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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: A29/13

In the matter between: Reportable

ABSA BANK LIMITED	**APPELLANT**

And

THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION OF SA	**FIRST RESPONDENT**
THE MINISTER OF TRADE & INDUSTRY N.O	**SECOND RESPONDENT**
THE MINISTER OF FINANCE N.O.	**THIRD RESPONDENT**
THE MINISTER OF PUBLIC WORKS N.O.	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS, CAPE TOWN	**FIFTH RESPONDENT**
THE SHERIFF OF THE MAGISTRATE'S COURT, KNYSNA	**SIXTH RESPONDENT**
ANDREW JOHNSTONE	**SEVENTH RESPONDENT**
THE KNYSNA MUNICIPALITY	**EIGHTH RESPONDENT**

NIKKEL TRADING (PTY) LTD **NINETH RESPONDENT**

Coram: YEKISO, ROGERS & CLOETE JJ

Heard: **12 APRIL 2013**

Delivered: **19 APRIL 2013**

JUDGMENT

ROGERS J:

Introduction

[1] On 30 April 2012 the appellant ('Absa') applied in the court *a quo* for the issuing of a rule nisi calling upon the respondents and other interested parties to show cause why an order should not be granted reinstating the registration of a close corporation called Voigro Investments 19 CC ('Voigro') in terms of s 83(4)(a) of the Companies Act 71 of 2008 ('the Act' or 'the 2008 Act') read with s 26 of the Close Corporations Act 69 of 1984 ('the CC Act') and why certain ancillary relief should not be granted.

[2] On 9 May 2012 Gamble J made an order issuing the requested rule nisi, returnable on 13 June 2012. He also granted, pending the return date, an interim interdict preventing the sixth respondent (the Sheriff of the Magistrate's Court Knysna – 'the Sheriff'), and the fifth respondent (the Registrar of Deeds Cape Town) from transferring the immovable property known as Erf 506 Knysna ('the property') to Nikkel Trading Pty Ltd ('Nikkel') or to anybody else.

[3] There was no opposition on the return day. However, after hearing argument Henney J in a reserved judgement dismissed the application. Absa now appeals to a full bench with the leave of the court *a quo*. Although the effect of Henney J's order was *inter alia* to discharge the interim interdict against the transfer of the property to Nikkel we were informed by Mr Vivier for the appellant that there is an agreement that the property will not be transferred pending judgment on the appeal.

The facts

[4] On 12 April 2006 the property was registered in Voigro's name. At the same time a covering mortgage bond was registered in Absa's favour to secure the loan made by Absa to Voigro to fund the purchase of the property.

[5] On 1 April 2008 the eighth respondent (the Knysna Municipality – 'the Municipality') obtained default judgement against Voigro for R11 704,08 in respect of arrear rates plus R641,21 in respect of costs.

[6] On 24 February 2011 Voigro was finally deregistered by the Registrar of Close Corporations in terms of s 26(2) of the CC Act as it then read. This was because of Voigro's failure to lodge its annual returns in terms of s 15A of the CC Act.

[7] The 2008 Companies Act came into force on 1 May 2011. In terms of item 8(1) of schedule 3 to the 2008 Act, s 26 of the CC Act was substituted with effect from the same date.

[8] On 1 July 2011, nearly three years after obtaining default judgement against Voigro, the Municipality obtained a writ to attach the property in execution of its judgment. The Municipality did so in ignorance of the deregistration of Voigro. Indeed, it seems that the Municipality, the Sheriff, Absa and Nikkel were all unaware of the deregistration until April 2012.

[9] On 26 September 2011 the Sheriff informed Absa's Knysna branch that a warrant to attach the property had been issued. The sale in execution was

scheduled for 14 October 2011. On the day of the auction the Sheriff warned Absa's Knysna branch that Absa needed to take steps to protect its position. The Knysna branch, apparently being inexperienced in such matters, failed to do anything. The result was that on 14 October 2011 the property was sold in execution to Nikkel for R200 000, well below the property's market value.

[10] On 7 November 2011 Absa obtained default judgement against Voigro for R1 517 122,09 plus costs together with an order declaring the property executable. This summons was issued through Absa's head office in ignorance of the sale in execution to Nikkel. On 13 December 2011 Absa caused the property to be attached. It was only towards the end of March 2012 that Absa's head office learned that the property had been sold in execution to Nikkel. In order to prevent transfer to Nikkel, Absa on 3 April 2012 obtained an urgent provisional winding-up order against Voigro, unaware that Voigro had been deregistered. The fact of deregistration came to light later in April 2012. This led to the launching of the application on 30 April 2012 which has given rise to this appeal. In his judgment of 14 November 2012 Henney J dismissed the application and also discharged the provisional liquidation order.

The relief sought

[11] The primary relief sought by Absa pursuant to the rule *nisi* was: [a] an order reinstating Voigro's registration in terms of s 83(4)(a) of the 2008 Act read with s 26 of the CC Act; [b] an order directing the first respondent (the Companies and Intellectual Property Commission of South Africa – 'the CIPC') to reinstate Voigro on the register of close corporations; [c] an order directing that upon reinstatement (i) the assets of Voigro would no longer be *bona vacantia*; (ii) the assets of Voigro would vest in the corporation with retrospective effect to 24 February 2011 (the date of final deregistration) as if Voigro had not been deregistered; (iii) all liabilities of Voigro would continue and would be enforceable against the corporation.

