THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

In the matter between : Case number: 63/06

1) INSAMCOR (PTY) LTD **APPELLANT**
and
DORBYL LIGHT & GENERAL ENGINEERING (PTY) LTD **RESPONDENT**

In the matter between: Case number: 319/2006

2) DORBYL LIGHT & GENERAL ENGINEERING (PTY) LTD **APPELLANT**
and
INSAMCOR (PTY) LTD **RESPONDENT**

CORAM : **HARMS, BRAND, NUGENT, PONNAN JJA *et***

SNYDERS AJA

HEARD : **16 FEBRUARY 2007**
DELIVERED : **12 MAART 2007**

Neutral citation: This judgment may be referred to as *Insamcor v Dorbyl* [2007] SCA 6 (RSA)

SUMMARY: Two appeals – one against order setting aside the restoration of a formerly deregistered company under s 73(6) of Companies Act 61 of 1973 – setting aside order upheld mainly on basis that restoration not preceded by issue of rule *nisi* and necessary party not joined. The other appeal – against successful claim for royalties by company restored to register – upheld on basis that because restoration order had been rightly set aside – the claim had effectively been granted in favour of a party that did not exist.

JUDGMENT

BRAND JA/

BRAND JA:

[1] In these two appeals that were heard together, the parties are the same. The first appeal, by Insamcor (Pty) Ltd as the appellant, is against the judgment of Meyer AJ in the Johannesburg High Court. It emanated from a claim by the respondent in the first appeal, Dorbyl Light & General Engineering (Pty) Ltd ('DLG'), in motion proceedings. The claim was for payment of royalties arising from the manufacturing and selling of certain diaphragm valves by Insamcor under sub-licence from DLG. In addition, DLG sought an interdict preventing Insamcor from further manufacturing these valves on the basis that the sub-licence agreement had been terminated. Both claims were upheld by Meyer AJ. The appeal against that judgment is with his leave.

[2] The second appeal, by DLG as the appellant, is against a judgment of Blieden J, also in the Johannesburg High Court, upholding an application by Insamcor for the setting aside of a previous court order by Cachalia J. The order by Cachalia J was granted in terms of s 73(6) of the Companies Act 61 of 1973. In substance it directed that DLG, which had previously been deregistered under s 73(5) of the Act, be restored to the register of companies. The appeal against the judgment of Blieden J, since reported *sub nom Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2006 (5) SA 306 (W), is again with the leave of the court *a quo*.

[3] The source of the relationship between the parties lies in a tri-partite agreement which was concluded on 11 September 1985. The three parties involved were Insamcor, Stewarts & Lloyds of South Africa Ltd ('S&L') and a company registered in the United Kingdom, Saunders Valve Company Limited ('Saunders'). With the consent of the other two parties, DLG subsequently took over all the rights and obligations of S&L in terms of the agreement. This happened during September 1988.

[4] The preamble to the 1985 agreement explained four things that are pertinent. Firstly, that Saunders held copyright in certain diaphragm valves referred to as 'the licensed products'. Secondly, that by virtue of an earlier agreement which was entered into on 1 July 1982, Saunders had granted S&L a licence to manufacture and sell the licensed products in South Africa. Thirdly, that during 1983 Saunders had instituted an action, based on an alleged infringement of its copyright in the licensed products, against Insamcor, and that this action had been settled by agreement. Fourthly, that as part of the settlement, it had been agreed that S&L would appoint Insamcor, *inter alia*, as sub-licensee in respect of some of the licensed products, referred to as the sub-licensed products.

[5] The operative part of the agreement is divided into five chapters, numbered I to V. Of relevance are chapter II, which recorded the terms of the sub-licence granted by S&L to Insamcor and chapter V, which set out the general terms applicable to each of the other four chapters. With regard to the payment of royalties by Insamcor, clause 13 in chapter II provided that:

'13.1 For the rights and licences granted in terms of this chapter II, the sub-licensee shall for the duration of this agreement pay to the sub-licensor a royalty on the 'net

selling price' of all sub-licenced products sold or otherwise disposed of, at the rate of 7,5% (seven comma five per centum) per piece.

