Ltd v Minister of Finance*[1419] Pillay J accepted that section 82(4) of the Companies Act of 2008 gave the Companies and Intellectual Property Commission discretion. Commenting on the requirements to be complied with when application for reinstatement of registration is made the court said:

> "All this information must be relevant to the Commission *to exercise its discretion* to grant or refuse an application for reinstatement of registration of a deregistered company in terms of s 82(4), otherwise the Commission would not insist on it as it emphatically does ..."[1420]

9 9 GIVING NOTICE OF THE APPLICATION TO INTERESTED PARTIES

As already indicated in terms of section 73(6)(a) of the Companies Act of 1973 application for restoration of the name of the company to the register of companies was made to court. In accordance with the well-known *audi alteram partem* rule the applicant was required to join all parties who had an interest[1421] in the order which was being sought and then serve notice

1418 The Companies and Intellectual Property Commission's requirements for reinstatement of registration were discussed in Part 9 4 3 above.

1419 2013 5 SA 294 (KZP).

1420 *Nulandis (Pty) Ltd v Minister of Finance* para 36. (My emphasis).

1421 In *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD) the third party who had a of motion on them so that they could take necessary steps to safeguard their interests. First and foremost the notice of motion had to cite and was to be served on the Registrar of Companies as the person who effected deregistration.[1422] Secondly, if there was any *bona vacantia* property involved the relevant State department involved had to be cited and then served with the notice of motion.[1423] In the case of money and movable property, the appropriate department was that under the Minister of Finance as head of treasury.[1424] If the property involved was land the proper department to cite and give notice of motion was that of Land Affairs.[1425]

It is submitted that the general statement set out in *Ex parte Pillay and Sons Ltd*[1426] to the effect that "in connection with the consideration of the petition the question further arises whether notice should not be given to the relevant government department which may be interested in the fate of the property referred to in the petition" addressed the core of the problem. While it was the treasury, which is to say the Department of Finance, that was primarily in charge of State assets and finances it could happen that eventually the property ended up under the control of some other department which would be closely related to the use of the property in question. For example, mineral rights are within the domain of the Department of Mineral and Energy Affairs, water and forests under the Department of Water Affairs and Forestry etc. For this reason it is submitted that the preferred view would be that the particular department to which the affected property closely relate should be cited and served with the notice of motion. However, it appears that the practice is different and that the approach is to cite the Minister of Finance, as head of the National Treasury, in all instances of *bona vacantia* irrespective of the kind of property involved.[1427] In any event, it

---

"direct and substantial interest" in the restoration application and who should accordingly have been joined was the purchaser of the deregistered close corporation's property even though transfer had not taken place at the time of the hearing of the matter. However, the issue had become academic as the attorney for that party had waived the right to be joined and elected to abide by the decision of the court.

1422 *Van der Ploeg v Vivier* 1966 3 SA 218 (SWA); *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 475 (T); *Ex parte National Bank of SA Ltd (In re B.A. Meintjies Ltd)* 1924 WLD 64; *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W).

1423 *Ex parte Pillay and Sons Ltd* 1951 1 SA 229 (T).

1424 *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *Ex parte Pillay and Sons Ltd* 1951 1 SA 229 (T); *Rainbow Diamonds (Edms) Bpk v Sanlam* 1984 3 SA 1 (A).

1425 *Ex parte Pillay & Sons Ltd* 1951 1 SA 229 (T).

1426 1951 1 SA 229 (T).

1427 According to *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA would seem that practical considerations dictate that such a course be followed, seeing that the National Treasury is in charge of allocation of national resources. Of course the approach belies the requirement of Practice Note 6 of 2012[1428] issued by the Companies and Intellectual Property Commission in terms of which application for reinstatement of registration of a company must be accompanied by a letter from the National Treasury, and if the company owned immovable property at the time of deregistration, also a letter from the Department of Public Works confirming that the application would not be opposed.

It is further submitted that the position was correctly summed up by Brand JA in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1429] who said:

> "... third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the court to make the order subject to such directions under s 73(6)(b) [of the Companies Act of 1973] as may serve to alleviate its prejudicial consequences. The inevitable conclusion I draw from all this is that third parties who will or may suffer prejudice as a result of the restoration order, have a 'direct and substantial interest' in the outcome of the application for such an order. It follows that they should be joined as necessary parties to the application..."[1430]

In some cases the notice of motion was served on quite a few officials and bodies as happened in *Ex parte Sengol Investments (Pty) Ltd*[1431] where the court indicated:

> "Notice of this application was given to the Registrar of Companies, the Department of Community Development and State Auxiliary Services, the Registrar of Deeds, the Department of Finance and the

484 (WCC) para 12 it has become a standard requirement that the Minister of Finance, as the Minister responsible for the National Treasury, should be joined in "any application" to court for reversal of the dissolution of a company by reregistration. The issue was also dealt with in *Rainbow Daimonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A) 4F-H and *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD, [2014] ZAKZDHC 6 (20 March 2014) paras 6-7 where the State Attorney, acting on behalf of the Minister of Finance, resolved the issue by giving notice indicating that the Minister did not wish to participate in the proceedings and would abide by the decision of the court. The concern of the court was whether it was proper to have cited the Minister of Rural Development and Land Reform instead of the Minister of Finance who had to be cited in "any application" (para 6).

1428 The Practice Note came into effect on 1 November 2012.

1429 2007 4 SA 467 (SCA), 2007 ZASCA 6, 2007 SCA 6 (RSA) (12 March 2007).

1430 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 27.

1431 1982 3 SA 474 (T).

Registrar of Mining Titles. These officials and bodies have no objection to the granting of this order."[1432]

Just as the above quotation indicates, in the vast majority of cases the parties served with the notice usually did not oppose the application even though there was nothing preventing them from doing so. For years the attitude of the State had been a well-known fact, namely the State did not wish to enrich itself at the expense of others and would therefore ordinarily not oppose an application for restoration of registration of a company and declaration of *bona vacantia* property as having revested in the company.[1433]

In the case of unidentified third parties whose interests could be prejudiced by the granting of the restoration order or those parties whose addresses could not be verified for the purposes of serving the application on them, the solution was found in issuing a rule *nisi* calling upon interested parties to show cause on a specified return date why a restoration order should not be granted. Those parties who found it advisable to do so could oppose the application accordingly, failing which they were taken as having consented to restoration of registration. After all, a rule *nisi* was a judicial invitation to join issue, failure to appear after proper notice of which was regarded as a waiver of the right to be joined as well as a submission to the order of the court.[1434] Moreover, it obviated individual joinder of interested parties, serving a very useful purpose where such joinder was particularly difficult if not effectively impossible.[1435]

A typical order, in an abridged form and which serves as a good example, was one granted by Van Dijkhorst J in *Ex parte Sengol Investments (Pty) Ltd*[1436] in the following terms:

1432 *Ex parte Sengol Investments (Pty) Ltd* 475D.
1433 *Rainbow Diamonds (Edms) Bpk v Sanlam* 1984 3 SA 1 (A) 15B-C.
1434 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 478E-F.
1435 This argument was raised in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 28 and in response to which the court pointed out that for many years the issue of citing the many parties, some of them unknown, who could be affected by a restoration or order was solved by resorting to the mechanism of a rule *nisi* which was used as an alternative to actual joinder of all necessary parties.
1436 1982 3 SA 474 (T).

1. A rule *nisi* is issued returnable on 10 May 1982 calling upon all interested persons to show cause why an order should not be made in the following terms:

1.1 the registration of Sengol Investments (Pty) Ltd is restored to the company register in terms of s 73(6) of Act 61 of 1973;

1.2 This rule is to be served on the Minister of Community Development, the Registrar of Companies, the Registrar of Deeds, the Registrar of Mining Titles and the Minister for Finance.

1.3 The rule is to be published once in English and Afrikaans in the *Government Gazette*; once in English in an English daily newspaper and once in Afrikaans in an Afrikaans daily newspaper circulating in the Transvaal.[1437]

In terms of section 82(4) of the Companies Act of 2008 this is no longer the position. As already indicated application for reinstatement of registration is now made to the Companies and Intellectual Property Commission and not the court. Therefore, the right which interested parties and various State departments had to be made aware of the application for restoration of registration and the opportunity to oppose it or request that it be made subject to certain conditions that took into account their interests has largely been lost. To somehow ameliorate the adverse effect of reinstatement of registration on interested parties regulation 40(7) of the Companies Regulations, 2011 provides that reinstatement of registration may be granted on such terms and conditions as the Companies and Intellectual Property Commission may determine. While this is a step in the right direction, and in fact an admission that the right thing is not being done, it is submitted that such terms and conditions as the Companies and Intellectual Property Commission may impose may not necessarily be a sufficient substitute for service of notice on interested parties. After all the Companies and Intellectual Property Commission is an independent juristic person which is required to be "impartial and perform its functions without fear, favour or prejudice".[1438] The Commission is therefore no surrogate for the Department of Finance or any other State department and may not necessarily represent their interests adequately. In any event if the company owns immovable property the Commission is not allowed to reinstate its registration unless it receives a letter from the Treasury and another from the Department of Public Works confirming that they have no

1437 *Ex parte Sengol Investments (Pty) Ltd* 478G-479B. The order was made during the past dispensation when English and Afrikaans were the only two official languages. The Transvaal Province has since been divided into Limpopo Province, Mpumalanga Province, Gauteng Province and North West Province in terms of the South African Constitution of 1996.

1438 Section 185(2)(c) of the Companies Act of 2008.

objection to such reinstatement.[1439] The dispensation brought about by section 82(4) of the Companies Act of 2008 was commented on by Binns-Ward J in *Peninsula Eye Clinic v Newlands Surgical Clinic (Pty) Ltd*[1440] as follows:

> "… there is a curious omission in the current statutory scheme of any requirement for notice to be given to the Treasury of any application for reinstatement to the register. The interests of the Treasury and other potentially interested parties … potentially fall to be addressed by the Commission by way of conditions to be imposed in respect of such application in terms of reg 40(7) of the Companies Regulations." [1441]

It should be noted that in terms of Practice Note 6 of 2012 the Companies and Intellectual Property Commission requires letters from the Treasury and Department of Public Works only and no one else. Therefore, interested parties other than those two seem to be left out. This does not seem to be fair to them. The position is nevertheless far from clear and was described by Binns-Ward J in the *Peninsula* case as "being less than clearly articulated"[1442] in that it requires publication of the application for reinstatement in a "local newspaper" giving 21 days before making the application, this being an apparent reference to a newspaper circulating in the district in which the company's registered office is situated. The purpose of such publication in a local newspaper would be to give notice to potentially affected State departments and interested third parties.[1443] The question still remains though as to whether that is sufficient notification. One would venture to suggest that that is probably not the case.

9 10 OPPOSING THE RESTORATION APPLICATION

It does happen from time to time that certain persons having vested interest in the continued non-existence of the company would rather have the *status quo* maintained. This they may wish to achieve for example by opposing the application for restoration of registration. The

1439 As per Practice Note 6 of 2012 which came into effect on 1 November 2012. The issue was discussed in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 15 and *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) para 35.

1440 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1441 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 12.

1442 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 16.

1443 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 17.

question is therefore whether such opposition is permissible. In *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd*[1444] the court held that a third party be it a creditor, debtor or any party in pending litigation had no right to intervene in restoration proceedings in order to oppose the application for restoration of registration. Besides, such third party had no legal interest to protect in an application to restore the company to the register of companies. It was the view of the court that if any party had an issue with the company or any claim that the company could be having, the matter could best be resolved after the restoration of registration of the company, at which stage the two parties could fend for themselves but definitely not pre-emptively at the stage of application for restoration of registration. As De Vos J put it:

> "There seems to be no reason why any party, albeit as creditor, debtor or party in litigation pending, should have a right to intervene in an application of this kind, particularly in the present circumstances, where the restoration of the company to the register would afford that company an opportunity which it would otherwise lose of proceeding with litigation against the intervening party."[1445]

Contrary to the *Varvarian* approach, in *Ex parte Ziman*[1446] Viljoen J granted leave to intervene and oppose the restoration application. However, the opposition itself was dismissed on the merits, the court finding it without substance. In the subsequent case of *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd*[1447] the Minister of Lands successfully opposed restoration of registration of a company and, as the company remained non-existent because of lack of restoration of registration, the court ordered the second and third applicants for restoration, the company's shareholders, to pay the Minister's costs of successful opposition to restoration of registration. In neither the *Ziman* nor *Ventersdorp Muslim Trust* case was reference made to the *Varvarian* case.

The issue was authoritatively dealt with in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1448] where the court referred to both *Varvarian* and

1444 1965 4 SA 306 (W).
1445 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309G.
1446 1970 1 SA 164 (T).
1447 1964 3 SA 469 (T).
1448 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

Ventersdorp Muslim Trust cases, and a few other cases.[1449] Brand JA held that third parties who would or could be prejudiced by the restoration order had to be given the opportunity to persuade the court not to exercise its discretion in favour of a restoration order. Alternatively, they could endeavour to persuade the court to make the order subject to such directions as would serve to alleviate its prejudicial consequences. Accordingly, such third parties having a direct and substantial interest in the outcome of the restoration application had to be joined as necessary parties to the application.[1450] As the recent case of *Missouri Trading CC v Absa Bank Ltd*[1451] demonstrates, over the years the attitude of the State has been that it would not seek to benefit itself by opposing restoration of registration and resulting revesting of *bona vacantia* property in the company. Consistent with that approach in the *Missouri* case the Minister of Finance did not object to an order confirming reinstatement of registration of the company and that its property was no longer *bona vacantia* on condition that no costs order was sought against the State.[1452]

In terms of section 82(4) of the Companies Act of 2008 as application for reinstatement of registration is made to the Companies and Intellectual Property Commission and not to court, formal joinder to the reinstatement application and effective opposition thereto remains a challenge. Nevertheless, as already indicated the Treasury and Department of Public Works are required to furnish letters indicating their attitude to the reinstatement application. Furthermore, the Commission requires the application to be advertised in a "local newspaper". Therefore, some opportunity is created for opposition to reinstatement of registration by interested parties but whether that is sufficient seems dubious. In any event it is unlikely that such could be considered sufficient opportunity to oppose reinstatement of registration.[1453]

1449 Such as *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T); *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *Amalgamated Engineering Union v Minister of Labour* 1949 3 SA 637 (A); *Ex parte Gold* 1956 2 SA 642 (T); *Ex parte Millsite Investments Co (Pty) Ltd* 1965 2 SA 582 (T).

1450 *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* para 27.

1451 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014).

1452 *Missouri Trading CC v Absa Bank Ltd* para 7.

1453 The issue was looked at in Part 9 9 above which deals with the question of giving notice of the application for restoration of registration to interested third parties.

9 11 THE ROLE OF A RULE *NISI*

A rule *nisi* had a dual role to play in the application for restoration of registration of a company. In the first instance it was used as an alternative to service of notice of motion on a person having interest in the application for restoration and mostly a State department that ought to have been served with the notice of motion in the first place but which for one reason or another was not. The rule *nisi* route was used in *Ex parte Sengol Investments (Pty) Ltd*[1454] which was followed in *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd.*[1455] Once the rule was served on an interested party or State department the need to begin the case *de novo* and cite that party or department as a party to the proceedings fell away.[1456]

Secondly, even where all interested parties had been cited and served with the notice of motion, it was still desirable, and this appears to have been a common practice, to issue a rule *nisi* returnable on a specified date, calling upon all interested persons, if any, to show cause why an order restoring the company to the register of companies should not be made.[1457] In this respect a rule *nisi* served as a judicial invitation to all interested persons to join issue as failure to appear after proper notice thereof was regarded as a waiver of the right to be joined and a submission to the order of the court.[1458]

When a court granted an order authorising restoration of registration of the company to the register of companies the standard practice was to require that a rule *nisi* be served on the parties cited in the papers, including the relevant State departments and also that the rule

1454 1982 3 SA 474 (T).
1455 1984 2 SA 372 (W).
1456 *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 377H.
1457 *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (T); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T).
1458 *Ex parte Sengol Investments (Pty) Ltd* 478E.
1459 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

be issued for the sake and benefit of all other interested parties who would wish to come forward and show cause against the granting of a restoration order. The significance of a rule *nisi* was reiterated in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1459] where Brand JA said:

> "What these two cases[1460] laid down in substance, was that an order of restoration under s 73(6) of the Companies Act [of 1973] should, as a matter of practice, be preceded by a rule *nisi* calling upon all interested persons to show cause why the company's registration should not be restored."[1461]

Using the practice then prevalent in the past when there were only two official languages, the rule was usually published once in local English and Afrikaans newspapers as well as in the Government Gazette, again in the same languages.[1462] The publication of the rule *nisi* in newspapers and the Government Gazette at the moment should, in view of the many officials languages prevailing today, be a practical rather than a doctrinal exercise, it is submitted. The cost implications of redundant publications in multiple languages should, it is submitted, be carefully considered. After all, the requirement under section 82 of the Companies Act of 2008 is that certain things which are required to be done should be done "in the prescribed manner".[1463]

In view of the fact that application for reinstatement of registration under section 82(4) of the Companies Act of 2008 is made to the Companies and Intellectual Property Commission and not to court, it would be self-evident that the rule *nisi* route, and whatever advantages it might have carried, is no longer available. Therefore, in terms of this section unidentified creditors and other parties having or who could have an interest in reinstatement

1460 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) and *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W).

1461 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 19.

1462 *Ex parte Sengol Investments (Pty) Ltd* 479B-C; *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 376B-C; *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 473C; *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 311A..

1463 See for example s 82(3)(b) and (4) of the Companies Act of 2008.

of registration of a company, and who would have wished to oppose had they known of the application, are effectively left out. This is yet one more drawback brought about by the Companies Act of 2008.

9 12 ABSENCE OF TIME FRAME WITHIN WHICH TO SEEK RESTORATION OF REGISTRATION

Section 82(4) of the Companies Act of 2008 does not give a time frame within which application should be made to the Companies and Intellectual Property Commission for reinstatement of registration of a company. This was also the position under the Companies Act of 1973 as well as its predecessor, the Companies Act of 1926, in terms of which restoration or registration was made to court and not the Companies and Intellectual Property Commission, which is a creature of the Companies Act of 2008. Although in terms of section 73(6A) of the 1973 Companies Act application for restoration of registration could be made to the Registrar if the reason for deregistration was failure to lodge annual returns, once again there was no time limit within which to do so. The same also applied to close corporations in terms of section 26(6) of the Close Corporations Act of 1984, where application for restoration of registration was made to the Registrar.

Therefore, under South African law application for reinstatement of registration can be made at any time. Needless to say that if the application were to be granted after a very long period of deregistration, while that would obviously benefit those seeking it, it would invariably prejudice third parties who would be affected by it because of the change in the status of their rights and obligations which reinstatement of registration brings about. This is particularly so as reinstatement is granted by the Companies and Intellectual Property Commission which does not have the inherent discretion of a court or the powers which the court had under section 73(6)(a) and (b) of the Companies Act of 1973.

In terms of section 1024(4) of the UK Companies Act of 2006 application to the Registrar for restoration is required to be made within six years of deregistration. If application is made to court under section 1030 the general rule is also that it should be made within six years of deregistration. However, if application to court follows the registrar's refusal of a restoration application, the application is required to be made within 28 days of the Registrar's refusal, irrespective of whether such refusal was made within or outside six years of deregistration. If the reason for restoration of registration is in order to pursue a personal injury damages claim against the company, the application can be made at any time.[1464] However, this is subject to the proviso that the court may not grant a restoration order if it appears that the personal injury claim has prescribed. Even then the court is enjoined to take into account the power it has under section 1032(3) relating to giving consequential directions in terms of which it could direct that the period between deregistration and the granting of a restoration order is not to count for the purposes of the running of prescription.[1465]

Like it is the case in South African law, academic writers on English law do not comment on the significance of the period within which application for restoration of registration should be made. For example, dealing with restoration of registration by the Registrar, Cadde *et al* say: "Such an application may only be made by a former director or former member of the company; and it may only be made after the end of the period of six years from the date of the dissolution of the company."[1466] In the case of application for restoration of registration to court the authors write:

> "An application to the court for restoration of a company to the register may be made at any time for the purpose of bringing proceedings against the company for damages for personal injury; but no order may be made on such an application if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought. In making that decision the court must have regard to its power to direct that the period between the dissolution, or striking off, of the company and the making of the order is not to count for the purposes of any such enactment."[1467]

This notwithstanding, it would appear that the period within which the application has to be made coincides with the general period of prescription, the intention being that registration of

1464 Section 1030(1) of the UK Companies Act of 2006.

1465 Section 1030(2) and (3) of the UK Companies Act of 2006.

1466 Cadde *et al* "Companies" in Hannigan (consulting editor) *Halsbury's Laws of England* vol 15 (2009) 787 para 1532. Footnotes omitted.

1467 Cadde *et al* 790 para 1536. Footnotes omitted.

registration should not be restored only to find that rights and obligations for or against the company may not be enforced due to prescription. This conclusion is reinforced by provision in section 1030(3) of the UK Companies Act of 2006 to the effect that the court granting restoration must also take into account its power to direct that the period of prescription that could have lapsed in the interim period shall not be taken into account, thus rendering the obligations under consideration still valid and therefore enforceable.

9 13 CONSTITUTIONALITY OF RESTORATION OF REGISTRATION

As Van Dijkhorst J indicated in *Ex parte Sengol Investments (Pty) Ltd*[1468] restoration of registration 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 revert to the company, including assets which became *bona vacantia* and as such having accrued to the State. Likewise, debtors and creditors of the company at the time of deregistration may upon restoration of registration find their obligations or rights resuscitated.[1469] That is what happened in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1470] where restoration of registration of the company revived the obligations of third parties who had not been granted the opportunity to articulate their position relating to restoration of registration, as to whether they opposed it or demanded that it be granted on terms less prejudicial to them. Precisely for that reason restoration of registration was set aside, the court holding that a party whose rights could be affected had a right to be present and given a hearing.[1471]

Section 82(4) of the Companies Act of 2008 empowers the Companies and Intellectual Property Commission to reinstate registration of a company but does not make provision for third parties who will be affected by the reinstatement to be present and heard. While in the case of the Department of Finance and the Department of Public Works a letter

1468 1982 3 SA 474 (T).
1469 *Ex parte Sengol* 477C-D.
1470 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006).
1471 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 26, citing *Nelson Mandela Metropolitan Municipality v Geyvenwouw CC* 2004 2 SA 81 (SE) 89B and *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 2 SA 353 (W).

is required stating whether they oppose reinstatement of registration, the same does not go for other third parties such as debtors and creditors in general. The practice of requiring notice of the intended reinstatement to be published in a "local newspaper" appears to be only a practice stemming from Practice Note 6 of 2012[1472] which does not have the force of law as it does not appear in the Companies Act of 2008 itself or in any schedule or regulation made in terms of the Act.[1473]

It has been suggested that section 82(4) falls foul of s 3 of the Promotion of Administrative Justice Act of 2000[1474] (PAJA) which requires among others that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, which requires giving adequate notice of the nature and purpose of the administrative action and a reasonable opportunity to make representations. As the court indicated in *MB Barter and Trading (Pty) Ltd v Asbury*,[1475] this being a case dealing with deregistration of a close corporation under section 26 of the Close Corporations Act of 1984, the constitutional right to "just administrative action requires that corporation members, whose rights are materially affected, be afforded a chance of being heard before such a decision is made".[1476] It is evident that section 82(4) simply flouts the fairness requirement of section 3 of PAJA. Moreover, PAJA is not a stand-alone piece of legislation as it emanates directly from section 33(1) of the Constitution.[1477] The issue of the

1472 The Practice Note was mentioned in *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) para 35. The information it contains is also available online at Companies and Intelectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq1/ (accessed 14-08-2014).

1473 In terms of s 1 of the Companies Act of 2008, "this Act" is defined to include the Schedules and regulations.

1474 Act 3 of 2000. This issue was raised by Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 19. In the *Peninsula Eye Clinic* case the court also referred, in footnote 22, to s 5(4)(b)(dd) of the Companies Act of 2008 in terms of which in the event of inconsistency between its provisions and those of PAJA, the latter would prevail. The issue of constitutionality of the equivalent provisions under the Companies Act of 1973, namely s 73(6A) in terms of which the Registrar could order restoration of a company that had been deregistered for failure to file annual returns and pay annual duty was also raised by the authors of *Henochsberg on the Companies* Act vol 1 (Service Issue 33, 2011) 144(3) in the context of a discussion of *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006).

1475 [2012] ZAWCHC 177 (25 October 2012).

1476 *MB Barter and Trading (Pty) Ltd v Asbury* para 13.

1477 A similar issue was raised in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 27 and was one of the reasons for setting aside a restoration order. An appeal against the decision was dismissed in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 constitutionality of section 82(4) of the Companies Act of 2008 is yet to be pursued with vigour but the indications are that it may not meet the test. Nevertheless a legal challenge to the section is yet to be launched.

9 14 GRANTING A RESTORATION ORDER

Section 73(6)(a) of the Companies Act of 1973 gave the court discretion to grant a restoration order if the requirements of the section were met, namely if at the time of deregistration the company was either carrying on business, was in operation or if it was otherwise just that restoration of registration be granted. The key word used and thus giving the court discretion was "may". Dealing with the predecessor of the section, namely section 199(7) of the Companies Act of 1926 which also used the word "may" Viljoen J held in *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust*[1478] that the use of that word indicated that the court had a discretion and that even if any or all three of the requisites were present, the court was not bound to restore the company to the companies register.[1479] In other words the court had to look at all the circumstances of the case and particularly any facts that would render it unjust to order restoration of registration. The above approach has since enjoyed consistent endorsement, the issue of discretion of the court being emphasised case after case.[1480]

In the *Ventersdorp Muslim Trust* case restoration of registration was denied because ownership of landed property which the company sought to reassert was prohibited by the Group Areas Act of 1966.[1481] The issue of discretion of the court was also dealt with in *Ex parte Sengol Investments (Pty) Ltd*[1482] in which Van Dijkhorst said:

(SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

1478 1964 3 SA 469 (T).

1479 *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 471A.

1480 See for example *Ex parte Sengol Investments (Pty) Ltd* 477B; *Ex parte Stubbs: In re Wit Extension Ltd* 1982 1 SA 526 (W) 531; *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 26.

1481 Act 36 of 1966. The Act, which divided the country into areas according to racial classification and prohibited members of any racial group from owning and even leasing land designated for use by another racial group, was repealed in 1991 in terms of Abolition of Racially Based Land Measures Act 108 of 1991. The Group Areas Act of 1966 repealed the previous Group Areas Act 77 of 1957 which in turn repealed its predecessor, the Group

> "I have some doubt whether it would be inequitable or unjust to refuse to restore the registration of a company, which 15 years ago deliberately elected to abandon its rights and cause its own demise, merely because it now transpires that the rights then abandoned have now become of some value. The restoration of a company on the basis that it is just that the company be restored to the register is not automatic. The Court has a discretion."[1483]

One of the considerations which the court would have regard to in the exercise of its discretion was the potential prejudice which the restoration would cause to third parties.[1484] Generally the court would not grant a restoration order where the applicant acquiesced in conduct by the company prior to its deregistration or who, with full knowledge of all the relevant facts, was guilty of delay in bringing restoration proceedings.[1485]

If the application for restoration of registration were successful the court would grant an order authorising and directing the Registrar of Companies to restore the registration of the company to the register of companies in terms of section 73(6) of the Companies Act of 1973.[1486] The order would also indicate that the assets of the company in general and also those which had been specified in the order were henceforth declared no longer to be *bona vacantia*.[1487] The order would also require all statutory records to be brought up to date within a specified time, this including the submission of necessary forms where applicable, and especially the lodgement of annual returns and payment of annual duty as well as those forms relating to the appointment of directors and the like.[1488]

Areas Act 41 of 1950.

1482 1982 3 SA 474 (T).

1483 *Ex parte Sengol Investments (Pty) Ltd* 477A-B.

1484 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd: Dorbyl Light and General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* para 26; Blackman 4-179.

1485 *Ex parte Stubbs: In re Wit Extension Ltd* 1982 1 SA 526 (W) 531-532; *Goodman v Suburban Estates Ltd* 1915 WLD 15 26; *Spottiswoode, Dixon and Hunting Ltd* [1912] 1 Ch 410, [1911 -1913] All ER 526; Blackman 4-179.

1486 *Ex parte Sengol Investments (Pty) Ltd* 478H; *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 362 (W) 377H; *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 310H (s 199 of the Companies Act of 1926).

1487 *Ex parte Sengol Investments (Pty) Ltd* 477B; *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 378A-B;

1488 *Re Porter* (1994) 15 ACSR 424 SC (WA); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T); *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (T); *Re M Belmont and Co Ltd* [1951] 2 All ER 898.

Although it was not required by the Companies Act of 1973 the courts usually required that the restoration order be published in the Government Gazette and newspapers circulating in the area in which the company was carrying on business at the time of deregistration.[1489] This was, however, not a must and could in some instances be dispensed with.[1490]

The proceedings for restoration of registration being ordinarily by way of unopposed *ex parte* application the costs were invariably borne by the applicant.[1491] In most cases the court did not make an order as to costs although it did happen at times that an order for costs was made against a party that unsuccessfully opposed the application.[1492] Sometimes it was ordered that the costs were to be "costs in the cause",[1493] whatever that was intended to mean in that context. Occasionally the court would order that costs were to come out of the estate of the company.[1494] Technically the making of an order for costs against the company was inappropriate since until the company was restored by the Registrar to the register of companies it was non-existent with the result that no court order could be made in its favour or against it.[1495]

Section 82(4) of the Companies Act of 2008 provides that any interested person "may" apply in the prescribed manner and form to the Companies and Intellectual Property Commission for reinstatement of registration of the company. The section does not, however, indicate how the Commission should deal with the application. The "prescribed manner and form" governing reinstatement application refer to regulation 40(7) of the Companies

1489 *Ex parte Pillay and Sons Ltd* 1951 1 SA 229 (T); *Ex parte Herr: In re Brakpan Universal Suppliers Ltd* 1925 TPD 387; *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W).

1490 *Voigt Ltd v Registrar of Companies* 1938 CPD 89; *Ex parte Cook* 1957 1 SA 367 (N).

1491 *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517.

1492 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W); *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T).

1493 *Van der Ploeg v Vivier* 1966 3 SA 218 (SWA). "Costs in the cause" essentially means that costs will follow the outcome of the case when the matter is finally determined, in which case costs would ordinarily be awarded to a successful party. In the case of granting restoration of registration the problem would normally be that such order is final with the result that there would not be another occasion on which the same issue would be determined again. A "costs in the cause" order is therefore appropriate if the application is removed from the roll or postponed and particularly so if the restoration application is contested for when the matter comes again for final hearing, an order would be made as to the party who should bear costs.

1494 *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458.

1495 The issue was discussed in chapter 8 part 8 2 above.

Regulations, 2011 in terms of which a company may be reinstated only after filing outstanding annual returns and paying outstanding prescribed fees in that regard. However, the question is whether after compliance with these and such other requirements as may be specified, the Companies and Intellectual Property Commission has a discretion to decline reinstatement of registration as the court had under section 73(6)(a) of the Companies Act of 1973. There is no clear answer to this question. Nevertheless, two things about which there is no doubt is that section 82(4) does not provide for such discretion and that the Companies and Intellectual Property Commission is a statutory body, a juristic person by the way, and not a court of law. It may not therefore have discretionary judicial powers which a court of law has, especially powers which the governing statute does not confer.[1496] However, the position of the Companies and Intellectual Property Commission is that reinstatement of registration would not be granted if the company did not have property or liabilities or was carrying on business either at the time of deregistration or thereafter.[1497] In other words jurisdictional facts must be satisfied before registration can be reinstated. This does not, however, answer the question whether, even if such requirements are satisfied, the Commission may still decline reinstatement of registration.

In the case of application for reinstatement of registration, one of the requirements is that there should be an advertisement in a local newspaper giving 21 days notice of the proposed application. It is said that the purpose of such notice is to give interested parties the

1496 In terms of s 185(1) of the Companies Act of 2008 which creates it the Companies and Intellectual Property Commission is a "juristic person" and therefore not a court of law. In terms of s 185(2) it is independent and subject only to the Constitution, the "law" and any policy statement, directive or request issued to it by the Minister in terms of this Act and must exercise the functions assigned to it in terms of this Act or any other law or by the Minister. The principle of legality requires of it to exercise no power other than that which it has been granted in terms of the Constitution, this Act, the law or functions granted by the Minister. Section 82(4) of the Act does not give it any power other than to reinstate registration of a company on application in the prescribed manner and form by an interested person. The question relating to the power of the Commission when dealing with reinstatement of registration of a company is yet to come before court. However, in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) Binns-Ward J held after obtaining reinstatement of registration of a company in terms of s 82(4) an interested party could approach the court in terms of s 83(4) for any order that is "just and equitable" in the circumstances. Obviously, it would be at that stage that the role played by the Commission in the reinstatement of registration of the company, including the power exercised by it and how that was done, would be scrutinised.

1497 Companies and Intellectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq1/ (accessed 14-08-2014).

opportunity to object to the intended reinstatement of registration.[1498] It is submitted that publishing the notice in a newspaper may not be a sufficient substitute for giving formal written notice to the creditors of the company and other interested parties whose specific interests and particulars are known. Moreover, it is not clear if after granting the application, there is a requirement that reinstatement be publicised in the newspapers or in any "prescribed manner and form" as restoration of registration in terms of section 73(6)(a) was ordinarily done. For unless there is some kind of meaningful publicity that accompanies reinstatement of registration it could be that interested persons who ought to know of that fact would not, and in some instances this would be to their prejudice as they would not be able to do or take steps which, had they known of that fact, would have well been advised to do. Once again, this is another reminder that reinstatement of registration under section 82(4) of the Companies Act of 2008 is not without problems.

9 15 FORM OF RESTORATION ORDER

A restoration order granted in terms of section 73(6) of the Companies Act of 1973, founded on the prayer in the notice of motion and a draft order based thereon, would typically provide as follows:

- Registration of the company is restored to the company register in terms of section 73(6) of the Companies Act No 61 of 1973;
- The assets of the company are declared to be no longer *bona vacantia*;
- The assets will vest in the company with retrospective effect to the date of deregistration as if the company had not been deregistered;
- The company shall be deemed to have continued in existence as if it had not been deregistered and the period between deregistration and restoration of registration shall not be counted for the purpose of prescription in the case of any creditors whose debts were not prescribed at the date when the company was deregistered;
- The costs of this application shall be costs in the administration of the company, alternatively be paid by any respondent or other person, body or institution that

1498 *Ibid.*

opposes this application.[1499]

Given that in terms of section 82(4) of the Companies Act of 2008 it is the Companies and Intellectual Property Commission and not the court that grants reinstatement of registration, it would be expected that the Commission would indeed order that reinstatement of registration of the company is granted and that assets of the company are declared to be no longer *bona vacantia* since the written consent of the Minister of Finance and the Department of Public Works would have been provided, without which reinstatement of registration would not be granted in any event. It is submitted that the other aspects of a restoration order which could be incorporated into a court order may not be dealt with by the Companies and Intellectual Property Commission as it is not a court of law nor does it have statutory basis in terms of section 82(4) to make consequential orders relating to reinstatement of registration. It is thus obvious that section 82(4) is deficient in not providing the Companies and Intellectual Property Commission with the power to make ancillary orders in the event of reinstatement of registration of a company, the Commission itself having no residual powers to make such orders.

9 16 COSTS OF RESTORATION

When a court granted a restoration order in terms of section 73(6) of the Companies Act of 1973 it usually also granted an order as to costs. The proceedings for restoration of registration being mostly by way of unopposed *ex parte* application the costs were invariably

1499 This is a specimen based on *Berrange v Registrar of Companies* [2007] ZAKZHC 35 (5 December 2007), [2008] JOL 21225 (N) para 8, with minor adaptations made. There the court would not accept a provision relating to the running of prescription, holding that it would rather leave that issue for determination at an appropriate time rather than advantage or disadvantage any of the parties at the restoration stage. However, as the English cases of *Re Donald Kenyon Ltd* [1956] 3 All ER 596 and *In re Workvale Ltd (In dissolution)* [1992] 1 WLR 416 (CA) indicate there is nothing that prevents a court, where such a case has been made out, from ordering that the period between the date of deregistration and restoration of registration should not count for the purposes of the running of prescription. For other examples of a restoration order, not all of which are similar, see *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 478G – 479B; *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 3; *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 13.

borne by the applicant.[1500] This was in line with the view of Blackman *et al*[1501] that as a general rule a party who sought revival of a defunct company had to face the prospect of bearing the costs of whatever had to be done to ensure that the restoration was properly effected. Therefore, in the absence of anyone against whom the applicant could seek an order for costs, he had to bear them himself.

In most cases the court did not make an order as to costs although it did happen at times that an order for costs was made against a party that unsuccessfully opposed the application.[1502] As noted earlier sometimes it was ordered that the costs were to be "costs in the cause".[1503] Occasionally the court would order that costs were to come out of the estate of the company.[1504] In order to overcome the problem of making an order against a company that did not exist, in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1505] the court ordered that the company would, upon its restoration to the register, be liable to pay the costs of the applicant in bringing the application. However, in the case of *Berrange v Registrar of Companies*,[1506] it would seem, the applicant wanted to have an advantage either way. There the applicant sought and was granted an order in terms of which the costs of the application were the costs in the administration of the company or alternatively to be paid by any respondent or other person, body or institution that opposed the application.

It should be noted that the issue of costs does not arise in the context of reinstatement of registration in terms of section 82(4) of the Companies Act of 2008 as application is made to the Companies and Intellectual Property Commission and not to the court. This, it is

1500 *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517.
1501 Blackman, Jooste, Everingham and Larkin *Commentary on the Companies Act* vol 1 (Revision Service 8) (2012) 4-183.
1502 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W); *Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 3 SA 469 (T) 472H - 473A.
1503 *Van der Ploeg v Vivier* 1966 3 SA 218 (SWA).
1504 *Ex parte Sprawson (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458. In *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) para 76(f) the court specifically ordered that the costs be paid by the company.
1505 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC) para 68(b)(vi).
1506 [2007] ZAKZHC 35 (5 December 2007), 2008 JOL 21225 (N) paras 8 and 20(a).

submitted, is the position notwithstanding the suggestion made in certain quarters about unnecessary wasting of costs.[1507]

9 17 SETTING ASIDE A RESTORATION ORDER

The granting of a restoration order by the court in terms of section 73(6) was not the final word as there was always an opportunity to appeal against it if one of the parties felt that the order ought not to have been granted. More interesting for present purposes though was the possibility of a court order reviewing and setting aside a restoration order. The courts have on numerous occasions hinted at such a possibility and in some instances went on to grant an order reviewing and setting aside a restoration order. In a recent decision of the Supreme Court of Appeal in *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC*[1508] Maya JA mentioned, albeit very briefly and without elaborating, that there was always "the remedy of review available to an aggrieved party to set aside the restoration if it is prejudicial".[1509]

A court order reviewing and setting aside a restoration order was granted by the Witwatersrand Local Division[1510] in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*,[1511] an appeal against which was dismissed by the Supreme Court of Appeal in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd.*[1512] There a restoration order was set aside in that:

- An interested party (Insamcor) that was materially affected by the restoration of the company with which it had a running contract, had not been joined in the restoration application and no rule *nisi* (notice of the application) was served on it;

1507 See Jacobs "Restoration of registration in terms of the new Companies Act" 2011 (September) *De Rebus* 32 where the learned author concludes: "I therefore submit that the legislator should intervene by clarifying the position in order to prevent unnecessary wasting of costs for parties seeking to restore the registration of a company."