[12] Absa also sought an order that the sale of the property to Nikkel be declared null and void. Finally, Absa asked for an order that its costs be borne by Voigro upon its restoration to the register.

The applicant's case in the court *a quo*

[13] The applicant's case was that a deregistered close corporation can, in terms of s 26 of the CC Act (as amended with effect from 1 May 2011) read with the 2008 Companies Act, be revived either by the CIPC in terms of s 82(4) of the Act or by the court in terms of s 83(4)(a) of the Act.

[14] The applicant contended that revival by the CICP was not practically available to Absa because an application to the CIPC for reinstatement must in terms of s 82(4) be made 'in the prescribed manner'. Regulation 40(6) of the regulations promulgated in terms of s 223 requires in this regard that the annual returns which the corporation should have lodged be brought up to date together with payment of the prescribed fees. This is not something which can be done by an outsider such as Absa. Voigro's sole member at the time of its deregistration was the seventh respondent (Andrew Johnstone) but he could not be compelled to do what is needed to achieve reinstatement in terms of s 82(4).

[15] It was thus just and equitable, so Absa contended, for the court to revive Voigro in terms of s 83(4)(a) and to grant the ancillary relief sought.

[16] This, in summary, remained the applicant's case before us.

The Court *a quo*'s judgment

[17] Henney J found that s 83(4)(a) read with section 26 of the CC Act was not applicable to the case of a close corporation deregistered by the Registrar (prior to 1 May 2011) or by the CIPC (on or after 1 May 2011) for failure to file annual returns. The exclusive manner in which a corporation could be revived in such a case was by reinstatement by the CIPC in terms of s 82(4). In reaching this conclusion Henney J had regard to the distinction which existed in the previous Companies Act (Act 61 of 1973) between the restoration of deregistered companies (s 73(6) of the 1973 Act) and the declaring void of the dissolution of companies following liquidation (s 420 of the 1973 Act). He concluded that s 83(4)(a) had the same scope as the old s 420.

[18] Henney J recognised that an interested party in Absa's position faced certain obstacles in complying with the procedures prescribed pursuant to s 82(4) for reinstatement by the CIPC but was not convinced that it was 'impossible or that difficult' to bring such an application.

The relevant statutory provisions

Prior to 1 May 2011 - companies

[19] The position prior to 1 May 2011 in relation to companies was the following. Chapter IV of the 1973 Act (ss 32-73) dealt, according to its heading, with 'FORMATION, OBJECTS, CAPACITY, POWERS, NAMES, REGISTRATION AND INCORPORATION OF COMPANIES, MATTERS INCIDENTAL THERETO AND DEREGISTRATION'. The last part of Chapter IV (containing only s 73) was headed 'Deregistration'. In terms of s 73(5) the Registrar of Companies could, after following the procedure laid down in ss 73(1) and (3), deregister a company if the company had failed to lodge an annual return or if the Registrar had reasonable cause to believe that the company was not carrying on business or was not in operation. Such a company could have its registration restored by the court in terms of s 73(6) or by the Registrar in terms of s 73(6A). However, the grounds on which the court and the Registrar respectively could restore the company differed: [a] A court could restore the company (regardless of the basis of deregistration) if satisfied that at the time of deregistration the company had been carrying on business or had been in operation or that it was otherwise just and equitable to do so. [b] The Registrar could restore the company only if the company had been deregistered due to failure to lodge an annual return and only after the company had lodged the outstanding return and paid the prescribed fee.

[20] It follows, in the case of a company deregistered for failure to lodge an annual return, that if the interested party could not procure the lodging of the outstanding return and thus obtain restoration from the Registrar in terms of s 73(6A), he could approach the court in terms of s 73(6) and obtain restoration if this was just and equitable.

[21] The stated effect of restoration of registration in terms of these provisions was that the company would be 'deemed to have continued in existence as if it had not been deregistered'. It has recently been confirmed by the Supreme Court of Appeal that this means that the company's actions and conduct during the period of deregistration are deemed to have been undertaken by an existing company (*Kadoma Trading (Pty) Ltd v Noble Crest CC* [2013] ZASCA 52).

[22] The word 'dissolution' was not used in s 73. The event which brought the company's existence to an end (subject to any later restoration) was 'deregistration'.

[23] Chapter XIV of the 1973 Act (ss 337-426) dealt, according to its heading, with 'WINDING-UP OF COMPANIES'. The penultimate part of Chapter XIV (ss 419-422) dealt, according to its heading, with 'Dissolution of Companies and Other Bodies Corporate'. It applied to all liquidations, voluntary and compulsory. Section 419(1) stated that in any winding-up the Master should, when the affairs of the company had been completely wound up, transmit to the Registrar a certificate to that effect and send a copy to the liquidator. In terms of s 419(2) the Registrar was required to 'record the dissolution of the company' and to publish a notice thereof in the prescribed manner. Section 419(3) provided that the date of dissolution was the date on which the Registrar recorded the dissolution in terms of s 419(2).