13.2 . . .

13.3 The sub-licensee agrees to pay all amounts owing to the sub-licensor in terms of sub-clause 13.1 of this clause within 30 days of the last day of March, June, September and December of each year for the three preceding full calendar months . . . '

[6] In terms of clause 7 of chapter II, Insamcor was entitled, against payment of the royalties set out in clause 13, to utilise the know-how and technical aid defined in the agreement in order to manufacture, assemble and sell the sub-licensed products in South Africa. Clause 8 obliged S&L – and subsequently DLG – to furnish Insamcor 'as promptly as practicable following receipt of requests therefore', with all such know-how and technical aid as Insamcor was entitled to.

[7] DLG brought its application for payment of royalties on 31 August 2004. In support of the claim it contended that Insamcor had breached its contractual obligations by failing to make any of the quarterly royalty payments, contemplated by clause 13, since 31 September 2001. By reason of this breach, DLG averred, it had cancelled the 1985 agreement on 3 August 2004, as it was entitled to do in terms of the general provisions in chapter V. In consequence of the cancellation, DLG contended, Insamcor was bound not to manufacture or sell any of the sub-licensed products for a period of two years following the cancellation. It is on the basis of these last mentioned allegations that the prohibitory interdict was sought.

[8] In its answering affidavit, Insamcor originally relied on a number of defences. Of these the only one persisted with derived from the

allegation that, on a proper interpretation of the 1985 agreement, its obligation to pay royalties was reciprocal upon performance by DLG of its obligations under clauses 7 and 8, to provide know-how and technical aid. Because DLG had failed to comply with these obligations, so Insamcor contended, it was not entitled to claim royalties or to cancel the agreement.

[9] Resolution of the royalties dispute was, however, overtaken by another event. Two days before the matter was set down for hearing, Insamcor compelled discovery of two documents which formed the basis of an additional defence against the royalties claims. What is more, these two documents – and the paper trail leading from them – also paved the way for the setting aside application before Blieden J, which eventually gave rise to the second appeal.

[10] What emerged from these documents were facts previously unknown to Insamcor. First and foremost among these was the fact that on 19 March 1996 and at the behest of its parent company, Dorbyl Ltd ('Dorbyl'), DLG had been deregistered by the Registrar of Companies in terms of s 73(5) of the Companies Act. The deregistration, so it appeared, originated from a decision taken during 1989 to restructure the Dorbyl Group and to rationalise the activities of the entities in the group. As part of the restructuring process, the business of DLG was transferred to Dorbyl. From then on the business was conducted as a division of the latter and no longer as the business of a separate legal persona. Since DLG then ceased to be operational, Dorbyl alleged, it filed the deregistration application with the Registrar of Companies.

[11] What also transpired was that on 21 September 2001, Dorbyl sold the business previously conducted by DLG, including control of the Saunders license, to a company known as Dynamic Fluid Control (Pty) Ltd ('DFC'). After the business had been transferred to DFC pursuant to the sale, Insamcor, however, refused to accept DFC as its debtor under the 1985 agreement. In an obvious attempt to overcome this difficulty, Dorbyl decided to sell the shares in DLG, as opposed to its former business, to DFC. Dorbyl must then have realised that DLG no longer existed. The two documents of which Insamcor obtained discovery shortly before the hearing of the royalties matter were those pertaining to the DFC transaction, namely the deed of sale of DLG's business in September 2001 and the subsequent sale of shares in DLG, which was entered into on 28 January 2004. The share sale agreement recorded that the business of DLG had already been transferred to DFC and that DLG had previously been deregistered, but that Dorbyl was in the process of applying for the restoration of its name to the register of companies. The agreement was specifically subject to the successful outcome of the restoration application.