1508 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA).

1509 *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* para 18.

1510 The court was later to be known as the South Gauteng High Court, Johannesburg in terms of the Renaming of High Courts Act 30 of 2008 which has since been repealed by the Superior Courts Act 10 of 2013 which came into operation on 23 August 2013. In terms of the Superior Courts Act the court is now known as the Gauteng Local Division, Johannesburg.

1511 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006).

1512 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).

- The applicant had failed to reveal material facts and information, which were also misrepresented, which facts would have influenced the court in arriving at a decision to grant relief.

The Witwatersrand Local Division held that failure to reveal material facts and information which could have influenced the court in arriving at a decision was in itself sufficient to warrant a dismissal of the restoration application and therefore justify the setting aside of the order complained of.[1513] The Supreme Court of Appeal, on the other hand, held that failure to issue a rule *nisi* or formal joinder of Insamcor as a necessary party, was alone sufficient to have the restoration order set aside.[1514]

In the case of restoration of registration of a close corporation under s 26(6) of the Close Corporations Act of 1984 which was done by the Registrar and not the court, and currently reinstatement of registration in terms of section 82(4) which is done by the Companies and Intellectual Property Commission instead of the court, the approach is different. Since restoration of registration by the Registrar and reinstatement of registration by the Commission constitute an administrative act, review and setting aside of such act would take place in terms of the Promotion of Administrative Justice Act of 2000[1515] (PAJA). As the court indicated in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd*:[1516]

> "Declaratory relief in respect of the registration status of a company should therefore ... as a general rule, be sought from a court only in the context of the review of a decision or failure to make a decision by the Commission in that connection."[1517]

1513 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 30, citing *Schlesinger v Schlesinger* 1979 4 SA 342 (W) 345F-H.

1514 *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 30.

1515 Act 3 of 2000.

1516 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1517 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 26. Footnote omitted.

The application of PAJA to setting aside of a restoration or reinstatement order was expressly mentioned by Pillay J in *Nulandis (Pty) Ltd v Minister of Finance*[1518] who said:

> " ... decisions of the Commission,[1519] including its failure or refusal to decide any matter that it is empowered to decide, remains the subject of review by the court by virtue of the court's inherent power of review, reinforced by the Promotion of Administrative Justice Act 3 of 2000 or in terms of s 156 of the new Act.[1520] In this regard I respectfully agree with the judgments in *Absa Bank*[1521] and *Peninsula Eye Clinic* ... which also conclude that the power to reinstate the registration of a deregistered company or close corporation vests exclusively in the Commission, leaving the power of review with the courts."[1522]

Therefore, the right to review and set aside reinstatement of registration of a company that was not properly obtained stems from the inherent power of review of the court (the common law), PAJA, section 156 of the Companies Act of 2008 as the *Nulandis* case shows and section 33(1) of the Constitution, the latter having been relied on in particular in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*.[1523] It should, however, be noted that in *Missouri Trading CC v Absa Bank Ltd*[1524] Koen J, quite incorrectly it is submitted, took the view that deregistration of a company can be set aside in terms of section 83(4), either with or without any relief that might be "just and equitable in the circumstances", if deregistration had not been properly done,[1525] for example as to the circumstances in which or the reason for which it was done. It is submitted that the approach is incorrect as section 83(4) deals with deregistration or dissolution which had been properly done, the only reason for seeking the voidance order being a good one such as for example the need to finish unfinished business of the company or simply to bring the company back to life so that it may resume normal business activities.

1518 2013 5 SA 294 (KZP).
1519 Companies and Intellectual Property Commission.
1520 Companies Act of 2008. Section 156(c) of the Act provides among others that a person may seek to enforce any provision or right in terms of the Act by applying for appropriate relief to the division of the High Court that has jurisdiction over the matter.
1521 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).
1522 *Nulandis (Pty) Ltd v Minister of Finance* para 31. Footnotes omitted.
1523 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 27.
1524 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014).
1525 *Missouri Trading CC v Absa Bank Ltd* para 39.

9 18 EFFECT OF RESTORATION OF REGISTRATION

9 18 1 General effect of restoration of registration

Section 73(6)(a) of the Companies Act of 1973 provided that when a court granted an order that registration of the company be restored "thereupon the company shall be deemed to have continued in existence as if it had not been deregistered". It is submitted that the effect of this provision was that immediately on the granting of a court order deregistration was to be disregarded as if it had never taken place. This would mean among others that all steps and activities carried out by or against the company during deregistration period, and as could have been done but for deregistration, would be valid as if the company was in existence at the time. In terms of section 73(6)(b) a restoration order could contain such directions and make such provision as to the court seemed just for placing the company and all other persons in the position, as nearly as could be, as if the company had not been deregistered. It is submitted that the effect of the subparagraph was to expressly enable the court deal with ancillary matters emanating from restoration of registration which could not be adequately covered by and dealt with under the general provisions of section 73(6)(a). Therefore, any matter which needed particular attention and warranted separate specification could best be dealt with under section 73(6)(b) rather than section 73(6)(a).

In terms of section 73(6A)[1526] if a company had been deregistered due to its failure to lodge an annual return, on application by the company concerned to the Registrar and on payment of the prescribed fee, the Registrar could restore the registration of the company and "thereupon the company shall be deemed to have continued in existence as if it had not been deregistered". The section did not provide the Registrar with the power to give directions and make such provisions which a court could make for the purpose of placing the company and all other persons in the position, as nearly as could be, is if the company had not been deregistered as was provided for in section 73(6)(b).

1526 This section was inserted by s 15 (b) of Corporate Laws Amendment Act 24 of 2006.

Section 82(4) of the Companies Act of 2008 simply provides that an interested person may apply in the prescribed manner and form to the Companies and Intellectual Property Commission to reinstate registration of the company. The section does not even provide that the Commission may reinstate registration as requested, let alone make provision for the terms on which that could be done. As the purpose of making the application for reinstatement is with a view to having it granted, it must of necessity be assumed that such will in fact be the case if the application meets the requirements set by the Commission. As to the effect of the Commission's reinstatement of registration of the company and the directions on which it may be made, the section making no provision to that effect[1527] and in the absence of satisfactory judicial interpretation of these provisions to date, any comment on the likely dispensation could only amount to tentative suggestions at best if not outright speculation. According to the author of Henochsberg[1528] "reinstate" in terms of section 82(4) means "restoration to the register with retrospective effect" and therefore is the same thing as restoration of registration under section 73(6) of the Companies Act of 1973.

There is no doubt the case of *Amarel Africa Distributors (Pty) Ltd v Padayachee*[1529] which is taken to mean,[1530] and in fact does have the effect of so holding, that reinstatement of registration of a company by the Companies and Intellectual Property Commission has retrospective operation and validates deregistration period activities by or against the company. There the court held that the "plaintiff [company] having been reinstated, the acts done by the plaintiff or against the plaintiff *from the dates of its reinstatement* should be regarded as being of full force and effect."[1531] It should be noted that the language used in the *Amarel Distributors* case is very unfortunate and regrettable. There the court referred to the acts by or against the company "from the dates of reinstatement" rather from the date of "deregistration". Surely once the company is reinstated there should be no problem with acts "by or against it" as it is reinstated precisely for that reason. Nevertheless, the acts there

1527 See for example *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD), [2004] ZAKZDHC 6 (20 March 2014) para 26 where the omission was noted.

1528 Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (Service Issue 6) (2013) 332.

1529 [2013] ZAGPPHC 87 (28 March 2013).

1530 The case was dealt with by Koen J in *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014) para 31.

1531 *Amarel Africa Distributors (Pty) Ltd v Padayachee* para 24. My emphasis.

involved, which were held to have been of "full force and effect" were in fact those done after "deregistration" rather than "reinstatement".

Because of lack of decisive authority dealing with section 82(4) of the Companies Act of 2008 the discussion that follows is based on the provisions of section 73(6) of the Companies Act of 1973 and authorities decided under it as well as those decided under its predecessor, section 199(7) of the Companies Act of 1926. Where helpful, a few Commonwealth decisions decided under similar legislation would be referred to. It is nevertheless hoped that existing authorities would be helpful in the development of jurisprudence relating to the effect of reinstatement of registration under section 82(4) of the Companies Act of 2008. After all, it would not be long before the question arises, more so that it has already been referred or simply alluded to, but not decided, in a few instances.[1532] In a recent decision Muller AJ held *obiter* in the case of *Du Rand v Companies and Intellectual Property Commission of South Africa*[1533] that reinstatement of a company in terms of the procedure envisaged by section 82(4) "*prima facie* points [to] resurrection of the company with retrospective effect". However, as the court pointed out it was not necessary to answer that question in the case. Equally, the court did not indicate the basis on which it assumed that reinstatement of registration would have retrospective effect, more so that the section does not contain any words to that effect as section 73(6) of the Companies Act of 1973 did.

The effect of a restoration order granted in terms of section 73(6) of the Companies Act of 1973 was summarised by Van Dijkhorst J in *Ex parte Sengol Investments (Pty) Ltd*[1534] as follows:

> "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

1532 See for example such recent cases as *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); *Amarel Africa Distributors (Pty) Ltd v Padayachee* [2013] ZAGPPHC 87 (28 March 20130).

1533 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 para 13.

1534 1982 3 SA 474 (T).

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 deregistration find their obligations or rights resuscitated. It follows that the restoration of the registration of a company in terms of s 73(6) may have wide-ranging effects."[1535]

Some of the many things that restoration of registration did bring about were that the company was brought back into existence as if the Registrar had never deregistered it and accordingly left all parties concerned in a position to enforce such rights as they had against the restored company just as it could itself in turn enforce its rights against them. In other words restoration of registration revived the pre-existing relationships which had been terminated by the action of the Registrar in effecting the removal of the company from the register.[1536]

To make restoration of registration as smooth and effective as possible section 73(6)(b) provided that the restoration order could contain such directions and make such provision as the court deemed just for placing the company and all other persons in the position, as nearly as possible, as if the company had not been deregistered. These provisions empowered the court to give directions and make provision for the regulation of ancillary matters related to restoration of the company. The court was, by virtue of those provisions, put in a better position to for example implement the retrospectivity of the operation of its order as the circumstances of each case warranted.[1537]

1535 *Ex parte Sengol Investments (Pty) Ltd* 477C-D. This passage was quoted with approval in *Weichelt v Triponza Trading 276 CC* [2008] ZAGPHC 201 (15 May 2008) para 14.

1536 *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) 309F; *Weichelt v Triponza Trading 276 CC* [2008] ZAGPHC 201 (15 May 2008) para 16; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

1537 Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 (Service Issue 33) (2011) 144(1).

It is submitted that the effect of the two paragraphs, namely section 73(6)(a) and (b) of the Companies Act of 1973 is best summarised by the statement made by Sir R Evershed MR in *Tyman's Ltd v Craven*[1538] where his Lordship said:

> "During the period of the company's suspended animation, the company, as well as third parties, might well have abstained from taking those steps - a step in an action, or the exercise of some contractual right - for which the proper time might have in the meantime expired. In my judgment, the final words of the sub-section can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both [the] company and third parties in the same position as they would have occupied in such cases if the dissolution [deregistration] of the company had not intervened. More generally the final words of the sub-section seem to me designed not, by way of exposition, to qualify the generality of that which preceded them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the 'as you were position', which, according to the ordinary sense of those general words, is *prima facie* their consequence."[1539]

The "as you were" position is queried in South African jurisprudence. In M*outon v Boland Bank Bpk*[1540] Schutz JA took issue with the fact that the legislature in section 26(7) of the Close Corporations of 1984, which was the equivalent of section 73(6) of the Companies Act of 1973, created a fiction in terms of the deeming provisions, providing that a close corporation which in fact ceased to exist on deregistration, would be deemed not to have so ceased to exist on restoration of its registration. After all, the legislature could not recall time past. The court said:

> "The legislature has created a statutory fiction that a corporation never ceased to exist, when in fact it did. But I do not think that we should attribute to the legislature a belief that it can actually recall time passed, for, as the poet said:
>
> *'The moving Finger writes; and, having writ,*
>
> *Moves on: nor all thy Piety or Wit*
>
> *Shall lure it back to cancel half a Line.'*
>
> More prosaically, I agree with Bennion *Statutory Interpretation* 3rd ed [1997] sec 304 at 736, where the learned author says:
>
> 'The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further.'"[1541]

1538 [1952] 1 All ER 613 (CA), [1952] 2 QB 100.
1539 *Tyman's Ltd v Craven* 619.
1540 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA), [2001] ZASCA 58 (10 May 2001).
1541 *Mouton v Boland Bank Bpk* paras 12 – 13.

Again in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1542] Brand JA was critical of the "as you were" approach, holding that it was "an over simplification to regard a restoration order as no more than an 'as you were'" as such order could cause severe prejudice to third parties who, for instance, upon deregistration of the company acquired rights to its property, such as the State does in terms of the *bona vacantia* principle, and who lose those rights when registration of the company is restored.[1543] The court held:

> "As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company – precisely because the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order seems to validate, retrospectively, all acts done since deregistration – including, for example, the institution of legal proceedings – on behalf of a company that did not exist."[1544]

There is therefore more to restoration of registration than one would wish to assume.

9 18 2 Effect of restoration of registration on activities carried out during deregistration period

9 18 2 1 *General*

There are two schools of thought relating to the effect of restoration of registration on activities by or against the company during deregistration period. The first school of thought holds that since deregistration deprives a company of legal existence and renders it, as it were, "completely dead", during that period the company is not able to act nor can anybody act on its behalf, any attempt to do so being a mere act of "usurpation".[1545] In the same manner, no action or steps may be validly taken against it during that period. Therefore,

1542 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).
1543 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 24.
1544 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 23.
1545 The issue was discussed at length in chapter 4 above.

whatever action has been taken by or against the company during that period will not be validated by subsequent restoration of its registration.

The second school of thought is the opposite of the first and holds that notwithstanding the death and non-existence of a company due to deregistration, restoration of registration changes the picture completely. Apart from bringing the company back to life, restoration of registration also breathes life into activities and steps by, for or against it and which took place during deregistration period. This has to be since section 73(6)(a) of the Companies Act of 1973, as well as its predecessor under the Companies Act of 1926, being section 199(7), provided that upon the granting of a restoration order by the court the company would be "deemed to have continued in existence as if it had not been deregistered". After all, in terms of section 73(6)(b) the court had the power to give such directions and make such provision as seemed just for placing the company and all other persons in the position as if the company had not been deregistered. Therefore, the effect of the words "as if the company had not been deregistered" was to disregard deregistration period.

Interestingly, both schools of thought come from the same source, namely the decision of the English Court of Appeal in *Tyman's Ltd v Craven*[1546] where the majority, per Evershed MR, followed the retrospective validation of deregistration period activities while in a dissenting judgment Jenkins LJ held that no automatic validation of such activities should follow, which validation would take place only if a court makes declaration to that effect.

1546. [1952] 1 All ER 613 (CA), [1952] 2 QB 100.

9 18 2 2 *First school of thought: Restoration of registration does not have retrospective effect*

The foundation of the first school of thought which denies automatic validation of post-deregistration activities is the dissenting judgment of Jenkins LJ in *Tyman's v Craven.*[1547] His Lordship's approach was that the effect of the deeming provisions in section 353(6) of the UK Companies Act of 1948 which provided that after the granting of a restoration order the company "shall be deemed to have continued in existence as if its name had not been struck off" was amply satisfied by the necessity of restoring the company to its original corporate status and preserve its identity as the same company and the same legal person as was previously deregistered. For if that were not so obvious difficulties as to incorporation, membership, share capital, and so forth, would arise, and if the resuscitated company was brought into being as a legal entity distinct from the dissolved one, claims by and against the resuscitated company in respect of the pre-deregistration deals of the deregistered company would not be maintainable. Accordingly, the notional continuation of the company's existence brought about by the deeming provisions related not to activities of the company during deregistration period but its identity so that after restoration of registration the old company, as opposed to a new one, would have been brought back to life.[1548] For that reason, said Jenkins LJ, the true construction and effect of the deeming provisions was no more than that a restoration order:

- Operated to restore and preserve the original corporate status and identity of the company as if its name had not been struck off the register;
- Could at the discretion of the court provide for validation of acts purporting to have been done by or on behalf of the company while it had been in a state of deregistration so far as the court considered it just to do so, having regard to the rights and interest of all parties concerned; but
- Did not, in the absence of any such provision in a court order, have the effect of validating any such acts.[1549]

1547 *Ibid.*

1548 *Tyman's Ltd v Craven* 622. See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 3 All SA 183 (WCC) para 22 which was dealt with in *Missouri Trading CC v Absa Bank Ltd* 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014) para 32.

1549 *Tyman's Ltd v Craven* 623.

A few South African decisions have since endorsed the above approach, and it cannot be over-emphasised that they are very few indeed. It should be mentioned though that such cases are in the minority and do not represent the predominant view in South African corporate law jurisprudence. For example, in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd*[1550] Binns-Ward J indicated that the retrospectivity theory would not apply under the Companies Act of 2008 as section 82(4) does not contain anything, at least expressly, equivalent to the retrospectivity provisions that obtained in terms of section 73(6)(a) and (b) of the Companies Act of 1973.[1551] The court added that even if the company were restored to registered status it did not necessarily follow that an infusion of validity to activities conducted ostensibly by and on its behalf while it was in law actually non-existent would inevitably attend the restoration.[1552]

The view that restoration of a company does not have retrospective effect was taken in *Village Freezer t/a Ashmel Spar v C A Focus CC*[1553] where the court accepted the contention that the purpose of section 26(7) of the Close Corporations Act of 1984, which provided for restoration of registration of close corporations and was similar to section 73(6)(a) of the Companies Act of 1973, was to restore a corporation with its assets and liabilities which existed before deregistration but not to validate or revive legal proceedings which were commenced during the period of deregistration.[1554] Accordingly, during deregistration period prescription ran and resulted in a debt prescribing, which debt would not be saved by serving a summons during that period. Restoration of registration did not therefore validate a summons served during deregistration period so as to interrupt prescription.[1555]

1550 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1551 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 5.

1552 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 22. There the court criticised cases such as *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) and *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* [2012] ZAWCHC 36 (24 April 2012) for endorsing a contrary view.

1553 2012 6 SA 80 (ECG).

1554 *Village Freezer t/a Ashmel Spar v C A Focus CC* para 6.

1555 *Village Freezer t/a Ashmel Spar v C A Focus CC* paras 18, 19, 20, 24 - 26. Like Binns-Ward J did in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC), the court criticised Brand JA's contrary approach in

The same approach was followed in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa*[1556] which did not refer to the *Village Freezer* case, probably because it was not yet reported. Henney J, noting that section 82(4) of the Companies Act of 2008 does not have the deeming provisions which were contained in section 73(6)(a) and section 73(6A) of the Companies Act of 1973 held:

> "If parliament wanted to retain these [retrospectivity] provisions it would have expressly stated so, by either enacting similar or identical provisions or by stating its intentions to do so under sch 5 of the Act. As such, it is my view that in terms of the new Act, it was the intention of the legislature not to retain the retrospective provision in terms of the previous Act."[1557]

The court rejected *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1558] where Van Oosten J held that the court could exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the Companies Act of 2008, on application or otherwise, to validate anything done by or against the affected company, between deregistration and its reinstatement, and make such order as it considered appropriate.[1559] Henney J held that a court could not exercise its inherent jurisdiction to grant relief where no provision was made for such relief in terms of the law. In the instant case the legislature in the Companies Act of 2008 expressly stated its intention not to retain the retrospectivity provisions which provided for a situation that a company, which had been deregistered, should upon restoration of registration be deemed to have continued in existence as if it had not been deregistered. A High Court could not in the exercise of its inherent powers negate the unambiguous expression of the legislature's intent, so it was said.[1560]

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) as being incorrect and *obiter*.

1556 2013 3 SA 78 (WCC).

1557 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* para 24. Footnote omitted.

1558 2013 1 SA 570 (GSJ).

1559 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* para 26.

1560 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* para 28.

Therefore, according to this theory and as reiterated in *Missouri Trading CC v Absa Bank Ltd*[1561] the position is as follows: "There would be no compelling reason to conclude that its reinstatement would operate retrospectively. The change in the wording from the previous statutory provisions points to prospectivity."[1562]

9 18 2 3 *Second school of thought: Restoration validates activities retrospectively to date of deregistration*

The provisions of section 73(6)(a), (b) and section 73(6A) of the Companies Act of 1973, their predecessor section 199(7) of the Companies Act of 1926, and their equivalent in the Companies Acts of the UK, and particularly section 353(6) of the UK Companies Act of 1948 have received considerable judicial scrutiny in both South African and English law. The predominant view that emerges is that restoration of registration has retrospective effect and has the result that actions and steps taken during deregistration period by and against the company are validated by restoration of registration. This is all the more interesting since as already indicated deregistration terminates the existence of a company as a legal person or any other thing for that matter. During the period of deregistration the company "remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution [deregistration] to have been void. Then, and only then, is the company restored to activity."[1563] During that period the company being non-existent it could not lawfully do anything. Likewise nothing could be done for or against it. Acts done for it or in its name during that time were mere acts of usurpation.[1564] As Maya JA put it in *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC*[1565] once deregistration takes place:

> "... a corporation loses its legal personality and ceases to exist. It is trite that an entity with no legal personality cannot perform a juristic act such as entering into a contract ... agreements concluded during the respondent's state of deregistration were entirely void." [1566]

1561 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014).
1562 *Missouri Trading CC v Absa Bank Ltd* para 37.
1563 Per Jenkins LJ in *Tyman's Ltd v Craven* [1952] 1 All ER 613 (CA) 626, [1952] 2 QB 100.
1564 *Tyman's Ltd v Craven* [1952] 1 All ER 613 (CA) 626; *Bowman v Sacks* 1986 4 SA 459 (W) 463H.
1565 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA).
1566 *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* para 10. Footnotes omitted.

Notwithstanding the clarity and validity of the above general principles the court per Evershed MR held in *Tyman's Ltd v Craven*[1567] that a restoration order made it "at least reasonable and sensible to expect that the re-animation of the company should be retro-active in its effect." [1568] The retroactive effect of a restoration order meant that all activities carried out by, for, in the name of and against a deregistered and therefore non-existent company were conditionally valid, the condition being restoration of registration of the company. Once the condition was fulfilled all the activities were valid and binding since a restoration order had retroactive effect. As the court indicated, "by the terms of the sub-section, the company had ... to be deemed to have continued in existence as if its name had never in fact been struck off the register".[1569] The logical consequence of this approach was that it was possible for a company to conditionally acquire rights and incur obligations during deregistration, which condition would be fulfilled when registration was restored.

Fairly soon after *Tyman's Ltd v Craven*[1570] the Chancery Division held, per Roxburgh J, in *Re Donald Kenyon Ltd*[1571] that in the case of creditors whose debts were not statute-barred, that is had not prescribed, the period between the date of dissolution (deregistration) and the date of restoration to the register should not be counted for the purposes of any statute of limitation (prescription).[1572] That meant that restoration of registration was retrospective so as to preserve during deregistration period the rights and obligations which would otherwise have been lost but for retrospective restoration of registration.

South African case law dealing with retrospectivity of restoration of registration is fairly settled and accepts such as the position. In *Berrange v Regstrar of Companies*[1573] the court briefly noted that the parties had accepted that in terms of section 73(6)(a) the automatic and general effect of a restoration order granted without qualification was that the company was deemed to have continued in existence as from the date of deregistration as if it

1567 [1952] 1 All ER 613 (CA), [1952] 2 QB 100.
1568 *Tyman's Ltd v Craven* 619. The decision was followed more recently in *Top Creative Ltd v St Albans District Council* [2000] 2 BCLC 379 (CA) 385e-387f; *Royal Bank of Canada v Cressler Hotels Ltd* 1980 CanLII 1072 (AB QB).
1569 Per Sir R Evershed MR in *Tyman's v Craven* 620.
1570 [1952] 1 All ER 613 (CA), [1952] 2 QB 100.
1571 [1956] 3 All ER 596.
1572 *Re Donald Kenyon, Ltd* 599.
1573 [2007] ZAKZHC 35 (5 December 2007), 2008 JOL 21225 (N).

had not been deregistered.[1574] This was in line with the *obiter dictum* of Brand JA in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd*[1575] who said:

> "… a restoration order seems to validate, retrospectively, all acts done since deregistration – including, for example, the institution of legal proceedings – on behalf of a company that did not exist."[1576]

The issue was also dealt with in the context of section 26(7) of the Close Corporations Act of 1984 in N*obel Crest CC v Kadoma Trading 15 (Pty) Ltd*[1577] where Saba AJ held that the intention of the legislature in incorporating the deeming provisions in the section was to ensure that the obligations of a close corporation which could not be enforced because of deregistration were revived on restoration of registration and could be enforced.[1578] The purpose and object of the deeming provisions in section 26(7) was to validate agreements concluded on behalf of a close corporation while it was deregistered. Therefore, the defects in the validity of the agreements entered into on behalf of a company while it was deregistered were cured by its later re-registration.[1579] The decision was upheld on appeal to the Supreme Court of Appeal under the name *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC*[1580] where Maya JA held:

> "I see no reason to depart from the plain meaning of the words used in s 26(7) in the circumstances. They simply mean what they say – that a corporation deemed to have continued in existence as from the date of its deregistration as if it were not deregistered, is deemed to have been in existence with legal personality and is capable of performing juristic acts, including entering into valid contracts. The interpretation which the court below gave to the deeming provisions was therefore correct."[1581]

The case is understood to mean that the company's actions and conduct during the period of deregistration are deemed to have been undertaken by an existing company.[1582]

1574 *Berrange v Registrar of Companies* para 12.
1575 2007 4 SA 467 (SCA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007).
1576 *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* para 23.
1577 2012 ZAWCHC 36 (24 April 2012).
1578 *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* para 22.
1579 *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* para 23.
1580 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA).
1581 *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* para 19.
1582 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC) para 21.

Section 82(4) of the Companies Act of 2008 is different from section 73(6)(a), (b) and section 73(6A) of the Companies Act of 1973 in that it does not have deeming provisions or those that give the court the discretion to make an order as may seem just to the court.[1583] After all it is not even the court but the Companies and Intellectual Property Commission which reinstates registration. Be that as it may in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1584] Van Oosten J held *obiter* that the word "re-instate", as used in section 82(4), implied that restoration to the register was meant to be with retrospective effect.[1585] However, in that case the court did not consider it necessary to decide whether retrospectivity followed *ipso facto* upon reinstatement.[1586] Nevertheless, the court added, again *obiter*, that there was no reason why a court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision in terms of section 82(4) of the Companies Act of 2008, on application or otherwise, to validate anything done by or against the affected company between deregistration and its reinstatement, and to make such order as was considered appropriate.[1587] According to yet another *obiter dictum* it is not even necessary for the court to exercise its inherent jurisdiction since, as Muller AJ put it in *Du Rand v Companies and Intellectual Property Commission of South Africa*:[1588] "Reinstatement of a company in terms of the procedure envisaged by s 82(4), *prima facie* points [to] resurrection of the company with retrospective effect."

1583 This issue was noted by Cachalia JA in *CA Focus v Village Freezer t/a Ashmel Spar* 2013 6 SA 549 (SCA) para 22 where it was suggested that because of the many anomalies which would normally arise when restoration operates retrospectively, that could be the reason for not including retrospective provisions in s 82(4) of the Companies Act of 2008. Moreover, as there was in s 73(6) of the Companies Act of 1973, and now s 82(4) of the Companies Act of 2008, no time limit within which application for restoration of registration had to be made, it could potentially be sought and granted a decade later, during which time a few things could have happened, such as commencing and finalising litigation before restoration of registration was granted. The issue would be whether all those deregistration period activities were validated by restoration of registration, no doubt a very difficult question to answer in some instances.

1584 2013 1 SA 570 (GSJ).

1585 In coming to this conclusion the court relied on *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 189 (WCC), a case where the issue was not finally determined. In the *Peninsula Eye Clinic* case Binns-Ward J opined (para 21) that the legislature's use in s 82(4) of the Companies Act of 2008 of the word "reinstate", with its connotation of placing the object in issue in its former position, implied that restoration to the register was meant to be with retrospective effect. The court added, however, that even if the company were restored to registered status with retrospective effect, it did not follow that an infusion of the arbitration proceedings conducted ostensibly by and on behalf of the company while it was in law actually non-existent, due to deregistration, would inevitably attend the restoration (para 22).

1586 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 13.

1587 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 14.

1588 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 para 13.

9 19 NECESSITY OF A COURT ORDER

Because of the difficulty of determining whether a reinstatement order granted by the Companies and Intellectual Property Commission in terms of section 82(4) of the Companies Act of 2008 has retrospective effect, which doubt was entertained in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd*[1589] and *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1590] even though both cases would rather prefer reinstatement of registration having retrospective effect, it is submitted that the proposition suggested by Van Oosten J in the *Fintech* case has merit and ought to be followed as it could solve a few problems. The proposition is to the effect that after receiving a reinstatement order granted by the Companies and Intellectual Property Commission, which would invariably be neutral on the retrospectivity issue, the solution would be to approach the court by way of application for an order declaring the reinstatement thus granted to have retrospective effect and thus validate activities by or against the company carried out during deregistration period. Doing so would result in a two-stage approach to validate deregistration period activities, first by obtaining a reinstatement order issued by the Commission followed by a court order. That would no doubt be expensive in terms of time and money but would nevertheless bring about the desired result. Referring to the need for a court order, Van Oosten J, in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd*[1591] said:

> "I can see no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the 2008 Act, on application or otherwise, to validate anything done by or against the affected company between deregistration and its reinstatement, and to make such order it considers appropriate."[1592]

Although the "inherent jurisdiction" of the court to make an order in terms of section 82(4) has since been questioned and rejected by Henney J in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa*,[1593] as the section does not provide a basis on which to

1589 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).
1590 2013 1 SA 570 (GSJ).
1591 *Ibid.*
1592 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 14. Footnote omitted.
1593 2013 3 SA 78 (WCC) paras 27 – 28.

make such an order, it is nevertheless submitted that Van Oosten J's proposed solution to an obviously burning issue has much merit and should be supported.

9 20 EFFECT OF RESTORATION OF REGISTRATION ON PRE-DEREGISTRATION DEBTS OF A CLOSE CORPORATION

Section 26(5) of the Close Corporations Act of 1984 provided that if a corporation was deregistered while having outstanding liabilities, persons who were members of such corporation at the time of deregistration were jointly and severally liable for such liabilities. In subsection (6) provision was made for restoration of registration of a corporation in terms of subsection (7) as from the date of restoration of registration, this being the date on which the Registrar of Close Corporations gave notice to that effect in the Government Gazette. From that date the position was that the "corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered".[1594]

The Act did not indicate whether liability of the members which arose in terms of section 26(5) came to an end or continued after restoration of registration. All that it said was that the corporation would continue in existence and be deemed to have continued in existence as from the date of restoration of registration as if it were never deregistered. It was therefore possible that the decision could go either way as the matter was entirely in the hands of the courts to determine.

In *Boland Bank Ltd v Mouton*[1595] the High Court per Rose Innes J held that restoration of registration of a close corporation had no effect on liability of members of the corporation for its debts as provided for in section 26(5), which liability continued to exist. The court

---

1594 14 December 2007 is the date on which s 62(c) of the Corporate Laws Amendment Act 24 of 2006, which amended s 26(7) of the Close Corporations Act of 1984, came into operation. Because of the amendment, as from that date the date of restoration of registration was to be determined in the "prescribed manner" rather than by way of publication of notice to that effect in the Government Gazette.

1595 [1997] 4 All SA 67 (C).

made this important finding in a carefully considered decision which started with a broad overview of the philosophy and approach of the Act regarding the question of civil and criminal sanctions relating to observance of and compliance with the provisions of the Act. In this respect the approach of the court was that as the Act had very little criminal provisions to ensure compliance with its requirements, the provisions governing civil liability of members of the corporation could be used as some kind of punishment for non-compliance with the requirements of the Act. This, it is submitted, was a wrong approach. A classic example of the unfortunate approach of the court reads:

> "The liability of members under s 26(5) is a sanction and penalty imposed by the Act upon members who neglect and fail to inform the Registrar, as is contemplated by s 26(1) and (2), when notified of the proposed deregistration of their corporation, that it is carrying on business or is in operation or has assets or liabilities, or who falsely inform the Registrar that the corporation has ceased to carry on business and has no assets or liabilities. The consequence of such a default or misrepresentation may well be that the corporation is deregistered in circumstances in which it is inappropriate that the corporation should be deregistered. In effect the members would have permitted or procured the provisions of s 26 for the deregistration of the corporation to be misapplied or have abused those statutory provisions ... The provisions of s 26 convey no indication whatsoever that it was intended that the penalty imposed by the Act, as a sanction against the defaults or misrepresentations aforementioned, once incurred, should be remitted upon reregistration of the corporation."[1596]

It is submitted that to the extent that the case held that after restoration of registration liability of members of the corporation for its pre-deregistration debts continued unaffected, the decision is regrettable and should not have enjoyed support in cases that followed. Nevertheless, the decision was followed in *Commissioner for SARS v Mendes*[1597] where Ludorf J held that members' personal liability for debts of a close corporation had to continue after restoration of registration as legislation did not provide either expressly or by implication for the extinction of such liability, saying that had the "legislator intended that to be the case it would have said so."[1598] An appeal against the decision of Rose Innes J was dismissed by the Supreme Court of Appeal in *Mouton v Boland Bank Ltd*[1599] where Schutz JA reiterated that members' personal liability for the debts of a close corporation which arose

1596 *Boland Bank Ltd v Mouton* 78f – i.
1597 [2001] 2 All SA 316 (SE).
1598 *Commissioner for SARS v Mendes* 319c.
1599 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA), [2001] ZASCA 58 (10 May 2001).

in terms of section 26(5) continued after restoration of registration of a close corporation. This approach has since enjoyed consistent following and that without dissent.[1600]

It should be noted that section 26(5) of the Close Corporations Act of 1984 had no equivalent in the Companies Act of 1973. The problems which it raised did not therefore arise as far as companies were concerned. Because of the hardship which the section created for members of a close corporation who became personally for its debts, to attend to their plight the section was amended in 2006. Section 1 of the Close Corporations Amendment Act of 2005[1601] introduced a new section 26(7) of the Close Corporations Act of 1984 which provided that when the Registrar gave notice of restoration of registration of a corporation in the Government Gazette, and as from the date of such notice, the corporation would be deemed to have continued in existence as from the date of deregistration as if it had not been deregistered and that a member or any other person having a material interest could apply to court for any one or more of the following orders, namely:

- An order that the legal liability incurred by a member in terms of subsection (5) would cease to exist;
- An order that the corporation whose registration had been restored would become liable for any liabilities incurred by a member of the corporation in terms of subsection (5);
- An order that the corporation whose registration had been restored would compensate a member who lawfully paid a claim that arose as a consequence of the provisions of subsection (5);
- Any other order that the court on the basis of fairness deemed appropriate.

As already indicated the above provisions were removed from the Close Corporations Act of 1984 by section 62(c) of the Corporate Laws Amendment Act of 2006 which came into effect on 14 December 2007. Furthermore, it should also be noted that the whole section 26 of the Close Corporations Act of 1984 has since been repealed by the Companies Act of 2008. Deregistration of close corporations, like that of companies, is now governed by section 82 of

1600 *Edward Street Property Investments CC v Lambrechts* [2010] ZAWCHC 218 (1 December 2010); *Boseme v Rogers* [2011] ZAGPJHC 174 (23 November 2011); *Absa Bank Ltd v Hlathini Safaris* [2012] ZAGPJHC 176 (17 August 2012).

1601 Act 25 of 2005 which came into effect on 11 January 2006.

the Companies Act of 2008 which does not have provisions imposing personal liability on members of a close corporation on its dissolution. Therefore, the issue of continued personal liability of members of a close corporation on reinstatement of its registration in terms of section 82(4) of the Companies Act of 2008 does not arise.[1602]

9 21 EFFECT OF RESTORATION OF REGISTRATION ON RUNNING OF PRESCRIPTION

9 21 1 General

The general principle governing prescription of debts is found in section 15(1) of the Prescription Act of 1969[1603] which provides among others that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. It is submitted that the position is the same whether the company, whose registration has since been restored, is the creditor or debtor for in each case the same considerations would arise. The question whether prescription runs against a company during deregistration period is a rather tricky one. For a start, it is trite that a summons issued by a company after deregistration is a nullity.[1604] It is submitted that the position is the same regarding summons issued against a deregistered company as in either case the company, by virtue of deregistration, would have ceased to exist, regardless of whether the summons was issued by or against it.

1602 This issue is also picked up and commented on by Smith Tabata Buchanan Boyes "Impact of the new Companies Act on the Close Corporations Act" http://www.stbb.co.za/upload/stbb_lul-2013s2.pdf (accessed 02-11-2013).

1603 Act 68 of 1969.

1604 *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 Ltd v SA Linde (Pty) Ltd* 1973 3 548 (W) 549C-E; *Pieterse v Kramer* 1977 1 SA 589 (A) 597H and 601H.

9 21 2 The view that prescription does run

There is a minority voice which argues that prescription does run during deregistration period with the result that when restoration of registration is granted, the rights and claims lost during that period would not be revived and steps taken would not be validated. This argument was raised in *Berrange v Registrar of Companies*[1605] where one of the respondents (PWC) sought an order to the effect that a summons issued against it by a deregistered company was a nullity and that prescription continued to run in its favour until a fresh summons was issued after restoration of registration.[1606] The court rejected the argument holding that such a qualification would severely prejudice the company and give PWC an unfair advantage by providing an opportunity to capitalise on an administrative error that resulted in deregistration of the company, turning such administrative error into a defence.[1607] However, the argument was accepted in *Village Freezer t/a Ashmel Spar v C A Focus CC*[1608] where Makaula J held that when the legislature enacted section 26(7) of the Close Corporations Act of 1984 it never intended it to affect the prescription rights bestowed by the Prescription Act of 1969 by reviving a debt due to a close corporation which prescribed during the course of deregistration period.[1609] The court added that a right was created in favour of the defendant at the time when the debt was extinguished by prescription during deregistration period. Such right, once so extinguished, could not be revived by some fiction in section 26(7) which deemed the corporation to have been in existence at the time of the issue of summons during deregistration period. After all, there was a presumption, if not a canon of construction, that a statute would not remove existing rights, and that rights would not be lightly presumed to have been taken away by mere implication.[1610]

The view that prescription does run during deregistration period can be accepted as the minority voice that does not command much following. It should therefore be accepted as one way of seeing things even though it does not command much support.