[24] Section 420 then provided as follows:

'When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'

[25] The effect of an order declaring a dissolution void differed from the restoration to the register in terms of s 73. In the case of s 420 there was no provision that the company would be deemed to have remained in existence despite its dissolution. It is well established in other Commonwealth jurisdictions with provisions worded in a similar way to s 420 that upon a declaration that a dissolution is void the assets and liabilities which the company had immediately prior to its dissolution are re-vested in

the company but that during the period of dissolution any purported acts by the company are of no effect and no proceedings can validly be instituted or pursued by or against the company during that period. Such matters are not revived or validated by the order declaring the dissolution void (see, for example, *Morris v Harris* [1927] AC 252 at 257 *per* Lord Sumner and at 268 *per* Lord Blanesburgh; *In re CW Dixon Ltd* [1947] Ch 252; *Smith v White Knight Laundry Ltd* [2001] EWCA Civ 660; the authorities on provisions in this form and the contrast with provisions closer in form to s 73(6) of our 1973 Companies Act were fully reviewed in *Peakstone Ltd v Joddrell* [2012] EWCA Civ 1035 paras 18-29). This view was followed in South Africa in relation to s 420 and its antecedents (*Pieterse v Kramer NO* 1977 (1) SA 589 (A) at 600A-601H).

[26] The word ‘deregistration’ was not used in this part of Chapter XIV. The event which brought the liquidated company’s existence to an end (subject to any later order under s 420) was the Registrar’s recording of the ‘dissolution’.

Prior to 1 May 2011 – close corporations

[27] Part III of the CC Act (ss 12-27) dealt, according to its heading, with ‘REGISTRATION, DEREGISTRATION AND CONVERSION’. Section 26 provided for deregistration. In terms of s 26(2) the Registrar could deregister a corporation on essentially the same grounds as he could deregister a company in terms of s 73(5) of the 1973 Act, after following the procedure laid down in s 26(1).

[28] Sections 26(4) and (5) contained provisions regarding the liability of members of deregistered corporations which did not have their counterpart in s 73 of the 1973 Act.

[29] Section 26(6) empowered the Registrar to restore the registration of a close corporation if he was satisfied that at the time of deregistration the corporation had been carrying on business or had been in operation or that it would otherwise be just to do so. It was provided, however, that if the corporation had been deregistered for failure to lodge an annual return the Registrar could only restore its registration after the corporation had lodged the outstanding return and paid the prescribed fee.

[30] There was no provision for the court to restore the registration of a close corporation. Section 26(6) of the CC Act was thus broadly the counterpart of section 73(6A) of the 1973 Companies Act, save that in terms of s 26(6) the Registrar could restore a corporation's registration on the wider grounds which, in the case of companies, were available only to a court in terms of s 73(6). Nevertheless, and despite the Registrar having the power to restore a corporation on these wider grounds, there remained the restriction that in the case of deregistration for failure to file an annual return there could only be restoration if the outstanding annual return was lodged and the prescribed fee paid. If an interested party could not procure such lodging, there was no provision (as there was with companies) for such party to approach the court on just and equitable grounds.

[31] The effect of restoration in terms of s 26(6) of the CC Act was, by virtue of s 26(7), the same as in s 73 of the 1973 Companies Act: a corporation was 'deemed to have continued in existence as from the date of deregistration as if it were not deregistered' (see the *Kadoma* case *supra*, which dealt specifically with this provision).

[32] Chapter IX of the CC Act (ss 61-81) was headed 'WINDING-UP'. Section 66(1) made various provisions of the 1973 Companies Act applicable to close corporations. Chapter IX dealt both with voluntary (s 67) and compulsory liquidations (s 68). Among the provisions of the 1973 Act made applicable to the winding up of close corporations were ss 419(1) to (3) and s 420. It follows that a corporation's existence, upon completion of a winding up (whether voluntary or compulsory), came to an end upon the Registrar recording its 'dissolution' but that the court could, as with companies, declare such dissolution void.

Position as from 1 May 2011 - companies

[33] In terms of item 9 of schedule 5 to the 2008 Companies Act the provisions of Chapter XIV of the 1973 Companies Act remain applicable to the winding up of companies, save that the key sections in the said Chapter XIV do not apply to solvent companies and save further that in the case of a conflict between the provisions of Chapter XIV and those of the new Act in regard to solvent companies

the provisions of the new Act prevail. At the risk of over-simplification, therefore, one can say that in general Chapter XIV of the old Act applies to the liquidation of companies unable to pay their debts while the provisions of the new Act in general regulate the winding up of solvent companies.

[34] Chapter 2 of the new Act (ss 11-83) deals, according to its heading, with 'FORMATION, ADMINISTRATION AND DISSOLUTION OF COMPANIES'. Part G of that Chapter (ss 79-83) is headed 'Winding-up of solvent companies and deregistering companies'.

