REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPEHIGH COURT, CAPE TOWN)

Case No: 21325/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

PENINSULA EYE CLINIC (PTY) LTD Applicant

and

NEWLANDS SURGICAL CLINIC (PTY) LTD First Respondent
THE MINISTER OF TRADE AND INDUSTRY Second Respondent
THE MINISTER OF FINANCE Third Respondent

JUDGMENT DELIVERED: 2 MAY 2012

BINNS-WARD J:

[1] Pursuant to an arbitration agreement concluded in October 2007, arbitration proceedings ensued between Peninsula Eye Clinic (Pty) Ltd (PEC) and the Newlands Surgical Clinic (Pty) Ltd (NSC). These proceedings culminated in an award in favour of PEC on 25 July 2008. The award determined the extent of PEC's shareholding in NSC, which had been in dispute, and consequentially directed NSC to pay a stated amount to PEC in respect of dividends, together with arrear interest. It also directed NSC to pay the costs of

the arbitration, as well as the costs of preceding litigation between the parties in the High Court. The arbitration agreement permitted an appeal. The appeal noted by NSC was dismissed with costs on 18 October 2010 by three arbitrators constituted as an appeal tribunal. NSC refused to pay the amount apparently due by it in terms of the arbitral award. In order to enable it to enforce compliance with the arbitral awards, PEC has applied for an order in terms of s 31(1) of the Arbitration Act, 42 of 1965.[1]

[2] NSC has opposed the application. It has been contended on its behalf that to give the arbitral awards the court's imprimatur would be to, in effect, lend force to a transaction that was legally void by reason of its contravention of s 38 of the Companies Act 61 of 1973 ('the 1973 Companies Act', or the '1973 Act'), which was applicable at the material time.

[3] However, before one can reach that question there is a preliminary matter which requires determination. It arises out of PEC's application, in terms of paragraphs 1 and 2 of the notice of motion, for the following relief:

> 1. That it be declared that:
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> 1.1 The first respondent [i.e. NSC] has been re-registered as a company;
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> 1.2 That (sic) the assets of the first respondent which vested in the first respondent prior to it being deregistered, have been re-vested in the first respondent with effect from the date upon which the respondent was deregistered.
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> 2. Alternatively to prayer 1, giving such directions as the above Honourable Court may deem meet to effect the re-registration of the first respondent, and the re-vesting of the first respondent's former assets in the first respondent.

[4] The application in terms of paragraphs 1 and 2 of the notice of motion came about because an impediment to the enforcement of the arbitral awards was identified upon the discovery that NSC had been deregistered as a company in January 2008, as a consequence of its failure to file an annual return, as required in terms of s 173 of the 1973 Companies Act,

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[1] Section 31(1) of Act 42 of 1965 provides:
An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

which was then in force. The deregistration of NSC thus predated both the arbitral awards. The parties to the arbitration learned about the deregistration of NSC only after the completion of those proceedings.[2]

[5] In *Miller and Others v NAFCOC Investment Holding Co Ltd and Others* 2010 (6) SA 390(SCA), at para 11, it was observed '*Deregistration.... puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist at death*'. Unlike a natural person, however, a deregistered company is amenable to resurrection. Under the 1973 Companies Act this could happen in terms of an order of court made in terms of s 73(6), or by restoration of its registration by the registrar of companies in terms of s 73(6A)[3] of the Act. Those provisions, which also expressly allowed that upon the restoration of a company's registration it would be treated, at least to the extent required, as if it had remained in existence during the period of its deregistration, were repealed in terms of s 224 of the currently applicable Companies Act 71 of 2008, which came into operation with effect from 1 May 2011. Broadly equivalent, but by no means identical, provisions to those of s 73(6) and 73(6A) of the 1973 Act[4] are to be found in s 82(4) of the currently applicable

