Reportable

Republic of South Africa

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

Case No: 21325/11

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

PENINSULA EYE CLINIC (PTY) LTD Applicant

and

NEWLANDS SURGICAL CLINIC First Respondent
THE MINISTER OF TRADE AND INDUSTRY Second Respondent
THE MINISTER OF FINANCE Third Respondent

Arbitration – application for order in terms of s 31(1) of Arbitration Act No. 42 of 1965 – approach by court when it is contended by unsuccessful party in the arbitration that to make the award an order of court would be to permit enforcement of unlawful agreement rehearsed. Held that agreement in issue did not offend against s 38(1) of the Companies Act No. 61 of 1973.
Company – proper construction of ss 82 and 83 of the Companies Act No. 71 of 2008 in respect of restoration of the registration of company removed from the register by the Companies and Intellectual Property Commission in terms of s 82(3) –nature and extent of retrospective effect of reinstatement to the register in terms of s 82(4) of the Act determined. Held that corporate personality and property restored retrospectively ipso factoupon reinstatement, but any validation of corporate activity during period of deregistration falls to be dealt withon applicationby a court in terms of s 83(4) of the Act if necessary.

JUDGMENT: DELIVERED: 22 OCTOBER 2013

BINNS-WARD J:

[1] The relief sought by the applicant in terms of its supplemented notice of motion is essentially twofold. Firstly, it seeks a declaration confirming that the reinstatement of the registration of the respondent company[1] in terms of s 82(4) of the

[1]Three parties were joined as respondents in the application. The second and third respondents were the Minister of Trade and Industry and the Minister of Finance, respectively. The second and third respondents did not take an active role in the proceedings; the third respondent having filed a notice of

Companies Act 71 of 2008has occurred with retrospective effect, with an attendant re-vesting in the company of the property it had owned when it was deregistered and a validation of 'all acts done by or against [it] from the date of its deregistration until the date of its reinstatement'; alternatively, for an order to be granted in terms of s 83(4) of the Act directing that the reinstatement should have the aforementioned effects. Secondly, it seeks relief in terms of s 31 of the Arbitration Act 42 of 1965 making the arbitral awards obtained in its favour against the respondent an order of court. By way of ancillary relief, orders are also sought directing the respondent to furnish the applicant with a copy of its signed, audited financial statements for 2011in terms of s 31(1)(b) of the Companies Act, 2008, and directing the company to comply with its statutory obligations, in particular to file its annual returns.

[2] The applicationfirst came before me last year. It was not clear then that the registration of the respondent company, which had been deregistered for failing to render its annual returns, had been effectively reinstated in terms of s 82 of the Companies Act, 2008. In the circumstances described in the judgment given at the time (which is reported *sub nom Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others*2012 (4) SA 484 (WCC), [2012] 3 All SA 183), the matter was postponed in order to allow the status of the respondent company to be confirmed. I had declined to enter into the merits of the application until Ihad been satisfied on supplemented papers that the registration of the respondent had been effectively reinstated.

[3] The application has been re-enrolled on supplemented papers, as permitted in terms of the order made in the previous judgment. It is plainly established on the additional evidence now before the court that the registration of the respondent company had been effectively reinstated on 3 April 2012. The Companies and Intellectual Property Commission ('the Commission') effected the reinstatement in terms of s 82(4) of the Companies Act, 2008.

[4] The respondent's opposition to the application is multi-layered.It contends that the arbitration award is not amenable to being made an order of court because of the illegality of the underlying transaction, which it alleges fell foul of s 38 of the Companies Act 61 of 1973. It further contends that the reinstatement of the registration of the respondent company in terms of s 82(4) of the Companies Act 2008

intention to abide the court's judgment. It has therefore been convenient for the purposes of this judgment to refer to the first respondent, save in the orders made, simply either as 'the respondent', or 'the respondent company'.

did not have retrospective effect in respect of the corporate activity purportedly conducted on its behalf during the period when it was not on the register and that the arbitration proceedings that were purportedly conducted in its name during the period of its deregistration were thus void and of no effect. In answer to the applicant's contention, advanced in the alternative to its principal submission that the reinstatement of the respondent's registration had the effect of deeming the company never to have been deregistered, the respondent argued that s 83(4) of the 2008 Act did not find application when the dissolution of a company had been reversed administratively by reinstatement of its registration by the Commission in terms of s 82(4). It also contended that an interested person which had obtained the administrative reinstatement of a company's registration in terms of s 82(4) could not thereafter apply for and obtain consequential relief in terms of s 83(4) from a court.