[35] Section 79(1) states that a solvent company may be 'dissolved' voluntarily in terms of s 80 or by the court in terms of s 81.

[36] Section 82 is headed 'Dissolution of companies and removal from register' while s 83 is headed 'Effect of removal of company from register'. Given the importance of these provisions in this appeal, it is worth quoting them in full:

'82. **Dissolution of companies and removal from register.**

(1) The Master must file a certificate of winding up of a company in the prescribed form when the affairs of the company have been completely wound up.

(2) Upon receiving a certificate in terms of subsection (1), the Commission must-

(a) Record the dissolution of the company in the prescribed manner; and

(b) Remove the company's name from the companies register.

(3) In addition to the duty to deregister a company contemplated in subsection (2)(b), the Commission may otherwise remove a company from the companies register only if-

(a) the company has transferred its registration to a foreign jurisdiction in terms of subsection (5), or-

(i) has failed to file an annual return in terms of section 33 for two or more years in succession; and

(ii) on demand by the Commission, has failed to-

(aa) give satisfactory reasons for the failure to file the required annual returns; or

(bb) show satisfactory cause for the company to remain registered; or

(b) the Commission-

(i) has determined in the prescribed manner that the company appears to have been inactive for at least seven years, and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or

(ii) has received a request in the prescribed manner and form and has determined that the company-

(aa) has ceased to carry on business; and

(bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.

(4) 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.

(5) A company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction, if-

(a) the shareholders have adopted a special resolution approving such an application and transfer of registration; and

(b) the company has satisfied the prescribed requirements for doing so.

(6) The Minister may prescribe criteria and procedural requirements that must be satisfied by a company before it may be de-registered in terms of subsection (5).

83. **Effect of removal of company from register.**

(1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction, as contemplated in section 82(5).

(2) The removal of a company's name from the companies register 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.

(3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.

(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.

[37] I shall return to the scope and interpretation of these provisions in due course but the following may be noted at this stage:

[a] The winding up of solvent companies and the deregistration of companies for administrative non-compliance or inactivity are now dealt with in the same part of the Act.

[b] Two additional bases for deregistration have been introduced, namely an application by the company itself (i) because it has ceased to carry on business and either has no assets or there is no reasonable probability of its liquidation because of the inadequacy of its assets; or (ii) because the company has transferred its registration to a foreign jurisdiction.

[c] On completion of a solvent company's winding-up the CIPC must not only record the dissolution but must remove its name from the register (s 82(2)).

[d] Removal of a company's name from the register is also what occurs when a company is deregistered for administrative non-compliance or inactivity or on application by the company on one of the two new grounds just mentioned (s 82(3)).

[e] The concepts of dissolution and removal from the register are brought together by the provision in s 83(1) that a company is dissolved as of the date its name is removed from the register (except where the company's registration is transferred to a foreign jurisdiction, in which case the company's name is removed from the register but it is not dissolved).

[f] Section 82(4) empowers the CIPC to 'reinstate' a company's registration if its name was removed from the register on any of the permitted grounds other than pursuant to the company's liquidation as a solvent company. The effect of 'reinstatement' is not specified. In particular, it is not stated that the company will

upon reinstatement be deemed to have continued in existence as if it had not been deregistered.

[g] Section 83(4) applies to any company which has been 'dissolved' and is in broadly similar terms to the old s 420, save that the relief which may be sought and granted is not confined to an order declaring the dissolution void: the court may also grant 'any other order that is just and equitable in the circumstances'.

Position as from 1 May 2011 – close corporations

[38] In regard to the winding-up of close corporations, s 66(1) of the CC Act now makes the laws mentioned in item 9 of schedule 5 to the new Companies Act applicable. This means, generally speaking, that Chapter XIV of the 1973 Act continues to apply to the liquidation of close corporations unable to pay their debts. This would include ss 419-420 of the 1973 Act.

[39] In the case of the liquidation of solvent close corporations, the amended s 67 of the CC Act now states that Part G of Chapter 2 of the new Companies Act applies. This means that ss 79, 80, 81, 82(1), 82(2) and 83 apply to the winding-up of solvent close corporations.

[40] The provision for the liquidation of close corporations by the court, previously contained in s 68 of the CC Act, has been repealed. Such liquidations are now governed either by the laws contemplated in item 9 of schedule 5 to the new Act (ie Chapter XIV of the 1973 Act) in the case of insolvent corporations or (via the amended s 67) by s 81 of the 2008 Companies Act.

[41] Section 26 of the CC Act as amended, headed 'Deregistration', makes applicable to close corporations the provisions of ss 81(1)(f), 81(3), 82(3), 82(4) and 83 of the new Companies Act. The reference to ss 81(1)(f) and 81(3) is puzzling since those provisions, which concern the winding up of solvent companies by the court, have no relevance to administrative deregistration nor does there seem to be any particular reason for singling them out – they are in any event made applicable to the judicial liquidation of solvent corporations by the more general terms of s 67 of

the CC Act. The other provisions listed in s 26 refer to the administrative deregistration provisions contained in ss 82(3) and (4) of the new Companies Act and to the dissolution provisions of s 83 of the new Act.