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[2] The apparent ignorance by the directors of NSC of the company's de-registration is puzzling. In terms of s 73(5) of the 1973 Companies Act, the registrar of companies was required to give notice of a company's deregistration and the date thereof in the prescribed manner. The editors of Meskin, *Henochsberg on the Companies Act*, LexisNexis (loose-leaf edition Edition 32 at 139) opine that deregistration in terms of s 73 of the 1973 Companies Act occurred effectively only when the notice was published. The provision did not, however, speak of publication of the notice, but rather of the *giving* of the notice. In terms of s 73(7) a notice under the section had to be addressed to the company '*at its registered office, its postal address and to the care of the directors or officers and the auditor of the company or may, if there is no director, officer or auditor of the company whose name and address is known to the Registrar, be sent to each of the persons who signed the memorandum of the company, at the address mentioned in the memorandum*'. There was no provision in the 1973 Act equivalent to that found in s 26(3) of the Close Corporations Act 69 of 1984, which provided for the deregistration of the affected entity in terms of the equivalent provision under that statute to be published in the Government Gazette. I was also unable to find any such provision in the Administrative Regulations made in terms of the 1973 Act.

[3] Sub-section 73(6A) was inserted into the 1973 Companies Act by s 15(b) of the Corporate Laws Amendment Act 24 of 2006 with effect from 14 December 2007. The provision was thus in operation for just three and a half years, during the Act's twilight period.

[4] Subsections 73(6) and (6A) of the 1973 Act provided:

(6)

> *(a)The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.*

statute.[5] However, the currently applicable provisions do not contain anything, at least expressly, equivalent to the retrospectivity provisions that obtained in terms of s 73(6)(a) and (b) and s 73(6A) of the 1973 Act. Furthermore, under the 2008 Companies Act, the reinstatement of the registration of companies deregistered in terms of s 82(3) of the Act falls exclusively within the province of the Companies and Intellectual Property Commission ('the Commission'). There is no provision in the 2008 Act for the restoration of the registration of a company by order, on application to a court.

[6] There is also no express provision in the 2008 Act for the restoration of the registration of companies, like NSC, which were deregistered in terms of the 1973 Companies Act. However, the only manner of giving sensible effect to paragraph (c) of the definition of '*company*' in s 1 of the 2008 Companies Act, which relates to '*a juristic person that, immediately before the effective date- …was deregistered in terms of the Companies Act, 1973 (Act 61 of 1973), and has subsequently been re-registered in terms of this Act'*, is to read into s 82(4) of the statute, after the words '*as contemplated in subsection (3)*', the words '*or a company has been deregistered in terms of section 73(5) read with section 73(3) of the Companies Act, 1973 (Act 61 of 1973),'*.[6] The result is that a company that has been deregistered in terms of the 1973 Companies Act for failing to file its annual returns may be reinstated on the register by the Commission on application in terms of s 82(4) of the 2008 Companies Act.

(b) Any such order may contain such directions and make such provision as to the Court seems just for placing the company and all other persons in the position, as nearly as may be, as if the company had not been deregistered.

(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.

[5] Section 82(4) of the 2008 Companies Act provides '*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.'*

[6] Cf. *Nedbank Ltd and others v National Credit Regulator and another* 2011 (3) SA 581 (SCA) at para. 29.

[7] The relief sought in terms of paragraph 1 of the notice of motion was predicated on PEC's allegation that NSC was re-registered at its instance in or about October 2011; the erstwhile directors of NSC having failed over a period of some months to carry out their undertaking to achieve that result themselves. PEC made the application for 'the restoration' of NSC to the register of companies on a duly completed Form CoR 40.5, as required in terms of reg. 40.7[7] of the Companies Regulations, 2011.[8] The application was submitted under cover of a letter to the Commission from PEC. The letter made no mention of the reason for the deregistration of NSC and gave no indication that any default of a statutory obligation by NSC which might have led to its deregistration had been made good. The covering letter also contained nothing to suggest that PEC had preceded its application by ascertaining any conditions with which its application might be required to be compliant in terms of reg. 40(7). The significance of these aspects will become apparent presently.

[8] The Commission responded to PEC's application as follows:

[7] Regulation 40(7) provides: *An application to re-instate a de-registered company or external company must be made in Form CoR 40.5 and must comply with such conditions as the Commission may determine.*
[8] Published under GNR 351 in Government Gazette 34239 of 26 April 2011.