[12] The two discovered documents led Insamcor to the founding affidavit in the restoration application. It was deposed to by the financial director of Dorbyl on the same day that the share sale agreement was signed. Yet the affidavit made no reference to that agreement or to the earlier alienation of DLG's business to DFC. In fact, the situation represented in the founding affidavit was that DLG's business had been taken over and was still conducted by Dorbyl. The founding affidavit also made no mention of the 1985 agreement between DLG and Insamcor. The only agreement adverted to was the 1982 licensing agreement between Saunders and S&L which had subsequently been taken over by

DLG. As it turned out, the 1985 agreement nevertheless received specific mention in the restoration order.

[13] The Registrar of Companies and two government departments were cited as respondents in the restoration application. Other than the three respondents, no one else was notified. On 2 March 2004 the matter came before Cachalia J on an unopposed basis. Apart from the restoration order itself and certain ancillary relief, he granted the following relief in paragraph 5 of the order:

'5. It is declared that upon the restoration of the registration of the company:

5.1 The assets of the company are no longer *bona vacantia*;

5.2 The assets of the company will vest in the company with retrospective effect to the date of deregistration and as if the company had not been deregistered.

5.3 The assets of the company include all its right, title and interest in and to a sub-licence agreement concluded between Saunders Valve Company Limited, Stewarts and Lloyds of South Africa Limited, Insamcor (Proprietary) Limited and the Company under licence to manufacture and sell various models of Saunders' diaphragm valves.'

[14] Upon learning of these facts, Insamcor launched an application for the setting aside of the restoration order. At the same time it sought a stay of the royalties proceedings, pending the outcome of the setting aside application on the basis that, if DLG were to revert to its previous state of deregistration, the claimant for royalties would disappear.

[15] Meyer AJ held that Insamcor's application for a stay was without merit, because, so he found, Insamcor, from the outset, had no *locus standi* to oppose the grant of the restoration order and therefore had no *locus standi* to bring an application for the order to be set aside. As is apparent from Meyer AJ's judgment, his views were largely influenced by

the judgment of De Vos J in *Ex Parte Varvarian: In re Constantia Pure Food Co (Pty) Ltd* 1965 (4) SA 306 (W) to which I shall presently return. After refusing the stay, Meyer AJ then proceeded to decide the merits of the royalties claim. The outcome, as we know, was a judgment in favour of DLG.

[16] Before dealing with the appeal against the judgment of Meyer AJ in the royalties proceedings I should revert to the application for the setting aside of the restoration order before Blieden J. As appears from his reported judgment (para 14 at 312A-D) Insamcor relied on three grounds in support of its application. First, since it had a direct and substantial interest in the outcome of the restoration order, it should have been joined in those proceedings. Second, Dorbyl, as applicant in the restoration application, not only failed in its duty to fully appraise the court of all the relevant facts, but indeed misrepresented material facts to the court. Third, in any event, para 5.3 of the restoration order was not competent, in that the 1985 agreement which the paragraph declared to be an asset of DLG, was not even referred to in the founding papers.

[17] For the reasons appearing from his reported judgment (see paras 16-38 at 312D-318E) Blieden J essentially agreed with Insamcor in respect of all three grounds upon which its application relied. On appeal DLG's main contention was that Blieden J had erred in his finding that Insamcor should have been joined as a necessary party to the restoration application, because, so it argued, Insamcor would, in any event, have no *locus* standi to oppose that application. In consequence, so the argument went, Blieden J should have found that Insamcor likewise had no *locus standi* to seek the setting aside of the restoration order.

[18] As authority for this argument, DLG relied mainly on those *dicta* by De Vos J in *Ex Parte Varvarian (supra)* which had persuaded Meyer AJ not to stay the royalties proceedings. In dealing with the precursor to s 73(6) of the Companies Act – s 199(7) of Act 46 of 1926 – De Vos J said the following (at 309D-G):

'Now it seems to me that the provisions of this section could never have been envisaged by the lawgiver as affording a new or additional remedy, either substantive or procedural, to persons standing in some legal relationship to the company, either as member, creditor or otherwise where such remedy is not otherwise in law provided for . . . . If this right [to apply for restoration] is exercised the worst that can happen to any party, or the best, according to the facts, would be the revival of a pre-existing relationship which may have been terminated by the action of the Registrar in securing the removal from the register. The restoration then brings the company back into existence as if the Registrar had never acted, and leaves all parties concerned thereafter to enforce such rights as they may have against the restored company.