1605 [2007] ZAKZHC 35 (3 December 2007), 2008 JOL 21225 (N).
1606 *Berrange v Registrar of Companies* para 9.
1607 *Berrange v Registrar of Companies* para 19.
1608 2012 6 SA 80 (ECG).
1609 *Village Freezer t/a Ashmel Spar v C A Focus* CC paras 27 - 28.
1610 *Village Freezer t/a Ashmel Spar v C A Focus* CC para 19. In this respect the court referred to *Mouton v Boland Bank Ltd* 2001 3 SA 877 (SCA) para 10.

9 21 3 Prescription does not run approach

When granting a restoration order, it is permissible for a court to add a proviso to the effect that in the case of creditors whose debts were not statute-barred at the date of deregistration, the period between the date of deregistration and the date of restoration of registration shall not be counted for the purposes of any statute of limitation, that is, prescription, so held Roxburgh J in *Re Donald Kenyon Ltd.*[1611] The opposite of that order was sought but rejected in *Berrange v Registrar of Companies*[1612] where Theron J held that doing so would severely prejudice the company by giving the creditors an unfair advantage of capitalising on an administrative error that resulted in the deregistration of the company. After all, an administrative error of deregistering a company should not turn into a defence.[1613] Significantly, in the *Berrange* case the parties accepted that in terms of section 73(6)(a) of the Companies Act of 1973 the automatic and general effect of a restoration order granted without qualification was that the company was deemed to have continued in existence as from the date of deregistration as if it had not been deregistered.[1614] In essence that had the effect that prescription did not run during deregistration period as steps taken during that period, by or against the company, would be validated by a restoration order since the company would be taken to have been in existence at the relevant time.

The principle that prescription is interrupted by issuance and service of a process commencing legal proceedings and accordingly does not run during deregistration period was accepted by the court in *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)*[1615] where Binns-Ward J, dealing with counsel's submissions, explained the position thus:

> "The potential restoration of the deregistration of the corporation entails that the action might be resumed at any time in the future and the defendant to continue to provide for that eventuality. The

1611 [1956] 3 All ER 596 599H.
1612 [2008] JOL 21225 (N), [2007] ZAKZHC 35 (5 December 2007).
1613 *Berrange v Registrar of Companies* 2008 JOL 21225 (N), [2007] ZAKZHC 35 (5 December 2007) para 19.
1614 *Berrange v Registrar of Companies* para 12.
1615 2011 5 SA 14 (WCC), [2011] ZAWCHC 261 (9 June 2011).

effect of s 15 of the Prescription Act 68 of 1969 is that the running of prescription against the corporation was interrupted when it served summons claiming payment of the alleged debt on the defendant. If the registration of the corporation were to be restored at any time in the future the plaintiff could, by reason of the deeming effect of s 26(7) of the Close Corporation[s Act of 1984] and notwithstanding the intervening passage of time, resume the prosecution of the action."[1616]

The latest case dealing with this issue is *CA Focus CC v Village Freezer t/a Ashmel Spar*[1617] where, reversing the decision of the High Court in *Village Freezer t/a Ashmel Spar v CA Focus*,[1618] the Supreme Court of Appeal, per Cachalia JA, noting that the issue for determination was whether or not section 26(7) of the Close Corporations Act of 1984 had the effect of retrospectively validating an invalid summons issued by a close corporation after deregistration so as to interrupt the running of prescription, held that as there was no limitation or qualification to section 26(7), the section placed all parties, including third parties, in the same position as if there were no deregistration.[1619] In other words, prescription did not run during deregistration period. The court did, however, note anomalies that would arise from the operation of the principle such as, for example, the fact that there was no time limit within which restoration of registration had to be sought, this having the result that it could notionally be sought and granted a decade after the date of deregistration. The issue in that event would be whether all those things which happened during deregistration should be reversed. The court concluded that all those anomalies were an incident of the purpose of the section. The court could not decline to give effect to that purpose only because the section gave rise to anomalies since in the absence of any ambiguity there was no room to give the section a meaning that did not accord with its plain meaning.[1620]

1616 *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* para 3.
1617 2013 6 SA 549 (SCA).
1618 2012 6 SA 80 (ECG).
1619 *CA Focus CC v Village Freezer t/a Ashmel Spar* para 11.
1620 *CA Focus CC v Village Freezer t/a Ashmel Spar* paras 21 - 22.

9 22 EFFECT OF RESTORATION OF REGISTRATION ON *BONA VACANTIA*

The effect of an order restoring the company to the register of companies is that the State is divested of ownership of property it acquired as *bona vacantia.*[1621] The vesting of the property in the State as *bona vacantia* being an invariable consequence of deregistration the position is such that the revesting of the property in the company upon restoration of registration is automatic. This can be gathered from among others the *dictum* of Van Dijkhorst J in *Ex parte Sengol Investments (Pty) Ltd*[1622] where he explained:

> "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 these assets will revert to the company. This includes assets which have become *bona vacantia* and as such accrued to the State."[1623]

Revesting of *bona vacantia* property in the restored company being as it were automatic, it follows that truly speaking no court order to that effect was necessary.[1624] In practice, however, an application for restoration of the company to the register included as one of the prayers a request that the assets of the company be declared to be no longer *bona vacantia.*[1625] In *Berrange v Registrar of Companies*[1626] the request, which was granted, went a little further to seek an order that the assets of the company were declared to be no longer *bona vacantia* and were to vest in the company with "retroactive effect to the date of deregistration as if [the company] had not been deregistered".[1627] Vesting of the assets in the

---

1621 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 478A; *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); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

1622 1982 3 SA 474 (T).

1623 *Ex parte Sengol Investments (Pty) Ltd* 477C-D.

1624 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC) para 61 where the court dealt with voidance of dissolution of a company that had been deregistered precisely because the appellant Absa Bank was not able to have its registration reinstated by the Companies and Intellectual Property Commission as it could not comply with annual returns filing obligations.

1625 *Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T); *Ex parte Reid M F* 1982 1 PH E5 (N).

1626 [2008] JOL 21225 (N), [2007] ZAKZHC 35 (5 December 2007).

1627 *Berrange v Registrar of Companies* para 8. A restoration order on similar terms which provided that the assets of the company revested in it "with retrospective effect to the date of deregistration and as if the company had not been deregistered" was set aside on procedural company with retrospective effect to the date of deregistration is acceptable but that is not so in the case of voidance of dissolution,[1628] a matter which is discussed in the next chapter.

9 23 EFFECT OF RESTORATION OF REGISTRATION ON DIRECTORS

The effect of both deregistration and restoration of registration of a company on the office of directorship is correctly summarised by Kunst, Delport and Vorster who, commenting on section 73 of the Companies Act of 1973 say:

> "It is submitted that ... deregistration automatically terminates the office of a director: for no-one can be a director of a non-existent company. It is further submitted that the provisions of sub-s (6)(a) do not have the effect of automatically restoring a former director to his office as such: it is necessary for the company again to appoint directors. Where in the circumstances this cannot be done in accordance with the articles (eg because of the impossibility of obtaining a quorum for a general meeting) ... the Court can make an appropriate order to this end. It is further submitted that because at the stage when its registration is restored the company would be without directors, the Court should not entertain an application for its winding-up to be heard immediately upon the grant of the order for restoration: for the company would be powerless to defend itself against such application through there being no-one with authority to take any decision on its behalf ..."[1629]

Seeing that after restoration of registration there should be an appointment of directors and other officers of the company, evidence is required to show how this is to be done.[1630] The court could, in the exercise of its power to give directions and make such provisions as to it may seem just for placing the company and all other persons in the position, as nearly as may

---

grounds and on the basis of non-disclosure in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006). An appeal against the High Court order was dismissed by the Supreme Court of Appeal in *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).

1628 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC) para 63.

1629 Kunst, Delport and Vorster (eds) *Henochsberg on the Companies Act* vol 1 (Service Issue 33) (2011) 144(2).

1630 *Re Amtrao Pty Ltd* (1994) 13 ACSR 654 SC (NSW).

be, as if the company had not been deregistered, direct the applicant to call meetings of the shareholders to determine by whom the affairs of the company are to be conducted.[1631]

It is submitted that in the case of reinstatement of registration of a company by the Companies and Intellectual Property Commission in terms of section 82(4) of the Companies Act of 2008 the critical issue is the circumstances under which the company was deregistered. If the company was deregistered when it was very much active, and deregistration practically having no effect on the activities of a company, such as where the company was deregistered for failure to file annual returns, there should be no problem with continuation of activities after reinstatement of registration. After all, not much would have changed in a practical sense as business would have continued as usual, obviously nobody being aware that the company had been deregistered.

The position would be different though if the company was defunct in the sense that it had long ceased doing business at the time of deregistration. In that event its revival would be necessary. To that end the Companies and Intellectual Property Commission would do a worthwhile work in giving guidance relating to the holding of the first meeting of members of the company so that a decision could be taken on the way forward. For unless the Commission plays a pro-active role, the task of getting the company going would fall on the applicant for reinstatement of registration or the company's members as at the time of deregistration to call a meeting of members to attend to its business.

9 24 CONDITIONAL VERSUS UNCONDITIONAL RESTORATION OF REGISTRATION

When the court granted a restoration order under section 73(6) of the Companies Act of 1973 it did so in general terms so that the company was restored to the register of companies for all legitimate purposes. That meant that after restoration of registration the company could do all things which were legally permissible while at the same time all things could be done against

1631 *Lawsa* para 96; *Re Amtrao Pty Ltd* (1994) 13 ACSR 654 SC (NSW).

it which were legally possible. Although the application for restoration of registration would invariably specify the reason for which restoration was sought, for example, to deal with the company's funds, property or enforce a claim and so on and so forth, that did not mean that such a reason became the only purpose for which restoration could be granted or perhaps the only activity that was permissible. That reason merely served as a factor which would be taken into account by the court in the exercise of its discretion for or against granting the order sought.

The court had no power to, and could not, direct that registration was to be restored for a limited purpose or for a limited time only.[1632] Nor could it impose a penalty as a condition for restoration of the company to the register.[1633] The court could, however, in appropriate circumstances restore the registration conditionally upon the company applying for its winding-up within a specified period.[1634] However, a request to that end was made but rejected in *Ex parte McGuire*[1635] where, in order to avoid the cost of removing the company from the register once the purpose of restoration of registration was achieved, the Registrar requested that restoration of registration of the company be restricted to the sole purpose of permitting the applicant for restoration to execute under his mortgage bond. MacDonald J declined the request holding that section 277(7) of the Rhodesian Companies Act of 1951 did not confer the power to make an order which would operate for a limited purpose or time and then fall away.[1636]

It was nonetheless competent for a court to order that a company which had been deregistered after a complete winding-up of its affairs and business should upon restoration of registration continue in winding-up so that the funds or property which had since become

1632 *Ex parte McGuire* 1963 2 SA 149 (SR); Kunst, Delport and Vorster 144(3).
1633 *Re Moses and Cohen Ltd* [1957] 3 All ER 232.
1634 Kunst, Delport and Vorster 144(3); *Ex parte Smith: In re Parkside Trading Co (Pty) Ltd* 1974 2 PH EQ (C). *Du Rand v Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, an unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013 para 35. Although the case might seem to deal with voidance of dissolution, as that is what the applicants sought, it in fact dealt with companies that had been deregistered. Only that it was difficult to reinstate their registration in terms of s 82(4) of the Companies Act of 2008 as the applicants were not able to comply with annual returns filing obligations.
1635 1963 2 SA 149 (SR).
1636 *Ex parte McGuire* 150A.

available for distribution to creditors or members could be dealt with accordingly.[1637] That was not a conditional restoration of registration since the other consequences of restoration also followed.

It is submitted that in very broad terms the above approach also applies to reinstatement of registration of a company by the Companies and Intellectual Property Commission in terms of section 82(4) of the Companies Act of 2008. If this were to be the case, as it should be, it would ensure that reinstatement of registration, although occasioned perhaps by a particular reason, is nevertheless reinstatement for all purposes rather than just for that reason.

A notable exception to this rule is found in section 359 of the British Columbia Business Corporations Act of 2002 (Canada) in terms of which a company may be restored for a limited / specified period. Such limited restoration may be granted on application to the Registrar of Companies or the Supreme Court of British Columbia. When that period expires the company becomes dissolved again. It is said that limited restorations are usually done in order to undertake or finalise a particular legal transaction with the company after which the restoration would come to an end and dissolution of the company returns.[1638] However, it would appear that such restoration is limited as to the duration and not activities against companies. For while the company may indeed only do such things as need to be done during that period, it does not follow that nothing can be done against it, for example the institution of legal proceedings against it. After all, in terms of section 346(1) legal proceedings commenced by or against the company before its dissolution may be continued as if the company had not been dissolved while proceedings may be brought against the company within two years after its dissolution as it had not been dissolved.

1637 *Ex parte Reid M F* 1982 1 PH E5 (N); *Re Vickers and Bott Ltd* [1968] 2 All ER 264.

1638 British Columbia Registry Services "Information for limited restoration of a BC company by the Registrar" http://www.bcregistryservices.gov.bc.ca/local/bcreg/documents/.../reg45.pdf (accessed 09-08-2014).

9 25 SUMMARY

Section 73(6) of the Companies Act of 1973 made provision for restoration of registration of a company by the court, not Registrar of Companies, providing that upon granting of a restoration order the company was "deemed to have continued in existence as if it had not been deregistered". Furthermore, the restoration order could contain such directions and make such provision as to the court seemed just for placing the company and all other persons in the position, as nearly as could be, as if the company had not been deregistered. Thus in terms of the section restoration of registration was retrospective and validated deregistration period activities. Moreover, apart from the restoration order containing such directions and making such provision as seemed just to the court, the court could exercise its inherent jurisdiction, on application or otherwise, to validate anything done by or against the company between deregistration and its restoration, and make such order as it considered appropriate.[1639]

Currently, restoration of registration is governed by section 82(4) of the Companies Act of 2008 in terms of which application for reinstatement of registration is required to be made to the Companies and Intellectual Property Commission. The Commission is not a court of law and lacks inherent jurisdiction to make orders and give directions which a court could do. Furthermore, section 82(4) does not have the deeming provisions which section 73(6) of the Companies Act of 1973 had. Nor is the Commission given the power to make orders and give directions which it may deem just for placing the company and all other persons in as nearly a position as if the company had not been deregistered. The only power that the Commission has been granted is to require that before registration can be reinstated, the company must bring its annual return obligations, including payment of outstanding annual duty, up to date[1640] but this is a mechanical issue that does not address the core of the restoration of registration problem. Apart from this no other power is given to the Commission relating to restoration of registration.

1639 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ) para 14. Although the "inherent jurisdiction" of the court view was criticised and rejected in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 3 SA 76 (WCC) paras 27 and 28, it is submitted that such is a better approach which is in fact correct and should accordingly be supported.

1640 Regulation 40(7) of the Companies Regulations, 2011.

Therefore, far from addressing the thorny issue concerning restoration of registration section 82(4) simply ran away from it. Needless to say that doing so is not solving the problem at all. Retrospective restoration of registration, as was the case under section 73(6) of the Companies Act of 1973, was no doubt not without obvious anomalies. As Cachalia JA observed in *CA Focus CC v Village Freezer t/a Ashmel Spar*[1641]

> "There is no time limit, for example, for reregistration of a close corporation; it could notionally be restored a decade after it has been deregistered. Can it then seriously be suggested that all that has happened during this period can be undone. And what of proceedings that commence and are concluded before reregistration – can these be reversed?"[1642]

In the *CA Focus CC* case the Supreme Court of Appeal suggested that perhaps because of anomalies which arose when restoration of registration was granted with retrospective effect, the legislature deliberately omitted retrospectivity provisions from section 82(4) of the Companies Act of 2008. However, it should be evident that one does not solve a problem by running away from it. It is submitted that the section needs urgent attention in which the legislature unequivocally declares its intention on whether retrospective reinstatement of registration is intended, and if not, how problems that arise relating to restoration of registration should be dealt with, more so that in most instances companies are deregistered for failure to file annual returns and pay annual duties while they are otherwise very much active and engaging in normal business activities. What then would be the fate of all those activities by or against the company, all entered into and carried out innocently, in good faith and without knowledge of the apparent deregistration of the company?[1643] It appears that a lot

1641 2013 6 SA 549 (SCA).

1642 *CA Focus CC v Village Freezer t/a Ashmel Spar* para 20. The case dealt with restoration of registration of a close corporation in terms of s 26(7) of the Close Corporations Act of 1984. Similar concerns were raised, albeit in a slightly different context, in *Mouton v Boland Bank Ltd* 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA) paras 11 – 12. There the court described the consequences which would follow if the clock were to be turned back to be "at best verging on the absurd in that everything done would have to be undone". Noting that the legislature had in s 26(7) of the Close Corporations Act of 1984 created a statutory fiction that a corporation never ceased to exist when in fact it did, Schutz JA (para 12) held that the court should not "attribute to the Legislature a belief that it could actually recall time passed."

1643 According to Maya JA in *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA) para 16 the provisions of s 26(6) of the Close Corporations Act of 1984, being the equivalent of s 73(6) of the Companies Act of 1973, signified an objective to save a corporation's acts, performed in good faith during a period of of work still needs to be done in this area of South African company law. One would therefore agree with Binns-Ward J who in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd*[1644] remarked: "The practical need for retrospective consequences to follow upon reinstatement of a de-registered company's registration is manifest."[1645] In *Du Rand v Companies and Intellectual Property Commission of South Africa*[1646] Muller AJ held *obiter* that reinstatement of registration in terms of s 82(4) was retrospective. If anything such an approach would mark the beginning rather than the end of the debate. For according to Cox the position is as follows:

> "Apart from the obvious administrative law hurdles that the Commission[1647] would have to overcome if it tried to reinstate a company or close corporation to the register retrospectively, s 82(4) of the Companies Act [of 2008] does not permit it. Reinstate means to bring back into existence, and not ignore the fact of deregistration completely. So if there is going to be an interregnum, what happens during the interregnum? What happens with prescription, both acquisitive and extinctive, with rights and obligations, and with contracts? This is likely to be the subject of endless debate and highly profitable litigation: That is, if you are a lawyer. My guess is that our courts will look to what happens on the death of a natural person for a functional equivalent."[1648]

---

deregistration, from invalidity. Section 82(4) of the Companies Act of 2008 not having those deeming and other related provisions, the question arises as to how the company's acts during the period of deregistration are to be saved from invalidity.

1644 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1645 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* para 24. Footnote omitted.

1646 Case No: 71624/2012, unreported judgment of the North Gauteng High Court, Pretoria dated 07 March 2013.

1647 Being the "Companies and Intellectual Property Commission".

1648 Cox "Back to the drawing board" 2012 (January / February) *De Rebus* 4.

CHAPTER 10

Voidance of dissolution of a company

10 1 INTRODUCTION

"There is life after death", so said Blieden J in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd.*[1649] In the case of a company, apart from restoration of registration,[1650] section 83 of the Companies Act of 2008 makes provision for voidance of dissolution in the following terms:-

> "(4) At any time after a company has been dissolved-
>
> (a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any order that is just and equitable in the circumstances; and
>
> (b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved."

Subject to a few exceptions, the bulk of the above subsection has been in operation both in English and South African law and can, for example, be traced back to the English Companies (Consolidation) Act of 1908, which was followed a year later in South Africa by the Transvaal Companies (Consolidation) Act of 1909.[1651] The position was repeated in the South African Companies Act of 1926. The Companies Act of 1973 also made provision for voidance of dissolution in section 420, subject of course to this notable change, namely that from then onwards South African law discarded the requirement that an application for voidance of dissolution had to be made to court "at any time within two years", which requirement had hitherto been the norm.[1652] Thus the current provision that application for a

1649 2006 5 SA 306 (W), [2005] ZAGPHC 107 (18 April 2006) para 1.
1650 "Restoration of registration" was discussed in chapter 9 above.
1651 Section 193 of the Transvaal Companies (Consolidation) Act of 1909 was precursor to s 191(1) of the Companies Act of 1926.
1652 The predecessor of s 420 of the Companies Act of 1973, namely s 191(1) of the Companies Act of 1926, was the last South African statutory provision requiring a voidance application to be made within two years after dissolution of the company.

court order declaring the dissolution to have been void may be made "at any time" without prescribing the period within which that should be done is a continuation of the dispensation introduced by section 420 of the Companies Act of 1973. Nevertheless, section 83(4) of the present Companies Act of 2008 goes one step further by providing that as an alternative to a voidance order the court may make "any other order that is just and equitable in the circumstances". The latter provision was not to be found in past South African or English legislation, nor does it find its equivalent in the present UK Companies Act of 2006. It could be that this is significant in the development of South African company law relating to voidance of dissolution.

10 2 VOIDANCE OF DISSOLUTION: A JUDICIAL OR ADMINISTRATIVE ACT?

Voidance of dissolution is a judicial rather than an administrative act. Section 83(4) of the Companies Act of 2008, like its slightly worded predecessor, namely section 420 of the Companies Act of 1973, provides that to obtain a voidance order, the liquidator or any other person with an interest in the company, "may apply to a court" for an order declaring the dissolution to have been void. This is different from reinstatement of registration in terms of section 82(4) of the Act, which is an administrative act done by the Companies and Intellectual Property Commission and in respect of which it is provided that any interested person "may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company."[1653]

As will be shown below the power of the court to grant an order declaring dissolution of the company void is unlimited in any respect, thus giving the court a discretion whether to

1653 In the past restoration of registration also required a court order as per s 73(6)(a) of the Companies Act of 1973. An exception was found in s 73(6A) of the Act in terms of which the Registrar of Companies could restore registration of a company that had been deregistered for failure to lodge annual returns and pay annual duty. However, registration would be restored only after compliance with lodgement of the annual returns and payment of the annual duty. Section 73(6A) was introduced in 2006 in terms of s 15(b) of the Corporate Laws Amendment Act 24 of 2006. For close corporations though no application to court was required as s 26(6) of the Close Corporations Act of 1984 provided that application for restoration of registration had to be made to the Registrar of Close Corporations.

grant the order or not. In the exercise of its unfettered discretion[1654] which is required to be exercised judicially,[1655] the court may decline the application for a voidance order. According to *Re Thompson and Riches Ltd*[1656] the court has a discretion to grant a voidance order which is not "available for the asking"[1657] and before doing so will take into account a number of factors such as opposition to the application, the interests of other parties who would be affected by the order as well as prejudice which the order will cause them and also the delay in bringing the application.[1658]

It is therefore submitted that great care should be exercised in ordering dissolution of a company so that the need for voidance thereof would not arise lightly. For if the need for a voidance order were to arise and the court declines the application, parties seeking the order would indeed be subjected to serious prejudice.

10 3 SETTING ASIDE DISSOLUTION INSTEAD OF DECLARING IT VOID

Although section 83(4) of the Companies Act of 2008 makes provision for a court order declaring dissolution of a company to have been void, it is not always necessary to resort to the section to reverse a dissolution order. After all, in terms of the section the court has discretion to grant the order as it "may" and not "must" grant the order when the application is made. Accordingly, an interested person may instead apply for an order reviewing and setting aside dissolution of a company, and will be advised to do so, if the requirements for review are met.

1654 Blackman *et al Commentary on the Companies Act* vol 3 Revision Service 7 (2010) 14 - 505.

1655 *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013 para 20.

1656 [1981] 2 All ER 447.

1657 *Re Thompson & Riches Ltd* 483f.

1658 *Re Thompson & Riches Ltd* 483f-g.

As was indicated by Rogers J in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1659] the power contained in section 83(4) to declare a dissolution void is not a review power to be exercised only upon proof of some irregularity or unlawfulness in the act of removing the company's name from the register. On the contrary, where the company's dissolution is the result of a reviewable irregularity the exercise of the section 83(4) power is not needed since the court's ordinary power of review is available.[1660] Such ordinary power of review would be exercised where dissolution of a company was obtained fraudulently[1661] or erroneously[1662] in circumstances where it should not have been granted in the first instance.

In *Pieterse v The Master*[1663] an application was made for voidance of dissolution of a company in terms of section 420 of the Companies Act of 1973 in circumstances which truly speaking called for a review and setting aside of the dissolution. The court, while granting the voidance order, nevertheless pointed out that the case merited a review and setting aside order instead of a voidance one. There the Master had issued a letter in terms of section 385(1) of the Act, which served as a certificate confirming that the liquidator had completed his duties of liquidating the affairs of the company, but that was not the case as the liquidator was still busy with litigation in which the company was the plaintiff. As a result of the certificate of the Master which was transmitted to the Registrar of Companies in terms of section 419 of the Act the company was duly dissolved. That brought to an end the existence of the company and accordingly affected legal proceedings which were underway, hence the voidance application. Waglay AJ held that the certificate issued by the Master in terms of section 419 fell to be set aside. The court explained that in the circumstances of the case there was no need to have sought a declaration that the dissolution was void. Although the dissolution of the company was a separate act, it was dependent upon the certificate issued by the Master in terms of section 419. If the certificate were set aside the underlying cause for dissolution would fall away, in which case it would only be proper for the dissolution also to be set aside.[1664]

1659 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).
1660 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 58.
1661 *Coxon v Gorst* [1891] 2 Ch 73 77.
1662 *Pieterse v Kramer* 1977 1 SA 589 (A) 596F.
1663 2004 3 SA 593 (C).
1664 *Pieterse v The Master* para 16.

Moreover, the effect of setting aside the certificate issued by the Master, and as a result also dissolution granted on the basis thereof, was retroactive and brought about the *status quo* which existed before the erroneous dissolution and had the result that the action which was pending would continue.[1665] On the other hand, in the case of voidance of dissolution, a debate would arise as to the effect thereon on pending legal proceedings, whereas in the case of steps taken during the dissolution period they would definitely not be validated and would have to be taken afresh if time still allowed. The significance of this case therefore lies in the difference that it shows to be existing between voidance of dissolution and setting aside thereof.

10 4 VERY WIDE POWERS TO DECLARE DISSOLUTION VOID

It is said that the power of the court to make an order declaring dissolution of a company void is unlimited in any respect and, as the circumstances under which a voidance order may be sought are likely to vary in every case, it would be inadvisable to lay down any general principle upon which the court may grant the order.[1666] This has the result that unlike the approach of Mason J in *Goodman v Suburban Estates Ltd*[1667] that a voidance order should not be granted unless some "unforeseen event" such as the discovery of new assets has occurred or some fraud or concealment practised or the dissolution has otherwise become an instrument of injustice, the wide powers given by section 83(4) of the Companies Act of 2008, its predecessor, namely section 420 of the Companies Act of 1973, as well as the equivalent provisions of previous legislation, remain unlimited in any respect and are not circumscribed as suggested in the *Goodman* case. Thus, the width of the power of the court to declare dissolution void goes not only to the grounds on which such may be done, as the court sought to do in the *Goodman* case, but also to the circumstances under which the company was dissolved. This must be so as a company may not only be dissolved after a

1665 *Pieterse v The Master* para 15. The case is briefly noted by Brink Cohen le Roux Inc "Can a company, once 'dead', be brought back to life?" http://bclr.com/company_back_to_life.htm (accessed 26-07-2013).

1666 *Ex parte Liquidator Natal Milling Co (Pty) Ltd* 1934 NPD 312 313 which was quoted with approval and followed by Levenberg AJ in *Klass v Contract Interiors CC (In liquidation)* [2009] ZAGPHC 35 (23 February 2009) paras 53 – 54.

1667 1915 WLD 15.

complete winding-up of its affairs as provided for in section 82(2) of the Companies Act of 2008 but is also to be dissolved after deregistration as provided for in section 82(3) of the same Act. After all, section 83(1) of the Act brings together dissolution and deregistration by providing that a company is dissolved as of the date its name is removed from the companies register, which removal is nothing other than deregistration of the company.

It is submitted that the wide powers of the court to declare dissolution void also apply to a company which has been dissolved in terms of section 115(9)(d) of the Companies Act of 2008, which dissolution takes place in terms of amalgamation, merger or scheme of arrangement which does not involve the winding-up of the company to be dissolved but transfer of its business and assets to another company. The width of the power of the court was made very clear by Muller AJ in *Du Rand v Companies and Intellectual Property Commission of South Africa*[1668] where the court said:

> "In my judgment, the ambit of s 83(4) of the Companies Act [of 2008] is wider than section 420 of the previous Act. In terms of the previous Act the dissolution of a company could only have been achieved by winding-up of the company. [Section] 83(4) has reference to a company that has been dissolved. *It matters not what the reason was for the dissolution.*"[1669]

10 5 THE APPLICANT

10 5 1 General

In terms of section 83(4) of the Companies Act of 2008 the application for a voidance order is required to be made by the "liquidator of the company, or other person with an interest in the company". The language of the section is slightly different from, and it is submitted is an improvement on the somewhat more general language of section 420 of the Companies Act of 1973 and its predecessor, section 191(1) of the Companies Act of 1926. The latter two

1668 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 7 March 2013.

1669 *Du Rand v Companies and Intellectual Property Commission of South Africa* para 18. My emphasis.

sections referred to the "liquidator of the company", which was not a problem, but went further to use the more general wording and described the other applicant as "any other person who appears to the Court to have an interest". It is submitted that the words "any other person who appears to the Court to have an interest" were rather more tentative than precise, and furthermore, did not particularly specify that such interest should in fact be in the company, although that was to be assumed in any event.

10 5 2 Liquidator

Although it is strictly speaking not correct to label a person a "liquidator of the company" after completion of liquidation and dissolution of the company since at that stage the company would be non-existent,[1670] it is submitted that reference to the liquidator of the company is in fact reference to a person who was its liquidator at the time of dissolution.[1671] As the court pointed out in *Re Wood and Martin (Bricklaying Contractors) Ltd*[1672] the word "liquidator" refers to a "genuine ex-liquidator" in the sense of a person who at one stage was duly appointed liquidator of the company and not someone who has never been a duly appointed liquidator at all but had, without lawful authority, been carrying on the liquidation of the company[1673] or whose appointment was otherwise illegal.[1674]

10 5 3 Person with an interest in the company

Although there is a slight difference in the language of section 83(4)(a) of the Companies Act of 2008 which refers to "other person with an interest in the company" and section 420 of the

1670 *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 733j; *Willow Green Development Ltd v Lucas Anderson Construction* (1993) Co *Ltd* 1998 CanLII 4518 (BC) para 13; *Coxon v Gorst* [1891] 2 Ch 73 76 78; *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 36C 37C; *H L Hall and Sons Group Services Ltd v Wilsnach* 1997 3 SA 116 (T) 118I 119E. The issue was discussed in chapter 4 above.

1671 *Re Henderson's Nigel Co Ltd* [1911] 105 LT 370; *Pieterse v Kramer* 1977 1 SA 589 (A); *Re Lindsay Bowman Ltd* [1969] 3 All ER 601.

1672 [1971] 1 All ER 732 734j.

1673 *Re Wood and Martin (Bricklaying Contractors) Ltd* 734j.

1674 *H L Hall and Sons (Group Services) Ltd v Wilsnach* 1997 3 SA 116 (T).

Companies Act of 1973 whose language was that of "any other person who appears to the Court to have an interest" without specifying the object of that interest, it is submitted that the essence of the two provisions is the same. Accordingly, it is further submitted that an interpretation of the one section would bring about a result sought to be achieved by the other.

In the case of application for reinstatement of registration of a company to the Companies and Intellectual Property Commission in terms of section 82(4) of the Companies Act of 2008 the applicant is described as "any person interested". The language used is exactly the same as that of section 73(6)(a) of the Companies Act of 1973. The slight difference in the "any interested person" language of section 82(4), and "person with an interest in the company" language of section 83(4)(a) of the Companies Act of 2008 as well as their predecessors notwithstanding, it is submitted that the essence and meaning of all these provisions remain the same. This has the result that the discussion concerning "any interested person" which featured in the previous chapter applies with equal force to the present exposition of "person with an interest in the company". Moreover, the interest that the person must have, it is submitted, is one in the revival of the company, be it by way of reinstatement of registration of the company in the case of deregistration and voidance of dissolution of the company in the case of its dissolution.

It is also submitted that the "any other person who appears to the Court to have an interest" language of section 420 of the Companies Act of 1973 is to be preferred over the current language of section 83(4) of the Companies Act of 2008 as it appeared to give the court the sufficient flexibility required to incorporate a somewhat wider category of applicants for a voidance order than the apparently rigid "other person with an interest in the company" language of section 83(4). Furthermore, it is submitted that the wording of section 420 of the Companies Act of 1973 gave the court a wide discretion to include in that category quite a few more persons than would ordinarily be the case under the somewhat more circumscribed "any interested person" language of section 82(4), as well as its predecessor, namely section 73(6)(a) of the Companies Act of 1973 and the "other person with an interest in the company" language of section 83(4).

The words "any other person who appears to the court to have an interest" are of "widest amplitude".[1675] They are intended to somewhat relax the standard of proof thus allowing the court to act on *prima facie* evidence in cases which will usually be brought *ex parte*.[1676] They therefore have the meaning of "a person appearing to the court to be a person interested".[1677] "Interest" is said to be the "most general term that can be employed to denote a right, claim, title, or legal share in something".[1678] In the present context it refers to legal interest and not merely a "social or ethical interest" and also includes a "proprietary or financial interest".[1679]

In English law the requisite interest is narrowed down to a financial or proprietary one. While the word "interest" is susceptible of more meanings than one nevertheless its meaning often has to be discerned from the context. In relation to making an order for the revival of a defunct company, a dissolved company being defunct, it seems more probable that the word refers to "pecuniary or proprietary interest".[1680] As Megarry J put it in *Re Roehampton Swimming Pool Ltd*[1681] the word "interest", in this content, refers to a "pecuniary or proprietary interest than that it embraces all matters of curiosity or concern". After all, those who are interested in companies are nearly always interested financially or in a proprietary way. The whole field is dominated by finance.[1682] The particular financial or proprietary interest need not however be firmly established or highly likely to prevail as long as it is not shadowy.[1683] It is submitted that while it is not particularly clear what kind of

1675 *Re Test Holdings (Clifton) Ltd* [1969] 3 All 517 519I.
1676 *Re Roehampton Swimming Pool Ltd* 664B.
1677 *Re Roehampton Swimming Pool Ltd* 664B-C.
1678 Per Nicholas AJA in *Nieuwoudt v The Master* 1988 4 SA 513 528H, citing *Black's Law Dictionary* (1979) 729.
1679 *Nieuwoudt v The Master* 528H-I; *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* [2008] ZAGPHC 133 (29 April 2008) para 18.
1680 *Re Roehampton Swimming Pool Ltd* 665E.
1681 *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661.
1682 *Re Roehampton Swimming Pool Ltd* 665E.
1683 *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 736d; *Ex parte Stubbs: In re Wit Extensions Ltd* 1982 1 SA 526 (W); *Stanhope Pension Trust Ltd v Registrar of Companies* [1994] 1 BCLC 628 (CA) 635; *Re Phillips Powis Ltd* [1998] 1 BCLC 440 (CA); Blackman *et al* 14-505; Blackman "Companies" in Joubert (ed) *Lawsa* vol 4 Part 1 First Reissue (1997) para 339.

"financial or proprietary interest" would be considered "shadowy", it nevertheless appears that this might be a reference to a negligible financial or proprietary interest.[1684]

It is said that in South African law the required interest may be one which is "neither pecuniary nor proprietary, there being no qualification of the word 'interest' in s 420 [of the Companies Act of 1973]."[1685] In this regard reference may be made to *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[1686] where although the applicant was not a former liquidator of the company he nevertheless had all the records of the company and was really in the position of a *negotiorum gestor* for the liquidator and in fact was seeking to have himself appointed as liquidator to administer moneys lying in the Guardians' Fund. The court held that the applicant had a sufficient interest in the application to satisfy the requirements of s 420. It is submitted that the decision was correct and gave effect to the intention of the legislature as expressed in the section.

Referring to the words "interested person" which appeared in section 73(6)(a) of the Companies Act of 1973 the court held *obiter dictum* in *Ex parte Stubbs: In re Wit Extensions*[1687] that they included:

> "... any person who has a financial interest of any sort, whether actual or contingent, in or against a company, or relating to it, or with which interest that company might be concerned, provided however that the financial interest in question is not negligible."[1688]

It is submitted that the above *dictum* applies both as regards any person who appears to the court to have an interest as provided for in section 420 of the Companies Act of 1973, and the slightly differently worded language of section 83(4) of the present Companies Act of 2008, as well as to a "proprietary interest" as the context may require. An unpaid creditor of a dissolved company, including a contingent or prospective creditor thereof has sufficient

1684 *Ex parte Stubbs: In re Wit Extensions Ltd* 1982 1 SA 526 (W) 513B; *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 736d.

1685 Kunst, Delport and Vorster (eds) *Henochsberg on the Companies Act* vol 1 5 ed Service Issue 33 (2011) 902(2); *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* [2008] ZAGPHC 133 (29 April 2008) para 18.

1686 1985 (1) SA 70 (W).

1687 1982 1 SA 526 (W).

1688 *Ex parte Stubbs: In re Wit Extensions Ltd* 513B.

interest in the voidance of its dissolution and may therefore apply for a voidance order.[1689] Confirming this approach the court in *Re Wood and Martin (Bricklaying Contractors) Ltd* said:[1690]

> "The situation is unusual, but the possibility of a claim being made by the applicant and the possibility of a claim being made against him, when added together, seem to me to remove him from the category of persons who cannot fairly be regarded as having any proprietary or pecuniary interest of this kind. It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy ..."[1691]

A former member or director of a dissolved company, merely as such and without more, it is submitted, does not have sufficient interest to apply for the voidance of its dissolution.[1692] It is further submitted that a former member or director of a dissolved company would first have to demonstrate his interest before being allowed to apply.

10 6 GROUNDS FOR VOIDANCE OF DISSOLUTION

10 6 1 General

Like its predecessor, section 420 of the Companies Act of 1973, section 83(4)(a) of the Companies Act of 2008 gives the court the power to make an order declaring the dissolution to have been void but does not indicate the grounds on which this may be done. However, unlike section 420, section 83(4)(a) goes further to provide in the alternative that, apart from making an order declaring the dissolution to have been void, the court may make "any order that is just and equitable in the circumstances".

1689 *Re Spottiswoode, Dixon and Hunting Ltd* [1912] 1 Ch 410, [1911- 913] All ER Rep 526; *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661; Kunst, Delport and Vorster 902(3).

1690 [1971] 1 All ER 732.

1691 *Re Wood and Martin (Bricklaying Contractors) Ltd* 736c - d.