> **Re: NEWLANDS SURGICAL CLINIC (PTY) LTD (REG NO: 1970/003873/07**
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> Dear Sir/Madam:
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> The above company has been re-instated to de-registration process dated (*sic*) 03 October 2011, until such time as the annual returns are brought up to date, where after (sic) the company will be restored to [?the] active register of the Companies and Intellectual Property commission.
>
> Please note that the Status will only change to "Deregistration Process" and on a monthly basis should you inform us if the status are pending regarding the judgment/court order or summons as the entity will be placed back into final deregistration again. Therefore when a deregistered enterprise is placed back in the process of deregistration its registration has been restored and you should be able to proceed with your litigation.
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> (My underlining for emphasis.)

Unfortunately, no analytical attention was given in argument by counsel to the content of the Commission's response. It appears to have been assumed, without investigation, that reinstatement to so-called 'deregistration process' was sufficient. Indeed, I was moved to examine the response closely only after consideration of a further communication from the Commission, which was annexed to a supplementary affidavit put in by PEC after the hearing, in circumstances to be described below. It is actually difficult, indeed impossible, to understand parts of the Commission's response to PEC's application. But it does confirm that the cause of NSC's deregistration was due to that company's failure to render its annual returns. At the same time its tenor is quite inconsistent with any apprehension by the Commission that the outstanding annual returns had been rendered; in fact quite to the contrary. As I shall show, this information bears materially, in the context of the applicable statutory provisions, on the question of the validity or effectiveness of the purported reinstatement to 'deregistration process' status, whatever that might mean. (I was informed at the hearing from the bar that the annual returns were subsequently brought up to date.)

[9] The obligation on all companies to file[9] annual returns currently arises in terms of s 33 of the 2008 Companies Act. This provision is in substance a reiteration of the provisions of s 173 of the 1973 Companies Act. In terms of s 73 of the 1973 Companies Act, a company

[9] The word '*file*' is specially defined to mean '*when used as a verb, means to deliver to the Commission in the manner and form, if any, prescribed for that document*'.

was susceptible to deregistration if it failed to file its annual return. Section 73(6A) of the 1973 Act allowed, during the last three and a half years of the operation of that statute, for the restoration of the registration of such a company by the registrar of companies on application by the company concerned, and on payment of the prescribed fee.[10] Consistently with the requirements of reg. 40(6) under the current statutory regime,[11] the registrar was, however, permitted to reregister the company only after it had lodged the outstanding annual returns and paid the outstanding prescribed fee in respect thereof. In the event of the restoration of the registration of a company in terms of s 73(6A), the company was deemed to have continued in existence as if had not been deregistered.[12] (As mentioned, there is no equivalent provision concerning retrospective arrangements in the currently applicable legislation.)

[10] For the purposes of the declaratory relief the Minister of Trade and Industry was joined as the second respondent and the Minister of Finance as the third respondent.

[11] The second respondent was cited as 'the Minister under whom the Companies and Intellectual Property Registration Office (CIPRO) resorts'. However, as from 1 May 2011 – that is before the institution of this application - the relevant functions concerning the registration of companies previously undertaken by CIPRO have fallen under the aegis of the Commission.[13] In terms of the 2008 Companies Act, the Commission is mandated to carry

[10] The editors of Meskin, *Henochsberg on the Companies Act*, questioned the constitutionality of s 73(6A). See *op cit* vol. 1, at 144(3) (loose-leaf Issue 29), but it seems to me, *prima facie*, that the grounds advanced for that argument could have been met by the application of appropriate administrative safeguards in the execution by the registrar of his/her powers in terms of the provision. Similar considerations would apply in respect of s 82(4) of the 2008 Act. That is not to suggest that I consider that the effective operation of s 73(6A) was free of difficulty. On the contrary; see note 29, below.

[11] The text of reg. 40(6) of the Companies Regulations, 2011 is quoted in para. [19], below.