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

[19] Blieden J in the court *a quo* was of the view (see para 22 at 313H) that, although *Varvarian* was not specifically referred to, it had in effect been subsequently overruled in *Ex Parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T), which was followed in *Ex Parte Jacobson: In re Alec Jacobson Holdings* 1984 (2) SA 372 (W). What these two cases laid down in substance, was that an order of restoration under s 73(6) of the Companies Act should, as a matter of practice, be preceded by a rule

nisi calling upon all interested persons to show cause why the company's registration should not be restored.

[20] The reasoning behind this practice appears from the following statement by Van Dijkhorst J in *Sengol* (at 477C-F):

'The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become *bona vacantia* and as such accrued to the State. Likewise debtors and creditors of the company at time of deregistration may upon restoration find their obligations or rights resuscitated.

It follows that the restoration of the registration of a company in terms of s 73 (6) may have wide-ranging effects. Although the applicant alleges that the company had no other assets than the mineral rights, and that it had no liabilities, the possibility does exist of the discovery of forgotten assets. That this is not illusory is evidenced by the cases where this fact necessitated an application like the present . . . .'

(See also Goldstone J in *Ex Parte Jacobson* at 377F-H.)

[21] The statement by Van Dijkhorst J must, of course, be understood against the background of s 73(6). It provides:

'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.

(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.'

[22] With regard to the effect of s 73(6) the basic premise of the judgment in *Varvarian* – and, building upon it, the argument by DLG – appears to be that an order under the section is no more than a return to 'as you were' whereby all parties involved are retrospectively placed in the same position as they were prior to deregistration. Proceeding from that premise the accepted notion seems to be that the rights and obligations of all parties remain the same as prior to deregistration. Since all parties have the same defences available against each other as prior to deregistration, no one can be prejudiced by the restoration order.

[23] But, with respect to De Vos J, the reality is not that simple. As Schutz JA said, albeit in a somewhat different context, in *Mouton v Boland Bank Ltd* 2001 (3) SA 877 (SCA) at 882D-H), during the period that elapsed since deregistration, 'the moving finger', so to speak, may very well 'have moved on' and the deeming provision in s 73(6) cannot change that fact. As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise their rights against the company – precisely because the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order seems to validate, retrospectively, all acts done since deregistration – including, for example, the institution of legal proceedings – on behalf of a company that did not exist.

[24] In the light of all of this, it is an over simplification to regard a restoration order as no more than an 'as you were'. It can clearly cause severe prejudice to third parties. In *Sengol* (at 477C) Van Dijkhorst J

gave the example of those who, upon deregistration, acquired rights to company property, who will lose those rights when the registration of the company is restored. Examples of such prejudice have also been recognised in other jurisdictions (see eg *Smith v White Knight Laundry Ltd* [2001] EWCA Civ 660; [2001] 3 All ER 862 (CA); *Tyman's Ltd v Craven* [1952] 2 QB 100; [1952] 2 All ER 613 (CA)).

[25] Insamcor contended that on the facts of this case its prejudice resulting from the restoration order is plain: prior to the restoration order it could raise the defence in the royalties proceedings that, upon deregistration of DLG, its rights and duties under the 1985 agreement came to an end. But, because of the restoration order, that defence was no longer available. In fact, DLG's whole answer to the defence based on deregistration relied on the retrospective effect of the restoration order.