[42] The cumulative effect of ss 66(1), 67 and 26 of the amended CC Act is thus that the statutory provisions relevant to the liquidation, dissolution, deregistration and revival of companies apply equally to close corporations in so far as they have any bearing on this appeal.

Applicability of s 83(4)

[43] Against this background I now address the main issue in this appeal, namely whether s 83(4) applies to a company or close corporation which has been deregistered in terms of s 82(3). If one examines the provisions of the new Companies Act and the amended CC Act, untrammelled by views derived from repealed legislation, there is no difficulty in concluding that s 83(4) applies as much to a company or corporation dissolved pursuant to administrative deregistration as to one dissolved pursuant to its liquidation as a solvent company. The liquidation of solvent companies and the administrative deregistration of companies are dealt with together in Part G of Chapter 2 of the 2008 Act. In all the cases dealt with in Part G the term used to denote the termination of the company's existence is 'dissolution', and in terms of s 83(1) this occurs in all instances on the date the company's name is removed from the register, whether pursuant to s 82(2)(b) (in the case of liquidation) or s 82(3) (in the case of administrative deregistration). Deregistration and removal of a company's name from the register are used interchangeably in Part G and mean the same thing (see particularly s 82(1)(b) and the opening words of s 82(3), where the removal of the company's name as contemplated in the former provision is described in the latter provision as deregistration). If s 83(1) applies to all companies dissolved by the removal of their names from the register, there is no reason that s 83(4), which forms part of the same section and applies 'at any time after a company has been dissolved', should not apply to a company dissolved by the removal of its name from the register pursuant to s 82(3).

[44] Not only is this the ordinary meaning of Part G but its correctness is, I consider, conclusively established by two further considerations.

[45] Firstly, s 83(1) expressly excludes from dissolution the case of a company whose name has been removed from the register on its own application because it has moved its registration to a foreign jurisdiction. Now in such a case the company's name is not removed from the register following its liquidation but is removed in terms of s 82(3) following an administrative application in terms of s 82(5). If s 83(1) applied only to companies dissolved pursuant to liquidation, it would not have been necessary for the lawmaker specifically to exclude s 83(1)'s operation in the case of companies deregistered in terms of s 82(5). The fact that this special exclusion was created shows that s 83(1) applies in general to companies whose names have been removed from the register, and not only to those deregistered pursuant to liquidation. If, as is thus clear, s 83(1) applies to all cases of removal from the register, the same must be true of s 83(4).

[46] Second, it is permissible, in interpreting Part G of Chapter 2 of the 2008 Act, to have regard to the amendments which the same Act introduced into the CC Act. In terms of s 67 of the amended CC Act, Part G of Chapter 2 (including s 83) is made applicable to the liquidation of solvent close corporations. But crucially s 26 of the CC Act (as amended), by making ss 82(3) and 83 applicable to close corporations, also renders s 83 applicable to a close corporation deregistered pursuant to s 82(3) of the new Companies Act. Section 26 of the new CC Act could only sensibly have made s 83 applicable on the premise that s 83 applies to a close corporation dissolved by deregistration in terms of s 82(3). And if that is true for close corporations (which is what this appeal actually concerns) it must also be true for companies.

[47] The court *a quo*, as I have already noted, attached significance to the distinction between deregistration and dissolution in the 1973 Companies Act. However, this distinction in the repealed legislation can be relevant only if there is a basis for inferring that the provisions of the new legislation intended to maintain the distinction. I do not believe there is such a basis. The 2008 Companies Act is not a

codification of the 1973 Act. The new Act is a complete re-writing of our corporate law. There are many new provisions and procedures. While some other provisions are, unsurprisingly, similar to those in the old Act, there is in many instances a change in language. The organisation of the new Act and the arrangement of its provisions are completely different. These changes, insofar as they bear on the present appeal, will be apparent, I think, from my summary of the relevant provisions of the old and new legislation.

[48] In enacting provisions relating to deregistration, dissolution and revival, the lawmaker had various options available to it. In terms of the old Companies Act deregistration and dissolution were dealt with separately and in Chapters far removed from each other. In the case of deregistration, an interested party could apply for restoration either to the court or to the Registrar, on varying grounds. In the case of close corporations an interested party could seek restoration only from the Registrar, but on wider grounds than the Registrar could grant when dealing with companies. Thus even in the existing legislation there was no single template. And, of course, the lawmaker, in drafting the new Act, could devise a solution which departed from the differing solutions already contained in the old Companies Act and unamended CC Act. That, in my view, is precisely what the lawmaker decided to do. The lawmaker brought the concepts of deregistration and dissolution together by establishing dissolution as the juristic effect of deregistration and by then borrowing and modifying the provisions of s 420 which had previously applied to dissolution under the 1973 Act. The important modification is that the court is now not confined to making an order declaring the dissolution void; it may make any other order that is just and equitable in the circumstances. (Although the references in s 83(4)(a) to a declaration of voidness and to any other order that is just and equitable are linked by the word ‘or’, I do not believe that the court can grant only one or the other. An order that is just and equitable may entail a declaration that the dissolution is void together with ancillary relief.)