1692 *Ex parte Stubbs: In re Wit Extensions Ltd* 1982 1 SA 526 (W); Cf Kunst, Delport and Vorster 902(3) where a submission is made that a former member can apply.

Over the years the courts have provided certain guidelines and examples of circumstances in which a voidance order may be given. Needless to say that the situations previously encountered and in which voidance orders were given serve as mere examples without being in anyway exhaustive.

It is considered that the submissions made by Kunst, Delport and Vorster[1693] that under section 420 of the Companies Act of 1973, and therefore also under section 83(4)(a) of the Companies Act of 2008, the court could avoid dissolution in "any circumstances where the justice of the case warrants such course" and further that "there must be some ground justifying the avoidance, which is not to be had merely for the asking" correctly reflect the philosophy behind the section.

10 6 2 Typical voidance grounds

While one would have thought that examples of situations that would justify voidance of a dissolution order as given by Mason J in *Goodman v Suburban Estates Ltd (In liquidation)*[1694] were sufficiently wide and general enough, it is with much interest that one notes dissatisfaction therewith by the court in *Ex parte Liquidator Natal Milling Co (Pty) Ltd.*[1695] In the *Goodman* case the approach was:

> "... the Court ought not to avoid a dissolution unless some unforeseen event such as the discovery of new assets has occurred or unless there has been some fraud or concealment practised or unless the dissolution has become either by reason of surrounding circumstances or through some contrivance of parties the instrument of injustice."[1696]

1693 Kunst, Delport, Vorster 902 903.
1694 1915 WLD 15.
1695 1934 NPD 312.
1696 *Goodman v Suburban Estates Ltd (In liquidation)* 26. See also *Klass v Contract Interiors CC (In Liquidation)* 2010 5 SA 40 (W), [2009] ZAGPHC 35 (23 February 2009) paras 52 and 54.

The above approach was rejected in *Ex parte Liquidator Natal Milling Co (Pty) Ltd*[1697] where Hathorn J preferred an alternative approach which says:

> "... the power of the court to make an order declaring the dissolution to have been void is unlimited in any respect, and as the circumstances under which the section may be brought into operation are likely to vary in every case, it seems to me inadvisable to lay down any principle upon which the court will act."[1698]

It is submitted that the approach of the two cases is correct and that the two can be reconciled by looking at the *Goodman* case as merely giving examples of the most common situations in which voidance of dissolution would be justified. This being so there is no need to look at the case as being in anyway prescriptive. It is further submitted that the two cases cover quite adequately, albeit not exhaustively, the grounds on which dissolution of a company could be said to be susceptible to voidance.

A typical example of a situation justifying voidance of dissolution is one where there are assets which belong to the company and which were not taken into account in a winding-up or which could have been recovered by the liquidator, and the applicant has a claim to be satisfied out of them or alternatively if there is property which was not transferred to a person entitled to it.[1699] In other words dissolution of a company is mostly avoided to finish some unfinished business of a dissolved company.[1700] In this respect it has been suggested that section 420 of the Companies Act of 1973 could be resorted to in order to revive a company so that the question of liability of directors and officers of the company for fraudulent or reckless trading as provided for in section 424 of that Act could be addressed.[1701] It is submitted that there is merit in the suggestion. Moreover, according to Kunst, Delport and Vorster, under section 420 the court "may avoid the dissolution in any circumstances where

1697 1934 NPD 312.
1698 *Ex parte Liquidator Natal Milling Co (Pty) Ltd* 313.
1699 *Re Henderson's Nigel Co Ltd* [1911] 105 LT 370 (Ch); *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402; *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd* 1936 WLD 53; *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* [2008] ZAGPHC 133 (29 April 2008) para 25; *Stanhope Pension Trust Ltd v Registrar of Companies* [1994] 1 BCLC 628 (CA) 632; Blackman *et al* 14-503; Kunst, Delport and Vorster 902; *Lawsa* para 339.
1700 *Tymans Ltd v Craven* [1952] 1 All ER 613 (CA) 616; *Re Servers of the Blind League* [1960] 2 All ER 298 299; *Re Test Holdings (Clifton) Ltd* [1970] Ch 285, [1969] 3 All ER 517.
1701 *Bowman v Sacks* 1986 4 SA 459 (W) 462 E-F.

the interests of justice warrants [*sic*] such course".[1702] This is in line with the approach of Mason J in *Goodman v Suburban Estates Ltd (In liquidation)*[1703] where it was held that dissolution could be avoided if it had "become either by reason of surrounding circumstances or through some contrivance of parties the instrument of injustice."[1704]

10 6 3 The just ground

As the case of *Goodman v Suburban Estates Ltd (in liquidation)*[1705] shows, apart from specific grounds for voidance of dissolution there indicated, the more general ground which was pointed out was that a voidance order could also be granted if dissolution of the company was an "instrument of injustice".[1706] This, it is submitted, is a very flexible ground on which dissolution could be sought as exigencies of the case dictate. This is in line with the view of Kunst, Delport and Vorster that the court may "avoid the dissolution in any circumstances where the interests of justice warrants (*sic*) such course".[1707]

A few cases may be referred to as demonstration of the application of the just ground principle, such as *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1708] where voidance of dissolution of a company was sought after it was dissolved while legal proceedings which it had instituted were still underway. Voidance of dissolution was sought so that the proceedings could be finalised. Labuschagne J held that on the facts of the matter "it was clearly just and equitable to all the parties concerned that such an order [voidance of dissolution order] should be granted".[1709] Much the same reasoning was applied in *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Company Ltd*[1710] where the purpose of the intended voidance of dissolution was to enable the company to transfer ownership of

1702 Kunst, Delport and Vorster 902.
1703 1915 WLD 15.
1704 *Goodman v Suburban Estates Ltd* 26.
1705 1915 WLD 15.
1706 *Goodman v Suburban Estates Ltd (In liquidation)* 26.
1707 Kunst, Delport and Vorster 902.
1708 1991 3 SA 846 (W).
1709 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 850C.
1710 1936 WLD 53.

shares to buyers, an event which had been overlooked before dissolution of the company. The court explained that if it did not:

> " ... make an order in the present case voiding the dissolution it would be unjust to [the buyers] ... because they have paid the price for the property and they are entitled to its transfer, and unless the Court voids the dissolution there is no way by which this company [the buyer] can obtain transfer of what they have purchased."[1711]

Another helpful case in this respect is *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd*[1712] where sureties and a cessionary applied for and were granted an order in terms of section 420 of the Companies Act of 1973 declaring dissolution of a company to have been void. The purpose of such an order was to reopen the liquidation and distribution account of the company as prepared by the liquidators and also set aside a contract of sale concluded by the liquidators with certain third parties. It was alleged that there was collusion between the liquidators and purchasers in terms of which the property of the company was given away cheaply. Mavundla J held that the serious allegations of collusion, including those of *mala fides*, fraud and self-aggrandisement made against the liquidators were sufficient ground for voiding dissolution of the company and concluded that the court "can grant an order such as the one sought *in casu*, where the interest of justice warrants that such order be granted".[1713]

10 7 DISCRETION OF THE COURT

By providing that the court "may" grant an order declaring the dissolution of the company to have been void, section 420 of the Companies Act of 1973 gave the court discretion to grant a voidance order in appropriate circumstances.[1714] Such discretion was unfettered[1715] and had to be exercised judicially. That the discretion was unfettered was confirmed in *Ex parte*

1711 *Ex parte McCalgan: In re Meyer & Chalton Gold Mining Co Ltd* 56 - 57.

1712 [2008] ZAGPHC 133 (29 April 2008).

1713 *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* para 26.

1714 *Cronje v Hillcrest Village (Pty) Ltd* 2009 6 SA 12 (SCA), [2009] 4 All SA 383 (SCA), [2009] ZASCA 81 (17 July 2009) para 30.

1715 Blackman *et al* 14–505; *Ex parte Natal Milling Co (Pty) Ltd* 1934 NPD 312; *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013 para 20.

Liquidator Natal Milling Co (Pty) Ltd[1716] where Hathorn J held that the power of the court to make an order declaring the dissolution void was unlimited in any respect as the circumstances in which such an order could be sought were likely to vary in every respect with the result that each case had to be decided on its merits. In that case the voidance order was granted as the court found that no one would suffer any prejudice as a result thereof.

Section 83(4)(a) of the Companies Act of 2008 also uses the word "may" but only in relation to the making of the application rather than the court exercising discretion to grant the order sought. However, section 83(4)(b) uses the word "if" in relation to the granting of the voidance order by the court. Given the usage of "may" and "if" in the two paragraphs, it is submitted that, like its predecessor section 420 of the Companies Act of 1973, section 83(4) of the Companies Act of 2008 also gives the court discretion to grant a voidance order. This was confirmed in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1717] where, reading a unanimous judgment of the full bench of the Western Cape High Court, Rogers J held that the court's wide discretion under section 420 was guided by the interests of justice in all the circumstances of the case. The court held further that although section 83(4) applied both to voidance of dissolution and reinstatement of registration, there was no good reason not to be guided by earlier case law in regard to the circumstances making it appropriate to exercise the power to declare a dissolution void. In the instant case it was held that voidance of dissolution of the company in terms of section 83(4) was "just and equitable".[1718]

In the exercise of its discretion to grant or refuse a voidance order, the court will take into account a number of factors such as, among others, whether dissolution of the company had been used an as instrument of injustice[1719] by seeking to defeat the claims of the creditors against the company,[1720] the time that has lapsed between the date of dissolution and that on

1716 1934 NPD 312.
1717 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).
1718 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 58.
1719 *Goodman v Suburban Estates Ltd (In liquidation)* 1915 WLD 15 26; *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402.
1720 *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013 para 22.

which the order is sought,[1721] the mischief which dissolution seeks to achieve such as concealing fraud,[1722] the possibility of voidance of dissolution yielding any benefit to the applicant,[1723] etc. Therefore, the court would be inclined to grant a voidance order if doing so would do some good.[1724]

Consistent with section 420 of the Companies Act of 1973, section 83(4) of the Companies Act of 2008 provides that the application for a voidance order may be made "at any time after the company has been dissolved". The section solves the issue of the two-year requirement within which an application for voidance of dissolution had to be made as was prescribed under section 191(1) of the Companies Act of 1926. As a result one would have thought that time is no longer of the essence with the result that failure to make an application fairly quickly, or within a reasonable time for that matter, would no longer be an issue. Regrettably this is not the case because time still matters after all. Dealing with an application in terms of section 193 of the Transvaal Companies (Consolidation) Act of 1909, which had a two-year period requirement within which the application had to be made, Mason J held in *Goodman v Suburban Estates Ltd (In liquidation)*:[1725]

> "I [do not] think this extraordinary relief should be afforded to an applicant, who has acquiesced in the action which he complains of, or has been guilty of laches in invoking the assistance of the Court."[1726]

1721 *Du Rand v The Companies and Intellectual Property Commission of South Africa* para 23. In terms of s 191(1) of the Companies Act of 1926 application for a voidance order had to be made within two years of dissolution of the company. In line with s 420 of the Companies Act of 1973, s 83(4) does not specify time within which the application has to be made. It simply provides that application may be made "at any time after a company has been dissolved". Nevertheless, a number of decisions show that time is of the essence as the longer it takes to launch the application the more difficult it becomes to obtain the order. In this respect see, for example, *Cronje v Hillcrest Village (Pty) Ltd* 2009 6 SA 12 (SCA), [2009] 4 All SA 383 (SCA), [2009] ZASCA 81 (17 July 2009).

1722 *Du Rand v The Companies and Intellectual Property Commission of South Africa* para 23; *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* [2008] ZAGPHC 133 (29 April 2008) para 28.

1723 *Cronje v Hillcrest Village (Pty) Ltd* 2009 6 SA 12 (SCA), [2009] 4 All SA 383 (SCA), [2009] ZASCA 81 (17 July 2009) para 36.

1724 *Re Oakleague Ltd* [1995] 2 BCLC 624; *Re Phillips Powis Ltd* [1998] 1 BCLC 440 (CA) 446.

1725 1915 WLD 15.

1726 *Goodman v Suburban Estates Ltd (In liquidation)* 26. That was precisely the reason for rejection of the voidance application in *Motala v Master of the High Court (North Gauteng)* [2014] 2 All SA 154 (SCA) where the applicants, former liquidators of the company, were found to have been at fault in a number of respects. For example, no explanation was given for the exclusion of other co-liquidators from the application, the court was not taken into confidence by way of full and frank disclosure of the facts, the applicants sought voidance of dissolution, which they had themselves requested, to continue litigation which at the time of dissolution was, to their knowledge, underway but this was not disclosed to the Master of

More recently, the Supreme Court of Appeal held against granting a voidance order precisely because of the delay in launching the application. Dealing with that issue in *Cronje v Hillcrest Village (Pty) Ltd*[1727] Streicher ADP held:

> "... having regard to [a party's] inaction and the remote possibility of an avoidance of dissolution yielding a surplus, the dissolution should in my view not be avoided pursuant to an application ... launched some five years after the auction, more than three years after confirmation of the liquidation and distribution account and almost two years after dissolution of [the company]. See in this regard *Goodman v Suburban Estates Ltd (in liquidation) & others* 1915 WLD 15 at 26 ..."[1728]

In the exercise of discretion whether to grant a voidance order or not the courts also take into account the issue whether the applicant is the right person to ask for the order sought and the reason for doing so. In *Re Servers of the Blind League*[1729] the company was given a part of the residuary estate of the testatrix in terms of a will. The company having been dissolved before the death of the testatrix an application was thereafter made for an order declaring the dissolution void so that the company could inherit under the will. Pennyquick J held that it would not be right to make such an order because the "residuary share under the will of the testatrix, never belonged to the company at all, and the order would dispossess other persons who obtained a vested interest in the asset under a title not derived from the company."[1730]

The court will ordinarily refuse to declare the dissolution void if the purpose is to enable the company to enforce a claim which upon the dissolution passed into the ownership of the State as *bona vacantia* where such claim has prescribed.[1731] This was the attitude of the court in *Kanderson (Pty) Ltd v The Registrar of Companies*[1732] where it was said:

> "It is clear that a court will only exercise its discretion in terms of section 420 of the [Companies] Act [of 1973] and void the dissolution if it is satisfied that any liquidator to be appointed by the Master has

---

the High Court. Moreover, that litigation did not have good prospects of success as it was very much speculative. In brief, no good cause was shown for seeking voidance of dissolution.

1727 2009 6 SA 12 (SCA), [2009] 4 All SA 383 (SCA), [2009] ZASCA 81 (17 July 2009).
1728 *Cronje v Hillcrest Village (Pty) Ltd* para 36.
1729 [1960] 2 All ER 298.
1730 *Re Servers of the Blind League* 299E.
1731 Kunst, Delport, Vorster 900.
1732 1987 2 PH ET (T).

an enforceable claim against the respondents. If any such claim has become prescribed no purpose would be served by granting the applicants the relief they now claim."[1733]

Equally the court will reject the application where no satisfactory reason is provided for seeking a voidance order such as happened in *Motala v Master of the High Court (North Gauteng)*[1734] where the Supreme Court of Appeal found the request for such an order lacking in a number of respects. The court took into account amongst others the fact that not all the former liquidators of the company were taking part in the proceedings, in respect of which no explanation was offered; the liquidators had asked the Master of the High Court to dissolve the company, indicating that its affairs had been completely wound up even though to their knowledge the company was still involved in litigation; and also the fact that while continuation of that unfinished litigation was supposedly for the benefit of the creditors of the company, such creditors were conspicuous by their absence from the voidance application. Moreover, that litigation appeared to have been very speculative and had dragged on for many years without making good progress. Accordingly, the court exercised its discretion against granting a voidance order.

Although most of the cases dealt with the predecessors of s 83(4) of the Companies Act of 2008 it should not be forgotten that in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1735] Rogers J held:

> "Although the new s 83(4) is no longer confined to dissolution pursuant to liquidation, there is no good reason not to be guided [in its interpretation] by earlier case law in regard to the circumstances making it appropriate to exercise the power [to declare the dissolution to have been void]."[1736]

1733 *Kanderson (Pty) Ltd v The Registrar of Companies* 27.
1734 [2014] 2 All SA 154 (SCA).
1735 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).
1736 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 58.

10 8 JOINDER OF INTERESTED PARTIES

In an application for an order declaring dissolution of the company to have been void the Companies and Intellectual Property Commission, formerly the Registrar of Companies, as an entity which recorded the dissolution, is a necessary party. For that reason it has to be cited in the notice of motion and then served with same.[1737]

Because upon dissolution of a company its property which has not been dealt with passes into ownership of the State as *bona vacantia*, where such property is in existence the State is a necessary party in the application and should be joined.[1738] Joinder may, however, be dispensed with where the State waives its rights and undertakes to be bound by the order.[1739] In this context the State essentially refers to the appropriate government department. If the property involved is land the relevant department is currently known as that of Rural Development and Land Reform[1740] which in the past was called as the Department of Land Affairs. In case of claims or money having vested in the State as *bona vacantia* the appropriate department is that of Finance[1741] while the Master of the High Court should also be joined if there are funds lying in the Guardians' Fund.[1742] Where any other department is interested notice must be given to it.[1743] In very broad terms though it is the Department of Public Works that is in charge of the State's urban immovable property as well as government buildings and should accordingly be cited as a party and served with the voidance application papers.[1744]

1737 *Ex parte White v Smit* 1914 CPD 414; *Ex parte Bowman: In re International Rock Products* 1985 1 SA 70 (C); *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W).

1738 Kunst, Delport and Vorster 902 (2).

1739 *Ex parte Lime Products (Pty) Ltd* 403. In *Ex parte P J Yelland and Co (Pty) Ltd* 1934 NPD 158 the court dispensed with notice to the State, this being done on the basis that the property in question could not be regarded as *bona vacantia*. It is difficult to understand how the property did not become *bona vacantia* as the company was indeed dissolved.

1740 *Ex parte Pillay and Sons Ltd* 1951 1 SA 229 (T).

1741 *Re Jacobson's* Ltd 1927 TPD 857; *Ex parte White and Smit* 1914 CPD 414.

1742 *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (C).

1743 *Lawsa* para 339 note 30; *Van der Ploeg v Vivier* 1966 3 SA 218 (SWA).

1744 This should not come as a surprise since, in respect of reinstatement of registration of a company by the Companies and Intellectual Property Commission, regulation 40(7) of the Companies Regulations, 2011 requires that there be letters from the National Treasury ie Department of Finance, and the Department of Public Works, indicating that they have no objection to the company's reinstatement, if it owned immovable property – see, for

If apart from the State there are other persons whose interests would be affected by the avoidance order the application should in the first instance be for a rule *nisi* with appropriate directions as to its service and publication,[1745] the latter being usually done in the Government Gazette and local newspapers but in *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd*[1746] the court granted a final order declaring the dissolution to have been void without issuing a rule *nisi*. The decision was influenced by the fact that most of the contributories that the company had were living overseas, this creating a problem of substantial expenses and long delay if notice was to be given to them. It also appears from the case that not even the Registrar of Companies or the State was given notice of the application. This, it is submitted, was a dangerous route to follow since at the time of dissolution the company had property which it had sold but had not transferred to the purchaser. That being the case the property still belonged to the company and therefore on its dissolution became the property of the State in terms of the *bona vacantia* principle. To deal with property of the State without giving it the opportunity to be heard was contrary to the general principles of the law relating to joinder of parties having an interest in the matter. It is thus evident that had the State so wished it could simply have applied for the setting aside of both the voidance order as well as the subsequent transfer of the property to the purchaser.

10 9 APPLICATION OF S 83(4) TO COMPANIES DISSOLVED IN TERMS OF AMALGAMATION OR MERGER AGREEMENT

In terms of section 311 of the Companies Act of 1973 it was possible to have a scheme of compromise or arrangement between a company and its creditors or a class thereof or between the company and its members or a class thereof. It could also happen that as part of

example, Delport (ed) *Henochsberg on the Companies Act 71 of 2008* vol 1 Issue 7 (2013) 331.

1745 Kunst, Delport and Vorster 902 (2). Instead of publication in the Government Gazette and newspapers the practice these days is simply to require publication in the "prescribed manner", which practice started in 2006 with the amendment of s 73(3) of the Companies Act of 1973 by s 15(a) of the Corporate Laws Amendment Act 24 of 2006. That practice is currently continued under s 82(2) of the Companies Act of 2008.

1746 1936 WLD 53.

the scheme the company was wound up and dissolved. It was, however, also possible that the scheme could provide for the dissolution of the company without winding-up.[1747]

There was also the possibility that in terms of section 313 the compromise or arrangement could be part of a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies. It could also happen that as part of the reconstruction or amalgamation scheme there was transfer of the business or property of a company (transferor company) to another company (transferee company). The court could, when sanctioning the scheme or by any subsequent order, make provision for, among others, the dissolution, without winding-up, of any transferor company.[1748]

In terms of the Companies Act of 2008 a scheme of arrangement is governed by section 114 while an amalgamation or merger of companies is governed by sections 115 and 116. Section 115(9)(d) specifically provides that if an amalgamation or merger has been approved by the parties involved, any person to whom assets are, or an undertaking is to be transferred, may apply to a court for an order to effect the dissolution, without winding-up, of a company as contemplated in the amalgamation or merger agreement. Section 116(5)(b) deals with deregistration of any of the companies involved in the amalgamation or merger and provides that after receiving a notice of amalgamation or merger, the Companies and Intellectual Property Commission "must" deregister any of the amalgamation or merging companies that did not survive the amalgamation or merger.

The question arises whether section 83(4) of the Companies Act of 2008, and previously section 420 of the Companies Act of 1973, applies to companies which have been dissolved or deregistered in terms of the above provisions. It would be noted that in terms of section 419 of the Companies Act of 1973 a company could be dissolved in any winding-up when its affairs had been "completely wound up". Similarly, in terms of section 82(1) and (2) of the Companies Act of 2008 the Companies and Intellectual Property Commission "must" record the dissolution of the company in the prescribed manner and remove the company's

1747 Section 311(4).
1748 Section 313 (1)(d).

name from the companies register "when the affairs of the company have been completely wound up".

In terms of sections 311 and 313 of the Companies Act of 1973 it was possible to have a complete winding-up of a company which was then followed by its dissolution but that was an otherwise very rare event indeed. But it was also possible to have dissolution without winding-up, which was a more common occurrence. Dissolution without winding-up, it is submitted, did not fall within the ambit of section 419 which required the affairs of the company to have been completely wound up. Nor would it meet the requirements of section 82(2) of the Companies Act of 2008.

There is divergence of opinion on whether voidance of dissolution in terms of section 83(4) of the Companies Act of 2008, and previously section 420 of the Companies Act of 1973, applies to dissolution, and probably also deregistration, granted in terms of the amalgamation and merger provisions outlined above. Most of the doubt emanates from English court decisions. According to Blackman the "provisions in s 420 empowering the court to declare a dissolution void are not applicable where the company has been dissolved as a result of a reconstruction or amalgamation in terms of s 313(1)(d)."[1749] This view is shared by the authors of Henochsberg who submit that the "intention is that the Court's power under s 420 can be exercised only where the dissolution has occurred in the context of the winding-up of the company which has been completed …"[1750]

The leading English law authority dealing with the issue is the decision of the House of Lords in *Nokes v Doncaster Amalgamated Collieries Ltd*[1751] where in a dissenting judgment Lord Romer expressed the following views:

> "The court has, no doubt, power under sect. 294 of the Act[1752] to declare the dissolution of a company 'to have been void', but the section would seem to be applicable only to cases where the company has been in compulsory or voluntary liquidation and the dissolution has been effected under the provisions

1749 *Lawsa* para 336 note 3.
1750 Kunst, Delport and Vorster 900 (1).
1751 [1940] 3 All ER 549 (HL), [1940] AC 1014 (HL).
1752 UK Companies Act, 1929.

of sect. 221, sect. 236 or sect. 245. Under those sections, it is a condition precedent of dissolution that the affairs of the company have been completely or fully wound up, and where, owing to some liability or some asset of the company having been overlooked, the condition precedent has not been fulfilled, the court can properly declare the dissolution 'to have been void'. Where, however, the court has, under sect. 154,[1753] brought about the dissolution of the company without a winding up, I can see no ground upon which the court could possibly thereafter declare such dissolution 'to have been void'. It is to be observed, moreover, that the order under sect. 294 is to be made upon an application by:

... the liquidator of the company or by any other person who appears to the court to be interested...

Those words seem quite inapplicable to the case of a dissolution without a winding up."[1754]

The above views are consistent with an earlier statement in the dissenting judgment of Lord Blanesburgh in *Morris v Harris*[1755] in which he held that section 223(1) of the Companies (Consolidation) Act of 1908 which dealt with voidance of dissolution was "confined to cases where the dissolution follows the complete winding-up of the company's affairs".[1756]

There is the possibility that the need may arise for revival of a company which was dissolved without a winding-up of its affairs, this being done as part of the scheme of reconstruction, amalgamation or merger. A properly drafted scheme of reconstruction, amalgamation or merger would no doubt take care of all the assets, claims, rights and obligations of the dissolved company. The assets, claims, rights and obligations which have not been liquidated can simply be delivered, transferred, ceded, delegated or assigned to the transferor company or any other person, as the case may be. The problem which still remains though is what should be done if because of oversight some assets, claims, rights or obligations of a dissolved company have not been disposed of? After all, in some instances the problem can arise out of plain poor drafting of the scheme.

It is not a requirement of section 83(4) of the Companies Act of 2008, nor was it a requirement of section 420 of the Companies Act of 1973, that a company should have been

1753 Section 154 of the UK Companies Act, 1929 dealt with amalgamation and merger of companies.
1754 *Nokes v Doncaster Amalgamated Collieries Ltd* 567 - 568B.
1755 [1926] All ER Re 15 (HL), [1927] AC 252 (HL).
1756 *Morris v Harris* 24C.

wound-up and dissolved. The section merely provides that at any time after the company has been dissolved, application may be made to court for an order declaring the dissolution to have been void. For the purposes of a voidance order application in terms of the section it is sufficient that the company has been dissolved, no mention being made of the winding-up of its affairs.

It is submitted that a dissolved company, whether dissolution is a result of the winding-up of the affairs of the company, a scheme of compromise, arrangement, reconstruction, amalgamation or merger, can be revived in terms of section 83(4) because it meets the requirements of the section, namely it has been "dissolved". Although the need to resort to the section in the event of there having been a scheme of compromise, arrangement, reconstruction, amalgamation or merger should indeed be very rare, there is nevertheless such a possibility. It would be unfair to discriminate against interested persons needing help in terms of section 83(4), they seemingly meeting the requirements of the section, and thus deny them a right that the law provides.

Like its predecessor, section 420 of the Companies Act of 1973, section 83(4) does not disqualify interested persons from being granted relief simply because there was no winding-up of the affairs of the company. Moreover, there is this interesting scenario that if as a result of a scheme of compromise, arrangement, reconstruction, amalgamation or merger the affairs of one or more of the companies involved are completely wound up before dissolution takes place, no one, it is submitted, can seriously contend that voidance of dissolution in terms of section 83(4) is precluded. After all, in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1757] Rodgers J indicated that section 83(4) "applied to any company which had been 'dissolved' and is in broadly similar terms to the old s 420 [of the Companies Act of 1973] …."[1758] More explicit though was the view of Muller AJ in *Du Rand v The Companies and Intellectual Property Commission*[1759] that section 83(4) "has

1757 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1758 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 37(g).

1759 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013.

reference to a company that has been dissolved. *It matters not what the reason was for the dissolution*"[1760] and further:

> "There is no reason … why a distinction should be drawn between dissolution of a company in terms of s 82(3) read with s 83(1) due to its failure to render its annual return *and the dissolution for any other reason, for the purposes of relief under s 83(4).*" [1761]

10 10 COURT ORDER DECLARING DISSOLUTION VOID

10 10 1 Dissolution declared void

The wording of section 83(4) is very clear and states that an application may be made for an order "declaring the dissolution to have been void". If the application were to be successful that would be exactly what the court would order and, as Williams[1762] suggests, the wording of the order can be something like "the dissolution of the company be and is hereby declared void".[1763]

Although this is not done in the vast majority of cases, it is nevertheless submitted that the better approach is to grant the voidance order in two stages, namely by way of an interim order in the form of a rule *nisi* specifying the return date on which the order would, unless it is successfully opposed, be made final. The purpose of the rule *nisi*, which would be required to be published in the Government Gazette and newspapers circulating in the district in which the company was doing business, would be to give interested parties the opportunity to show cause why the order should not be made final, and if indeed the final order were to be granted, why it should not be made on certain terms. That was particularly so in terms of section 420 of the Companies Act of 1973 which allowed the court to make a voidance order "upon such terms as the Court thinks fit" while section 83(4)(a) of the Companies Act of

1760 *Du Rand v The Companies and Intellectual Property of South Africa* para 18. My emphasis.

1761 *Du Rand v The Companies and Intellectual Property of South Africa* para 21. My emphasis.

1762 Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 619.

1763 A typical order reads "the dissolution of the company is declared void" - see *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 W 850D-E.

2008 enjoins the court to make any order that is "just and equitable in the circumstances". A rule *nisi* gives interested parties, some of whom might not have been cited in the application, the opportunity to make submissions to the court.

A very helpful case dealing with a rule *nisi* is *Du Rand v The Companies and Intellectual Property Commission*[1764] which involved voidance of dissolution of a number of companies. The court granted a rule *nisi* returnable on a specified date, which called upon the respondent Companies and Intellectual Property Commission and all other interested persons to advance reasons why the following order should not be made final, namely:

- That the dissolution of the named companies be declared void:
- That the applicants institute winding-up proceedings[1765] against the companies within a period of one calendar month from the date of the order;
- That the order be published in the local newspaper and the Government Gazette;
- That the order be served upon the directors of the affected companies and also upon the registered address of each of the companies as on the date of deregistration;[1766] and
- That the order be served upon the respondent and the Minister of Trade and Industry as the member of Cabinet responsible for companies.

On the return date of the rule *nisi* if the order is made final, it could be made on more or less the following terms, as the case of *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd*[1767] illustrates, namely:

- The dissolution of the company is declared void;

1764 Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 7 March 2013.

1765 The companies in question had been deregistered for failure to file annual returns and were not wound up. However, the applicants were granted an order declaring their dissolution, instead of deregistration, to have been void. The applicants had a good reason for seeking voidance of dissolution in terms of s 83(4) of the Companies Act of 2008 instead of reinstatement of registration in terms of s 82(4) as, not being directors of the companies, they were not able to provide information required for lodging of annual returns.

1766 The issue of "voidance of dissolution" instead of "reinstatement of registration" of the companies concerned was explained in the previous note.

1767 [2008] ZAGPHC 133 (29 April 2008).

- The company, in liquidation, is revived;
- The company is to be restored to the register;[1768]
- The Master of the High Court is ordered to appoint a liquidator to wind up the company; and
- The respondents are ordered to pay the costs occasioned by their opposition to the application, jointly and severally, the one paying the others to be absolved.[1769]

Three other important and frequent issues not dealt with in the *Hillcrest* case but which are otherwise very common were dealt with in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1770] namely:

- The assets of the company immediately prior to its dissolution are declared to be no longer *bona vacantia* and are revested in the company;
- The liabilities of the company immediately prior to its dissolution are declared to revest in it; and
- Activities and legal steps taken by or against the company during the dissolution period of the company are declared null and void.[1771]

The *Hillcrest* case resolves the question of restoring the name of the company to the companies register. For if no such order is sought in the prayer and therefore not granted, it would mean that armed with a voidance order, the Companies and Intellectual Property Commission would have to be approached to restore the name of the company to the register.

1768 A similar order was specifically given in *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013) para 68 where the court ordered the Companies and Intellectual Property Commission to restore the name of the close corporation to the register of close corporations as the case dealt with a close corporation instead of a company.

1769 If the application is not opposed the issue of an adverse costs order will not arise, in which case costs would be costs in the liquidation of the company, should the company be taken back into liquidation, as would normally be the case. For an order that costs be costs in liquidation see for example *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 73I.

1770 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1771 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013) para 68.

10 10 2 Any order that is "just and equitable"

Section 420 of the Companies Act of 1973 provided that a court could make an order declaring the dissolution void "upon such terms as the Court thinks fit". However, the language of section 83(4) of the Companies Act of 2008 is different and provides that application may be made to court for an order declaring the dissolution to have been void "or any other order that is just and equitable in the circumstances". The words "upon such terms as the Court thinks fit" were held to be merely intended to deal with matters ancillary to the voiding order without in any way creating additional power to grant an order having an effect beyond that contemplated by the order.[1772]

Ancillary matters could for example take the form of filing some required forms with the Registrar of Companies such as those relating to annual returns or an order such as was made in *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[1773] where the court not only declared dissolution to have been void but also referred the matter to the Master for appointment of a liquidator who was given authority to withdraw funds lying in the Guardians' Fund and administer them in liquidation. It was emphasised that the words did not, for example, empower the court to order that proceedings which were pending at the time of dissolution had been revived by a voidance order.[1774] The power to make an order upon such terms as the court thought fit was therefore specifically related to the power to declare the dissolution void and to revive the company, but did not give the court general power to do all sorts of other things.[1775] As Gautschi AJ put it in *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd*:[1776]

> "The quoted words ["upon such terms as the Court thinks fit"] are in my view merely intended to deal with matters ancillary to the voiding order, such as the payment of annual duty by the company ... they do not create any additional power to grant an order having an effect beyond that contemplated by the voiding order."[1777]

1772 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W).
1773 1985 1 SA 70 (W).
1774 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 327H.
1775 *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (W) 73A - B.
1776 1993 2 SA 323 (W).
1777 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 327F-G.

Surprisingly, the courts also take the view that the differently worded section 83(4) of the Companies Act of 2008 has the same effect as section 420 of the Companies Act of 1973. Thus, the words "or any order that is just and equitable in the circumstances" are said to do no more than enable the court to make an order upon such terms as it thinks fit just as it would have done under s 420.[1778] After all, said Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic*,[1779] the remedies of "an order declaring the dissolution to have been void" and "any other order that is just and equitable in the circumstances" are not mutually exclusive.[1780] As Pillay J put it in *Nulandis (Pty) Ltd v Minister of Finance*:[1781]

> "Effectively, an order on dissolution that 'the Court thinks fit' in terms of s 420 [of the Companies Act of 1973] and one 'that is just and equitable' in terms of s 83(4)(a) [of the Companies Act of 2008] are not different. Both give the court wide discretion to decide each case on its merits."[1782]

In the recent case of *Absa Bank Ltd v Companies and Intellectual Property Commission*[1783] Rogers J, reading a unanimous decision of the full bench of the Western Cape High Court, held that section 83(4) of the Companies Act of 2008 was not confined to making an order declaring the dissolution void as it could also make any other order that was "just and equitable in the circumstances". Although reference in section 83(4) was to declaration of the dissolution as being void and to any other order that was just and equitable and the two alternative orders were linked by the word "or", that did not mean that the court was bound to grant one only or the other. An order that was "just and equitable" could entail a declaration that the dissolution was void, together with ancillary relief.[1784] Therefore, according to the case "any other order that is just and equitable in the circumstances" primarily relates to ancillary relief rather than a substantive alternative order to declaring the dissolution to have been void. However, the court took the point one step further and held that the court's wide discretion in terms of the section was guided by the "interests of justice" in all the

1778 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC); *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1779 2013 5 SA 294 (KZP).

1780 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* para 41.

1781 2013 5 SA 294 (KZP).

1782 *Nulandis (Pty) Ltd v Minister of Finance* para 61.

1783 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1784 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 48.

circumstances. In the instant case that "wide discretion" enabled the court to declare the dissolution to have been void in a matter in which the name of the company had been removed from the companies register (deregistered) for failure to lodge annual returns, a matter which truly speaking called for reinstatement of registration in terms of section 82(4). The court added that the voidance order also necessarily implied that the name of the company had to be restored to the register.[1785]

The "any other order that is just and equitable in the circumstances" remedy is very broad and flexible.[1786] It is broad enough to include an order directing restoration of a company to the register, as was done in the *Absa Bank Ltd v Companies and Intellectual Property Commission*,[1787] coupled with directions formulated to put the affected parties in the position they would have been, had the company not been deregistered or simply directing that the company should be deemed never to have been deregistered.[1788] To this extent the case digressed from typical voidance of dissolution to using the power to effect revival of a company through section 83(4) of the Act instead of section 82(4) and in respect of which the Companies and Intellectual Property Commission, and not the court, is given the power to reinstate registration of a company. The "just and equitable" order could also include an order validating any corporate action purportedly done on the company's behalf during the period of deregistration.[1789]

It is submitted that in confining the "very broad and flexible" and "certainly broad enough"[1790] words of section 83(4) which give the court "wide discretion"[1791] to making merely "ancillary orders", which the courts had always done in any event, is unnecessarily

1785 *Absa Bank Ltd v Companies and Intellectual Property Commission* paras 58 - 59. This approach was confirmed in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 41.

1786 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* para 43.

1787 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1788 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 43. In so doing the court digressed from a typical voidance of dissolution order to using the power to effect revival of a deregistered company through section 83(4) of the Act instead of reinstatement of registration under s 82 which is done by the Companies and Intellectual Property Commission and not the court.

1789 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* para 43. Once again this is a notable digression from voidance of dissolution to restoration of registration.

1790 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* para 43.

1791 *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) para 61.

restrictive and is not justified. It is further submitted that the words "or any other order that is just and equitable in the circumstances" give the court power to go further than make ancillary orders and in fact make an order that is alternative to an order declaring the dissolution to have been void, just as the wording of the section expressly provides. It cannot be over-emphasised that the connecting word is "or" instead of "and" which would have made a difference had it been used. Although South African law has not yet reached that stage, it is nevertheless submitted that a court could make good use of the words "any other order that is just and equitable in the circumstances" by providing a helpful remedy to the applicant without necessarily also making an order declaring a dissolution to have been void.

It is submitted that the court could, for example, and this is just one example, make an order that would ordinarily have warranted revival of the dissolved company without granting an order declaring the dissolution to have been void. One can think of a situation where the company sold property but to due oversight same was not transferred to the purchaser. If in that situation all that is required is simply a signature on behalf of the company, and perhaps a few other minor things, it is submitted that it could be beneficial for the court to make an order that is "just and equitable in the circumstances" by simply giving somebody, for example, the Master of the High Court, a former director or liquidator of the company and so forth, authority to do the necessary without having to worry about the burdensome task of first reviving the company to do a very simple thing. After all, if a voidance order is granted, and that is not guaranteed in the first place as the court has discretion to grant the order, revival of the company is generally speaking for all purposes rather than just for the purpose of doing the only one or a few acts that need to be done. In some instances, revival of a dissolved company could very well have unintended consequences of opening a can of worms, something which may not be in anyone's interest.

