

Company reinstatements: End of confusion

In 2013, I wrote about two questions which were causing interpretation confusion and uncertainty since the advent of the Companies Act, 71 of 2008 ("**Companies Act**"), ('*Company reinstatements: conundrum and clarity*' *Without Prejudice Journal*, Vol. 13. No.6, July 2013 (see also <http://www.polity.org.za/article/company-reinstatements-conundrum-and-clarity-2013-07-11>). I argued that it will take a decision of the Supreme Court of Appeal of South Africa ("**SCA**") to answer these questions and therefore remove the confusion and uncertainty. The first question was whether or not the reinstatement –in terms of s 82(4) of the Companies Act– of a company which was deregistered for failure to lodge annual returns has automatic retrospective effect. The second question related to the scope of s 83(4) of the Companies Act.

Recently –on 20 March 2015– the SCA answered the above questions in *Newlands Surgical Clinic v Peninsula Eye Clinic* (Case No. 086/2014), ("**Newlands Decision**"). The Newlands Decision is useful because it was preceded by more than five broadly conflicting judgments from different divisions of the High Court in relation to the interpretation of s 82(4) and s 83(4) of the Companies Act. Therefore, the Newlands Decision introduces legal certainty, a critical ingredient for business efficiency. Although the Registrar of Companies deregistered approximately 750 000 companies and close corporations in 2010, there are companies whose deregistration is unknown to the relevant people. Therefore, the clarity provided by the Newlands Decision will be useful in these circumstances.

To appreciate the significance of the Newlands Decision, understanding the relevant legislative matrix is important. In terms of s 73(6) of the Companies Act, No. 61 of 1973 ("**1973 Act**"), registration of a deregistered company could be restored by an interested person or the Registrar of Companies through a High Court application. Further, s 73(6A) of the 1973 Act allowed companies who had been deregistered due to failure to lodge annual returns to approach the Registrar of Companies to be restored upon payment of a prescribed fee. Both s 73(6) and s 73(6A) of the 1973 Act specifically provided that the reinstated company "*...shall be deemed to have continued in existence as if it had not been deregistered...*" The reinstatement of a deregistered company is important to persons who may have claims against deregistered companies because in law when a company is deregistered, its corporate personality ceases and its assets are 'forfeited' to the State as ownerless property (*bona vacantia*) and can therefore not be attached by a third party who may have a claim against a deregistered company without first getting the deregistered company reinstated. Until the 1973 Act was overhauled by the Companies Act, there were no interpretation difficulties relating to the reinstatement of deregistered companies in terms of the 1973 Act.

Section 82(4) of the Companies Act (which superseded s 73(6) and s 73(6A) of the 1973 Act), provides as follows:

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

Section 83(4) of the Companies Act provide as follows:

"(4) At any time after a company has been dissolved –

(a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and

(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved." [Emphasis added]

It would seem that the confusion relating to the interpretation of reinstatement provisions of the Companies Act arose because –

- there is no section in the Companies Act which gives courts the power to reinstate a company upon application by an interested person in the form of the wording similar to s 73(6)(a) of the 1973 Act; and
- s 82(4) of the Companies Act (which is similar to s 73(6A) of the 1973 Act in that it gives reinstatement powers to the Companies and Intellectual Property Commission ("**CIPC**"),) does not contain a deeming provision to the effect that such reinstatement will have retrospective effect.

The facts in the Newlands Decision were as follows: Peninsula Eye Clinic Proprietary Limited ("**Peninsula**") and Newlands Surgical Clinic Proprietary Limited ("**Newlands**") were involved in some arbitration proceedings. The arbitrator decided the arbitration in favour of Peninsula and ordered Newlands to pay a certain amount of money to Peninsula. Newlands appealed against the decision of the arbitrator. Newlands lost the appeal. However, Newlands refused to pay what it was required to pay to Peninsula in terms of the arbitration order. Peninsula then instituted a High Court application to make an arbitration award in its favour an order of the court. After the arbitration proceeding had been finalised, Peninsula discovered that Newlands had –since the beginning of the arbitration proceedings– been deregistered as a company in terms of s 73 the 1973 Act. Such deregistration was effected due to failure of Newlands to file annual returns. On 3 April 2012, the registration of Newlands was reinstated by the CIPC. Thereafter, Peninsula sought an order from the High Court that Newlands be reinstated retrospectively in order to validate the arbitration proceeding. The High Court decided that (i) the reinstatement of Newlands in terms of s 82(4) of the Companies Act did not have automatic retrospective effect and that (ii) it was just and equitable in the circumstances –in terms of s 83(4) of the Companies Act– that the registration of Newlands is reinstated with retrospective effect. Newlands appealed to the SCA. It argued that whilst the High Court was correct to decide that the reinstatement of Newlands in terms of s 82(4) of the Companies Act did not have automatic retrospective effect, it erred in deciding that it was authorised in terms of s 83(4) of the Companies Act to afford the reinstatement in terms of s 82(4) of the Companies Act retrospective effect.