[49] I should add that the notion that a provision in the form of the old s 420 applied only to a company dissolved pursuant to liquidation and was inapplicable to a company whose existence had been terminated by administrative deregistration is by no means as obvious or self-evidently correct as is sometimes supposed. In

England that view was expressly rejected by Wynn-Parry J in *Re Belmont & Co Ltd* [1951] 2 All ER 898 (Ch), where he held that where a company had been deregistered by the Registrar an interested party had a choice of remedies, namely an application in terms of s 352(1) of the 1948 Companies Act (the equivalent of our old s 420) or an application in terms of s 353(6) (the equivalent of our old s 73(6)). This decision was followed by Megarry J in *Re Test Holdings (Clifton) Ltd* [1969] 3 All ER 517 (Ch) at 521I-522C. It appears from *Test Holdings* that in the period between *Belmont* and *Test Holdings* there were many revivals of deregistered companies on this basis. This practice continued after *Test Holdings* (see, for example, *Re Thompson & Riches Ltd* [1981] 2 All ER 477 (Ch)). When the 1985 English Companies Act replaced the 1948 Act the same view was maintained, namely that upon administrative deregistration an interested party seeking the company's revival could choose between s 651 and s 653 (see *Allied Dunbar Assurance plc v Fowle* [1994] 2 BCLC 197 at 202b-c; see also *Gower and Davies' Principles of Modern Company Law* 7th Ed at 868-870). In the current English Companies Act of 2006 the two different judicial avenues have been replaced with [a] an administrative process for revival in certain circumstances; and [b] a single judicial procedure for revival applicable to all cases where a company has been dissolved, whether by administrative deregistration or pursuant to a liquidation (*Gower and Davies' Principles of Modern Company Law* 9th Ed paras 33-62 to 33-65).

[50] The question whether our old s 420 could, as in England, be used as an alternative to s 73(6) never arose for decision in any reported judgment as far as I am aware. The leading commentaries opined that s 420 was confined to dissolution following upon liquidation, and practice seems to have followed that view, though there were contrary opinions.[1] The argument in favour of the view adopted in *Belmont* and *Test Holdings* was stronger in England than in South Africa because in s 353(5) of the English Act of 1948 it was expressly stated that upon publication of deregistration in the *Gazette* the company would be 'dissolved'[2] whereas the word 'dissolution' was not used in our s 73; and of course in the 1948 Act in England the two forms of judicial procedure existed side by side in the same part of the Act. But

[1]See, for example, RC Williams *Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973* (1990) 107 *SALJ* 610 at 615-616.
[2]Section 353(3) of the 1948 Act is quoted in *Thomson & Riches supra* at 479b-c.

this very difference shows why the 1973 Act is not a safe guide to the interpretation of s 83(4) of our new Act: the word 'dissolution' is now used in relation to the deregistration of companies in s 83(1); dissolution pursuant to liquidation and pursuant to administrative deregistration are now dealt with together; and there is now a single judicial remedy. The lawmaker here, as in England, evidently decided in the new Act to substitute the differing judicial remedies in ss 73(6) and 420 with a single remedy applicable to all cases of dissolution, such remedy existing alongside the administrative remedy in s 82(4).

[51] In *Peninsular Eye Clinic (Pty) Ltd v Newlands Surgical Clinic Pty Ltd & Others* [2012] 3 All SA 183 (WCC) Binns-Ward J said in para 6 that the 2008 Act contained no provision for the restoration of a company to the register by order of the court. It seems that the judge did not receive submissions on nor was he called upon to consider the scope of s 83(4). To the extent that his statement in para 6 was intended to convey that s 83(4) does not apply to a company deregistered by the CIPC in terms of s 82(3) I am in respectful disagreement.

[52] It follows, in my view, that 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 Chapter 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 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.

[53] The above conclusion accords with that of Muller AJ in a recent unreported judgment which Mr Vivier drew to our attention, *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (see paras 6-23). Because of the practical importance of the issue and

because we will be overruling a considered judgment of a judge of this division, I have dealt more fully with the matter than did Muller AJ but his reasoning is ultimately similar to mine.

The appeal

[54] Having resolved the main issue, I now turn to the remaining questions relevant to the appeal.

[55] Since Voigro was deregistered in terms of s 26(2) of the CC Act prior to its amendment and not in terms of s 26 of the amended CC Act read with s 82(3) of the 2008 Companies Act, a question arises whether s 83 of the 2008 Companies Act is applicable. In *Peninsular Eye Clinic supra* Binns-Ward J had occasion to consider whether a company deregistered in terms of s 73 of the 1973 Companies Act could be reinstated to the register by the CIPC in terms of s 82(4) of the 2008 Act. He held that this was indeed the case (para 7). He based this conclusion on the definition of 'company' in para (c) of the 2008 Act, namely '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'.