It is therefore submitted that a "just and equitable order" includes one providing a remedy to the applicant but which does not include an order "declaring the dissolution to have been void". An argument for transfer of property which belonged to a company at the time of its dissolution, without revival of such company by an order declaring its dissolution to have been void, was raised in *Ex parte McCalgan: In re Meyer and Charlton Gold Mining*

Co Ltd,[1792] citing as authority the case of *Ex parte Lydenburg Estates Ltd*.[1793] However, nothing turned on the point as no ruling was made thereon. Had a favourable ruling been made, it would have solved a problem which South African law faces under the present section 83(4) of the Companies Act of 2008 relating to "any other order that is just and equitable in the circumstances" which has been given a very restricted interpretation.

10 10 3 Costs

An answer to the problem of payment of costs occasioned by an endeavour to revive a dissolved company is suggested by Kunst, Delport and Vorster to be as follows:

> "The costs of the application should ordinarily be made costs of liquidation when the applicant is the former liquidator. Where, however, the applicant is someone who wishes to sue the company, it is submitted that ordinarily his costs should be costs in the cause in his contemplated action or reserved until it has been decided."[1794]

It is submitted that the above statement can be made more general in application but otherwise summarised in the following way, that is to say, if the application for a voidance order is granted and the company is put back in liquidation, costs of a voidance order should become costs in liquidation.[1795] If the application for a voidance order is successful but the company is not ordered to be one in liquidation, this being a possibility not much explored in South African law, for example, voidance of dissolution of a company that had been dissolved as a result of a scheme of arrangement or for that matter one that had been deregistered, the costs should be costs in the cause.[1796] Doing this would somehow be in line

---

1792 1936 WLD 53 55. Counsel for the applicants who made the submission was Mr Roper who was later to become a Judge.

1793 1909 LLR 127.

1794 Kunst, Delport, Vorster 902 (1).

1795 *Ex parte White and Smith* 1945 CPD 414; *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (W); *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402.

1796 In *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013) the court ordered that costs be paid by the company after voidance of its dissolution (and it had been deregistered) as deregistration benefitted it in that during that stage debts were not enforceable against it. The same approach was followed in *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

with Kunst, Delport and Vorster's proposal. If, on the other hand, the application for the order is unsuccessful, the applicant should promptly be ordered to pay the costs, this appearing to be a common phenomenon[1797] and quite understandably so as dismissal of the application would ordinarily be with costs.[1798] Any person who unsuccessfully opposes the application for voidance of dissolution should understandably be held liable for costs of such opposition.[1799]

10 11 EFFECT OF A VOIDANCE ORDER

10 11 1 Voidance order renders dissolution void *ab initio*

It is settled law that a court order declaring dissolution of a company to have been void, as provided in section 83(4) of the Companies Act of 2008, as well as its predecessor section 420 of the Companies Act of 1973, renders that dissolution void *ab initio*.[1800] This statement of principle has been repeated time and again, in such cases as *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*,[1801] where Labuschagne J reiterated the fact that an "order in terms of section 420 of the Act makes the dissolution of the company void *ab initio*".[1802] The voidance order has the effect that the company is revived or is simply brought back to life.[1803] It is commonly said that the company is restored to its status *quo* before

1797 *Ebrahim v Evans* 1990 4 SA 424 (D); *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W); *H L Hall and Sons (Group Services) (Pty) Ltd v Wilsnach* 1997 3 SA 116 (T).

1798 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W); *Kanderson (Pty) Ltd v The Registrar of Companies* 1987 2 PH E7 (T). In both cases the application was duly dismissed with costs.

1799 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC); *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W).

1800 *Re Servers of the Blind League* [1960] 2 All ER 298; *Re C W Dixon Ltd* [1947] 1 All ER 279; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W) 849G-H; *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA), [2001] EWCA 600 (CA), [2002] WLR 616 (CA).

1801 1991 3 SA 846 (W).

1802 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 849G.

1803 *Ebrahim v Evans* 1990 4 SA 424 (D) 427G-H.

dissolution[1804] with the result that all the consequences flowing from dissolution are avoided.[1805] According to Pennyquick J in *Re Servers of the Blind League*:[1806]

> "The effect of the voidance order, if made, would be that the dissolution would be void *ab initio*, with the consequence that the company must be regarded as having been in existence at the [relevant] date ..."[1807]

It is submitted that the statement of Vaisey J in *Re C W Dixon Ltd*[1808] correctly summarises the effect of a voidance order on the dissolution of a company. There the court said:

> " ... if the court makes a declaration to the effect that the dissolution is void, the declaration is not that the dissolution is void at the date of the order, or that it is to be deemed to be so void, or that it is to become void, or anything of that kind. The declaration is that the dissolution was void at the time when the company was supposed to have been dissolved ... the result is that it [the dissolution] was void *ab initio*, and all the consequences under the statute or otherwise which flow from that arrest themselves and are avoided."[1809]

On one occasion it was said that upon the granting of a voidance order the dissolution was taken never to have happened. This was the view of Goldstone J (as he then was) in *Government of the Republic of South Africa v Oceana Development Investment Trust plc*[1810] where his lordship declared:

> "The effect of such reregistration or restoration [voidance of dissolution], in both our companies legislation and that of England, is that the company is deemed never to have been dissolved."[1811]

However, the overwhelming view is to the contrary. Therefore, the correct view, it is submitted, is that the granting of a voidance order does not mean that no dissolution ever took

---

1804 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 849I.
1805 *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA), [2001] EWCA 600 (CA), [2002] WLR 616 (CA).
1806 [1960] 2 All ER 298.
1807 *Re Servers of the Blind League* 299C. See also *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA), [2001] EWCA 600 (CA), [2002] WLR 616 (CA) para 53.
1808 [1947] 1 All ER 279.
1809 *Re C W Dixon Ltd* 281E-F.
1810 1989 1 SA 35 (T).
1811 *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 37D.

place but only that the one that did, together with its consequences, had since been reversed by the court order. A number of authorities support this view. As Blackman puts it:

> "The company is not deemed never to have been dissolved. Rather, it is restored to life as it was at the time when it was dissolved, and therefore it is not deemed to have been capable of corporate activity during the interval between dissolution and voidance."[1812]

The matter received the attention of the Appellate Division (now Supreme Court of Appeal) in *Pieterse v Kramer*[1813] where the court per Holmes JA came out strongly against the denial of the dissolution as having taken place. There the court made the following observation:

> "In construing this provision[1814] one must guard against interpreting the words 'to have been void' as though the sub-section ended there. Had that been the case, there might have been some justification for thinking that the effect of the order of avoidance was that *de jure* the dissolution had never happened ... This however, is not the case."[1815]

It is submitted that the view that nothing in section 83(4) of the Companies Act of 2008 implies that avoiding dissolution is *ab initio*, that is, retrospective to the date of dissolution, as Pillay J held in *Nulandis (Pty) Ltd v Minister of Finance*[1816] is incorrect and should not be taken seriously. After all, that was merely by way of *obiter dictum*, the court quite frankly adding: "In any event, this is not a question I need consider in this application".[1817]

10 11 2 Voidance order restores the company's existence and activities

A court order declaring dissolution to have been void does no more than revive the company or bring it back to life[1818] and this with retrospective effect.[1819] Accordingly, voidance of

1812 Blackman *et al* 14-506-1.
1813 1977 1 SA 589 (A).
1814 Section 191(1) of the Companies Act 46 of 1926, the predecessor of s 420 of the Companies Act of 1973.
1815 *Pieterse v Kramer* 600B. See also *Morris v Harris* [1926] All ER 15 18C.
1816 2013 5 SA 294 (KZP).
1817 *Nulandis (Pty) Ltd v Minister of Finance* para 45.
1818 *Ebrahim v Evans* 1990 4 SA 424 (D) 427G.
1819 *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No:

dissolution of a company restores its corporate existence from the date of dissolution.[1820] The effect of a voidance order on the company's existence and activity prior to the dissolution was dealt with in *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1821] where the court held that on a proper interpretation of section 420 of the Companies Act of 1973 it could not be said that the legislature intended to regulate proceedings validly taken by a company prior to its dissolution. Although the section did not validate corporate activity of the company in the period between its dissolution and the voidance order, it nevertheless did not affect corporate activity taken prior to the dissolution. It followed that the company's existence and corporate activity prior to its dissolution were revived by an order under section 420 as if dissolution had never taken place. The company was therefore restored to its *status quo* by a voidance order.[1822]

10 11 3 Voidance order takes the company back into liquidation

If a company was dissolved as a result of the winding-up of its affairs in liquidation, since a voidance order restores the *status quo*, that can only mean that voidance of dissolution takes the company back into liquidation[1823] and, as Henochsberg[1824] indicates, the order of voidance of dissolution is retrospective to the extent that it restores the *status quo* as existing at the date of the dissolution. In this respect Blackman agrees saying:

> " ... if the company's corporate existence is restored, the company is restored to its position prior to its dissolution, ie to that of a company being wound up, and the power to bring proceedings on its behalf then vests in the liquidator."[1825]

71624 / 2012, unreported decision of the North Gauteng High Court dated 07 March 2013 para 22.

1820 *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA), [2001] EWCA 600 (CA), [2002] WLR 616 (CA).

1821 1991 3 SA 846 (W).

1822 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 849G-H.

1823 *Re Spottiswoode, Dixon and Hunting Ltd* [1911-1913] All ER Rep 526 529B; *Ex parte White and Smit* 1914 CPD 414; *Ex parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402; *Pieterse v Kramer* 1977 1 SA 589 (A) 596D; *Re Phillips Powis Ltd* [1998] 1 BCLC 440 (CA) 446 447.

1824 Kunst, Delport, Vorster 900(1) – 902.

1825 Blackman *et al* 14-508.

In *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[1826] Margo J granted an order declaring dissolution of the company to have been void and in terms of which the "company in liquidation was revived".[1827] This is also the position in Australia where the Federal Court held in *Civil and Civic Pty Ltd v R W Bass Pty Ltd*[1828] that in the event that the court declared dissolution of the company void, it would regain the status it had at the time the order of dissolution was made, namely a company in liquidation.

It should be pointed out though that the company in liquidation is revived only if there was liquidation in the first place. This has the result that if the company was dissolved other than as a result of winding-up of its affairs, voidance of dissolution would not lead to its liquidation. This led, among others, the court in *Nulandis (Pty) Ltd v Minister of Finance*[1829] to declare the dissolution of the company to be void and to also erroneously declare that the company was "revived as an association of its members".[1830] It is submitted that there was no need to declare the company "revived as an association of its members" as the court did. It was sufficient to have simply revived the company as a legal entity.

10 11 4 Appointment of liquidator

The Companies Act of 2008 does not have provisions dealing with the appointment, duties and removal of a liquidator as well as discharge of a person from the position of a liquidator. Accordingly, it is the provisions of the Companies Act of 1973 that govern the position of a liquidator. In terms of section 367 of that Act it is the Master of the High Court who appoints a liquidator. When the liquidator has completed his task of liquidating and winding-up the affairs of the company he should be released from office by the Master in terms of section 385(1) of the 1973 Act which provides that when a liquidator 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. When issuing the certificate, section

1826 1985 1 SA 70 (W).
1827 *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 73H.
1828 (1991) 20 ACSR 16 (FC, Aust) (General Division).
1829 2013 5 SA 294 (KZP).
1830 *Nulandis (Pty) Ltd v Minister of Finance* para 76.

385(2) requires the Master, among others, to state that he consents to its cancellation. Once the certificate is cancelled, the liquidator would have been released and, winding-up having been completed, the company would be duly dissolved in terms of section 83(1) of the Companies Act of 2008.

It was indicated above that voidance of dissolution of a company that was wound up takes it back into liquidation. Needless to say that liquidation needs a liquidator to run it. Since dissolution which had been properly done takes place only after the release of a liquidator, this has the result that when dissolution is declared void a company would be without a liquidator, which position is confirmed by case law. In *Civil and Civic Pty Ltd v R W Bass Pty Ltd*[1831] the Federal Court of Australia held that the effect of the order releasing the liquidator is that such release operates as a removal from office. This is also the position in South African law where the court held in *Pieterse v The Master*[1832] that the duties of a liquidator came to an end on dissolution of the company at the latest, for by then he would have been released. In any event, the duties of a liquidator cannot proceed beyond the dissolution stage.[1833]

As the power to appoint a liquidator vests in the Master the court has no power to make the appointment.[1834] In the context of voidance of dissolution, the appointment of a liquidator by the Master will be made only after, and not before, a voidance order has been granted as the case of *H L Hall and Sons (Group Services) Ltd v Wilsnach*[1835] shows. There it was said that when a court declares dissolution of a company to have been void it may include in the order a provision restoring the previous liquidator to his office or alternatively the matter may be referred to the Master for the appointment of a liquidator.[1836] The appointment of a liquidator by the Master is proper in that it is sanctioned by the Companies

1831 (1996) 20 ACSR 16 (FC, Aust) (General Division).
1832 2004 3 SA 593 (C).
1833 *Bowman v Sacks* 1986 4 SA 459 (W) 464E-F.
1834 *Ex parte Bowman: In re International Rock Products (Pty) Ltd* 1985 1 SA 70 (W) 73; *Hillcrest Village (Pty) Ltd v Waterkloofspruit Projects (Pty) Ltd* [2008] ZAGPHC 133 (29 April 2008) para 36; *Ex parte Malherbe: In re Pretoria Iron Mines Ltd* 1923 TPD 269.
1835 1997 3 SA 116 (T).
1836 Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 619.

Act of 1973.[1837] According to *H L Hall and Sons (Group Services) Ltd v Wilsnach*[1838] such appointment should be made after the dissolution has been declared void by the court.

There are a few odd cases dealing with the pre-1973 Companies Act dispensation where the court appointed a liquidator on voidance of dissolution. However, in view of the clear provisions of the Companies Act of 1973 this may no longer be done. In a very brief judgment in *Ex parte White and Smit*[1839] the joint liquidators of a company applied for the voidance of its dissolution and an order authorising and directing them to realise assets which although once thought valueless had since appreciated in value. The order was granted without addressing the issue of the appointment of the liquidators in particular. The court seems to have assumed that revival of the company of necessity included the power to restore the liquidators to their former office. In the case of *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd*[1840] the court indicated that it could exercise its power to appoint a liquidator and accordingly decided that the circumstances of the case warranted it appointing the liquidators forthwith, which it did. The exact basis of the power to appoint the liquidator by the court is not evident from the reading of the case itself. However, the *rationale* for the *McCalgan* decision was explained by Margo J in *Ex parte Bowman: In re International Rock Products (Pty) Ltd*,[1841] the court indicating that in terms of the Companies Act of 1926, and before its amendment in 1940, it had power to fill vacancies in the office of a liquidator. The position under section 377 of the Companies Act of 1973 was, and still is, that vacancies in the office of the liquidator are filled by the Master and not the court.

In *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[1842] the court suggested, albeit *obiter*, that it could be that when a voidance order was granted there was also power given to the court to restore the liquidator who held office when the company was dissolved. However, even in that case the court had no power to appoint an entirely new liquidator. It is nevertheless submitted that the correct approach is that represented by the

---

1837 Section 367.
1838 1997 3 SA 116 (T).
1839 1914 CPD 414.
1840 1936 WLD 53.
1841 1985 1 SA 70 (W).
1842 1985 1 SA 70 (W).

cases of *Ex parte Bowman: In re International Rock Products (Pty) Ltd*[1843] and *H L Hall and Sons (Group Services) Ltd v Wilsnach*[1844] in terms of which the appointment of the liquidator is left in the hands of the Master, this being a matter he takes care of in terms of s 385 of the Companies Act of 1973.

10 11 5 Re-vesting of *bona vacantia* property in the company

The effect of a voidance order on *bona vacantia* property which vested in the State on dissolution of the company is correctly summarised by the authors of Henochsberg who say:

> "The order is retrospective to the extent that it restores the *status quo* as existing at the date of the dissolution. Thus, property of the company still in existence at such date which passed into the ownership of the State as *bona vacantia*, on the avoidance of the dissolution, becomes again automatically the company's property and no order re-vesting it in the company is required."[1845]

This is in line with the approach in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1846] where Rogers J held:

> "It is well established in other Commonwealth jurisdictions with provisions worded in a similar way to s 420[1847] that upon a declaration that a dissolution is void the assets and liabilities which the company had immediately prior to its dissolution are revested in the company ..."[1848]

The question of revesting of *bona vacantia* property in the company received attention in the *Government of the Republic of South Africa v Oceana Development Investment Trust plc*[1849] where Goldstone J (as he then was) pointed out that the effect of voidance of dissolution, in

---

1843 1985 1 SA 70 (W).
1844 1997 3 SA 116 (T).
1845 Kunst, Delport and Vorster 900 (1) – 901, citing the cases of *Re C W Dixon Ltd* [1947] Ch 251 254 – 255; [1947] 1 All ER 279 281 and *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 37. Blackman *et al* 14-506 agrees with this approach saying: "... any property which on dissolution was deemed vested in the State as *bona vacantia* is treated as never having so vested."
1846 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).
1847 Of the Companies Act of 1973.
1848 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 25.
1849 1989 (1) SA 35 (T).

both South African and English law, was that the company was deemed never to have been dissolved. As a result there was a "retrospective reverting of any assets which the company may have owned at the time of dissolution".[1850]

The issue was hotly contested in *Re C W Dixon Ltd*[1851] where the problem was formulated by Vaisey J as follows:

> "I am informed by counsel for the Attorney-General that in order to avoid any possible suggestion being made that the effect of an order under s 294[1852] is not sufficient to re-vest for all purposes any property which came within the ambit of s 296,[1853] at any rate, in one case a vesting order as to such property in favour of the restored, revived or resuscitated company was made, but I understand the making of such order is by no means frequent, and although it may have been done in one case *ex abundanti cautela* I think it would not be right for me to make such an order as though it were the necessary or common thing to do."[1854]

The decision of the court was that upon the granting of a voidance order the property of the company which vested in the Crown on dissolution automatically re-vested in the company. As Vaisey J put it:

> "I propose ... to make an order declaring the dissolution to have been void, and, in so doing, I express the view that any property which has vested in the Crown ... either in fact or in so far as it must be assumed to have vested, did not so vest, the vesting being avoided by my order ... I express the view that, by making the order in the terms which I do, nothing remains in the Crown, if anything was ever vested in the Crown ..."[1855]

It is submitted that the view that on voidance of dissolution property of the company returns to it automatically without the need for a revesting order is correct. Nevertheless, sometimes if not only out of caution, courts include in a voidance order provision to the effect that the property of the company at the time of its dissolution is no longer *bona vacantia* and revests

1850 *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 37D.
1851 [1947] Ch 251, [1947] 1 All ER 279.
1852 Of the UK Companies Act of 1929, the South African equivalent of which was s 420 of the Companies Act of 1973 and now s 83(4) of the Companies Act of 2008.
1853 Of the UK Companies Act of 1929, declaring that *bona vacantia* property vested in the Crown. It had no equivalent in South African Law.
1854 *Re C W Dixon Ltd* 281B.
1855 *Re C W Dixon Ltd* 281F.

in it as was done, for instance, in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1856] and *Nulandis (Pty) Ltd v Minister of Finance.*[1857] Doing this would satisfy the view by Williams[1858] that it is possible that when the court grants a voidance order it can include therein a provision declaring some specified property no longer to be *bona vacantia* but to have revested in the company. As the *Absa Bank* and *Nulandis* cases indicate, it is not just specified property of the company but all of it at the time of granting of a voidance order that returns to the company.

10 12 TIME FROM WHICH DISSOLUTION IS AVOIDED

10 12 1 *General*

There is controversy regarding the time from which dissolution should be taken to have been avoided and therefore of no effect. There is a school of thought which holds that dissolution, once avoided by a court order, should be considered to have been void *ab initio* from the day it took place. This theory is in favour of retrospective operation of a voidance order and has the effect that once dissolution is avoided, the company should be treated as having never been dissolved in the first place. The contrary school of thought is against retrospectivity of the operation of a voidance order and accepts as its premise the fact that dissolution did after all take place even though it was later declared void. In other words, to the extent that the company was at some stage dissolved, that fact has to be acknowledged and given effect to. The two theories have a bearing on the way in which the activities of a company during the dissolution period should be looked at in the event of the granting of an order declaring the dissolution to have been void.

1856 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).
1857 2013 5 SA 294 (KZP).
1858 Williams 620.

10 12 2 First school of thought: Voidance order is retrospective

The retrospectivity of a voidance order was pronounced in very clear terms by Lord Wrenbury in a dissenting judgment in *Morris v Harris*.[1859] In that case an arbitration award was made against a company in June 1921, at which time the company was dissolved. Thereafter dissolution was declared to have been void. The issue was the validity of the award. The majority of the House of Lords held that the award, having been made during the dissolution of the company, was invalid. In a dissenting judgment Lord Wrenbury disagreed saying:

> "The order made under s 223[1860] declaring the dissolution 'to have been void' operates to displace the state of facts in June, 1921, as they would have been in the absence of that order and substitutes a state of facts in which there was in June, 1921, no dissolution. The result, in my judgment, is that at the date of the award 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."[1861]

Apart from the above pronunciation there has not been any case in which the court went as far as to uphold the validity of activities carried out by or against a company during the period of dissolution. A few cases that there might be lending some support to the retrospectivity theory only go as far as upholding the validity, and therefore continuation after a voidance order, of actions done before dissolution. One of a few odd cases in support of retrospectivity is *Re Spottiswoode, Dixon and Hunting Ltd*[1862] in which Neville J made a very brief and obscure statement that:

> "... the order ... declaring the dissolution to have been void would put matters back into the position in which they were when the proceedings were taken by the liquidator which resulted in the statutory dissolution of the company."[1863]

1859 [1926] All ER Rep 15 (HL).
1860 Of the Companies (Consolidation) Act of 1908.
1861 *Morris v Harris* 21E-F.
1862 [1911 - 1913] All ER Rep 526.
1863 *Re Spottiswoode, Dixon and Hunting Ltd* 529B.

The problem with the retrospectivity theory is that it equates voidance of dissolution with restoration of registration of the company to the register. In the case of restoration of registration section 73(6)(a) of the Companies Act of 1973 made an honest attempt to disregard the deregistration by providing that upon the granting of a restoration order by the court the company "shall be deemed to have continued in existence as if it had not been deregistered". The equivalent provisions as contained in the English Companies Act 1948 were held in *Tymans Ltd v Craven*[1864] to mean that a restoration order made it "at least reasonable and sensible to expect that the re-animation of the company should be retro-active in its effect".[1865]

It should be noted that sections 82(4) and 83(4) of the Companies Act of 2008 do not have provisions similar to those of section 73(6)(a) of the Companies Act of 1973. Neither did section 420 of the Companies Act of 1973. At best for section 420 it gave the court discretionary powers, essentially to deal with ancillary matters, by providing that a voidance order could be made "upon such terms as the Court thinks fit". Consistent with this section 83(4) of the Companies Act of 2008, albeit differently worded, provides that a court may otherwise make "any other order that is just and equitable in the circumstances". It is submitted that like section 420 which did not have retrospective effect, so is the position under the current section 83(4) of the Companies Act of 2008. It is nevertheless submitted that making a voidance order "upon such terms as the Court thinks fit" as was provided for in section 420 of the Companies Act of 1973 or "any other order that is just and equitable in the circumstances" of the case, gives the court a basis on which, in a proper case, to make a voidance order which has retrospective effect generally or in respect of some aspects thereof. This was the approach of Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic*[1866] where he said:

> "The ambit of s 83(4) is wide enough to empower a court to deal not only with the validation, conditionally or otherwise, of corporate activity purportedly conducted on behalf of the company during its period of deregistration, but also, if it is just and equitable to do so, with any prejudicial consequences of the ordinary retrospective effects of reinstatement, viz the re-establishment of corporate personality, the reinvestment of ownership of property and the reconstruction of the company's board of directors and general body of members. The wide breath of the court's power …

1864 [1952] 1 All ER 613 (CA).
1865 *Tymans Ltd v Craven* 619 per Sir Evershed MR.
1866 2014 1 SA 381 (WCC), [2014] 1 All SA 582 (WCC).

affords the ability to make the effect of any restoration of the company retrospective, whether generally or selectively."[1867]

It is accordingly submitted that giving judicially controlled retrospectivity to a voidance order in a deserving case would be in line with the language of section 83(4) of the Companies Act of 2008 which permits the court to grant "any other order that is just and equitable in the circumstances" where such order is warranted.

10 12 3 Second school of thought: Voidance order is not retrospective

The second school of thought holds that a voidance order is not retrospective in application. This has the effect that full recognition is granted to the fact of dissolution of the company having taken place and for as long as it lasted.[1868] Therefore, an order declaring dissolution of a company to have been void does not affect the fact of dissolution or give validity to acts purportedly carried on by or against the company between the date of the company's dissolution and the making of the order. The company's corporate existence is restored with effect from the date of its dissolution, but not its corporate activity.[1869] During the period of dissolution it is not permissible to have activities and legal processes taken by, for, on behalf of or against the company, seeing that upon its dissolution the company ceased to exist.[1870] Therefore, voidance of dissolution does not validate activities which took place during the dissolution period.[1871]

1867 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* para 50. There the court was dealing with reinstatement of registration which it held could, after being granted by the Companies and Intellectual Property Commission in terms of s 82(4), be made an order of court in terms of s 83(4). When granting a "just and equitable" order in terms of s 83(4) the court could grant relief which the Companies and Intellectual Property Commission was not empowered to grant, especially one relating to ancillary issues.

1868 As Holmes JA explained in *Pieterse v Kramer* 1977 1 SA 589 (A) 600B there is no justification for thinking that the effect of a voidance order is that *de jure* the dissolution had never happened. That is not the case. Therefore, the order does not confer retrospective revival on acts done on behalf of or against the company.

1869 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 42. *Morris v Harris* [1927] AC 252 (HL) 257; *Top Creative Ltd v St Albans District Council* [2000] 2 BCLC 379 (CA) 384 – 385.

1870 *Sandton Town Council v Erf 89 Sandton Extension 2 (Pty) Ltd* 1991 3 SA 846 (W).

1871 *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC); *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA);

The weight of authority in both South African and English law favours the view that a voidance order does not have retrospective effect.[1872] In *Morris v Harris*,[1873] and also in *Ebrahim v Evans*,[1874] the court ruled against retrospective operation of a voidance order. On this issue of retrospectivity regarding dissolution period activities Lord Sumner said:

> "... most of the proceedings in the arbitration in this case, and, above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them. The respondent must, therefore, prove his claim afresh in proceedings to which the appellant [company] will be a party."[1875]

After quoting extensively from *Ebrahim v Evans*[1876] and authorities there referred to, Gautschi AJ in *Pyramid Freight (Pty) Ltd v Incorporated General Insurances*[1877] approved of both the decision and the line of reasoning of the *Ebrahim* case saying: "I respectfully agree with this reasoning and am of the view that the effect of an order made under s 420 is not to confer its retrospective revival of the action."[1878]

10 12 4 Activities and legal processes which took place prior to dissolution

It may happen that during the period prior to and leading to dissolution of the company certain activities and legal processes involving the company would have taken place without however coming to finality. The question which arises is whether upon the granting of a voidance order those activities and processes continue where they were left off or should rather start afresh. In other words should the same activities and processes continue as if there

---

Morris v Harris [1927] AC 252 (HL), [1926] All ER 15 (HL); *Foster, Yates and Thom Ltd v NW Edge-Hill Equipment Ltd* [1978] 122 *Sol J* 860.

1872 Kunst, Delport and Vorster 901; *Morris v Harris* [1926] All ER Rep 15 (HL); *Pieterse v Kramer* 1977 1 SA 589 (A); *Re Lewis and Smart Ltd* [1954] 2 All ER 19 (Ch); *Ebrahim v Evans* 1990 4 SA 424 (D); *Pyramid Freight Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W).

1873 [1926] All ER Rep 15 (HL).

1874 1990 4 SA 424 (D).

1875 *Morris v Harris* 19C-D.

1876 1990 4 SA 424 (D).

1877 1993 2 SA 323 (W).

1878 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 327E - F.

had been no dissolution, it having of course been declared void, or does the law recognise the dissolution as having had an effect on them and therefore require same to start afresh? By the way this question has everything to do with retrospectivity or lack thereof of a voidance order.

In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1879] the court held that a voidance order revived legal processes which were underway at the time of dissolution. As a result there would be no need to start the proceedings afresh. In this respect Labuschagne J said:

> "... I can see no reason in principle or logic why an action, which was pending at the time of dissolution of the company, is not also revived by the order under s 420 of the Act, even if it can be said that the action had terminated or lapsed when the company was dissolved."[1880]

No mention was made in the *Sandton Town Council* case of *Ebrahim v Evans*[1881] in which the Durban and Coast Local Division held that actions which came to an end upon dissolution were not revived. Because of the very close dates involved in the delivery of the two judgments it is possible that the court was not aware of the *Ebrahim v Evans* judgment. Nevertheless *Ebrahim v Evans*[1882] was followed and applied in *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd*[1883] where it was held that any "actions which were pending at the time of dissolution would not be revived and a fresh action would have to be instituted".[1884]

Without perhaps wishing to play the numbers game unnecessarily, one can go along with *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd*[1885]even though it violates the principle that voidance of dissolution restores the status *ante quo*. While it is not the best way of approaching voidance of dissolution it nevertheless serves a very useful

1879 1991 3 SA 846 (W).
1880 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 849I-J.
1881 1990 4 SA 424 (D).
1882 1990 4 SA 424 (D).
1883 1993 2 SA 323 (W).
1884 *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 327E-F.
1885 1993 2 SA 323 (W).

purpose of bringing certainty. After all, a party having a claim against a dissolved company that it desires to prosecute is a person with an interest in the dissolved company and can therefore apply for voidance of dissolution without delay, if that fact of dissolution is known. Anyone going the *Sandton City Council* way will have to deal with the unbearable situation highlighted by Broome J in *Ebrahim v Evans*[1886] in which the court alerted to the real possibility "of reviving a part-heard trial or arbitration - some years later when witnesses (or even the presiding Judge!) might no longer be available ..."[1887]

Both *Ebrahim v Evans*[1888] and *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1889] were discussed in the subsequent case of *Pieterse v The Master*.[1890] There Waglay AJ held that it could not be accepted that potential prejudice to which a litigant would be subjected if pending litigation were to continue could serve as a criterion for an absolute rule that an otherwise validly commenced action should be permanently terminated and added:

> "I believe that there may well be instances where notwithstanding the fact that litigation is pending the company whose dissolution is declared to be void should not be allowed to continue with that litigation. Each situation will have to be considered on its own merits and where there is or has been real and substantial prejudice to the other litigating party, a Court might refuse the applicant permission to continue with the action but it can be neither equitable nor correct to simply bar all litigation which was pending at the time a company is deregistered or dissolved and the deregistration or dissolution is declared to be void."[1891]

In the *Pieterse* case, while holding that proceedings pending at the time of dissolution were allowed to continue after voidance of dissolution, the court nevertheless ordered that any steps taken by the company during the period of dissolution had to be retaken.[1892]

1886 1990 4 SA 424 (D).
1887 *Ebrahim v Evans* 428B. See also Matlala "The Effect of Voidance of Dissolution of a Company on Legal Proceedings" 2005 *SA Merc LJ* 81 88, commenting on *Pieterse v The Master* 2004 3 SA 593 (C).
1888 1990 4 SA 424 (D).
1889 1991 3 SA 846 (W).
1890 1990 4 SA 424 (D).
1891 *Pieterse v The Master* para 21.
1892 *Pieterse v The Master* para 23.3.

Therefore the position is different when it comes to pre-dissolution activities and proceedings. The one-time lone view taken by Labuschagne J in *Sandton City Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1893] to the effect that a voidance order revives corporate activity undertaken prior to dissolution, has since been endorsed by Waglay J in *Pieterse v The Master* and can be accepted as an alternative voice. After all, if a voidance order is not obtained very long after dissolution, the principle could serve a very useful purpose of ensuring continuity in legal proceedings without unnecessary interruption. One of the problems that the approach is not able to solve though is the fact that voidance of dissolution may be ordered many years after dissolution. To hold that old legal proceedings can carry on from where they were left off at the time of dissolution would no doubt create its own problems. Unfortunate as this may be, it is nevertheless the direction in which the majority of the cases go. The court could, however, ameliorate any hardships which are likely to arise by making an order that is "just and equitable in the circumstances" when granting a voidance order, as Binns-Ward J suggested in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic*.[1894]

10 12 5 Activities and legal processes which took place during dissolution period

All activities and legal processes which took place during the dissolution period up until the granting of a voidance order are null and void. Any activities and processes carried out by, for or on behalf of the company are "acts of mere usurpation, by a liquidator or other pretended agent with no office ... done on behalf of a company which had no existence".[1895] Such activities and processes are null and void and cannot be validated by a subsequent court order declaring the dissolution to have been void.[1896] The clarity of the legal position in this regard can be summarily demonstrated by a reference to the statement of Lord Sumner in *Morris v Harris*[1897] which reads as follows:

1893 1991 3 SA 846 (W).
1894 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 50.
1895 Per Lord Blanesburgh in *Morris v Harris* [1926] All ER Rep 15 (HL) 24A. See also *Bowman v Sacks* 1986 4 SA 459 (W) 463H.
1896 *Pieterse v Kramer* 1977 1 SA 589 (A); *In re Lewis and Smart Ltd* [1954] 2 Ch 19; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W).
1897 [1926] All ER Rep 15 (HL), [1927] AC 252 (HL).

> "In my opinion, most of the proceedings in the arbitration in this case, and above all, the award itself, are null, for they were taken and made against a company which did not exist, and no subsequent validity has been or could be given to them."[1898]

Surprisingly, even *Sandton City Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[1899] which held that pre-dissolution activities were revived by a voidance order accepted that as far as post dissolution activities and processes were concerned the position was different. The clear statement by Labuschagne J says it all and reads: "... I therefore find that any steps or proceedings taken on behalf of the plaintiff, after its dissolution, are null and void".[1900] This was followed in *Pieterse v The Master*[1901] where it was held that pleadings which had been drawn when the company was dissolved could not be allowed to stand. Steps taken while the company was dissolved had to be retaken unless the parties agreed on a simpler manner to deal therewith.[1902] It should be added in this respect though that short of agreeing to condone the taking of steps by or against a company during its dissolution period, itself an irregularity, it is difficult to figure out how else the parties could agree on a simpler manner to deal with the issue.

10 12 6 Activities and legal processes after voidance of dissolution

Like its predecessor, being section 420 of the Companies Act of 1973, section 83(4)(b) of the Companies Act of 2008 provides that after the granting of a voidance order "any proceedings may be taken against the company as might have been taken if the company had not been dissolved". Dealing with legal proceedings in general the authors of Henochsberg make the following observation, namely:

1898 *Morris v Harris* 19D.
1899 1991 3 SA 846 (W).
1900 *Sandton City Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 849A-B.
1901 2004 3 SA 593 (C).
1902 *Pieterse v The Master* para 19.

> "Section 420 permits proceedings to be taken against the company once the dissolution has been avoided. By the omission in the section of any reference to proceedings being taken by the company the Legislature, it is submitted, does not intend to preclude the taking of such proceedings."[1903]

That legal proceedings may be taken by a company after avoidance of dissolution should be obvious enough. Upon voidance of dissolution the company is brought back to life and can therefore do the usual things like litigating. As the court put it in *Ebrahim v Evans*[1904] the voidance order "does no more than to revive the company, or bring it back to life".[1905] Indeed there is judicial endorsement of the fact that proceedings by the company after its revival are not precluded. Broome J confirmed this view in *Ebrahim v Evans*[1906] saying:

> "In my view the effect of an order declaring the dissolution to have been void is that any action may be taken thereafter or thereupon, any action that is by or against the company. That is as far as it goes."[1907]

Since the retrospectivity theory does not apply in South African law it follows that after voidance of dissolution any activities or legal proceedings in which the company was involved during its dissolution period, be they by or against it, must of necessity start afresh[1908] provided of course that they did not become prescribed in the meantime.

10 13 VOIDANCE ORDER VERSUS PRESCRIPTION

In Australia the position regarding the running of prescription during the dissolution period of the company is fairly simple and straight forward. In *Holli Managed Investments Pty Ltd v Australian Securities Commission,*[1909] the Federal Court of Australia held that dissolution of the company did not stop the running of prescription against it. As a result the application for reinstatement of the company, after its winding-up and dissolution, was dismissed as the

1903 Kunst, Delport and Vorster 901.
1904 1990 4 SA 424 (D).
1905 *Ebrahim v Evans* 427G-H.
1906 1990 4 SA 424 (D).
1907 *Ebrahim v Evans* 427G and also 428B.
1908 *Morris v Harris* [1926] All ER Rep 15 (HL) 19E; *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W) 327F; *Ebrahim v Evans* 428E.
1909 (1998) 160 ALR 409 (FC of Aust).

court held that even if reinstatement was granted the liquidator would not be entitled to make an application for an enquiry into the affairs of the company since the time for making that application had lapsed. Moreover, Australian law made provision for an enquiry into the affairs of the company without reinstating it.

Contrary to the very clear principle of Australian law, the position in South African and English law is somewhat obscure. One thing about which there is no doubt though is that, as already indicated, during the period of dissolution the company is non-existent. This has the result that no steps or proceedings may be taken by or against the company, at least not until the dissolution has been declared to have been void. It is therefore submitted that dissolution qualifies as a "superior force" which prevents the creditor from interrupting the running of prescription by way of the institution of legal proceedings as provided for in the Prescription Act of 1969.[1910] It is further submitted that the running of prescription against a dissolved company falls within the ambit of section 13(1)(i) of the above Act. The effect of this provision is that if an obligation owed to a company were to prescribe during the dissolution period, since the dissolution amounts to an "impediment", such obligation would accordingly not prescribe before a year has lapsed after the impediment ceased to exist. The impediment being the dissolution, it ceases to exist when an order declaring the dissolution to have been void is granted. The result is therefore that after the granting of a voidance order there would still be a period of twelve months in which to enforce an obligation against the company if the debt is one which should have prescribed during the period of dissolution. This is in line with the view of Kunst, Delport and Vorster[1911] whose position is that the running of prescription of a debt owed by the company as at the date of dissolution is interrupted in terms of section 13(1)(a) of the Act, dissolution qualifying as a "superior force" within the meaning of that section, and that if dissolution is granted such debt would be recoverable. It should be noted, however, that if prescription had already been completed at the time of the dissolution the subsection would not apply in the first place.

On dissolution of the company all its property, including claims that it may be having against others, vests in the State as *bona vacantia.* Prescription starts running against the

1910 Act 68 of 1969, section 13(1)(a).
1911 Kunst, Delport and Vorster 902 (1).

State upon the vesting of the property in it and is completed in the normal course of events. Section 13(1) of the Prescription Act plays no role in this instance as the case of *Kanderson (Pty) Ltd v The Registrar of Companies*[1912] shows. In that case it was held that the claim which the company had against third parties vested in the State as *bona vacantia* on dissolution of the company. Prescription started running against the State in terms of the Prescription Act and was completed in the usual way.