[12] The automatically operative retrospective effect of a restoration to the register by the registrar in terms of s 73(6A) of the 1973 Companies Act appears to have been determined upon by the legislature without insight into the potentially prejudicial effect on third parties of the restoration of the registration of a de-registered company identified and discussed in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 (4) SA 467 (SCA), and overlooking the considerations identified in *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). As suggested in note 10, the resultant vulnerability in the legislative scheme could have been remedied by the manner in which the administrative functions under the scheme were executed.

[13] In terms of item 12 of schedule 5 to the 2008 Companies Act, the person who had been chief executive officer of CIPRO fell to be regarded as having been appointed as the Commissioner in terms of s 189 of the 2008 Act,

out directions of the Minister of Trade and Industry and to report to and advise the Minister on various matters including 'the volume and nature of registration and enforcement activities' in terms of the Act.[14] The second respondent has not taken an active part in the current proceedings.

[12] The Minister of Finance was joined because it is a well-established principle in our law that the property of a dissolved company goes as *bona vacantia* to the state; see *Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (A) at pp.10-12.[15] In consequence it became a standard requirement that the Minister of Finance, as the Minister responsible for the Treasury, be joined in any application to a court for reversal of the dissolution of a company by re-registration (see *Rainbow Diamonds (Edms) Bpk* at p.14F-H). The Minister would therefore have essentially the same interest in the declaratory relief sought by PEC, more especially that in terms of paragraph 1.2 of the notice of motion. He would also have the same interest in the administrative application submitted by PEC to the Commission on Form CoR 40.5, but there is no indication that any notice of that application was given to the third respondent, or indeed to any third parties. What is more, while there is no indication in the Companies Act, 2008, of a legislative intention to amend the law concerning the proprietary consequences of the deregistration of a company, 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 (cf. *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T); *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 (2) SA 372 (W) and *Insamcor (Pty) Ltd v Dorbyl Light & General*

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and the personnel of CIPRO were transferred to become employees of the Commission.

[14] Section 188(1)(b) of Act 71 of 2008; and see generally Part A of ch 8 of the Act.

[15] It is a matter of debate whether the state becomes the owner by default of the deregistered company's property which becomes *bona vacantia*, or merely becomes custodian of the property on behalf of those who would have been entitled to it as against the company when it ceased to exist, for example the members; see JC Sonnekus '*Persoonlike Diensbaarhede en die herregistrasie van 'n deregistreerde Maatskappy as Reghebbende op gespanne voet*', 2008 TSAR 130 at 134-8.

Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd 2007 (4) SA 467 (SCA)) presumably fall to be addressed by the Commission by way of conditions to be imposed in respect of such applications in terms of reg. 40(7) of the Companies Regulations. The third respondent delivered notice that he abides the judgment.

[13] In the course of preparing this judgment it came to my notice that the Commission is not merely a government department. It is a juristic person in terms of s 185(1) of the 2008 Companies Act and, to the extent provided in the Act, is an independent organ of state within the public administration, but outside the public service. Its statutory functions include the registration and deregistration of companies.[16] I therefore convened a meeting with counsel in chambers to inform them that I would not be able to entertain the application for declaratory relief unless the Commission waived its right to be joined as a party and indicated its willingness to abide the judgment of the court.

[14] PEC's attorneys thereafter furnished a copy of the notice of motion in the case to the Commission and requested confirmation that it was willing to abide the court's judgment. The Commission subsequently furnished a notice to the applicant's attorneys formally advising that it abided the decision of the court provided that it was not rendered subject to any liability as to costs in the case. The correspondence between PEC's attorneys and the Commission in this connection was put in under cover of a supplementary affidavit by the applicant's attorney of record on 27 March 2012.[17]

[15] Of significance is that the notice given by the Commission of its willingness to abide the judgment of the court included the following rider:

> Once a final order court order is granted and within 21 days of such an order, the company must submit the following documents to the Companies and Intellectual Property Commission:
>
> - Certified ID copy of all members
> - Certified ID copy of applicant

[16] See s 187(4)(d) of Act 71 of 2008.

[17] The supplementary affidavit was filed during the court's autumn recess. Due an administrative oversight in my chambers it came to my attention only on 20 April 2012.