[56] This reasoning is not applicable without more in the present case for at least two reasons. Firstly, para (c) of the definition of 'company' refers to a company 're-registered' in terms of the new Act. The notion of re-registration is more obviously applicable to the 'reinstatement' of a company to the register by the CIPC in terms of s 82(4) than to a declaration by the court that the company's dissolution is void in terms of s 83(4). Second, we are concerned in the present case with a close corporation, not a company. The amended CC Act does not contain a definition of 'close corporation" comparable to the definition of 'company' in the new Companies Act.

[57] On the other hand, it could certainly not have been the intention of the lawmaker that there would, as from 1 May 2011, be no means of reviving a close corporation deregistered prior to 1 May 2011. Section 83 does not expressly refer to a dissolution effected pursuant to s 82. In order to avoid absurd and unjust results, it

is necessary to interpret s 83(4) as applying *inter alia* to any company whose existence came to an end by deregistration or dissolution under the 1973 Companies Act (other, of course, then a company wound up as insolvent, in which case s 420 of the old Act continues to apply). A company so deregistered or dissolved under the old Act can properly be described as one which was 'dissolved' for purposes of s 83(4). In particular, removal from the register in terms of s 73 brought the company's existence to an end (*Miller & Others v Nafcoc Investment Holding Company Ltd & Others* 2010 (6) SA 390 (SCA) para 11). The word 'dissolution' as applied to a company conveys in its ordinary meaning the termination of the company's existence. The same is true for a corporation by virtue of s 26 of the amended CC Act read with s 83(4).

[58] The power in s 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 s 83(4) power is not needed since the court's ordinary power of review is available (cf *Pieterse NO v The Master & Another* 2004 (3) SA 593 (C) at paras 13-17). Like the new s 83(4), the power in the old s 420 and similarly worded provisions was not limited to any particular grounds (see *Ex Parte Liquidator Natal Milling Co (Pty) Ltd* 1934 NPD 312 at 313). A common basis for exercising the power was the discovery of an asset which had not been dealt with (*Goodman v Suburban Estates Ltd (In Liquidation) & Others* 1915 WLD 15 at 25-26; *Ex Parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402). The court's wide discretion was guided by the interests of justice in all the circumstances (*In re Spottiswoode Dixon & Hunting Ltd* [1912] 1 Ch 410 at 415-416). Although the new s 83(4) is no longer confined to dissolution pursuant to liquidation, there is no good reason not to be guided by earlier case law in regard to the circumstances making it appropriate to exercise the power. I have no doubt that Voigro's revival in terms of s 83(4) would be just and equitable. It was dissolved while still owning a valuable property. Voigro has at least two unpaid creditors, namely the Municipality and Absa. The latter held a mortgage bond over the property at the time of Voigro's dissolution. Voigro's dissolution was not the fault of the Municipality or Absa. Absa launched the current proceedings promptly after learning of Voigro's dissolution.

[59] In its notice of motion Absa did not (at least expressly) seek an order declaring Voigro's dissolution to have been void (though it did squarely base its application on s 83(4)). What Absa sought was an order reinstating Voigro's registration. In terms of s 83(4)(a) the court may grant any order that is just and equitable. I am inclined to think that if the removal of a company's name from the register is the event bringing about its dissolution, an order that the dissolution is void would necessarily imply that the company's name must be restored to the register (cf *Belmont* at 901D-E; *Test Holdings* at 520C-D). If it were otherwise, how could such a revived company thereafter again be dissolved (since a company can only be dissolved by the removal of its name from the register)? However, I am reluctant to use the word 'reinstate' (the word used in s 82(4)) in case it should be thought to imply some effect not intended by the court order. I would rather use 'restore'.

[60] I thus consider that the primary relief to be granted to Absa should be an order declaring Voigro's dissolution void with a consequential direction that the CIPC restore Voigro's name to the register of close corporations. Since the order is being granted in terms of s 83(4), not s 82(4), the prescribed requirements relating to reinstatement under s 82(4) do not have to be met. Indeed, it is precisely because of the practical difficulty in meeting these requirements that Absa has approached the court rather than the CIPC. The CIPC will thus be obliged, by the court order, to restore Voigro's name to the register without compliance with further procedures; in particular, the CIPC will not be entitled to insist that outstanding annual returns be lodged or that prescribed fees are paid. (In *Du Rand supra* at paras 24-34 Muller AJ expressed doubts about the validity of regulation 40(6) insofar as it relates to reinstatement by the CIPC in terms of s 82(4). He also said that compliance with regulation 40(6) could not be a 'condition precedent' to a court order under s 83(4) (para 34). It is not clear to me whether the learned judge expressed the latter view as a matter of interpretation or as a reason why in his view regulation 40(6) was *ultra vires.* I prefer to express no opinion on the validity of regulation 40(6). In my view regulation 40(6) simply does not, on a proper construction of the regulations in their statutory context, apply to orders of reinstatement made under s 83(4), though

a court could no doubt in an appropriate case make an ancillary order under s 83(4) requiring returns to be filed if it was just and equitable to do so.)

[61] The ancillary declarations sought by Absa concern the assets and liabilities of Voigro. I have already referred to authority concerning the usual effects of a bare order declaring a dissolution void. The company is re-vested with the assets and liabilities it had immediately prior to its dissolution but nothing done by the company and no action taken against the company during the period of dissolution is of any effect and no validity or life is breathed into such conduct or action by the making of the order.