In English law there is one important consideration which applies as far as prescription is concerned. Section 1030(2) of the UK Companies Act of 2006 provides that no order for restoration of a company shall be made for the purpose of bringing proceedings against the company for damages for personal injury if it appears to the court that the proceedings would fail by virtue of any enactment as to the time within which proceedings must be brought. The provision thus accepts that other enactments may provide for the running of prescription in favour of a company that had been dissolved. The section should, however, be read together with section 1032(3) which provides that when a court grants a voidance or restoration order it may give such directions and make such provision as seems just for placing the company and all other persons in the same position, as nearly as may be, as if the company had not been dissolved or struck off the register. In addition section 651(6) of the UK Companies Act of 1985 provided that nothing affected the power of the court, on making a voidance order, to direct that the period between the dissolution of the company and the making of the order would not count for the purposes of any statute of limitation. The Companies Act of 2006 does not have this provision.

In a few applications in which voidance of dissolution was sought in English law applicants also sought a "limitation override order", meaning an order declaring that the period between the dissolution of the company and the making of the order shall not count for the purposes of any applicable statute of limitation. The order sought would simply amount to saying that prescription did not run during the dissolution period so that legal proceedings could be instituted in instances where, had prescription run, the company would be out of time. Such an order can be granted[1913] even though English courts have generally rejected

1912 1987 2 E7 (T) 28.
1913 *Re Donald Kenyon Ltd* [1956] 3 All ER 596; *Regent Leisuretime Ltd v Natwest Finance Ltd*

such requests.[1914] In *Re Mixhurst Ltd*[1915] the Chancery Division, while granting an order declaring the dissolution of the company to have been void, held per Evans-Lombe J that it did not have jurisdiction under section 651(6) of the UK Companies Act of 1985 to make a "limitation override order". The same approach was followed by the Court of Appeal in *Smith v White Knight Laundry Ltd*[1916] where it was held that a claim against a dissolved company became statute-barred, that is it prescribed, during the dissolution period and could not be prosecuted against the company after voidance of dissolution.

It will be recalled that section 83(4)(a) of the South African Companies Act of 2008 gives the court the power to make "any other order that is just and equitable in the circumstances". It is submitted that the section gives the court discretion, in a proper case, to grant a "limitation override order".[1917] In granting such an order the court would take into account a number of factors including, for instance, the time that had lapsed between the period of dissolution of the company and the making of the voidance application, duration of the period by which the claim would have prescribed as well as prejudice to other parties involved in the envisaged litigation.

10 14 NO VOIDANCE OF DISSOLUTION FOR A LIMITED PURPOSE

When a liquidator or person who appears to the court to have an interest makes an application for an order declaring dissolution of a company to have been void, it is obviously because such person has reason for seeking the order. The purpose for which the order is sought, for example, in order to have *bona vacantia* property which was considered valueless revested in the company,[1918] pass transfer of property to a person who bought it before dissolution but failed to take transfer[1919] or to take a legacy under the will of a testatrix who died after

[2003] EWCA Civ 391.

1914 *Re People's Restaurant Group Ltd* [2012] EWHC B33 (Comm) (30 November 2012); *Re Huntingdon Poultry Ltd* [1969] 1 All ER 328 (Ch).

1915 [1994] 2 BCLC 19.

1916 [2001] 3 All ER 862 (CA), [2001] EWCA Civ 600 (CA).

1917 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) para 43.

1918 *Ex parte White and Smit* 1914 CPD 414.

1919 *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd* 1936 WLD 53.

dissolution of the company[1920] should not be confused with the effect of the voidance order if and when it is granted. Once granted the dissolution is avoided for all intents and purposes subject only to such terms as the court may think fit and therefore impose. Therefore, it is not correct, it is submitted, to say:

> "... the court is empowered, for example, to order that particular, specified *bona vacantia* be revested in the company and to give directions as to their distribution, without reviving the company for other purposes or making an order affecting other *bona vacantia*."[1921]

One is inclined to agree with Blackman[1922] who says that the court has no power to declare the dissolution void for a limited purpose, for example for the purpose of the exercise by the liquidator of authority to receive a particular payment. This principle was applied in *Re Champdany Jute Co Ltd.*[1923]

If Williams' view were to prevail it could mean among others there could possibly be endless applications for the voidance of dissolution of a single company, each time to deal with one or a few matters that need attention, to the exclusion of everything else. To take this absurd example it would, at least in principle, be possible to declare dissolution to have been void in order to enable a company to institute legal proceedings and enforce its rights while at the same time denying others the right to sue it notwithstanding the clearest provisions of section 83(4)(b) in terms of which any proceedings may be taken against the company as might have been taken if the company had not been dissolved. It is submitted that doing this would not be in order. After all, in terms of section 83(4)(a) the court is expected to make "any other order that is just and equitable in the circumstances". It is further submitted that making an exclusively limited purpose voidance of dissolution order would not be just and equitable as doing a few other things not specified in the order could turn out to have been necessary albeit not foreseen at the time of making the application. Accordingly, the case of *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd*[1924] in which voidance of dissolution was granted so that liquidators of the company could transfer ownership of

1920 *Re Servers of the Blind League* [1960] 2 All ER 298.
1921 Williams 619.
1922 Blackman *et al* 14-508; *Lawsa* para 339.
1923 1924 SC 209.
1924 1936 WLD 53.

purchased property to the buyer, without having "the same powers as were given to the liquidators at the time the company went into voluntary liquidation"[1925] could be seen as making an order that was just and equitable in the circumstances of the case. As the court indicated, those powers were not necessary in the circumstances of the case as all that the liquidators were required to do was to finish the unfinished business of transferring property to the purchaser.

10 15 VOIDANCE OF DISSOLUTION VERSUS RESTORATION OF REGISTRATION

10 15 1 General

Consistent with English law section 199(3) of the Companies Act of 1926 somewhat blurred the distinction between deregistration and dissolution by providing that a company could be struck off the register (deregistered) and dissolved. However, this was not to be repeated in the Companies Act of 1973 which kept a clear line of demarcation between deregistration and dissolution. In terms of the latter Act, there was also a clear distinction between restoration of registration, which was governed by section 73(6), and voidance of dissolution, which was governed by section 420.

Interestingly, the Companies Act of 2008 in a way revives the dispensation which obtained under the Companies Act of 1926 in that in terms of section 82(2) the Companies and Intellectual Property Commission is required to record the dissolution of the company in the prescribed manner (dissolution) and remove the company's name from the companies register (deregistration). Similarly section 83(1) provides that a company is dissolved (dissolution) as of the date its name is removed from the companies register (deregistration) unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction. Therefore, in terms of the Companies Act of 2008 there is an overlap

1925 *Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd* 57.

between deregistration and dissolution, as well as between restoration / reinstatement of registration and voidance of dissolution which cannot be denied.

10 15 2 Choice of the applicant as to the mode of reviving a defunct company in English law

Like its predecessors, section 1000(3)(b) of the UK Companies Act of 2006 provides that a company will be "struck off the register" and "dissolved". This has a bearing on the manner in which the company can be revived, namely by way of application for restoration of registration to the Registrar of Companies in terms of section 1025 or by making application, again for restoration of registration, to court in terms of section 1029. In fact section 1029(1) expressly provides that application can be made to court to restore to the register a company that "has been dissolved" or "has been struck off the register".

Consistent with statutory provisions English courts have on a number of occasions held that the law gives the applicant a choice to decide whether to revive a company by way of restoration of registration of the company to the register or obtaining an order declaring the dissolution to have been void. It was also said that given this choice, it was not for the court to decide that the company ought to be revived under one section rather than the other. As the court put it in *Re Test Holdings (Clifton) Ltd: Re General Issue and Investment Co Ltd:*[1926]

> "If on the true construction of the Act[1927] 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

1926 [1969] 3 All ER 517.
1927 UK Companies Act of 1948.
1928 *Re Test Holdings (Clifton) Ltd: Re General and Investment Co Ltd* 518I.
1929 [1971] 1 All ER 732.
1930 *Re Wood and Martin (Bricklaying Contractors) Ltd* 736g
1931 [1951] 2 All ER 898, [1952] Ch 10.

be wrong for the courts to seek to take away a choice which the legislature has decided that the applicant should have."[1928]

In *Re Wood and Martin (Bricklaying Contractors) Ltd*[1929] the court was also of the view that "if Parliament has given him [applicant] a choice, he is entitled to avail himself of that choice."[1930] The leading case, which also forms the foundation of the principle, on the choice of the applicant to decide whether to apply for restoration of registration of the name of the company to the register or voidance of dissolution is *Re M Belmont & Co Ltd*[1931] where the court granted an order declaring the dissolution to have been void even though the company had been struck off the register and dissolved (that is, was deregistered).[1932] It was the view of the court that it had inherent jurisdiction to declare the dissolution to have been void even though the company had been struck off the register of companies.

The choice of the applicant notwithstanding the courts have also been careful to point out that voidance of dissolution was primarily a method of reviving a dissolved company, while restoration of registration was reserved for companies which had been deregistered (struck off the register and dissolved). Voidance of dissolution, so the saying goes, is "primarily concerned with companies that have been wound up [and dissolved]".[1933] Restoration of registration on the other hand is the main alternative method of restoring a company to life "after it has been struck off the register and dissolved".[1934]

1932 *Re Test Holdings Ltd* [1969] 3 All ER 517 519H. This view was followed in *Re Thompson and Riches Ltd* [1981] 2 All ER 447.

1933 *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732.

10 15 3 Choice of the applicant as to the mode of reviving a defunct company in South African law

It is submitted that under the Companies Act of 1973 the South African position was correctly summarised by Williams[1935] who wrote:

> "Where it is desired to reinstate a company whose existence was terminated by deregistration, s 73(6) is *prima facie* the appropriate provision, since the subsection refers to companies that have been 'deregistered', and not to companies that have been 'dissolved'. Where the company has been dissolved following a winding-up, then s 420 is *prima facie* appropriate, for it says that it applies 'when a company ... has been dissolved', and makes no mention of its applicability to companies that have been deregistered."[1936]

Because of the blurring of the distinction between deregistration and dissolution brought about by sections 82 and 83 of the Companies Act of 2008, South African courts have moved away from the rigid categorisation and distinction between reinstatement of registration and voidance of dissolution. Initially the thinking was that the distinction between reinstatement of registration and voidance of dissolution should be maintained but this has now changed. The first case to deal with the issue under the Companies Act of 2008 is *Absa Bank Ltd v Companies and Intellectual Property Commission*; *Absa Bank Ltd v Voigro Investments 19 CC*[1937] where Henney J held that section 83(4)(a) of the Companies Act of 2008 provided for the type of situation envisaged by section 420 of the Companies Act of 1973 by giving a remedy to an interested party when the company was "dissolved" following a winding-up in the circumstances set out in section 82(1) and (2) of the Companies Act of 2008 but did not empower a court to reinstate a company that had been "deregistered". On the other hand, in terms of section 82(4) a court was not empowered to grant a reinstatement of a deregistered company as that power lay exclusively in the hands of the Companies and Intellectual Property Commission. Accordingly, the remedy of reinstatement of registration of a close corporation which the applicant Absa Bank sought could not be founded on the provisions of

1934 *Re Test Holdings Ltd* 519g.
1935 Williams "Disinterring the body Corporate: Sections 73 (6) and 420 of the Companies Act 1973" 1990 *SALJ* 610.
1936 Williams 614.
1937 [2013] 2 All SA 137 (WCC).

section 83(4) as there was no provision in the Companies Act of 2008 for a court to re-instate the registration of a company or close corporation.[1938]

The decision of Henney J was overturned on appeal to the full bench of the Western Cape High Court where Rogers J held in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1939] that if section 83(1) applied to all companies dissolved by removal of their names from the register, there was no reason that section 83(4), which formed part of the same section and applied "at any time after a company has been dissolved", should not apply to a company dissolved by removal of its name from the register pursuant to section 82(3). Section 83(1) applied in general to companies whose names had been removed from the register, and not only to those deregistered pursuant to liquidation. Therefore, if section 83(1) applied to all cases of removal from the register, the same would be true of section 83(4).[1940] The decision has since been followed on a few occasions and the position can now be accepted as settled.[1941]

It is submitted that the approach of Koen J in *Missouri Trading CC v Absa Bank Ltd*[1942] to the effect that in the case of a deregistered company a voidance order in terms of section 83(4) is permissible only if there was some wrongdoing (error) in the deregistration of the company is incorrect and should not be supported. In that case the court held that if deregistration was properly done, for example as a result of failure by the company to lodge annual returns, voidance of dissolution would not be possible.[1943] On the contrary that should be the very reason for seeking a voidance order in terms of section 83(4) particularly as compliance with annual returns filing obligation is not always easy, especially by an outside party. Equally unacceptable, it is submitted, is the approach of Legodi J in *Amarel Africa*

1938 *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa; Absa Bank Ltd v Voigro Investments 19 CC* paras 42- 43.

1939 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WC), [2013] ZAWCHC 57 (19 April 2013).

1940 *Absa Bank Ltd v Companies and Intellectual Property Commission* paras 43 and 45.

1941 See for example *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) paras 73-74; *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013 paras 12 and 18. See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC) paras 52 and 53.

1942 2014 4 SA 55 (KZD), [2014] ZAKZDHC 6 (20 March 2014).

1943 *Missouri Trading CC v Absa Bank Ltd* paras 36, 39 and 41.

Distributors (Pty) Ltd v Padayachee[1944] where it was held that the court would deal with deregistration or reinstatement of registration of a company by the Companies and Intellectual Property Commission to decide on the "fairness" of the action of the Commission. In other words, if deregistration and/or reinstatement of registration was properly done as to the procedure followed and the ground for doing so, the court would not entertain an application in terms of section 83(4) to make a voidance order and/or one that is "just and equitable in the circumstances". This, it is submitted, is not the correct approach.

Voidance of dissolution in terms of section 83(4) of a company that was deregistered in terms of section 82(3) has two main advantages which reinstatement of registration by the Companies and Intellectual Property Commission is not able to offer. First, voidance of dissolution is used to overcome compliance with lodgement of annual returns where the applicant is not a director or other person who is in a position to make such lodgement, which is a condition precedent to granting reinstatement of registration by the Companies and Intellectual Property Commission.[1945] As a result annual returns would be lodged only after, and not before, restoration of registration of the company. Secondly, when an order is granted in terms of section 83(4) the court has the power to make "any other order that is just and equitable in the circumstances",[1946] the power which the Companies and Intellectual Property Commission does not have in terms of section 82(4).[1947] In this regard, if it were to be followed, the view of Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic*[1948] would take the issue to another level. There the court indicated that after reinstatement of registration of a company by the Companies and Intellectual Property Commission an interested person could apply to court in terms of section 83 for an order that was "just and equitable" in the circumstances. That order could take a variety of forms, according to what was just and equitable in the circumstances of each case, and in effect achieve what the Commission could have done had it had the power to do so, for example, declaring that activities by or against the company which took place during deregistration

1944 [2013] ZAGPPHC 87 (28 March 2013).

1945 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 60. Lodgement of annual returns before reinstatement of registration can be granted is required by regulation 40(6) of the Companies Regulations, 2011.

1946 *Du Rand v The Companies & Intellectual Property Commission of South Africa* para 20; *Absa Bank Ltd v Companies and Intellectual Property Commission* paras 59, 65 and 67.

1947 The issue was discussed in among others *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

1948 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

were valid or that prescription did not run during that period. This is an interesting suggestion which if pursued could solve a few problems associated with reinstatement of registration of a company by the Commission.

10 16 SETTING ASIDE VOIDANCE OF DISSOLUTION

Granting an order declaring dissolution to have been void in terms of section 83(4) of the Companies Act of 1973 is not the final word. There is still room for reversing the voidance order which can be done by way of setting aside the order on review or most probably on appeal. While it is possible that a voidance order can be set aside on review of court application proceedings, the probabilities of doing so are nevertheless close to non-existent. Although in *Absa Bank Ltd v Companies and Intellectual Property Commission*[1949] the court indicated in broad terms that review could be granted as the "court's ordinary power of review is available" "upon proof of some irregularity or unlawfulness",[1950] it is submitted that doing so in the present context would in all probability prove illusive and that for a number of reasons. First, the Superior Courts Act of 2013 deals with review of a decision of magistrates' court and not that of a High Court.[1951] Secondly, it is most unlikely that in application proceedings for voidance of dissolution, the High Court would err to the extent of justifying a review of its proceedings and decision. If anything, review applications normally follow trial instead of application proceedings as in lengthy trials mistakes justifying a setting aside of the decision can be made in the process.

It follows therefore that the most likely basis on which a voidance order may be set aside is on appeal, such as happened in *Cronje v Hillcrest Village (Pty) Ltd*[1952] where the Supreme Court of Appeal set aside a voidance order granted by the High Court. There the court noted allegations of fraud and collusion which had been made against the liquidators of the company and found that there had been "irregularities"[1953] during the winding-up process.

1949 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WC), [2013] ZAWCHC 57 (19 April 2013).
1950 *Absa Bank Ltd v Companies and Intellectual Property Commission* para 58.
1951 Section 22 of the Superior Courts Act 10 of 2013.
1952 2009 6 SA 12 (SCA), [2009] 4 All SA 383 (SCA), [2009] ZASCA 81 (17 July 2009).
1953 *Cronje v Hillcrest Village (Pty) Ltd* para 29.

As a result avoidance of dissolution was justified so that the allegations could be attended to and addressed accordingly. This notwithstanding the appeal was upheld and the High Court voidance order set aside. The court cited as reasons for its decision among others the fact that even if the liquidation and distribution account were to be re-opened the chances of it yielding a surplus were remote, the respondents had withdrawn their objection to that account when it lay for inspection, it was long (five years) after the sale of the company's property at an auction, more than three years after confirmation of the liquidation and distribution account and almost two years after dissolution of the company that voidance proceedings were launched.[1954]

10 17 VOIDANCE OF DISSOLUTION OF A CLOSE CORPORATION

Section 67 of the Close Corporations Act of 1984 makes winding-up provisions for a solvent company as found in the Companies Act of 2008, and the winding-up provisions of an insolvent company as contained in the Companies Act of 1973, including dissolution and voidance of dissolution provisions, apply to close corporations. As a result the Close Corporations Act does not contain dissolution or voidance of dissolution provisions but instead provides that dissolution and voidance of dissolution provisions of the Companies Act of 2008 also apply to close corporations.[1955] Therefore the law governing dissolution and voidance of dissolution of companies also applies to close corporations.

10 18 SUMMARY

Section 83(4) of the Companies Act of 2008 is a very helpful instrument which makes provision for the revival of a company, should the need to do so arise. Moreover, it has the

1954 *Cronje v Hillcrest Village (Pty) Ltd* para 36.

1955 Section 67(1) of the Close Corporations Act of 1984 provides that Part G of Chapter 2 of the Companies Act of 2008 (which governs winding-up of solvent companies as well as deregistration and dissolution of all companies) read with the changes required by the context, applies to solvent companies. Subsection (2) provides that this Part of this Act (the Close Corporations Act of 1984) must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act of 2008 (dealing winding-up of companies).

advantage that it is not circumscribed both as regards the time within which voidance of dissolution may be sought or the grounds on which this may be done. Furthermore, the court is given the power to make "any other order that is just and equitable in the circumstances".

However, voidance of dissolution does not solve all problems as activities by, for, on behalf of or against the company during dissolution period are not validated by the voidance order, even the very acts which but for dissolution, would otherwise have been valid. This therefore leaves setting aside of dissolution as the most effective way of validating dissolution period activities. But setting aside dissolution is possible only if dissolution was not properly made thus limiting the basis on which it can be sought. In a nutshell it is not always easy to undo the injustice which dissolution can bring about. After all, granting a voidance order is not automatic as the court has a discretion and may well turn down the application, regardless of how desperately the applicant may be in need thereof. As it is said, a voidance order is "not available for the asking" and can accordingly be denied if the circumstances of the case so warrant.[1956] Very briefly, like its predecessors the Companies Act of 2008 makes provision for voidance of dissolution, a process which is intended to solve problems. However, that cannot solve all problems, just as the preceding discussion demonstated.

1956 *Re Thompson & Riches Ltd* [1981] 2 All ER 447 483f.

CHAPTER 11

Conclusions and recommendations

11 1 INTRODUCTION AND RECAPITULATION

The purpose of this study was to examine the meaning of "deregistration" and "dissolution", the role which the two processes serve in company law, how they are brought into operation and their effect. However, as having a company deregistered or dissolved is not the final word since that process could be reversed it also became necessary to look at reinstatement of registration[1957] and voidance of dissolution,[1958] including the consequences thereof. In the course of doing so it was shown in this study that South African company law has its origin in English law, the earlier versions of South African company law statutes being a reproduction of United Kingdom company legislation of the time.[1959]

A major source of South African company legislation of the past was the Transvaal Companies (Consolidation) Act of 1909. In line with the UK Companies (Consolidation) Act of 1908 in relation to deregistration, the Transvaal Companies (Consolidation) Act of 1909 provided that the Registrar of Companies could "strike its name off the register" and after publication of the name of the company in the Government Gazette, the company would be "dissolved". After winding-up of its affairs the company was also to be "dissolved". The language of the Transvaal Companies (Consolidation) Act of 1909 was taken over by the Companies Act of 1926 which in section 199(6) made provision for the Registrar to "strike its name off the register" and after publication of its name in the Gazette the company was "dissolved". In terms of section 154 of the Companies Act of 1926 a company was "dissolved" after its affairs had been completely wound up. However, the dissolution

1957 Discussed in chapter 9 of this study under the heading "Restoration of registration of a company".

1958 Discussed in chapter 10.

1959 This was particularly so in the case of the Transvaal Companies (Consolidation) Act of 1909 which was a replica of the UK Companies (Consolidation) Act of 1908.

procedure under section 154 was cumbersome in that after completion of winding-up the affairs of the company, the Master had to apply to court for an order that the company be dissolved. Thus, just to dissolve a company after a complete winding-up of its affairs, a court order was required, dissolution not being a mere administrative act.

In chapter 5 of this study it was shown that section 73 of the Companies Act of 1973, like its predecessor section 191 of the Companies Act of 1926, had detailed provisions dealing with the procedure to be followed before a company could be deregistered. This is not the case with section 82 of the Companies Act of 2008 which simply deals with the grounds on which a company may be deregistered without providing the procedure to be followed. The study showed that as a small consolation regulation 40(2) of the Companies Regulations, 2011[1960] provides that if a company were to fail to lodge annual returns for two consecutive years, the Companies and Intellectual Property Commission could deliver a demand to the company by way of registered post or "other verified communication" in which the company is requested to comply with its lodgement obligations. If the company were to fail in its lodgement obligations the Companies and Intellectual Property Commission could then issue a Notice of Pending Deregistration and if there was still no compliance, the company could, after twenty business days, be deregistered. This study showed that that is the only instance in which the company would be informed of possible deregistration. If deregistration were to take place on other grounds the Companies Act of 2008 does not prescribe any procedure to be followed.

Deregistration has very serious consequences[1961] for the company and other persons in that among others the company loses its existence as a legal entity[1962] while its property accrues to the State in terms of the *bona vacantia*[1963] principle. This study showed that to deprive a company of its existence and property without giving it the opportunity to respond to pending deregistration can not be said to be fair. Moreover, it is arguable that in this

1960 The regulations were published under GNR 351 in Government Gazette 34239 of 26 April 2011 and amended in terms of Practice Note 6 of 2012 which came into effect on 1 November 2012.
1961 Discussed in chapter 6.
1962 Discussed in chapter 4.
1963 Discussed in chapter 7.

respect the provisions of the Companies Act of 2008 are vulnerable to a constitutional challenge.[1964]

In chapters 9 and 10 this study showed that the Transvaal Companies (Consolidation) Act of 1909 somehow blurred the distinction between deregistration and dissolution as the word "dissolved" was used both in relation to striking off the name of a company from the register (deregistration) and also after a complete winding-up of the affairs of the company (dissolution). The Companies Act of 1926 continued the trend. However, a significant change came about in terms of the Companies Act of 1973 which made a clear distinction between deregistration and dissolution, first by changing the wording used, preferring "deregistration"[1965] over "strike its name off the register" and secondly by omitting reference to "dissolved" in relation to deregistration of a company. In other words, the company was simply "deregistered" with no reference being made to "dissolution". However, that was not to be so with the current Companies Act of 2008 whose language takes South African company law back to where it was a century ago. In terms of section 82(2) of the Companies Act of 2008 when the Companies and Intellectual Property Commission receives a certificate of winding-up of the company confirming that its affairs have been completely wound up, it is required to do two things, first to dissolve the company by recording the dissolution of the company in the prescribed manner and, secondly to deregister it by removing its name from the companies register. The simultaneous dissolution and deregistration of a company is repeated in section 83(1) which provides that a company is dissolved (dissolution) as of the date its name is removed from the companies register (deregistration) unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction. This study showed that blurring the distinction between deregistration and dissolution, as the

1964 The issue was pertinently raised in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) in the context of restoration of registration where application papers were not served on such interested parties as the State which would, on restoration of registration, be deprived of property which vested in it in terms of the *bona vacantia* principle. As a matter of fact it was precisely for failure to give interested parties, and the State in particular, notice of restoration proceedings, and thereby denied it the opportunity to state their attitude to the restoration application, that a restoration order was set aside in *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).

1965 The word "de-registration" originated from the Commission of Enquiry into the Companies Act - Main Report (1970) para 50.20 where it was used to distinguish the process from dissolution.

Companies Act of 2008 does, was not a step in the right direction since far from clarifying the position, a seed of confusion was sown again.[1966]

It was also shown in chapters 9 and 10 of this study that the Companies Act of 2008 blurs the distinction between deregistration and dissolution and consequently between restoration of registration and voidance of dissolution which existed under the Companies Act of 1973 in terms of which the two processes were treated separately and differently. Deregistration was dealt with in section 73 which specified the grounds on which it could be granted as well as the procedure to be followed. The section also dealt with restoration of registration were the need for it to arise, specifying the grounds on which it could be sought and the consequences thereof. Significantly, restoration of registration was a judicial and not an administrative act.[1967] The effect of a restoration order granted by the court was that the company was "deemed to have continued in existence as if it had not been deregistered". Furthermore, a restoration order could contain "such directions and make such provision as to the Court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered". The study analysed at length the implications of the above provisions of the Companies Act of 1973 dealing with restoration of registration.

Again in chapter 9 this study showed that the Companies Act of 2008 created a new dispensation relating to restoration of registration. A few points were noted. For a start there is a change in wording. Whereas in terms of section 73(6) of the Companies Act of 1973 the wording used was "restoration of registration", that has changed to "reinstatement of registration" under section 82(4) of the Companies Act of 2008. However, the courts have held that nothing turned on the changed language brought about by section 82(4) as the effect is still the same so much so that whether one uses the old wording of "restoration of registration" or the new wording of "reinstatement of registration" the result remained the

1966 Discussed in chapters 9 and 10.

1967 An exception to the rule that application for restoration of registration was to be made to court was introduced in 2006 in terms of s 73(6A) which was inserted by s 15(b) of the Corporate Laws Amendment Act 24 of 2006. In the case of close corporations though restoration of registration was always done by the Registrar of Close Corporations in terms of s 26(6) of the Close Corporations Act of 1984, that is, until its repeal by the Companies Act of 2008.

same.[1968] More significant though is the fact that under section 82(4) of the Companies Act of 2008 it is the Companies and Intellectual Property Commission, and not the court, that reinstates registration of a deregistered company.[1969] This has created a few problems. First, the Companies and Intellectual Property Commission is simply a juristic entity created by the Act to administer its provisions and is not a court of law. Secondly, the courts have held that they do not have jurisdiction to reinstate registration as in terms of section 82(4) only the Companies and Intellectual Property Commission is allowed to do so.[1970] Thirdly, unlike section 73(6) of the Companies Act of 1973, section 82(4) does not have provisions to the effect that on reinstatement of registration a company shall be deemed to have continued in existence as if it had not been deregistered. Similarly when reinstating registration the Companies and Intellectual Property Commission is not given the power to make an order containing such directions as may seem just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.[1971] Fourthly, as the Companies and Intellectual Property Commission is not a court, it cannot grant ancillary orders when reinstating registration of a company. In this respect, this study has shown that the Companies Act of 2008 has, far from solving existing problems, simply created new ones. One would have thought that the Act was meant to solve rather than create problems. This is contrary to the purposes of the Act which, as stated in section 7, include among others creating flexibility and simplicity in the formation and maintenance of companies, continuing to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy and reaffirm the concept of the company as a means of achieving economic and social benefits.

It was demonstrated in this study that while the purpose of giving the Companies and Intellectual Property Commission the power to reinstate registration of a deregistered

---

1968 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 21.

1969 This point was emphasised in such cases as *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); *Absa Bank Ltd v Companies and Intellectual Property Commission of South Africa: Absa Bank Ltd v Voigro Investments 19 CC* [2013] 2 All SA 137 (WCC).

1970 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC), *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013).

1971 This issue was discussed, among others, in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

company was to simplify the process and make it affordable, lack of provisions dealing with retrospectivity of reinstatement in section 82(4) has the unfortunate unintended consequence of producing the opposite result. Whereas according to the decision of the Supreme Court of Appeal in *CA Focus CC v Village Freezer t/a Ashmel Spar*[1972] when the court gave a voidance order in terms of section 26(7) of the Close Corporations Act of 1984, and equally therefore also in terms of section 73(6) of the Companies Act of 1973, that order validated deregistration period activities for or against the close corporation, and therefore also of a company, the position is not the same when the Companies and Intellectual Property Commission reinstates registration of a company,[1973] or close corporation for that matter, under section 82(4) of the Companies Act of 2008.

Therefore, to solve the problem of lack of retrospectivity of activities by or against a company during deregistration period, it was suggested in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic*[1974] that the solution would be to follow a two step approach. First, an application would have to be made to the Companies and Intellectual Property Commission for reinstatement of registration in terms of section 82(4) which, if granted, would lead to the second step of approaching the court in terms of section 83(4) for an order which is "just and equitable in the circumstances". It is submitted that this two stage approach could not have been in the contemplation of the legislature when it enacted section 82(4) of the Companies Act of 2008 but has been necessitated by the failure to make provisions in the section validating deregistration period activities by or against the company, as well as failure to give the Companies and Intellectual Property Commission the power to make ancillary orders when granting reinstatement of registration. Far from making reinstatement of registration simple and affordable, the opposite turns out to be the case. This is yet one more unfortunate aspect of reinstatement of registration under section 82(4) of the Companies Act of 2008.

1972 2013 6 SA 549 (SCA). See also *Kadoma Trading (Pty) Ltd v Noble Crest CC* 2013 3 SA 338 (SCA).

1973 In *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC) para 21 Binns-Ward J suggested that it could be that reinstatement of a company by the Companies and Intellectual Property Commission was with retrospective effect. However, no definite conclusion was arrived at as it was not necessary to do so in the case.

1974 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

11 2 ISSUES AND THE DEBATE

This study has shown that a number of issues arise concerning both deregistration and dissolution but particularly deregistration. Deregistration being a process traceable way back to the United Kingdom's Companies Act of 1880, it appears that after some hundred and thirty four years a number of problems still remain unresolved. There is a debate in South African law which originated from the report of the Van Wyk de Vries Commission where the view was taken that should members of a deregistered company continue doing business after its deregistration it would no longer be the company doing so but the members in their capacity as an "association of persons" which lacks legal personality. As a result it would not be the company that conducts business but the "association of persons" whose members become personally liable for any resulting obligations. A few academic writers[1975] and court decisions[1976] accepted that as the correct approach but over the years the view changed so that the "association of persons" theory appeared to have been formally rejected. However, this study has shown that that was apparently not the very final word on the subject as of late the idea which one would have thought was finally laid to rest has made a turnaround and resurfaced.[1977]

The study has also shown that under the Companies Act of 1973 and its predecessors there was a prescribed procedure to be followed before a company could be deregistered. It was also shown that failure to follow the procedure would result in deregistration being declared invalid and accordingly set aside.[1978] Surprisingly, the Companies Act of 2008, which otherwise goes a long way in extending the grounds on which deregistration of a company may be obtained, does not prescribe the procedure to be followed in doing so. This

---

1975 See for example Cilliers & Benade *et al Corporate Law* (2000) para 30.06; Van Rooyen "Henochsberg on the Companies Act" 1987 *TSAR* 396.

1976 *Income Tax Case 1306* (1980) 42 SATC 139 145; *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

1977 It is hard to understand how Mohapi "The effect of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012) and Pillay J in *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP) paras 9, 42, 49, 65 and 76 could still come to their conclusion in respect of an issue which one would have thought had long been settled.

1978 *FirstRand Bank Ltd v Davis* 2004 1 SA 31 (N); *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008); *Boseme v Roger* [2011] ZAGPJHC 174 (23 November 2011).

immediately raises the question of fairness and legality[1979] of the process seeing that deregistration has significant consequences for the company and other interested persons such as the fact that on deregistration the property of the company becomes State property, any contract then in existence cannot be enforced while contracts concluded during deregistration period are not valid and binding, etc.[1980] As the company and interested persons are not warned that it would be deregistered, quite frankly, nobody would be aware of its pending deregistration and its eventual implementation with the result that as far as the company and everybody else is concerned, it would be business as usual. This mostly happens in the context of deregistration of a company for failure to lodge annual returns, although it may take place in any situation.[1981]

This study has also shown that on deregistration and dissolution of the company its property accrues to the State in terms of the *bona vacantia* principle. The initial debate that arose in terms of the decision of the Transvaal Provincial Division in *Ex parte Montrose Exploration Co Ltd*[1982] as to whether the property vested in the State automatically or needed a court order to that effect has since been resolved in, among others, the leading case of *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy*.[1983] The automatic vesting of property in the State is of course not without problems. For one thing, it is contrary to all modes of acquisition of ownership in property and particularly immovable property where registration is the way in which transfer of ownership takes place. That does not happen in the case of *bona vacantia* property, yet the State becomes the owner. Does it also mean that apart from the right of ownership the State also takes obligations attaching to the property? This study has shown that quite a few

1979 The problem of failure to notify interested parties arises mostly in the context of restoration of registration of a company which is obtained *ex parte* notwithstanding the fact that is will definitely affect other parties such as the State in relation to *bona vacantia* property as happened for instance in *Insamcor (Pty) v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 (CA), [2007] ZASCA 6, [2007] SCA 6 (RSA) (12 March 2007) and *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008). See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1980 The general consequences of deregistration were discussed in chapter 6 above.

1981 *FirstRand Bank Ltd v Davis* 2004 1 SA 31 (N); *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008); *Boseme v Roger* [2011] ZAGPJHC 174 (23 November 2011); *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd* 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC).

1982 1918 TPD 179.

1983 1984 3 SA 1 (A).

questions remain unanswered.[1984] Far from tackling the issues that arise relating to *bona vacantia* the Companies Act of 2008 simply refrains from doing so.

According to the Van Wyk de Vries Commission a solution to the problem of liability that would arise when a company was deregistered was to be found in holding that the remaining members of a company who continued carrying on business after deregistration were, as an association of persons without legal personality, personally liable for the debts. This study has shown that the recommendation did not find favour with the courts and has since been rejected.[1985] This has the unfortunate result that creditors of the company are left without protection and that their answer is to be found in seeking reinstatement of registration of the company in terms of section 82(4) of the Companies Act of 2008 which has its own challenges.

The case of *Mouton v Boland Bank Ltd*[1986] pointed out the shortcomings of reinstatement of registration, at that time "restoration of registration", as a remedy for creditors by highlighting the danger of possible plunder of the company's resources during the deregistration period since in the case of a defunct company there would be no one to take care of its assets. This would have the result that by the time registration of the company was reinstated, it could be that in some instances very little of the assets of the company, if anything at all, would still remain. In the case of close corporations section 26(5) of the Close Corporations Act of 1984 sought to protect creditors by declaring members of the corporation at the time of deregistration to be personally liable for its debts, which liability was not

1984 The issue is discussed by among others Brusser "The status of a deregistered company" 1985 *The South African Company Law Journal* 9. More critical of the *bona vacantia* principle though is Sonnekus who opposes vesting of property of a deregistered or dissolved company in the State. He argues that at best the State should be seen as holding the property as a trustee for interested persons such as members of the deregistered or dissolved company. By and large though his argument is that such property has no owner and is therefore capable of acquisition of ownership through acquisitive prescription. His writings on the issue include: Sonnekus "Enkele opmerkings na aanleiding van die aanspraak op *bona vacantia* as sogenaamde regalereg" *TSAR* 121; Sonnekus "Regsgevolge van natrekking en die formulering van aanhegtingsmaatstawwe" 1990 *TSAR* 320; Sonnekus "Grondeise en die klassifikassie van grond as *res nullius* of as staatsgrond" 2001 *TSAR* 82; Sonnekus "Persoonlike Diensbaarhede en die herregistrasie van 'n deregistreerde Maatskappy as Reghebbende op gespanne voet" 2008 *TSAR* 130.

1985 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D); *Terblanche v Nothnagel* 1975 4 SA 405 (C); *Indrieri v Du Preez* 1989 2 SA 721 (C); *Akromed (Pty) Ltd v Suliman* 1994 1 SA 673 (T). The issue was discussed at length in chapter 8 above.

1986 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA), [2001] ZASCA 58 (10 May 2001).

terminated on restoration of registration of the corporation.[1987] However, this study has shown that the section has since been repealed by the Companies Act of 2008 which has no equivalent provisions. As a result the little protection that section 26(5) offered has fallen by the wayside. Moreover, the courts have rejected protection of creditors on the basis of liability arising in terms of a contract concluded on behalf of a non-existent company.[1988] The issue of delictual liability arising out of fraudulent or negligent misrepresentation by entering into a contract on behalf of a non-existent company is yet to be pursued in South African law.[1989] It remains to be seen if any headway would be made in this respect.

This study has further shown that under section 73(6)(b) of the Companies Act of 1973 the court was given power to restore registration of a company in terms of an order that could contain such directions and make such provisions as to the court seemed just for placing the company and all other persons in the position, as nearly as could be, as if the company had not been deregistered. In other words, when granting a restoration order the court could grant such ancillary relief as was necessary to bring about justice to the affected parties. In terms of section 82(4) of the Companies Act of 2008 reinstatement of registration is done by the Companies and Intellectual Property Commission, which is not a court of law and does not have power to make ancillary orders and also lacks the power which the Companies Act of 1973 gave to a court in terms of section 73(6)(b). The study also showed that section 82(4) does not give the Companies and Intellectual Property Commission the power given to the court in terms of section 83(4)(a) to make "any order that is just and equitable in the circumstances".