- Deed Search
- If a company owns immovable property, letter from Treasury and a letter from Public works (sic)
- Copy of extract in local newspaper, giving 21 clear days (sic) notice of application.

[16] These requirements of the Commission, despite being less than clearly articulated, compel the inference that the registration of NSC has not yet been reinstated. They suggest instead that the Commission will determine the question of NSC's reinstatement to the register only after publication of the application for re-instatement in 'a local newspaper' (presumably a newspaper circulated in the area in which NSC had its registered office) and, in the event of any immovable property being, or having at the time of its de-registration been, registered in the company's name, after consideration also of the position of the Treasury and the Department of Public Works in respect of the application. (These departments of state presumably would be able to furnish the required letters only after being served with a copy of the application and with particulars of any immovable property concerned.)

[17] The rider to the Commission's notice to abide thus appears to be in the nature of a setting out of conditions determined by the Commission in terms of reg. 40(7) of the Companies Regulations, 2011.[18] The conditions would by their character appear to be directed at achieving satisfaction of the requirements concerning notice to potentially affected state departments and potentially interested third parties established by case law in respect of applications for the restoration of company registrations brought in terms of s 73(6) of the 1973 Companies Act.[19] They would fall to be satisfied *before* any reinstatement to the register was effected.

[18] These factors mean, of course, that the declaratory relief sought in terms of paragraph 1of the notice of motion cannot be granted. The position is not salvaged by the

[18] See note 7 supra for the text of the sub-regulation.
[19] Cf. the authorities cited in para. [12], above.

Commission's earlier advice to PEC that the first respondent's purported re-instatement to what it called 'deregistration process' had effectively restored the first respondent to life. The basis for the Commission's advice in this respect was not given. I was also not referred by counsel to any statutory provision which might create so-called '*deregistration process*' status. The only provision that I have been able to identify which might relate to what the Commission terms '*deregistration process*' status is that which pertains to the period during which a company is under notice of pending deregistration, in terms of reg. 40(4) of the Companies Regulations, 2011.[20] A company under notice in terms of reg. 40(4) is not a deregistered company. A company which is deregistered after being placed under notice of deregistration in terms of reg. 40(4) may only be reinstated to the register subject to compliance with reg. 40(6).

[19] The effect of reg. 40(6) of the Companies Regulations, 2011, which provides '*The Commission may re-instate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fee in respect thereof*' contradicts the assertion of the Commission in the response quoted in para. [8], above, that its restoration of the deregistered NSC to 'deregistration process' status restored the company to life so that the applicant could proceed with its intended litigation. The statutory provision is to the effect that the Commission is able to reinstate the company's registration only once the outstanding annual returns and fees had been filed and paid.[21] As

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[20] Regulation 40(4) provides:

> *If a company or external company fails to respond within 20 business days after receiving a demand under sub-regulation 2(a)* or a request or, in responding, fails to provide satisfactory additional information required in terms of sub-regulation (3)(b)(i), the Commission may-*
>
> *a)issue a Notice of Pending Deregistration in Form CoR 40.4 to the company or external company; and*
>
> *b) deregister the company or external company at any time more than 20 business days after delivering the Notice of Pending Deregistration, unless during that time the company or external company has filed its annual return for every year that it had failed to file.*

*The reference to sub-regulation 2(a) is a typographical error. There is no paragraph (a) in sub-regulation 2. The Commission may make a demand in terms of sub-regulation 2 after a company has failed to file an annual return for two years in succession.

[21] This sub-regulation reintroduced a requirement that had previously been provided for in the body of the 1973 Companies Act, in the proviso to s 73(6A).

mentioned earlier, it would seem that the annual returns were only subsequently rendered. It does not appear, however, that the prescribed fees have been paid. There is also the consideration that, for the reasons discussed in *Insamcor* supra, the legality of the administrative restoration of a company to the register without any procedure to afford prior notice to potentially interested third parties, including the third respondent, is questionable; consider in this regard s 3 of the Promotion of Administrative Justice Act 3 of 2000.[22] As already noted, all the indications are that the Commission's response to PEC's application for the restoration of NSC to the register of companies was not preceded by any notice of the application to other parties.