[62] The declaration sought by Absa that Voigro's assets will no longer be *bona vacantia* accords with the usual effect of a declaration that the dissolution is void. It can do no harm to spell this out in the order though it is probably unnecessary.

[63] Absa seeks an overlapping declaration to the effect that the assets will vest in Voigro with retrospective effect to the date of deregistration as if Voigro had not been deregistered. I have no difficulty with an order that the assets will vest in Voigro – that is the intended result of declaring the assets to be no longer *bona vacantia*. I do not think, however, that the assets should be stated to vest in Voigro 'with retrospective effect' and 'as if [Voigro] had not been deregistered'. I do not know precisely what these phrases are intended to convey. If they are intended to mean that Voigro will be deemed to have had some existence during the period of its dissolution, that would be contrary to the ordinary effect of a declaration that the dissolution is void. While the court has the power to make any other order which is just and equitable, and while this power may perhaps include a power to validate things that happened during the period of dissolution, I do not think it has been shown in this case that there is need for such an order. During the hearing of the appeal Mr Vivier indicated, in response to a question from the court, that Absa did not press for an order which would validate anything done during the period of deregistration.

[64] The requested declaration to the effect that the liabilities of Voigro 'continue' and may be enforced is in principle a natural consequence of the primary

declaration of voidness of the dissolution but again the word ‘continue’ is apt to confuse. What will re-vest in Voigro in the ordinary course are the liabilities it had immediately prior to its deregistration on 24 February 2011. It does not appear that Voigro purported to assume any liabilities after that date and it has not been shown to be just and equitable to validate purported liabilities which Voigro may have assumed during the period of dissolution. Again, Mr Vivier has not pressed for any validating order.

[65] Absa also sought an order declaring the sale in execution to Nikkel to have been null and void. The Sheriff and Nikkel did not oppose that order on the return day. I think the sale in execution was indeed null and void. Voigro did not exist at the time the Municipality attached the property in July 2011 or at the time the Sheriff purported to sell the property in October 2011. At the time of the sale in execution the property belonged to the State as *bona vacantia*, not to Voigro. As I have said, the order declaring the dissolution void does not without more retrospectively validate these actions.

[66] Although no order has been sought in that regard, I should perhaps make clear that the order to be granted in this appeal does not validate the default judgment which Absa purported to take against the dissolved Voigro or the liquidation proceedings which Absa instituted against Voigro in April 2012. Since Voigro did not exist at the time the default judgment was granted or at the time the liquidation proceedings were instituted and the provisional order granted, the default judgment is a nullity as are the liquidation proceedings and the provisional order.[3] Mr Vivier accepted that this would be the position and did not ask for a validating order.

[67] In its notice of motion Absa sought an order that Voigro should upon its revival be liable for the costs of the application. That seems to me to be a just and equitable order in the circumstances. I do not think, however, that any order should be made in regard to the costs of the appeal. The fact that an appeal was

[3]It appears from the case number on the default judgment that the summons on which Absa’s default judgment was granted was issued before Voigro’s deregistration. It is unnecessary in this judgment to determine whether the effect of declaring the dissolution void is that those proceedings may now be continued or whether Absa is required (if it seeks a judgment) to issue a fresh summons. No specific relief in that regard was sought in the notice of motion and, as noted, Mr Vivier did not seek a validating order.

necessitated was not the consequence of anything done by Voigro or its controller. Mr Vivier, after taking instructions, indicated that Absa did not seek a costs order in respect of the appeal.

Conclusion

[68] I would thus make the following order:

(a) The appeal succeeds.

(b) The order of the court *a quo* is set aside and replaced with an order in the following terms:

(i) The dissolution of the close corporation known as Voigro Investments 19 CC with registration number 2004/055360/23 ('Voigro'), which dissolution occurred upon Voigro's deregistration as a close corporation on 24 February 2011 in terms of s 26(2) of the Close Corporations Act 69 of 1984 as it then read, is declared void in terms of s 26 of the said Act 69 of 1984 as amended read with s 83(4) of the Companies Act 71 of 2008.

(ii) The first respondent is directed to restore Voigro's name to the register of close corporations.

(iii) The assets of Voigro immediately prior to its dissolution on 24 February 2011 are declared to be no longer *bona vacantia* and are re-vested in Voigro.

(iv) The liabilities of Voigro immediately prior to its dissolution on 24 February 2011 are declared to re-vest in Voigro.

(v) The sale in execution on 14 October 2011 of the immovable property known as Erf 506 Knysna by the Sheriff of the Magistrate's Court Knysna to Nikkel Trading (Pty) Ltd is declared null and void.

(vi) Voigro shall, upon its restoration to the register, be liable to pay the costs of the applicant in bringing this application.

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ROGERS J

[69] I concur and it is so ordered

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YEKISO J

[70] I concur.

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CLOETE J

APPEARANCES

For Appellant:	P VIVIER
	Instructed by:
	Fourie Basson & Veldtman
	Cape Town
For Respondents:	No appearances