1987 *Mouton v Boland Bank Ltd* 2001 3 SA 877 (SCA), [2001] 3 All SA 485 (SCA), [2001] ZASCA 58 (10 May 2001); *Boland Bank Ltd v Mouton* 1997 4 All SA 67 (C); *Commissioner for SARS v Mendes* [2001] 2 All SA 316 (SE); *Edward Street Property Investments CC v Lambrechts* [2010] ZAWCHC 218 (1 December 2010); *Boseme v Rogers* [2011] ZAGPJHC 174 (23 November 2011); *Absa Bank Ltd v Hlathini Safaris* [2012] ZAGPJHC 176 (17 August 2012).

1988 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D); *Terblanche v Nothnagel* 1975 4 SA 405 (C); *Indrieri v Du Preez* 1989 2 SA 721 (C); *Akromed (Pty) Ltd v Suliman* 1994 1 SA 673 (T). This was a rejection of liability created in terms of *Kelner v Baxter* LP 2 CP 174.

1989 According to *Indrieri v Du Preez* 1989 2 SA 721 (C) 728E it would be "clearly inappropriate" to hold anybody liable in those circumstances.

This study showed that in the case of restoration of registration, not only was registration of the company reinstated with retrospective effect so as to revive the existence of the company, its activities and pending proceedings as at the time of deregistration but it also validated deregistration period activities.[1990] However, that is not so with voidance of dissolution. There is divergence of judicial opinion as to revival of rights and obligations as at the time of dissolution,[1991] the effect of voidance of dissolution on pending legal processes[1992] and absolute denial of validation of dissolution period activities.[1993] This has the unfortunate result that time lost during dissolution period cannot be recovered or at least compensated for when a court grants an order declaring dissolution to have been void.

11 3 BROAD CONCLUSIONS

This study has shown that deregistration and dissolution of companies raise a number of issues some of which have been attended to by both the legislature and the courts, albeit not satisfactorily so in a number of respects[1994] while others seem not to have been attended to at all.[1995] This is obviously not a satisfactory state of affairs. For example, if one were to look at the treatment of the status of a deregistered company as understood by the Van Wyk de Vries Commission, one would be surprised by the ready acceptance of the theory of a deregistered

1990 All these issues were discussed in chapter 9 above.

1991 Which issues were dealt with in such cases as *Ebrahim v Evans* 1990 4 SA 424 (D); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W); *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013; *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (A), [2001] EWCA 600 (CA), [2002] WLR 616 (CA).

1992 The issue was dealt with in such cases as *Ebrahim v Evans* 1990 4 SA 424 (D); *Pyramid Freight Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W) and *Re Lewis and Smart Ltd* [1954] 2 All ER 19 (Ch).

1993 As per such cases as *Morris v Harris* [1926] All ER Rep 15 (HL), [1927] AC 272 (HL); *Pieterse v Kramer* 1977 1 SA 589 (A); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 3 SA 846 (W).

1994 For example, s 82(4) of the Companies Act of 2008 simplifies reinstatement of registration process by providing that application should be made to the Companies and Intellectual Property Commission, instead of court, to that effect. As chapters 9 and 10 of this study showed, the section does not have provisions making reinstatement of registration retrospective nor is the Companies and Intellectual Property Commission a court of law which would have power to make ancillary orders where necessary.

1995 Such as *bona vacantia* which is discussed in chapter 7 of this study. Surprisingly though one of the problems that has been totally solved is the issue of personal liability of members of a close corporation on deregistration, that liability having been totally removed, as chapter 8 showed.

company as becoming an "association of persons" without legal personality by some academic writers and certain judicial pronouncements, notwithstanding the contrary view uttered in many judgments. This study has nevertheless shown that the "association of persons" theory is not part of South African law.[1996]

This study has also shown that the Companies Act of 2008 goes further than its predecessor in creating a number of grounds on which a company may be deregistered, unlike the Companies Act of 1973 which had merely three grounds on which a company could be deregistered.[1997] However, the Companies Act of 2008 does not prescribe a procedure to be followed so as to ensure that deregistration is effected fairly. It would appear that the Act has a noble idea of a process of deregistration but lacks fair procedure for achieving same. One would suspect that this was due to oversight since there is for example the Promotion of Administrative Justice Act of 2000[1998] which requires a fair procedure to be followed by an administrator, such as the Companies and Intellectual Property Commission, in performing an administrative function.[1999]

Deregistration and dissolution bring about termination of legal existence of a company whose life comes to an end just like that of a human being on death.[2000] One of the many consequences of termination of such legal existence of a company is that its property that had not been dealt with accrues to the State as *bona vacantia*, which principle is well established in South African law.[2001] This study has shown that the manner in which the State acquires *bona vacantia* in this context is contrary to the established manner of acquisition of ownership in South African law. It was also shown that the Companies Act of 2008, like all its predecessors, does not deal with, let alone mention, *bona vacantia* property. Accordingly, the Act does not indicate how the State should deal with the property after vesting and how it

---

1996 The issue was discussed in chapter 4.

1997 This was discussed in chapter 5.

1998 Act 3 of 2000.

1999 This issue was raised briefly in chapter 9 points 9 13 and 9 17 above.

2000 This was discussed in chapters 4 and 6 above and included a plethora of authorities such as *Ex parte Jacobson: In re Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *Standard Bank of South Africa Ltd v The Master* 1997 3 SA 178 (C); *Bowman v Sacks* 1986 4 SA 459 (W); *Morris v Harris* [1927] AC 252 (HL), [1926] All ER Rep 15 (HL); *Insamcor (Pty) Ltd v Dorbyl Light and Engineering (Pty) Ltd* 2006 5 SA 306 (W), [2005] ZAGHC 107 (18 April 2006).

2001 This was discussed in chapter 7 above.

should be dealt with when it returns to the company on reinstatement of registration or voidance of dissolution.

This study also showed that after a company is deregistered or dissolved its liabilities cannot be enforced.[2002] There is a debate as to whether such liabilities become extinct or are merely rendered unenforceable for the duration of deregistration or dissolution.[2003] Moreover, nobody becomes liable for those debts. It was argued in this study that while South African courts have consistently held that members or directors of a deregistered company, or anybody for that matter, do not become personally liable in terms of a contract entered into on behalf of a deregistered company, unless that was the intention of the parties to the contract,[2004] there is a case for holding persons acting on behalf of a non-existent company personally liable, not on the basis of contract but in delict for fraudulent or negligent misrepresentation.[2005] As noted earlier, this aspect of liability is yet to be explored in South African company law.

In relation to close corporations section 26(5) of the Close Corporations Act of 1984 rendered members of the close corporation personally liable for its unpaid debts at the time of deregistration. The section thereby gave members of a deregistered close corporation every reason to have its registration restored so that it could attend to its liabilities. The section, which did not have an equivalent in the Companies Act of 1973 or the current Companies Act of 2008, has since been repealed by the Companies Act of 2008 with the result that members of a close corporation are no longer personally liable for its debts on deregistration. This has thus removed the incentive for members of a close corporation to seek reinstatement of its

2002 This was discussed in chapter 8 above, along with the leading cases on the issue including *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 2 SA 372 (W); *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); *Boland Bank Ltd v Mouton* 1977 4 All SA 67 (C).

2003 It appears that both views are correct in relation to deregistration. But when registration was restored under the Companies Act of 1973 and its predecessor, and now reinstated under the Companies Act of 2008, it was common to come across mention of revival of the company's obligations which had been "extinguished" or "terminated" by deregistration, as was done for example in *Ex parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 4 SA 306 (W) and *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).

2004 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D); *Terblanche v Nothnagel* 1975 4 SA 405 (C); *Indrieri v Du Preez* 1989 2 SA 721 (C); *Akromed (Pty) Ltd v Suliman* 1994 1 SA 673 (T).

2005 *Indrieri v Du Preez* 1989 2 SA 721 (C) 728F–G. The issue was discussed in chapter 8.

registration.[2006] Moreover, getting reinstatement of registration in terms of section 82(4) of the Companies Act of 2008 is well nigh impossible for outsiders since before that could be granted the Companies and Intellectual Property Commission requires compliance with the annual returns lodgement obligation, something very difficult for outsiders to do. In principle reinstatement of registration of a company, and close corporation for that matter, is a simple matter which is obtainable on application, in the prescribed manner, to the Companies and Intellectual Property Commission. In practice though, because of the requirement of annual return lodgement it is very hard, if not impossible, to obtain. This, of course, is cause for concern.

This study further showed that in terms of section 73(6) of the Companies Act of 1973 the court was given power to restore registration of a deregistered company, the effect of a restoration order being that the company was deemed to have continued in existence as if it had not been deregistered. Moreover, the court was given the power to include in the restoration order such directions and make such provision as the court considered just 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, in terms of the Companies Act of 1973 a restoration order had retrospective effect and validated all acts done by or against the company during deregistration period.[2007] To remove any element of doubt the court could simply include in the restoration order provisions expressly validating deregistration period activities or regulating any other ancillary matters. Section 82(4) of the Companies Act of 2008 does not have the provisions which were contained in section 73(6) of the Companies Act of 1973. Moreover, reinstatement of registration in terms of section 82(4) is done by the Companies and Intellectual Property Commission and not a court of law. Seeking validation of deregistration period activities in terms of the Companies Act of 2008 is therefore no small challenge.

2006 It was precisely for that reason that the directors in *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013 were interested in a number of companies becoming and remaining deregistered which they achieved by deliberately failing to lodge annual returns.

2007 *Berrange v Registrar of Companies* [2007] ZAKZHC 35 (5 December 2007), 2008 JOL 21225 (N); *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); *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 3 SA 338 (SCA), [2013] 3 All SA 126 (SCA); *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* 2013 1 SA 570 (GSJ).

This study also showed that because of problems encountered when revival of a company is sought through reinstatement of registration, interested parties turn to section 83(4) of the Companies Act of 2008 for voidance of dissolution even in instances where a company had been deregistered, for example, for failure to lodge annual returns. That is done because of the blurring of the distinction between deregistration and dissolution brought about by sections 82(1) and 83(1) of the Companies Act of 2008.[2008] But voidance of dissolution has its own problems. The most serious setback of voidance of dissolution, as this study has shown, is that dissolution period activities by or against a company are not validated by a voidance order.[2009] It has nevertheless been suggested that acting under the "or any other order that is just and equitable in the circumstances" power, the court could, in an appropriate case, make an order declaring that dissolution period activities by or against a company are valid.[2010] It remains to be seen if this is the direction in which South African company law would develop. In English law though the courts have generally rejected the "limitation override order" that would have the effect of providing that the period between dissolution and a voidance order did not count for the purposes of prescription.[2011] The effect of such an order would be to preserve the validity of claims which would otherwise have prescribed during the dissolution period.

2008 As demonstrated, among others, by the cases of *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC), [2013] ZAWCHC 57 (19 April 2013); *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP); *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013.

2009 *Sandton Town Council v Erf 89 Sandton Extension 2 (Pty) Ltd* 1991 3 SA 846 (W); *Pieterse v Kramer* 1977 1 SA 589 (A); *Ebrahim v Evans* 1990 4 SA 424 (D); *Morris v Harris* [1926] All ER Rep 15 (HL), [1927] AC 272 (HL); *Pyramid Freight Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W).

2010 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

2011 Although such order can be granted in a deserving case, as the cases of *Re Donald Kenyon Ltd* [1956] 3 All ER 596 and *Regent Leisuretime Ltd v Natwest Finance Ltd* [2003] EWCA show, the predominant view is nevertheless to the effect that such order should generally not be made, as was shown in *Re People's Restaurant Group Ltd* [2012] EWHC B33 (Comm) (30 November 2012); *Re Huntingdon Poultry Ltd* [1969] 1 All ER 318 (Ch); *Re Mixhurst Ltd* [1994] 2 BCLC 19 and *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 (CA), [2001] EWCA Civ 600 (CA).

11 4 RECOMMENDATIONS

11 4 1 General

The Companies Act of 1973 dealt with deregistration, restoration of registration, dissolution and voidance of dissolution of a company in three sections in which great care was taken to keep these processes separate. Moreover, an attempt was made to cover both processes fairly well regarding the grounds, procedure to be followed and the consequences thereof. However, this does not seem to be the case under the Companies Act of 2008 which covers the processes in just two sections. Notable by its absence from the Companies Act of 2008 is the procedure to be followed before a company could be deregistered as well as the effect of reinstatement of registration when granted by the Companies and Intellectual Property Commission. Also notable in the approach of the Companies Act of 2008 is the fact that it conflates deregistration and dissolution, not much care being taken to keep them separate. Nevertheless, in one respect the Companies Act of 2008 goes further than the 1973 Act by providing that the court may grant an order declaring the dissolution to have been void or "any other order that is just and equitable in the circumstances". It is hoped that if the recommendations which follow were to be implemented, South African company law relating to deregistration and dissolution of companies would have taken a great stride to catch up with other Commonwealth jurisdictions having a comparable dispensation.

11 4 2 "Association of persons" theory

According to the Van Wyk de Vries Commission[2012] deregistration of a company was accompanied by loss of legal personality and resulted in the company becoming an "association of persons" that ceased to be a body corporate. In other words deregistration changed a company from a "legal entity" into an "association of persons" without legal

2012 Commission of Enquiry into the Companies Act – Main Report (1970) para 50.20.

personality. This view enjoyed support among some members of the legal fraternity[2013] and from at least a few judicial pronouncements.[2014]

This study showed in chapter 4 that the "association of persons" theory does not apply in South African law and falls to be rejected. Not only is it not correct but it is also rejected by the majority of court decisions. It is recommended that such a view be authoritatively rejected as it is inconsistent with the basic tenets of South African corporate law jurisprudence, particularly as far as liability for debts of a company after deregistration is concerned. The theory would have it that should members of a company continue carrying on business after deregistration, they would attract personal liability in their capacity as members of an "association of persons" which lacks legal personality, which theory has been rejected in South African law.[2015]

11 4 3 Distinction between deregistration and dissolution

This study has shown that sections 82 and 83 of the Companies Act of 2008 blur the distinction between deregistration and dissolution, as well as between the way in which reinstatement of registration and voidance of dissolution should be treated. This has the result that a company that has been deregistered can now be revived by way of a voidance order granted by the court or by means of reinstatement of registration by the Companies and Intellectual Property Commission followed by a court order which is "just and equitable in the circumstances".[2016]

2013 See for example Cilliers and Benade para 30.06; Van Rooyen 396; Sharrock, De la Rey, Van der Linde and Smith *Hockly's Insolvency Law* (1996) para 23.14; Mohapi "The effect of deregistration of corporate entities during litigation proceedings" http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012).

2014 *Income Tax Case 1306* (1980) 42 SATC 139 145; *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

2015 *Nordis Construction Co (Pty) Ltd v Theron, Burke and Isaac* 1972 2 SA 535 (D); *Terblanche v Nothnagel* 1975 4 SA 405 (C); *Indrieri v Du Preez* 1989 2 SA 721 (C); *Akromed (Pty) Ltd v Suliman* 1994 1 SA 673 (T).

2016 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

It is recommended that the Companies and Intellectual Property Commission be given the power to grant reinstatement of registration on such terms as are "just and equitable in the circumstances" so that the need to seek a court order after reinstatement of registration would fall away.

11 4 4 Deregistration procedure

It was shown in chapter 5 of this study that section 82(3) of the Companies Act of 2008 creates a number of grounds on which a company may be deregistered but does not prescribe the procedure to be followed before deregistration can be carried out. The only instance in which the Companies and Intellectual Property Commission is required to give the company notice of intended deregistration is when the ground for doing so is failure to file annual returns. Given the implications of deregistration for the company and interested parties, including those relating to the existence of the company, its ability to act or be acted against as well as vesting of its property in the State, it has been suggested that legality of deregistering the company without giving it the opportunity to respond is questionable.[2017]

This is in stark contrast to the Companies Act of 1973 which set out a detailed procedure to be followed to verify if the company was still in existence or carrying on business so as to avoid erroneous deregistration. Moreover, it has been held that deregistering a company under section 73 of the Companies Act of 1973 or a close corporation in terms of section 26 of the Close Corporations Act of 1984, without following the notification procedure there specified was unlawful and had the result that such deregistration had to be set aside.[2018] After all, deregistration of a company is an administrative action. The Promotion

2017 The issue was raised by 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). The question of failure to give interested parties the opportunity to respond was raised in the context of application for restoration of registration in *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 4 SA 467 (SCA) where a restoration order was set aside precisely for that reason. See also *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) para 13 where reference was made to the *Insamcor* case.

2018 *FirstRand Bank Ltd v Davis* 2004 1 SA 31 (N); *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008); *Boseme v Roger* [2011] ZAGPJHC 174 (23 November 2011).

of Administrative Justice Act of 2000[2019] requires an administrative action to be fair. It is submitted that deregistration of a company without giving it the opportunity to respond cannot be fair.

It is therefore recommended that the notification procedure which was set out in section 73 of the Companies Act of 1973, which followed the procedure specified in section 199 of the Companies Act of 1926, should be reintroduced by way of necessary amendment of the Companies Act of 2008. This would avoid the risk of a company being deregistered by stealth, which is the position at the moment.

11 4 5 Lodgement of annual returns

It was shown in chapter 9 of this study that in terms of regulation 40(6) of the Companies Regulations, 2011 as amended, before the Companies and Intellectual Property Commission could reinstate registration of a company, irrespective of the reason for deregistration, the company is required to lodge outstanding annual returns and pay the required annual duty. This requirement serves a good purpose of ensuring that the records of a company are up to date before its registration is reinstated. However, the requirement also has a flip side in that annual returns require personal particulars like certified copies of identity documents of the directors of the company, this referring to persons who were directors of the company at the time of deregistration. This has the result that unless the directors themselves apply for reinstatement of registration or are cooperative it would not be possible to comply with annual return lodgement requirements. In brief, without such information forthcoming, it would not be possible to have registration of the company reinstated no matter how much interested parties might seek it.

It was shown in this study that in some instances deregistration of a company could be to the advantage of its directors and in the case of a close corporation to the advantage of its

2019 Act 3 of 2000.

members as under the Companies Act of 2008 they are no longer personally liable for its debts after deregistration.[2020] Thus, the temptation to maintain deregistration of a company or close corporation looms large.[2021]

It is therefore recommended that lodgement of annual returns and payment of annual duty be prescribed as conditions to be complied with after, and not before, reinstatement of registration. Annual return compliance would thus be a condition for reinstatement of registration to be complied with within a reasonable period such as, for example, 30 to 60 days.[2022] Although this would deny the Companies and Intellectual Property Commission the benefit of ensuring that annual returns are up to date, especially if that was the reason for deregistration of the company in the first place, it would nevertheless address the plight of innocent third parties who seek reinstatement of a company in order to assert their rights against it but who would not be able to satisfy the lodgement requirements as they presently stand. Once registration is restored, it would become relatively easy to comply with the annual return lodgement obligation.

11 4 6 Deregistration on request

It was shown in chapter 5 of this study that sections 82(1)(b)(ii) of the Companies Act of 2008 empowers the Companies and Intellectual Property Commission to 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

2020 The issue was discussed in chapter 8 of this study.

2021 As demonstrated, among others, by the case of *Du Rand v The Companies and Intellectual Property Commission of South Africa* Case No: 71624 / 2012, unreported judgment of the North Gauteng High Court dated 07 March 2013.

2022 Indeed the Companies and Intellectual Property Commission indicates that if a company or close corporation fails to file annual returns within 30 business days from the date of reinstatement it will be finally deregistered without further notification. However, it does not indicate the circumstances in which reinstatement would be granted without compliance with annual returns filing obligation first. Just for the benefit of a very small company that needs all the help it can get one would suggest that even then a reminder calling upon the company to comply with filing obligation and giving it another 15 or perhaps even 30 days would be very helpful, the idea being of course to assist a small business. Information on this issue can be found at Companies and Intellectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq/1 (accessed 14-08-2014).

of its assets, there is no reasonable probability of the company being liquidated. However, the section says nothing about liabilities of the company. It could happen that although the company might not have assets or only inadequate assets, it nevertheless has liabilities. Deregistration of a company which has liabilities that have not been resolved is very prejudicial to creditors. It appears that omission of reference to the company's liabilities was an oversight.

It is recommended that section 82(1)(b)(ii) be amended by including the words "or liabilities" after "no assets". Doing this would have the result that before a company could be deregistered on request, not only should it not have assets but also liabilities. This would be in line with section 73(5) of the Companies Act of 1973 which provided that the Registrar could deregister a company upon receipt of a written statement signed by every director of the company to the effect that the company had ceased to carry on business and had "no assets or liabilities". Once this is done, it would protect the interests of the creditors, something which is lacking at the moment.

11 4 7 Deregistration of an external company

It was shown in chapter 5 of this study that section 332 of the Companies Act of 1973 governed deregistration of an external company and provided that such company could be deregistered if it ceased to have a place of business in this country. It was also shown in that chapter that the present Companies Act of 2008 does not have equivalent provisions. As a result there is no basis on which the Companies and Intellectual Property Commission may deregister an external company, probably except at the request of the company, no matter how desirable deregistration might be.

It is accordingly recommended that the Companies Act of 2008 be amended to re-enact the equivalent of section 332 of the Companies Act of 1973 so that the Companies and Intellectual Property Commission may be put in a position to deregister an external company should the need to do so arise. Currently, the Companies Act of 2008 has this obvious *lacuna*.

11 4 8 Effect of reinstatement of registration

It was shown in chapters 9 and 10 of this study that in terms of section 82(4) of the Companies Act of 2008 the Companies and Intellectual Property Commission is given power to reinstate registration of a company but that is all. The section does not indicate the effect of such reinstatement of registration or the terms on which the Companies and Intellectual Property Commission may do so. This is different from the provisions of the Companies Act of 1973 whose section 73(6) provided that on granting a restoration order by the court the company was deemed to have continued in existence as if it had not been deregistered and further that the restoration 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.

It is recommended that section 82(4) be amended by adding to it the equivalent provisions of section 73(6) of the Companies Act of 1973.[2023] Alternatively, provision could be made for an application to be made to court, after reinstatement of registration of the company by the Companies and Intellectual Property Commission, for an order that is "just and equitable" in relation to reinstatement of registration of the company.[2024]

2023 There would be nothing new in this if it were to be done since s 26(7) of the Close Corporations Act of 1984, after amendment in 2005, had largely similar provisions. It provided that after restoration of a close corporation by the Registrar of Close Corporations the corporation was to be deemed to have continued in existence as from the date of deregistration as if it had not been deregistered and that a member of the corporation or any person having a material interest could apply to a court for any one or more of the following orders, namely:

(i) An order that the legal liability incurred by a member in terms of s 26(5) shall cease to exist:

(ii) An order that the corporation whose registration has been restored shall become liable for any liabilities incurred by any member of the corporation in terms of s 26(5);

(iii) An order that the corporation whose registration has been restored shall compensate a member who lawfully paid a claim that arose as a consequence of the provisions of s 26(5);

(iv) Any other order that the court on the basis of fairness deems appropriate.

2024 As suggested 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).

11 4 9 Cancellation of registration

It was shown in chapter 9 of this study that the Companies and Intellectual Property Commission does in some instances cancel deregistration. It was also shown in that chapter that neither the Companies Act of 2008 nor regulations made thereunder have provisions giving the Commission power to cancel deregistration as it does on occasion. It has been argued that in cancelling deregistration the Commission acts *ultra vires* its powers and therefore unlawfully.[2025] However, in doing so the Commission is able to achieve that which it is unable to do when reinstating registration in terms of section 82(4) of the Companies Act of 2008, namely retrospective reversal of deregistration with the result that such is taken never to have taken place in the first instance. The result is that all deregistration period activities by or against the company are validated with retrospective effect.[2026]

The circumstances under which deregistration can be cancelled are not known. Seemingly, deregistration is cancelled in the same situation in which registration could just as well have been reinstated in terms of section 82(4). It is recommended that cancellation of registration be properly regulated by provisions in the Companies Act of 2008 and in particular by specifying the circumstances in which that may be done. It is further recommended that cancellation of registration should be available where deregistration had been made "erroneously", meaning that deregistration was made in circumstances in which, had the Companies and Intellectual Property Commission had the necessary information, it would not have deregistered the company as it did. That would, for example, exclude cancellation of deregistration which had been done because of the company's failure to file annual returns as such deregistration is not erroneous. However, deregistration would be erroneous if before a company was deregistered for failure to file annual returns it was not duly warned that it had not complied and that after lapse of a specified time the company

2025 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* [2014] 3 All SA 664 (SCA) para 7.
2026 *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd* para 18.

would be deregistered unless it complied.[2027] Doing this would satisfy the "due process" requirementand can only be fair.

11 4 10 *Bona vacantia*

In South Africa there is no statute having provisions dealing with *bona vacantia* property which vests in the State on deregistration or dissolution of a company. The matter is governed by the common law which has two simple principles, namely first that on deregistration or dissolution of a company its property vests in the State as *bona vacantia* without further ado[2028] and secondly that on reinstatement of registration or voidance of dissolution the property re-vests in the company automatically.[2029]

The many challenges that arise concerning how *bona vacantia* property is dealt with were discussed in chapter 7 of this study where the difficulties encountered in trying to establish just how exactly the property is dealt with by the State were highlighted. It was there shown that the property is dealt with by the National Treasury in terms of the Public Finance Management Act of 1999.[2030] However, that Act is tailor-made for dealing with the administration of public funds rather than *bona vacantia* property which requires special treatment as it could return to the company anytime should reinstatement of registration or a voidance order be granted. Therefore, the Public Finance Management Act deals with how *bona vacantia* property should be treated after vesting in the State but says nothing about how it should be treated on return to the company. Accordingly, it is recommended that the Companies Act of 2008 be amended to make provision to the effect that:

- On deregistration or dissolution of a company all property belonging to it vests in the

2027 *MB Barter and Trading (Pty) Ltd v Asbury* [2012] ZAWCHC 177 (25 October 2012) paras 19 and 20.

2028 *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 3 SA 1 (A).

2029 *Ex parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP); *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). *The* issue was discussed in chapters 9 and 10 above.

2030 Act 1 of 1999.

State as *bona vacantia*;

- Property held by the company in its capacity as trustee of a trust does not vest in the State as *bona vacantia* but returns to the trust;[2031]
- On reinstatement of registration or voidance of dissolution of the company the property returns to the company without further ado;
- The property returns to the company at its current market value;
- The State or any agency acting on behalf of the State shall be entitled to necessary expenses incurred in the preservation and maintenance of the property;
- The State or any agency acting on behalf of the State shall be entitled to income generated by the property during the period of vesting;
- The State or any agency acting on behalf of the State shall compensate the company for damage to or depreciation in the value of the property other than for normal wear and tear; and
- Where the property cannot be returned to the company on reinstatement of registration or voidance of dissolution the State or any agency acting on behalf of the State shall pay the company compensation based on the current market value of the property.

Should it not be possible to include the above provisions in the current Companies Act of 2008 it is recommended that they be included in a future Companies Act.

11 4 11 Liability after deregistration

Apart from the view of the Van Wyk de Vries Commission to the effect that should members of a deregistered company carry on business they would be personally liable as members of an association of persons lacking legal personality, this study also showed that in terms of section 26(5) of the Close Corporations Act of 1984 members of a deregistered close

2031 This would be in line with s 1012(1) of the UK Companies Act of 2006 which provides that when a company is dissolved, all property and rights vested in or held on trust for the company immediately before its dissolution (including leasehold property) but "not including property held by the company on trust for another person" are deemed to be *bona vacantia* a and accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be.

corporation at the time of deregistration were personally liable for its debts. The study also showed that section 26(7) of the Close Corporations Act was amended in 2006 to relieve members of a close corporation, on application to court, of personal liability created in terms of section 26(5). This study further showed that the Companies Act of 2008 has since abolished section 26 of the Close Corporations Act of 1984 and the personal liability which it imposed on members of the close corporation at the time of its deregistration.[2032]

Currently section 83(2) of the Companies Act of 2008 provides that removal of a company's name from the companies register does not affect liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register. It is submitted that no harm would be done by adding to this subsection, and it is recommended accordingly, that a provision be added to the effect that no director or shareholder shall be personally liable for the debts of a company at the time of its deregistration by virtue only of being its director or shareholder. While a call for imposition of personal liability on directors of a deregistered company might appear attractive, it is nevertheless submitted that such a drastic step would create more problems than solutions. This is more so as in most instances a very active company is deregistered due to failure to file annual returns, often without notice to it of an intention to deregister. In any event, it is possible, albeit not always easy, to obtain reinstatement of registration or voidance of dissolution in what would have called for reinstatement of registration. After reinstatement of registration an outstanding debt could then be recovered from the company.

11 4 12 Retrospectivity of a voidance order

Section 83(4) of the Companies Act of 2008 provides that at any time after a company has been dissolved application may be made to court for an order declaring the dissolution to have been void or any other order that is just and equitable in the circumstances and further that thereafter any proceedings may be taken against the company as might have been taken

2032 This was discussed in chapter 8 above.

if the company had not been dissolved. However, there is a debate, and the courts are divided, on whether legal proceedings pending at the time of dissolution are revived by a voidance order or should rather start afresh.[2033] To solve this problem it is recommended that section 83(4)(b) be amended by adding to it a provision to the effect that the court granting a voidance order may declare that legal proceedings pending at the time of dissolution are revived. The effect of the provision would be to enable a court, in an appropriate case, to declare that pending legal proceedings are revived and can continue without the need to start them all over again as doing so raises the danger of prescription of the claim.

11 4 13 Just and equitable order

Section 83(4) of the Companies Act of 2008 enjoins the court to make an order "declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances". This study has shown that South African courts give these provisions an unduly restrictive interpretation by holding that the section means no more than that a court granting an order declaring the dissolution to have been void may grant ancillary relief relating to any other issue as would appear just and equitable in the circumstances.[2034] The furthest that the courts could go was to hold that after reinstatement of registration of a company by the Companies and Intellectual Property Commission, application could be made in terms of section 83(4) for an order that is just and equitable in the circumstances whose purpose would be to grant ancillary relief relating to a reinstatement of registration.[2035]

2033 The issue was discussed in chapter 10 of this study and includes such cases as *Sandton Town Council v Erf 89 Sandton Extension 2 (Pty) Ltd* 1991 3 SA 846 (W); *Pieterse v Kramer* 1977 1 SA 589 (A); *Ebrahim v Evans* 1990 4 SA 424 (D); *Morris v Harris* [1926] All ER Rep 15 (HL), [1927] AC 252 (HL); *Pyramid Freight Ltd v Incorporated General Insurances Ltd* 1993 2 SA 323 (W); *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC); *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC).

2034 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC); *Absa Bank Ltd v Companies and Intellectual Property Commission* 2013 4 SA 194 (WCC), [2013] 3 All SA 34 (WCC); *Nulandis (Pty) Ltd v Minister of Finance* 2013 5 SA 294 (KZP).

2035 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic* 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC).

It is recommended that the words "or any other order that is just and equitable in the circumstances" be given a wide meaning to enable the court, where the circumstances of the case justify the granting of such order, to make an order authorising a designated person such as for example the Master, former liquidator or director of the company, as the case may be, to do a necessary act on behalf of the company without declaring dissolution of the company to have been void. This would obviate the need to declare dissolution of the company to have been void if all that is required is to have a certain simple transaction done such as transferring property to a purchaser who bought it and had paid the price or some other simple act or a few acts. That would assist in having a required act done without the necessity of declaring dissolution void where that could be avoided. Moreover, doing this is neither radical nor new as it has already been done in South African law. In *Ex parte Garwood*[2036] the court granted an order authorising the signing of a cession and other documents, after dissolution of the company, as doing so had been overlooked before dissolution. This is more so since applying for a voidance order is no guarantee that it would be granted as the court has discretion to do so and could in some instances refuse to grant a voidance order.

11 5 CONCLUSION

When the Companies Act of 2008 was introduced, it was presented as a radical piece of legislation designed to usher in a new corporate law dispensation for the twenty first century.[2037] In many respects that is indeed so. However, when it comes to dealing with deregistration and dissolution of companies, this study has shown that the opposite is in fact the case. Far from taking South African corporate jurisprudence forward, there is regrettably notable regression in that some of the necessary things which were contained in the Transvaal

2036 *FirstRand Bank Ltd v Davis* 2004 1 SA 31 (N); *Dasarath v Hulett Aluminium (Pty) Ltd* [2008] ZAKZHC 26, [2008] BIP 382 (D) (31 March 2008); *Boseme v Roger* [2011] ZAGPJHC 174 (23 November 2011).

2037 The Department of Trade and Industry published a policy paper entitled "South African Company law for the 21st century – Guidelines for Corporate Law Reform" in Government Gazette 26493 of 23 June 2004 which envisaged the development of a clear, facilitating, predictable and consistently enforced law designed to provide a "protective and fertile environment for economic activity". The vision of the policy paper was that company law should promote the competitiveness and development of the economy through objectives now contained in s 7 of the Companies Act of 2008. The contents of the policy paper are also briefly referred to in Delport *et al Henochsberg on the Companies Act 71 of 2008* vol 1 Service Issue 7 (2013) 46(1) – 46(2).

Companies (Consolidation) Act of 1909, the Companies Act of 1926 and the Companies Act of 1973 are missing from the current Act. All these shortcomings were indicated in this study.

However, there are two very useful issues which the Companies Act of 2008 introduces and which were not there in previous legislation. One is the power given to the court when making a voidance order to make "any other order that is just and equitable in the circumstances". As the study has shown, in the years to come this power is likely to be used to achieve results which courts were not able to reach in terms of making an order "upon such terms as the Court thinks fit" as was provided for in section 420 of the Companies Act of 1973 and its predecessors. The other advantage of the Companies Act of 2008 over its predecessors is that in section 82(3) it introduces a number of grounds on which a company could be deregistered. In the past there were essentially two grounds on which a company could be deregistered, the third one, namely failure to lodge annual returns having had a history of ups and downs as it was brought in only to be removed and thereafter reintroduced. This study has shown that the same reason for deregistration became reason for reinstatement of registration were it to turn out not to have been well taken, that is, the circumstances of the case did not justify its inference or continued validity of the reason for deregistration.

Looking at the history of national legislation dealing with company law and using the Companies Act of 1926 as the starting, point the pattern is very clear. On the average South African company law legislation remains in the statute books for an average of 27 years. If this trend were to continue that would mean that the country would not have a new company law legislation until the middle of 2030's. One would hope that the country would somehow slightly change to the trend of the United Kingdom in terms of which on the average a new company law legislation comes into operation every twenty years. Waiting another twenty something years for a new company law legislation which would hopefully accommodate some of the issues raised in this study is no doubt a long wait. If there is one thing that can be learned from this study it is that details matter, something in respect of which concerning deregistration and dissolution, the current Companies Act of 2008 is lacking. As it is said, the devil is in the details, and in the present context, in the lack thereof.