[20] The status of NSC as an existing company is obviously a material issue affecting the determination of the other heads of relief sought in these proceedings. If the apparent extinction of the company with effect from January 2008 has not been effectively reversed in the respects relevant with retrospective effect, the arbitration awards might have been nullities because NSC, as an ostensible party in those proceedings, was not in existence at the relevant times; cf. *Pieterse v Kramer* NO 1977 (1) SA 589 (A), *Silver Sands Transport (Pty) Ltd v S.A. Linde (Pty) Ltd* 1973 (3) SA 548 (W), *Ebrahim v Evans NO* 1990 (4) SA 424 (D), *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1991 (3) SA 846 (W), *Pyramid Freight (Pty) Ltd v Incorporated General Insurances Ltd and Another* 1993 (2) SA 323 (W) *Pieterse NO and another v The Master and another* 2004 (3) SA 593 (C) and *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 (5) SA 14 (WCC).[23]

[21] The obligations on pre-existing companies to file annual returns under the 1973 Act and the remedy of applying under the 2008 Act for the remedy of restoration of registration in

[22] That the 2008 Companies Act falls to be construed consistently with the requirements of Act 3 of 2000 should not require stating. The proposition is, however, expressly confirmed in s 5(4)(b)(dd) of the 2008 Act.

[23] Incidentally, proceedings instituted in this court in case no. 14381/2010, purportedly by NSC, for an order reviewing and setting aside the decision of the arbitrator of first instance to consider whether the provisions of s 38(1) applied to contract between PEC and NSC might, for the same reason, also have been a nullity.

respect of deregistration as a consequence of a company's failure to render annual returns under the 1973 Act are addressed by the provisions of items 7 and 11 in schedule 5 to the 2008 Act, which regulates the transitional arrangements in respect of the change-over from the aegis of the 1973 statute to the 2008 Companies Act. Upon the reinstatement under the 2008 Act of the registration of a company that had been deregistered under the 1973 Act, the affected company thereupon qualifies as a '*pre-existing company*' within the meaning of the 2008 Act; see the definition in s 1 of '*pre-existing company*',[24] read with paragraph (c) of the definition of '*company*'.[25] The only provision of the 2008 Companies Act that is pertinent in this respect (s 82(4)) does not provide for the '*re-registration*' of the affected company, but rather for the reinstatement of the company's registration. The difference between 're-registration', which tends to suggest a registration afresh - implying a hiatus in the company's existence between its deregistration and re-registration - and reinstatement of registration - which denotes the same concept as 'restoration of registration' in the sense of s 73(6) and (6A) of the 1973 Companies Act - is potentially significant. A consideration of the 2008 statute as a whole, with due regard to the interpretative enjoinder in s 5 read with the objects set out in s 7, however, impels the conclusion that no difference in meaning can have been intended, and that the word '*re-registered*' used in paragraph (c) of the definition of 'company' relates to the *reinstatement of registration* by the Commission provided for in terms of s 82(4) of the Act. It might be that the legislature's use in s 82(4) of the word

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[24] '*"**Pre-existing company**" means a company contemplated in paragraph (a), (b) or (c) of the definition of 'company' in this section.*'

[25] *"**Company**" means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date—*

a) was registered in terms of the—

i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or

ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act.'

'reinstate', with its connotation of placing the object in issue in its former position, implies that the restoration to the register is meant to be with retrospective effect. The prescribed condition precedent that a company's outstanding annual returns – including those for the period during which it was deregistered – must be filed before it may be reinstated tends to support such a construction. I do not consider it right, however, that I should purport to decide the point without the benefit of argument.

[22] As cases like *Pieterse v Kramer NO* supra, illustrate, the absence of a retrospectivity provision in s 82(4) of the 2008 Companies Act could have a decisive effect on the determination of the application in terms of s 31(1) of the Arbitration Act. Indeed, as the cases cited in paragraph [20], above - which are not harmonious - also illustrate, it furthermore does not necessarily follow, even if NSC were restored to registered status with retrospective effect, that an infusion of validity to the arbitration proceedings conducted ostensibly by and on its behalf while it was in law actually non-existent would inevitably attend the restoration.