In the course of its judgment, the SCA reaffirmed the following established legal principles relating to company deregistrations (Newlands Decision, at Paragraph [15])–

- deregistration puts an end to the existence of a company and brings to an end its corporate personality;
- all subsequent actions purportedly taken on behalf of the deregistered company are void and of no effect; and
- the property of a deregistered company passes automatically into the ownership of the State as ownerless property.

In regard to the question whether or not the reinstatement –in terms of s 82(4) of the Companies Act– of a company which was deregistered for failure to lodge annual returns has automatic retrospective effect, Brand JA said (at Paragraph [29] of the Newlands Decision):

*"The only meaning available on that wording [of s 82(4) of the Companies Act]...is that s 82(4) [of the Companies Act] has **automatic retrospective effect**, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration."* [Emphasis added]

The practical effect of the abovementioned extract from the Newlands Decision is that if a company was deregistered and thereafter reinstated by the CIPC in terms of s 82(4) of the Companies Act, (i) the property that may have been owned by the company before its deregistration automatically revert in that company and (ii) all of the corporate activities that the company may have engaged in without knowing

that it was deregistered are automatically validated upon reinstatement. There is no need for a court to make a special declaratory relief for re-vesting of property or validation of corporate activities.

On the scope of s 83(4) of the Companies Act, as juxtaposed with s 82(4) of the Companies Act, Brand JA said (at Paragraph [30] of the Newlands Decision):

"...[T]he legislature had [through s 83(4) of the Companies Act] ... intended to alleviate the prejudicial effect on third parties or even the company which may be brought about by the retrospective effect of reinstatement under s 82(4) [of the Companies Act]. Any party who is prejudiced by this automatic retrospective action, is afforded the opportunity to seek amelioration under s 83(4) of the [Companies] Act, in which event the court is authorised to grant any relief it considers just and equitable."

Before making the aforementioned remarks, Brand JA confirmed (at Paragraph [26] of the Newlands Decision) that the retrospective validation of the corporate activities of a company during its period of deregistration holds inherent risk of prejudice to third parties. Therefore, the interpretation of s 83(4) of the Companies Act by the SCA ensures that a third party has legal recourse if that third party has been adversely affected by the reinstatement of a company.

The practical effect of the abovementioned reasoning of Brand JA is that even if a third party fails to object to the reinstatement of a company following advertisement in a local newspaper giving 21 days' notice of the proposed application for reinstatement –as required in terms of the CIPC Practice Note 6 of 2012 (entitled 'Requirements for re-instatement in terms of the Companies Act, 2008 (Act 71 of 2008)' and published in Government Gazette No. 36225)– such third party may approach a court for relief in terms of s 83(4) of the Companies Act even after a company in issue has already been reinstated.

An interested third party who intends to reinstate a deregistered company in order to enforce his rights will find it impossible to comply with the CIPC prescribed requirements for reinstatements in terms of s 82(4) of the Companies Act. In the Newlands Decision, it was decided (at Paragraph [30]) that recourse available to an interested third party in terms of s 83(4) of the Companies Act is available at any time (that is, after or before the company is reinstated in terms of s 82(4) of the Companies Act). This means an interested third party who may be unable to reinstate a company administratively in terms of s 82(4) of the Companies Act may approach a court for judicial reinstatement in terms of s 83(4) of the Companies Act.

The manifestation of the effects of mass deregistration of companies in 2010 will take some time and will affect companies and third parties differently. Whilst companies will have to keep up with the tedious and administratively cumbersome company reinstatement requirements of the CIPC for reinstatements in terms of s 82(4) of the Companies Act, interested third parties will have to incur legal expenses for reinstatements by courts in terms of s 83(4) of the Companies Act. The Newlands Decision gives companies and interested parties certainty in regard to the process and effects of reinstatements.

In a broader perspective, the Newlands Decision demonstrates that although the introduction of the Companies Act present some challenging interpretation gymnastics for legal advisors and Judges, the new jurisprudence on the Companies Act is slowly emerging as more cases are reaching the SCA.

For further information, please contact:
Siyabonga Shandu, Director, [Tony Tshivhase Inc.](mailto:Tony.Tshivhase@inc)
Tel: +27 (0)11 656 0804
Email: SiyabongaS@tshivhaseinc.com