BIBLIOGRAPHY

BOOKS

American Bar Association *Model Business Corporation Act Annotated* (2013)

Arden M & Prentice D *Buckley on the Companies Act* (2000)

Austin PP, Chatswood NSM, Ramsay IM *Ford's Principles of Corporations Law* (2013)

Badenhorst PJ, Pienaar JM, Mostert H *Silberberg and Schoeman's The Law of Property* 5 ed (2006)

Bainbridge S M *Corporations Law and Economics* (2002)

Bamford B *The Law of Partnership and Voluntary Association in South Africa* (1982)

Beck A, Foley P, Goddard D, Jones D *Morison's Company and Securities Law vol 1: Companies Commentary, Precedents* (1994)

Beck A, Foley P, Goddard D, Jones D *Morison's Company and Securities Law vol 2: Companies Commentary, Precedents* (1994)

Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker L, Pretorius JT *Entrepreunarial Law: Incorporating the New Companies Act Manual* Special Edition (2009)

Beuthin RC, Luiz SM *Beuthin's Basic Company Law* 3 ed (2000)

Black R, Henderson HM, Thomson JM, Miller K *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 4 (1991)

Blackman MS "Companies" in Joubert WA (ed) *Lawsa* vol 4 Part 1 First Reissue (1997)

Blackman MS, Jooste RD, Everingham GK, Yeats JL, Cassim FHI, De la Harpe R, Larkin ML, Rademeyer CH *Commentary on the Companies Act* vol 1 Revision Service 8 (2012)

Blackman MS, Jooste RD, Everingham GK, Yeats JL, Cassim FHI, De la Harpe R, Larkin ML, Rademeyer CH *Commentary on the Companies Act* vol 3 Revision Service 8 (2012)

Buckley FH, Gillen M, Yalden R *Corporations: Principles and Policies* (1995)

Butterworths *Australian Corporations Legislation* (1999)

Butterworths *Companies Act 71 of 2008* (2010)

Butterworths *Company Law Service* (2010)

Butterworths *Morison's Company and Securities Law* vol 1 (1994)

Cadde S, Cook M, Cundy T, Dey R, Harvey H, Marsh C, Pye I, Wright D "Companies" in *Halsbury's Laws of England* vol 15 5 ed (2009

Caney LR, Brooks PEJ "Associations" in Joubert WA (ed) *Lawsa* First Reissue vol 1 (1993)

Carey-Miller DL *The Acquisition and Protection of Ownership* (1990)

Carey-Miller DL, Pope DL *Land Title in South Africa* (2000)

Carr CT *The General Principles of the Law of Corporations* (1905)

Carswell J *The South Sea Bubble* (1960)

Cassim FHI, Cassim MF, Cassim R, Jooste R, Shev J, Yeats J *Contemporary Company Law* 2 ed (2012)

Cassim FHI, Cassim MF, Cassim R, Jooste R, Shew J, Yeats J *The Law of Business Structures* (2012)

CCH Australia Ltd *Australian Corporations & Securities Legislation* (2006)

Cheffins B *Company Law: theory, Structure and Operation* (1997)

Christie RH, Bradford GB *Christie's The law of contract in South Africa* 6 ed (2011)

Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker L, Pretorius JT *Cilliers & Benade Corporate Law* 4 ed (2012)

Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delport PA *Close Corporations Law* 3 ed (1998)

Cilliers HS, Benade ML, Henning JJ, Du Plessis JJ, Delport PA *Close Corporations Service* (2002)

Cilliers HA, Benade ML, Henning JJ, Du Plessis JJ, Delport PA, De Koker J, Pretorius JT *Entrepreneurial Law* 4 ed (2008)

Coaker JK, Zeffertt D T *Wille and Millin: Mercantile Law of South Africa* (2000)

Cooke CA *Corporation, Trust and Company: An Essay in Legal History* (1950)

Courtney TB, Hutchinson CB *The Law of Private Companies* 2 ed (2002)

Cowles V *The Great Swindle* (1960)

Cox JD, Hazen TL *Corporations* 2 ed (2003)

Davies PL, Prentice DD *Gower's Principles of Modern Company Law* 6 ed (1997)

Davis DM, Cassim FHI (eds) Geach W, Mongalo T, Butler D, Loubser A, Coetzee L, Burdette D *Companies and other Business Structures in South Africa* 2 ed (2011)

De la Rey EM, Ferreira NM *Companies Legislation and Related Statutes Prior to 1910* (1987)

Delport P *The New Companies Act Manual* 2 ed (2011)

DuBois AB *The English Business Company After the Bubble Act 1720 – 1800* (1938)

Du Plessis JJ *Principles of Contemporary Corporate Governance* (2011)

DuMoulin F M *Canada Business Corporations Act & Commentary* (2006/2007)

English H *A Complete View of Joint Stock Companies Formed in 1824 and 1825* (1827)

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

Erasmus HJ, Van Loggerenberg DE *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa* 10 ed (2012)

Farrar JH *Corporate Governance: Theories, Principles and Practice* (2005)

Farrar JH, Hannigan BM *Farrar's Company Law* 4 ed (1998)

Ford HAJ *Principles of Company Law* 5 ed (1990)

Ford HAJ & Austin RP *Ford and Austin's Principles of Corporations Law* 7 ed (1995)

Formoy RR *The Historical Foundations of Modern Company Law* (1923)

Geach WD, Schoeman T *Guide to the Close Corporations Act and Regulations* Service No 20 (2013)

Gibson JTR *South African Mercantile and Company Law* 8 ed (2004)

Gower LCB, Prentice DD, Pettet BG *Gower's Principles of Modern Company Law* 5 ed (1992)

Grant J *Law of Corporations* (1850)

Grantham RB, Rikett EF *Company and Securities Law: Commentary and Materials* (2002)

Gray WD *The Annotated Canada Business Corporations Act 1995* (1994)

Havenga M, Locke N *Corporations and Partnerships in South Africa* (2013)

Holdsworth WS *History of English Law* vol 8 3 ed (1928)

Hosten WJ, Edwards AB, Nathan C, Bosman F *Introduction to South African Law and Legal Theory* (1983)

Howard C *The Law of Commercial Companies* (1987)

HRibar Z *A Guide to Company Law* 3 ed (1989)

Hunt BC *The Development of the Business Corporation in England 1800 – 1867* (1969)

Jamneck R, Rautenbach C, Paleker M, Van der Linde A, Wood-Bodley M *The Law of Succession in South Africa* 2 ed (2012)

Jooste R *The Comparative Guide to the Old and New Companies Acts* (2011)

Kerr AJ *The Law of Agency* 4 ed (2006)

Kiggundu J *Botswana Company Law Service* (2005)

Kiggundu J *Company and Partnership Law in Botswana* 2 ed (2010)

Kiggundu J *Supplement to the Botswana Company Law Service* (2009)

Kopel S *Guide to Business Law* (2013)

Kunst JA, Delport PA (eds) *Henochsberg on the Close Corporations Act* Service Issue 27 (2013)

Leete BA, Fox K H *Business Law and the Legal Environment* (1982)

LexisNexis *Company Law Service* (2010)

LexisNexis *Company Legislation Handbook* 24th (2011)

LexisNexis *Company Legislative Service* Service Issue 6 (2013)

Library Pamphlet Collection XVIII *A Description of Trades, Goldsmiths* (1740)

Lieberman JK, Siedel GJ *Business Law and the Legal Environment* (1985)

Lipton P, Herzberg A *Understanding Company Law* 6 ed (1995)

Maitland FW C*ollected Papers* (1911)

Mann RA, Roberts BS *Essentials of Business Law and the Legal Environment* 11 ed (2013)

Maurer VG, Purver JM, Farber WD, Tinsley JE, Bjorklund CC *Business Law: Text and Cases* 2 ed (1983)

Maxwell P B *On the Interpretation of Statutes* 12 ed (1969)

Megarry R, Wade W, Harpum C, Bridge S *The Law of Real Property* (2012)

Meyer M *An Overview on the Distribution of an Estate of a Person Dying without or with a Will* (2011)

Mongalo T *Corporate Law & Corporate Governance: A Global Picture of Business Undertakings in South Africa* (2003)

Mongalo T (ed) *Modern Company Law for a Competitive South African Economy* (2010)

Mongalo T, Lumina C, Kader F *Forms of Business Enterprise: Theory, Structure and Operation* (2004)

Nagel CP *Commercial Law* 4 ed (2011)

Naidoo R *Corporate Governance: An Essential Guide for SA Compnies* 2 ed (2009)

Paterson WE, Ednie HH *Australian Company Law* (1962)

Paterson WE, Ednie HH, Ford HAJ *Australian Company Law* 3 ed vol 3 (1987)

Pethig R F, Millard I R *Morison's Company Law* vol 2 (1993)

Pollock F *The Law f Partnership in England* (1877)

Pretorius JT *Companies Act 61 of 1973 & Close Corporations Act 69 of 1984 and Regulations* 11 ed (2008)

Pretorius JT, Delport PA, Havenga M, Vermaas M *Hahlo's South African Company Law through the cases: A Source Book* 6 ed (1999)

Pretorius JT, Delport PA, Havenga M, Vermaas M *Student Case Book on Business Entities*

(2004)

Prime T, Scanlam G, Martindale R *The Law of Private Limited Companies* (1996)

Redmond P *Companies and Securities Law: Commentary and Materials* 3 ed (2000)

Reed M *Investment in Railways in Britain 1820 – 1844: A Study in the Development of the Capital Market* 1975)

Robson K *Robson's Annotated Corporations Law* vol 2 (2000)

Scott WR *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720* (1910)

Schmitthoff CM *Palmer's Company Law* 24 ed (1987)

Sharma A *Company Law* 1st ed (2009-2010)

Sharrock R, De la Rey E, Van der Linde K, Smith A *Hockly's Insolvency Law* 6 ed (1996)

Sharrock R *Business Transactions Law* 8 ed (2011)

Shrand D *The Law and Practice of Insolvency, Winding-up of Companies and Judicial Management* (1977)

Smith A *South Sea Bubble* (1825)

Smith HA *The Law of Associations, Corporate and Unincorporate* (1914)

Smith T, Black R (eds) "Companies" in *The Laws of Scotland: Stair Memorial Encyclopaedia*vol 4 (1991)

Spiller P *A Manual of Roman Law* (1986)

Stein C, Everingham G *The New Companies Act Unlocked* (2011)

Stewart JL, Palmer ML *Fraser and Steward:* Company *Law of Canada* 5 ed (1962)

Stockdale T, Prentice D, Hannigan B, Higginson HW *Buckley on the Companies Act* 15 ed (2000)

Strydom EML (ed) *Company Legislation Handbook* 25 ed (2012 / 2013)

Sutherland H, Horsley D B, Edmiston J M *Fraser's Handbook on Canadian Company Law* 7 ed (1985)

Thomas JAC *Textbook of Roman Law* (1976)

Tomasic R, Jackson J, Pentony B, Woellner R *Corporation Law: Principles, Policy and Process* (1990)

Tomasic R, Bottomleg S, McQueen R *Corporations Law in Australia* 2 ed (2002)

Van der Merwe CG *Sakereg* 3 ed (2000)

Van der Walt AJ *Law of Property: Casebook for Students* 7 ed (2009)

Van Dorsten L J *South African Business Entities: A Practical Guide* 3 ed (1993)

Van Jaarsveld SR, Oosthuizen MJ *Suid-Afrikaanse Handelsreg* 3 ed vol 2 (1988)

Van Loggerenberg DE, Bishop M, Brickhill J *Erasmus Superior Court Practice* Revision Service 40 (2012)

Visser C, Pretorius JT, Sharrock R, Van Jaarsveld M *Gibson: South African Mercantile and Company Law* 8 ed (2004)

Watts P G (ed) *Bowstead & Reynolds on Agency* 19 ed (2014)

Wegger G *Topham's Company Law* (1932)

Wegger G, Galgut O, Keeton A A F *Topham's Principles of Company Law: South African Edition* 3 ed (1953)

Welling B *Corporate Law in Canada: The Governing Principles* (1984)

Williams RC "Companies" in Joubert WA (ed) *Lawsa* 2 ed vol 4 Part 1 (2013)

Williams RC *Concise Corporate and Partnership Law* (1997)

Williams RC *Concice Corporate and Partnership Law Casebook* (2012)

Wille G, Du Bois F, Bradfield G *Wille's Principles of South African Law* 9 ed (2007)

JOURNAL ARTICLES AND BOOK CHAPTERS

Baxt R "Personal Liability of an Agent for an Unformed Company – Kelner v Baxter Revisited" 1967 *The Modern Law Review* 328

Benade ML "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" 1970 *CILSA* 277

Benade ML "The South Sea Bubble" 1965 6 *Codicillus* 27

Bird PA "Company Accounting and Disclosure" 1980 *Journal of Business Law* 32

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

Carey-Miller DL "Transfer of Ownership" in Feenstra R, Zimmerman R *Das Romisch-Hollandische Recht* (1992)

Carey-Miller DL "Transfer of Ownership" in Zimmerman R, Visser D P *Southern Cross: Civil Law and Common Law in South Africa* (1996)

Cox I "Back to the drawing board" 2012 (January / February) *De Rebus* 4

Davies W E D "Personal Liability of directors of Non-existent Companies" 1964 *University of Western Australia Law Review* 400

De Koker L "Personal liability for the debts of a corporation – an alternative approach to corporate sanctions in South Africa" in Rider AK, Andenas M "The Quest for an Ideal Legal form for Small Business" *Developments in European Company Law* vol 2/1997 (1999)

De la Rey E "Aspekte van die Vroee Maatskappyereg:'n Vergelykende Oorsig" 1986 *Codicillus* 4

Evans F "The Evolution of English Limited Joint Stock Trading Companies" 1908 *Columbia LR* 340

Hahlo HR "Early Progenitors of the Modern Company" 1982 *Juridical Review* 139

Havenga M "Members' Personal Liability for the Debts of a Close Corporation after Deregistration" 2002 *SA Mercantile Law Journal* 134

Hein LW "The British Business Company" 1963 *University of Toronto LJ* 134

Henning JJ, Wandrag MS "Limited companies and limited partnerships in English Law: A historical watershed" 1997 *Journal for Juridical Science* 150

Hiemstra VG "Die regsposisie van vrywillige verenigings" 1946 *THRHR* 23

Jacobs H "Restoration of registration in terms of the new Companies Act" 2011 (September) *De Rebus* 32

Keay A "The Pursuit of Legal Proceedings Against Dissolved Companies" 2000 *Journal of Business Law* 405

Kiggundu J "Company Law Reform in Botswana: The Agenda for the Twenty-First Century" 1996 *SALJ* 496

Klopper HB "Besigheidstrust en Artikel 30 en 31 van die Maatskappywet 61 van 1973" 1988 *De Jure* 340

Kripte H "The Myth of Informed Layman" 1973 *Business Lawyer* 631

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

Larkin ML "Company Law (including Close Corporations)" 1986 *Annual Survey of SA Law* 279

Lord Irvine of Lairg "The Law: An Engine for Trade" 2001 *Modern Law Review* 333

Ludington JP "Reinstatement of Repealed, Forfeited, Expired, or Suspended Corporate Charter as Validating Interim Acts of Corporation" 42 *American Law Reporter* 4th 392

Matlala DM "Brief Note on the Deregistration of a Company on the Ground that it is not in Operation or Carrying on Business" 2002 *Stellenbosch Law Review* 230

Matlala DM "Liability for the Debt of a Close Corporation after Deregistration" 2001 *SA Merc LJ* 429

Matlala DM "Note on Personal Liability for the Debts of a Close Corporation which is Able to Pay" 2004 *Stellenbosch Law Review* 295

Matlala DM "The Effect of Voidance of Dissolution of a Company on Legal Proceedings" 2005 *SA Merc LJ* 81

Mbodla N "*Res publicae*: A South African perspective" 2001 *THRHR* 115

Meyers EM "Verjaring tegen de overheid" 1946 *THRHR* 3

Mongalo T "South Africanizing company law for a modern, competitive global economy" 2004 *SALJ* 93

Olivier L "The treatment of trusts for income and capital gains tax purposes: The screws tighten" 2002 *TSAR* 220

Pama P "Debt collecting against a deregistered close corporation or company" 2013 (August) *De Rebus* 38

Schmitthoff M "The Origin of the Joint Stock Company" 1939 *University of Toronto* LJ 74

Sealy LS "The Disclosure Philosophy and Company Law Reform" 1981 *Company Lawyer* 51

Sigwadi M "Personal Liability for the Debts of Close Corporations" 2003 *SA Mercantile Law Journal* 303

Sonnekus JC "Enkele opmerkings na aanleiding van die aanspraak op *bona vacantia* as sogenaamde regale reg" 1985 *TSAR* 121

Sonnekus JC "Regsgevolge van natrekking en die formulering van aanhegtingsmaatstawwe" 1990 *TSAR* 320

Sonnekus JC "Grondeise en die klassifikasie van grond as *res nullius* of as staatsgrond" 2001 *TSAR* 82

Sonnekus JC "Persoonlike Diensbaarhede en die herregistrasie van 'n deregistreerde Maatskappy as Reghebbende op gespanne voet" 2008 *TSAR* 130

Theron L "Artikel 30 van die Maatskappywet 61 van 1973 en die besigheidstrust" 1990 *SALJ* 673

Theron L "Die Besigheidstrust" 1991 *TSAR* 268

Van der Merwe CG, Pienaar JM "Property" 2002 *Annual Survey of SA Law* 466

Van der Merwe CG, Rabie MA "Eiendom van wilde diere" 1974 *THRHR* 38

Van Rooyen L "Henochsberg on the Companies Act" 1987 *TSAR* 396

Walters DF "Solvent but unwanted companies" 1985 *Businessman's Law* 47

Williams RC "An Agent's Liability When Acting for a Non-existent Principal" 1990 *SALJ* 203

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

Williston S "History of the Law of Business Corporations before 1800" 1882 *Harvard LR*

105

Wunsch B "Are the assets of a deregistered company *bona vacantia*?" 1983 (August) *De Rebus* 393

OLD AUTHORITIES

Grotius H *Inleiding tot de Hollandsche Rechtwetenschap* (1631)

Modderman W *Handboek voor het Romeinsche Recht* 5 ed: Part 3 (2010)

Pothier R J *Traite des obligations* (1761)

Van Oven JC *Leerboek van Romeinsch Privaatrecht* 3 ed (1946)

Voet J *Commentarius ad Pandectas* (Gane's translation no 5 591) (1902)

INTERNET SOURCES

Adams & Adams "Deregistration & dissolution of companie" http://www.adamsadams.com/.../deregistration_and_dissolution_of_companies (accessed 02-03-2013)

Adams & Adams "Forewarned is forearmed: When deregistration matters most" http://www.adamsadams.com/.../Forewarned_is_forearmed_when_deregistratio... (accessed 12-07-2013)

Australian Securities and Investments Commission "voluntary deregistration of a company" http://www.asic.gov.au/asic/pdflib.nsf/LockupByfileName/.../6010.pfd (accessed 16-09-2012)

Bell W, Starling E, Webb L "The retrospective effect of court orders restoring a dissolved company" http://www.lexology.com/library/detail.aspx? (accessed 20-01-2014)

Benade ML "A Survey of the Main Report of the Commission of Enquiry into the Companies Act" http://www.sabinet.co.za/webx/access/journal_archive/.../1266.pdf (accessed 02-09-2012)

Bowman Gilfillan "Failure to submit annual returms leads to deregistration of companies and close corporations" http://www.bowman.co.za/News-blog/Blog/Failure-to-submit-annual-returns (accessed 10-02-2014)

Bregman R "Personal liability as a member of a deregistered CC" http://www.bregmans.co.za/personal-liability-as-a-member-of-a-deregistered-cc/ (accessed 11-05-2011)

Brink Cohen Le Roux Inc "Can a company, once 'dead', be brought back to life?" http://bclr.com/company_back_to_life.htm (accessed 26-07-2013)

British Columbia Registry Services "Information for limited restoration of a BC company by the Registrar" http://www.bcregistryservices.gov.bc.ca/local/bcreg/documents/../reg45.pdf (accessed 09-08-2014)

Cheda M "The effect of the de-registration and restoration of companies in liquidation" http://www.dingley.co.za/the-effect-of-the-de-registration-and-restoration-of-c... (accessed 04-08-2014)

Companies and Intellectual Property Commission "Deregistration – Companies and Intellectual Property Commission" http://www.cipc.co.za/Companies_Dereg.aspx (accessed 09-08-2014)

Companies and Intellectual Property Commission "Re-instatements" http://www.cipc.co.za/index.php/faqs/companies-faq1 (accessed 14-08-2014)

Companies and Intellectual Property Commission "Reinstatement of a Close Corporation" http://www.cipc.co.za/cc_Restoration.aspx (accessed 09-08-2014)

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

Cox I "The Dangers Of Deregistration" http://wwww.mondaq.com/x/... Company +Law+Dangers+Of+Deregistration (accessed 09-08-2014)

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

Davies PL, Rickford J "An Introduction to the New UK Companies Act (2006)" http://www.reference-global.om/doi/abs (accessed 11-11-2009)

Department of National Treasury "Registration or Restoration of Deregistered Companies" http://www.treasury.gov.za/restorations (accessed 20-08-2014)

Department of Public Works "Reinstatement of a deregistered company or close corporation" http://www.cipc.co.za/.../2013_04_08_Clarification_letters_from_DPW_and_t... (accessed 09-08-2014)

ENSafrica Insolvency Department "Recent developments in the deregistration and restoration of companies in liquidation" http://www.ensafrica.com/.../Recent-developments-in-the-de-registration-and-r... (accessed 05-12-2013)

eServices "Deregister or liquidate your company or close corporation" http://www.services.gov.za/services/content/.../deregisterin... (accessed 09-08-2014) eServices "Deregistration Process - and how to Restore a CC/PTY" http://www.deregistration.co.za (accessed 11-05-2013)

Insolvencydirect.bis.gov.uk "Restoration of Companies – insolvencydirect.bis.gov.uk" http://www.insolvencydirect.bis.gov.uk/.../RestorationOfCompanies (accessed 06-04-2014)

Klokow C "Frequently Asked Questions: Re-Instatements" http://www.cipc.co.za/cc_files/FAQ_on_Re-instatement_vl_l.pdf (accessed 09-08-2014)

Law of succession in South Africa http://en.wikipedia.org/wiki/Law_of_succession_in_South_Africa (accessed 16-07-2014)

Legal-Explanantion.com: http://www.legal-explanations.com/definitions/carrying-on-business.htm (accessed 26-05-2013)

Legal Thesaurus http://thesaurus.com/browse/legal (accessed 30-01-2013)

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

Meyer M "An Overview on the Distribution of an Estate of a Person Dying without or with a Will" http://www.justice.gov.za/juscol/.../201106_intestate_and_testate_succession.pdf (accessed 16-07-2014)

Meyering A, Ntshabele B "Reinstatement of a deregistered company or close corporation" http://www.cipc.co.za/.../2013_04_08_clarification_letters_from_DPW_and_t... (accessed 11-05-2013)

Mohapi S "The effect of deregistration of corporate entities during litigation proceedings": http://www.phfirms.co.za/NewsPublications/Newsarticle.aspx? (accessed 16-09-2012)

National Treasury "Registration or Restoration of Deregistered Companies" http://www.treasury.gov.za/restorations/ (accessed 09-08-2014)

National Treasury "Requirements for: Companies Restoration Approvals" http://www.treasury.gov.za/restorations/Guidelines%20for %20Restoration%20 (accessed 09-08-2014)

Office of Public Sector Information "Explanatory Notes to UK Companies Act 2006" http://www.opsi.gov.uk/acs/acs 2006 (accessed 11-11-2009)

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)

Roodt Inc Attorneys "Transactions entered into by a deregistered close corporation are retroactively validated if it is restored to the register" http://www.roodtinc.com/newsletter114.asp (accessed 09-08-2014)

Ross MJ “Evaluating New Zealand’s Companies Law” http://epress.anu.ed.au/agenda/011/2/1-2-A-5.pdf (accessed 18-11-2011)

Sharma A *Company Law* 1st ed (2009-2010) http://www.books.google.co.za/books?id (accessed 05-06-2010)

Smith Tabata Buchanan Boyes “Impact of the new Companies Act on the Close Corporations Act” http://www.stbb.co.za/upload/stbb_lul-2013s2.pdf (accessed 02-11-2013)

South African Registrations “Company / Close Corporation Deregistration” http://www.registercompany.co.za/ccderegistration.html (accessed 16-05-2014)

The Union of South Africa: South Africa Act, 1909 http:// www.law.wisc.ed/gls/cbsal.pdf (accessed 09-11-2011)

Van Wyk F “What happens to the unsettled liabilities of a company or close corporation upon its deregistration?” http://www.vvd.co.za/index.php?view...deregistration (accessed 28-01-2013)

Walker GR “Cross-Border Public Listing – International Transactional Practice – U.S. firms doing business in the Southern Hemisphere (Australia and New Zealand)” http://www.latrobe.edu.au/lawman/.../law/2011-gbl-May-CBPL-... (accessed 18-11- 2011)

Williams M “Deregister your company and avoid dividends tax” http://www.werkmans.co.za/.../Deregister_Your_Company_And_Avoid_Div ... (accessed 16-09-2012)

COMMISSION REPORTS

South Africa

Commission of Enquiry into the Companies Act – Main Report (1970)

United Kingdom

Report on Investments for the Savings of the Middle and Working Classes (1850)

Loreburn Committee Report (1906)

Wrenbury Committee Report (1918)

Greene Committee Report (1926)

Cohen Committee Report (1945)

Scottish Law Reform Committee (1960)

Jenkins Committee Report (1962)

OTHER SOURCES

Bells' *South African Legal Dictionary* (1953)

Black's *Law Dictionary* 9 ed (2011)

Broom's *Legal Maxims* (1925)

Claassen RD *Dictionary of Legal Words and Phrases* 2 ed vol 2 Service Issue 17 (2014)

Collins *English Dictionary* 11 ed (2011)

Dachs P "Liquidation rollover provisions when transferring a business" 2012 (February) *Without Prejudice* 8

Dwyer S, Ngwenya L "Using the appraisal remedy and finding fair value" 2013 (June) *Without Prejudice* 8

Green LG (ed) *Radin's Law Dictionary* (1955)

Govender N "Close Corporation Deregistration Untangled" 2014 (April) *Without Prejudice* 20

Oxford *English Dictionary* 2 ed (1989)

Saunders JB *Words & Phrases Legally Defined: Supplement* (2005)

Shandu S "Company reinstatements: conundrum and clarity" 2013 (July) *Without Prejudice* 23

Sisson JJL *The South African Judicial Dictionary* (1960)

Timothy L, Odolo N "Not so easy to deregister external companies" 2012 (May) *Without Prejudice* 26

Verwey J "The ghosts of companies past" 2013 (September) *Without Prejudice* 9

West's *Law and Commercial Dictionary in Five Languages* (1985)

Williams M "Deregister your company and avoid dividends tax" 17 January 2010 *Sunday Times*

TABLE OF CASES

South Africa

A

B

C

D

E

Ex parte Cook 1957 1 SA 367 (N) ....

Ex parte Doornfontein, Judiths Paarl Ratepayers' Association 1947 1 SA 476 (T) ....

Ex parte Garwood 1948 1 SA 483 (W) ....

Ex parte Gardner 1940 EDL 175 ....

Ex parte Gold 1956 2 SA 642 (T) ....

Ex parte Herr: In re Brakpan Universal Suppliers Ltd 1925 TPD 387 ....

Ex parte Jacobson: In re Alex Jacobson Holdings (Pty) Ltd 1984 4 SA 368 (W) ....

Ex parte Johannesburg Congregation of the Apostolic Church 1968 3 SA 377 (W) ....

Ex parte Lebowa Development Corporation 1989 3 SA 71 (T) ....

Ex parte Leeuw (1905) 22 SC 340 ....

Ex parte Liquidators Lime Products (Pty) Ltd 1942 CPD 402 ....

Ex parte Liquidator Natal Milling Co (Pty) Ltd 1934 NPD 312 ....

Ex parte Lydenburg Estates Ltd (1909) LLR 127 ....

Ex parte Malherbe: In re Pretoria Iron Mines Ltd 1923 TPD 269 ....

Ex parte Marchini 1964 1 SA 147 (T) ....

Ex parte McCalgan: In re Meyer and Charlton Gold Mining Co Ltd 1936 WLD 53 ....

Ex parte McGuire 1963 2 SA 149 (SR) ....

Ex parte Millsite Investments Co (Pty) Ltd 1965 2 SA 582 (T) ....

Ex parte Minister of Lands: Ex parte Ventersdorp Muslim Trust (Pty) Ltd 1964 3 SA 468 (T) ....

Ex parte Minister of Irrigation 1948 2 SA 779 (C) ....

Ex parte Montrose Exploration Co Ltd 1918 TPD 179 ....

Ex parte National Bank of SA Ltd (In re B A Meintjies Ltd) 1924 WLD 64 ....

Ex parte Pillay and Sons 1951 1 SA 229 (T) ....

Ex parte P J Yelland and Co (Pty) Ltd 1934 NPD 158 ....

Ex parte Reid M F 1982 1 PH E5 (N) ....

Ex parte Rolls Radio Corporation (Pty) Ltd 1962 2 SA 316 (W) ....

F

G

N

O

O' Leary v Harbord (1888) 5 HCG 1

Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC [2011] 3 All SA 173 (SCA), 2011 2 SA 508 (SCA)

Osman v Attorney-General for the Transvaal [1997] 4 All SA 702 (T)

OudeKraal Estates (Pty) Ltd v City of Cape Town 2004 6 SA 222 (SCA), [2004] 3 All SA 1 (SCA)

P

Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy 2014 6 SA 403 (GP)

Paterson v Kelvin Park Properties CC 1998 2 SA 89 (E)

Peak Lode Gold Mining Co Ltd v Union Government 1932 TPD 48

Peel v Hamon J & C Enginnering (Pty) Ltd 2013 2 SA 331 (GSJ)

Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd 2012 4 SA 484 (WCC), [2012] 3 All SA 183 (WCC)

Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic 2014 1 SA 381 (WCC), [2014] 1 All SA 592 (WCC)

Peri-Urban Areas Health Board v Breet 1958 3 SA 783 (T)

Pezzuto v Dreyer 1992 3 SA 379 (A)

Pieterse v Kramer 1977 1 SA 589 (A)

Pieterse v The Master 2004 3 SA 593 (C)

Preller v Jordaan 1956 1 SA 483 (A)

Presidency Property Investments (Pty) Ltd v Patel 2011 5 SA 432 (SCA), [2011] ZASCA 73 (25 May 2011)

Purdon v Muller 1961 2 SA 211 (A)

Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd 1993 2 SA 323 (W)

Q

Quartermark Investments (Pty) Ltd v Mkhwanazi 2014 3 SA 96 (SCA) ....

R

R v Twala 1952 2 SA 599 (A) ....

Rabinowitz v Van Graan 2013 5 SA 315 (GSJ) ....

Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy 1994 3 SA 1 (A) ....

Rand Trading Co Ltd v Lewkewish 1908 TS 108 ....

Ranger v Wykerd 1977 2 SA 976 (A) ....

Rapp and Maister Holdings Ltd v Ruflex Holdings (Pty) Ltd 1972 3 SA 835 (T) ....

Rasi v Madaza [2001] 1 All SA 498 (Tk) ....

Rathibe v Reid 1927 AD 74 ....

Re African Farms Ltd 1906 TS 373 ....

Re Champdany Jute Co Ltd (1924) SC 209 ....

Re Jacobson Ltd 1927 TPD 857 ....

Reck v Mills 1990 1 SA 751 (A) ....

Regering van die RSA v SA Eagle Versekeringsmaatskappy Bpk 1985 2 SA 42 (O) ....

Registrar of Deeds v Victoria Club (1882) 3 NLR 47 ....

Robin Consolidated Industries Ltd v Commissioner for Inland Revenue 1997 3 SA 654 (SCA) ....

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 ....

Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2004 2 SA 353 (W) ....

Ruto Flour Mills (Pty) Ltd v Adelson (2) 1952 4 SA 307 (T) ....

S

S v Arenstein 1967 3 SA 366 (A) ……………………………………………………………..........

S v Seroto 1972 4 SA 691 (O) …………………………………………………………………………

SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle 1955 3 SA 541 (N) ………………………………………………………………………………………..

Sackstein v Proudfoot SA (Pty) Ltd 2003 4 SA 348 (SCA), [2003] 2 All SA 59 (SCA), [2003] ZASCA 6 (7 March 2003) ……………………………………………………………………..

Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd 1991 3 SA 846 (W) ………..

Saunders v Johannesburg Stock Exchange 1914 WLD 112 …………………………….........

Schein v The Germiston Municiality 1910 TPD 829 ……………………………………….........

Schlesinger v Schlesinger 1979 4 SA 342 (W) ………………………………………………..

Sciacero and Co v Central South African Railways 1910 TPD 119 ……………………………..

Sebastian v Brummer 1929 TPD 679 ………………………………………………………………..

Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspeiders (Edms) Bpk 1970 3 SA 367 (A) ……………………………………………………………………………………..

Sheba Gold Mining Co v Vautin Millbourne and Steers (1889) Barber 16 ………………..

Shillings CC v Cronje 1988 2 SA 402 (A) …………………………………………………......

Singh v Provincial Insurance Co Ltd 1963 3 SA 712 (N) ………………………………………..

Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd 1973 3 SA 548 (W) …………………

Smit v Scania South Africa (Pty) Ltd 1973 3 SA 548 (W) ……………………………………

Solomon v The Alfred Lodge 1917 CPD 177 …………………………………………………

South African Association of Municipal Employees (Pretoria Branch) v Pretoria City Council 1948 1 SA 11 (T) ……………………………………………………………………

South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd 1938 CPD 199 ………………………………………………………………………………………

Staegemann v Langehoven 2011 5 SA 648 (WCC) ……………………………………………

Standard Bank of South Africa Ltd v The Master 1997 3 SA 178 (C) ……………..…………

T

U

V

United Kingdom

Allied Dunbar Assurance plc v Fowle [1994] 2 BCLC 197 ....

Armour v Liverpool Corporation [1939] Ch 422 ....

A/S Dampskib 'Hercules' v Grand Truck Pacific Railway Company [1912] 1 KB 222 ....

Attorney General v Plymouth Corporation [1909] 100 LT 742 ....

B

Barry (Inspector of Taxes) v Cordy [1946] 2 All ER 396 ....

Bramwell v Lacy [1879] 10 Ch D 691 ....

Buckley v Hann [1850] 5 Ex 43 ....

C

Carlysle and Silloth Gold Club v Smith [1913] 3 KB 75 ....

Carron Iron Company v McLaren [1855] 5 HL Cas 416 ....

Chartered Mercantile Bank of India, London and China v Wilson [1877] 3 Ex D108 ....

City of London Case [1610] 8 Co Rep 121 ....

Collen v Wright [1857] 120 ER 241, 27 LJ QB 215 ....

Cornelius v Phillips [1916-1917] All ER 685 (HL) ....

Coxon v Gorst [1891] 2 CH 73 ....

Customs and Excise Commissioners v Lord Fisher [1981] 2 All ER 147 ....

D

De Beers Consolidated Mines v Howe [1906] AC 455 ....

Doe d Wetherell v Bird [1834] 2 AD & EL 161 ....

Dunlop Company [1902] 1 KB 342 ....

Dunlop Pneumatic Tyre Co v Actien Gesellschaft fur Motor and Motorfahrzeugbau Vorm Cudell and Co [1912] 1 KB 342 ....

Rolls v Miller [1884] 27 Ch D 71 (CA), [1881-1885] All ER Rep 915 (CA) ....

S

Salton v New Beeston Cycle Company [1900] 1 Ch 43 ....

Shaw v Benson [1883] 52 LJQB 575 ....

Shaw v Simmons [1883] 12 QBD 117, 53 LJQB 29 ....

Shiels v Great Northern Railway Company [1861] 30 LJQB 331 ....

Shoyle v Taylor [1607] Cro Jac 178 ....

Sir Thomas Spencer Wells, Swinburne-Hanham v Howard [1933] Ch 29 ....

Smith v Anderson [1880] 15 Ch D 247 ....

Smith v White Knight Laundry Ltd [2001] 3 All ER 862 (CA), [2001] EWCA 600 (CA), [2002] WLR 616 (CA) ....

South India Shipping Corporation Ltd v Export-Import Bank of Korea [1985] 2 All ER 219, [1985] 1 WLR 585 (CA) ....

Speak v Powell [1873] LR 9 Exch 25 ....

Spiers and Pond Ltd v Green [1912] 3 KB 576 ....

Stanhope Pension Trust Ltd v Registrar of Companies [1994] 1 BCLC 628 (CA) ....

T

Taxation Commissioners v Kirk [1900] AC 588 (PC) ....

Theophile v Solicitor General [1950] 1 All ER 405 ....

Top Creative Ltd v St Albans District Council [2000] 2 BCLC 379 (CA) ....

Town Investments Ltd v Department of Environment [1977] 1 All ER 813 (HL) ....

Tyman's Ltd v Craven [1952] 1 All ER 613 (CA), [1952] OB 100 (CA) ....

W

Wannel v City Chamberlain of London [1725] 1 Stra 675 ....

America

Australia

Canada

TABLE OF STATUTES

South Africa

Year	No	Name
1861	23	Joint-stock Companies Limited Liability Act (C) ....
1864	10	Joint Stock Companies Limited Liability Law (N) ....
1865	18	To amend Law No 10 of 1864 (N) ....
1866	19	Winding-Up Law of 1866 (N) ....
1868	12	Winding-Up Act, 1868 (C) ....
1874	5	*De Akte van Maatschappijen met Beperkte Verantwoordelijkheid* (T) ....
1888	13	The Joint Stock Companies Act, 1888 (C) ....
1891	C	*De Wet over Beperkte Verantwoordeelijkheid van Naamlooze Vennootschapen* (O) ....
1891	8	*Wet op Liquideeren van Maatschappijen* (T) ....
1892	25	The Companies Act, 1892 (C) ....
1982	2	*Van Naamloze Vennootschappen on Voorziening te maken voor de Likwidasie van Naamloze Vennotschappen* (O) ....
1893	19	The Joint Stock Companies Amendment Law, 1893 (N) ....
1895	43	The Company Debenture Act, 1895 (C) ....
1896	3	To amend the Joint Stock Companies Limited Liability Law, 1864 (N) ....
1899	33	The Share Pledge Act, 1899 (N) ....
1906	8	Companies Amendment Act (C) ....
1909	31	Companies (Consolidation) Act (T) ....
		s 193 ....
1909		South Africa Act ....
1912	8	Irrigation Board Act ....
1926	46	Companies Act ....

4bis ....

s 154 ....

s 154(1) ....

s 174 ....

s 191 ....

s 191(1) ....

s 199 ....

s 199(2) ....

s 199(3) ....

s 199(4) ....

s 199(5) ....

s 199(6) ....

s 199(7) ....

Government Gazette 936 of 1949 ....

Government Gazette 56 of 1950 ....

1936 24 Insolvency Act ....

s 21(1) ....

1937 47 Deeds Registries Act ....

1950 41 Group Areas Act ....

1956 24 Pension Funds Act ....

s 28(1) ....

s 29(8) ....

1956 25 Friendly Societies Act ....

s 37(1) ....

s 37(15) ....

1957 77 Group Areas Act ....

		s 7 ....
		s 8 ....
		s 10 ....
1987	81	Intestate Succession Act ....
		s 1(1) ....
		s 1(1)(a) ....
		s 1(1)(b) ....
		s 1(1)(c)(i) ....
		s 1(1)(c)(ii) ....
		s 1(1)(d) - (e) ....
		s 1(1)(f) ....
1989	55	Financial Markets Control Act ....
		s 32(1) ....
		s 32(4) ....
		s 33 ....
1990	94	Banks Act ....
1990	97	Financial Services Board Act ....
		s 1 ....
1991	108	Abolition of Racially Based Land Measures Act ....
1993	124	Mutual Banks Act ....
		s 31 ....
1993	194	Trade Marks Act ....
		s 27(1) ....
		s 27(1)(c) ....
		s 27(2) ....
1993	195	Designs Act ....
		s 22(2) ....

		s 23(5) ....
1996	15	Electoral Commission Act ....
1996	108	Constitution of the Republic of South Africa ....
		s 25 ....
		s 33(1) ....
		s 216 ....
1997	71	Nonprofit Organisations Act ....
		s 12(2)(n) ....
1998	52	Long-term Insurance Act ....
		s 42(1) ....
1998	53	Short-term Insurance Act ....
		s 41(1) ....
1998	131	Medical Schemes Act ....
		s 29 ....
		s 53(1) ....
1999	1	Public Finance Management Act ....
		s 5 ....
		s 5(2) ....
		s 6(1) ....
		s 6(1)(g) ....
		s 6(2)(g) ....
		s 10(1) ....
		s 10(2)(b)(i) ....
		s 10(2)(c)(i) ....
		s 10(2)(d) ....
		s 11 ....
		s 11(1)(a) ....

		s 56(c)
2002	39	Corporate Laws Amendment Act
		s 5
2004	36	Securities Services Act
2005	14	Co-operatives Act
2005	25	Close Corporations Amendment Act
		s 1
		s 4
2006	24	Corporate Laws Amendment Act
		s 5
		s 15
		s 15(b)
		s 49
		s 62(b)
		s 62(c)
2008	30	Renaming of High Courts Act
2008	71	Companies Act
		s 1
		s 1(a)
		s 1(b)
		s 1(b)(i)
		s 1(b)(ii)
		s 1(b)(ii)(aa)
		s 1(b)(ii)(bb)
		s 8(3)
		s 11(2)(a) and (b)

Bills

clause 82(3) ....

clause 82(4) ....

clause 82(4)(a)(i) ....

clause 82(4)(a)(ii) ....

clause 82(4)(b) ....

clause 82(4)(b)(i) ....

clause 82(4)(b)(ii) ....

clause 82(5) ....

Government Gazettes

GG 936 of 1949 ....

GG 50 of 1950 ....

GG 26493 of 23 June 2004 ....

GG 34239 GNR 351 of 26 April 2011 ....

GG 34243 GN 370 of 26 April 2011 ....

United Kingdom

1719 Royal Exchange and London Assurance Corporation Act ....

1720 Bubble Act ....

1825 Bubble Companies Act ....

1834 Grant of Privileges to Companies Act ....

1834 Trading Companies Act ....

1837 Chartered Companies Act ....

1844 Joint Stock Companies Registration Act ....

1844 Companies Winding-up Act ....

1845 Company Clauses (Consolidation) Act ....

1846 Companies Winding-up Act ....

America

Australia

Lesotho

Mauritius

Namibia

New Zealand

Pakistan

1984 XL VII Companies Ordinance

s 439(1)

Swaziland

2009 8 Companies Act

s 62(1)

s 279

Tanzania

2002 12 Companies Act

s 400(1)

s 401

Zambia

2000 1 Companies Act (Amendment)

s 361(1)

Zimbabwe

1895 The Companies Ordinance

article 178

1951 47 Companies Act

s 7

s 277(b)

s 320(1)

s 321