[23] In *Insamcor* supra, at para 23, Brand JA remarked that a validly effected restoration to the register in terms of s 73(6)[26] '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'. I do not understand the judgment to have determined the point, however, and it was in any event predicated on a statutory provision that is not exactly replicated in the 2008 Companies Act. The provisions of s 73(6)(b) of the 1973 Act appear to have been included in the statute in recognition of the fact that, as observed by Schutz JA (*pace* Omar Khayyam) in *Mouton v Boland Bank Bpk* [2001] ZASCA 58, [2001] 3 All SA 485 (A), at para.s 12-13, 'the moving finger writes, and having writ moves on…' and tend to confirm that the legislature, pragmatically, did not believe that the deeming provision in s 73(6)(a) could in all respects 'actually recall time passed'. If Brand JA's quoted remark

[26] Section 73(6A) was not in effect when *Insamcor* was decided.

accurately summarised the position, it is difficult to conceive the need for s 73(6)(b) of the 1973 Act. (It might be that the learned judge of appeal had in mind an order in terms of s 73(6)(a) incorporating pertinent directions given in terms of s 73(6)(b) validating the institution of proceedings during the period of the company's deregistration.) The recent judgment of this court in *Nobel Crest CC v Kadoma Trading 15 (Pty) Ltd* [2012] ZAWCHC 36 (24 April 2012)[27] was decided with reference to s 26 of the Close Corporations Act and is thus not altogether in point.[28] In that case Saba AJ appears to have been content to be guided unquestioningly by Brand JA's obiter dictum, and consequently did not give any critical consideration to the question whether the retrospective restoration of the close corporation *ipso facto* (and without any provision for the sort of directions that could be given in terms of s 73(6)(b)) validated proceedings commenced while it was not in actual existence. In my view the question remains an open one.

[24] The absence of any express provision in s 82(4) of the 2008 Companies Act about retrospectivity is unfortunate. It has unnecessarily confused the position that had been quite clearly articulated in the equivalent provisions of the preceding legislation, which also expressly provided either for the court (in respect of a restoration of registration pursuant to an order of court in terms of s 73(6) of the 1973 Act) to give directions or to make provision, in the context of the deemed continuance in existence provided for in terms of s 73(6)(a), for placing the affected company and all other persons affected thereby in the position, as nearly as may be, as if the company had not been deregistered, or (in respect of a restoration of registration by the registrar of companies, in terms of s 73(6A)) for the affected company to be deemed to have continued in existence as if it had not been deregistered.[29] The question as

[27] www.saflii.org/za/cases/ZAWCHC/2012/36.pdf .

[28] In *Mouton v Boland Bank Bpk* supra, Schutz JA remarked (at para. 5) on the 'important differences' between s 26 of Act 69 of 1984 and s 73 of the 1973 Companies Act. As highlighted in this judgment, there are, likewise, important differences between s 73 of the 1973 Act and s 82 of the Companies Act, 2008.

[29] The operation of s 73(6A) of the 1973 Companies Act does not appear, as far as I have been able to establish, to have enjoyed consideration in any reported judgment. The effect of the omission from that provision of an administrative equivalent to s 73(6)(b) of the Act (such as exists in the UK Companies Act, 2006 – see note 30) thus does not appear to have been considered judicially.

to what the position is currently regarding retrospectivity when reinstatement to the register is granted goes begging. The practical need for retrospective consequences to follow upon the reinstatement of a de-registered company's registration is manifest.[30] The facts of the current matter confirm as much. These are matters that will have to be considered and determined after the reinstatement of NSC's registration has been properly obtained.