[26] According to s 73(6)(a) the court's power to grant a restoration order is introduced by the word 'may'. It follows that the court has a discretion to grant the order. It is not bound to do so, even if all the prerequisites imposed by the section are satisfied (see eg *Ex Parte Minister of Lands, Ex Parte Ventersdorp Muslim Trust (Pty) Ltd* 1964 (3) SA 469 (T) 471A; *Ex Parte Sengol Investments (Pty) Ltd (supra)* 477A-B). One of the considerations the court will inevitably have regard to in the exercise of that discretion, is the potential prejudice the restoration may cause to third parties. (See Blackman, Jooste, Everingham, *Commentary on the Companies Act*, original service, 2002 p 4-179. Cf *Unkovich v Commissioner for Corporate Affairs* (1986) 4 ACLC 502 SC (WA) 503; *Re Porter* (1994) 15 ACSR 424 SC (WA) 427).

[27] In the premises it is, in my view, self-evident that third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the court to make the order subject to such directions under s 73(6)(b) as may serve to alleviate its prejudicial consequences. The inevitable conclusion I draw from all this is that third parties who will or may suffer prejudice as a result of the restoration order, have a 'direct and substantial interest' in the outcome of the application for such an order. It follows that they should be joined as necessary parties to the application (see eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659).

[28] DLG's argument against this conclusion was that in some instances it would be well nigh impossible to join every party to a contract with the deregistered company and any other third party who may be prejudicially affected by the restoration order as respondents in the application. That, however, is not a novel dilemma. It often arises in cases where necessary parties may be numerous and sometimes even unknown. For many years this problem has been resolved by the mechanism of issuing a rule *nisi*, as an alternative to actual joinder of all necessary parties. The import of this mechanism in an analogous situation was explained as follows by Ramsbottom J in *Ex Parte Gold* 1956 (2) SA 642 (T) at 649E-F:

'The Court will exercise its power only where all the parties who have the right to object have consented . . .. The practice is well established that proof of consent is inferred from failure to object after the issue of a rule *nisi* served in the manner and on the persons ordered by the Court. In the present case the rule was duly served, and the consent of all persons concerned . . . was inferred. There was therefore no reason why the rule should not be confirmed.'

(See also eg *Ex Parte Millsite Investments Co (Pty) Ltd* 1965 (2) SA 582 (T) at 584H.)

[29] That was precisely the procedure suggested by Van Dijkhorst J in *Sengol* to be followed, as a matter of practice, in all applications for restoration orders under s 73(6). I agree. All I can add is that, since failure to react to the rule *nisi* will give rise to deemed consent, proper care should be taken in issuing directions as to service of the rule. Where a particular third party can be identified *a priori* as a necessary party – such as Insamcor in the present case, who was in fact referred to in the order by name – service of the rule on that party should be directed, while notice to unknown potentially interested parties can be ensured through publication of the rule (see eg the order in *Sengol* at 479A-C and in *Jacobson* at 378B-C).

[30] In the circumstances I find myself in agreement with the finding by Blieden J (in para 25at 314A-D) that, because the order restoring DLG to the register of companies was granted without the prior issue of a rule *nisi* or the formal joinder of Insamcor as a necessary party, the order could not stand. For that reason alone, the setting aside application therefore rightly succeeded.

[31] The inevitable result is that the appeal against the setting aside order must fail. In the event, DLG conceded, rightly, that Insamcor's appeal in the royalties matter should be upheld. Whether the restoration order was void *ab initio* or not is of no real consequence in the present context. Its setting aside must in any event have operated with retrospective effect to the date it was granted. It follows that the royalties proceedings were conducted all along on behalf of a claimant that did

not exist. This conclusion, incidentally, shows why the stay of the royalties proceedings, pending the outcome of the setting aside application would have been the appropriate solution. The question whether DLG's royalties claim should have succeeded on its merits is therefore not one we have to decide.

[33] For these reasons the following order is made:

(a) The appeal by DLG (under case number 319/2006) is dismissed with costs, including the costs of two counsel.

(b) The appeal by Insamcor (under case number 63/2006) is upheld with costs, including the costs of two counsel.

(c) The order of the court *a quo* in the last-mentioned matter is set aside and replaced with the following:

"The application is dismissed with costs."

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F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS JA
NUGENT JA
PONNAN JA
SNYDERS AJA