[25] A case for a declaratory order that NSC has been re-registered as a company, or that its registration has been reinstated not having been made out, it would be inappropriate, having regard to the fact that the reinstatement of deregistered companies' registration now lies within the exclusive province of the Commission, for this court to give any directions, as sought in terms of paragraph 2 of the notice of motion. Certainly, this must be so in the absence of any evidence that an application for the reinstatement of the first respondent's registration in a form compliant with s 82(4) of the Companies Act, 2008, read with reg. 40 of the Companies Regulations, 2011, has been made to the Commission. Nor has any application for NSC's reinstatement yet been considered by the Commission in a manner in accordance with the procedural requirements of administrative justice. PEC would thus be well advised to prevail upon the Commission to consider and determine its application with due regard to the requirements of the applicable legislation. The furthest I can go is to

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[30] In terms of the Australian Corporations Act, 50 of 2001, the registration of a company may be reinstated by the Australian Securities and Investments Commission ('ASIC') if it is satisfied that the company should not have been deregistered: alternatively by a court on the application of a person aggrieved by the deregistration or by the liquidator. If a court orders the reinstatement of a company's liquidation it may validate anything done between the deregistration of the company and its reinstatement, and make any other order it considers appropriate. The Corporations Act further provides '*If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim*'. See s 601AH of the Act. Similarly, in terms of the UK Companies Act, 2006 (c. 46), the general effect of administrative restoration to the register by the registrar of companies is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. Recognition that this might, by itself, not be sufficient to address all the conceivable exigencies is indicated by the further provision made for the court, on application to it made within three years of the administrative restoration, to 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. See s 1028 of the Act. Similar provisions exist in respect of restorations to the register by order of court, on application. See s 1032 of the Act.

venture that the Commission might be assisted in dealing with the application efficiently and effectively were it to take notice of some of the matters to which attention has been drawn in the course of this judgment.

[26] It is in any event the function of the Commission to maintain the register of companies[31] and to make the information in the registers maintained under the Act 'efficiently and effectively available to the public'.[32] Declaratory relief in respect of the registration status of a company should therefore, in my view, 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.[33] The content of the register of companies, which is a public document, should speak for itself. It is of course important that it should be kept in a manner strictly compliant with the applicable legislation. In the current matter the advices from the Commission that PEC has placed before the court indicate on their face that NSC has not been validly reinstated on the register of companies

[27] Determination of the application for relief against the first respondent in terms of s 31(1) of the Arbitration Act (para. 3 of the notice of motion) and the other relief sought in terms of paragraphs 4-6 of the notice of motion must obviously stand over until the restoration of the registration of the first respondent is confirmed and until that company has had the opportunity, after the reinstatement of its registration, to consider and respond to the application for relief against it in terms of paragraphs 3-6 of the notice of motion. This must be so also because the legal representatives who purported to represent NSC in these proceedings would appear to have had no means to have obtained authority to represent the company while it remained deregistered; cf. e.g. *Salton v New Beesley Cycle Co* [1900] 1 Ch 43. Moreover, for the reasons I have touched upon, it is not established that

[31] See ss 14, 82, 185, 186, and 187(4) of Act 71 of 2008.
[32] See s 187(4)(c) of Act 71 of 2008.
[33] Section 156(c) of the Companies Act, 2008, contemplates applications to court in respect of matters arising in terms of the Act only in matters in which '*appropriate relief*' is sought.

reinstatement of registration would result *ipso facto*, in their being regarded as if having acted under properly given authority. It is also desirable that the effect of the arbitration proceedings having continued while NSC was de-registered should be properly canvassed in argument, with especial attention to the effect of the absence of express retrospectivity provisions in s 82(4) of the Companies Act, 2008, before any determination of the relief sought in terms of para.s 3-6 of the notice of motion is made.

[28] The following orders are therefore made:

(a) The application for relief in terms of paragraphs 1 and 2 of the notice of motion is refused.

(b) As a consequence of the uncertainty about the registration status of the first respondent, no order is made at this stage in respect of the relief sought in terms of paragraphs 3-6 of the notice of motion.

(c) The applicant is granted leave to renew its application for relief in terms of paragraphs 3-6 of the notice of motion, if so advised, on the same papers supplemented to the extent necessary, and upon not less than 20 days' notice to the respondents and to the Companies and Intellectual Property Commission.

A.G. BINNS-WARD
Judge of the High Court