Is the arbitral award one that qualifies for endorsement by the court in terms of s 31 of the Arbitration Act?

[5] It is convenient to deal first with the question whether the arbitration award is amenable to being made an order of court, for if that question is answered in the negative it would be unnecessary, indeed academic, to deal with the other issues. The arbitration was conducted in two stages; a hearing before a single arbitrator at first instance, and thereafter an appeal from the award of that arbitrator to a tribunal comprised of three arbitrators. The issue in dispute between the parties was the extent of the shareholding held by the applicant in the respondent. However, as the arbitrator at first instance observed in his reasons for making the award, '*The real issue between the parties is not so much the shareholding per se as the right to receive substantial dividends which are payable in respect of these shares*'.

[6] The award made by the arbitrator at first instance was in the following terms:

1. Claimant, Peninsula Eye Clinic (Pty) Ltd, is declared to be the holder of 640 shares in the Respondent, Newlands Surgical Clinic (Pty) Ltd., i.e. 16% of the issued share capital of the Respondent.
2. Respondent is directed to accord Claimant all rights as a 16% shareholder including the right to receive dividends that may be declared in respect of the said shares and to share proportionately in any distribution of assets that may take place while Claimant is such a shareholder.
3. Respondent is directed to pay Claimant R732 000.00 in respect of dividends declared on 7 February 2007 with interest thereon at 15% per annum from 7 February 2007 to date of payment.

4. Respondent is to pay the costs of this arbitration, including the costs of the two interlocutory applications brought by Claimant, the costs of the venue, the costs of transcription and the fees of the arbitrator.
5. Respondent is to pay Claimant's costs in the High Court application under Case No. 4695/07.

The decision of the appeal tribunal was simply that '*the appeal is dismissed with costs*'.

[7] The order in terms of s 31 of the Arbitration Act is being sought because the respondent has refused to pay the amount due to the applicant in terms of the arbitration award. The relief sought in this regard in the notice of motion is an order that the arbitration award and the arbitration appeal award be made orders of court. The application that the appeal tribunal's award be made an order of court indiscriminately is misdirected in my view. The purpose of an order in terms of s 31(1) is to render an arbitral award enforceable 'in the same manner as any judgment or order to the same effect' (see s 31(3)). The substantive determination of the appeal tribunal left the first instance arbitrator's award unaffected. Thus the only relief that the applicant requires for the purpose of enforcing the arbitral awards is one making (a) the terms of the award at first instance and (b) the costs award of the appeal tribunal orders of court. The applicant's counsel (Mr *Butler* SC, assisted by Ms *Ioannou*) appeared to accept as much when I put the proposition to them during argument.

[8] As mentioned, the respondent opposes the relief sought in terms of s 31(1) of the Arbitration Act on the basis of its contention that to make the arbitration award at first instance an order of court would be to give effect to a transaction concluded in breach of the prohibition in s 38(1) of the since repealed 1973 Companies Act. It is not in dispute between the parties that a contract which contravened the statutory prohibition against the giving by a company of financial assistance, whether directly or indirectly, for the purchase of its own shares would, subject to considerations of severability, be illegal and void. It is also conceded by the applicant, correctly, that it would not be proper for a court in the exercise of its powers in terms of s 31(1) of the Arbitration Act to make an order placing its *imprimatur* on an arbitral award if the effect would be to purport to give respectability and enforceability to an unlawful or legally unenforceable transaction.

[9] A party to an arbitration which makes application in terms of s 31(1) for an award in its favour by the arbitrator to be made an order of court '*accepts an onus to prove that* [it] *is in possession of an award that can properly form the subject of an order of court*' (*Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA), at para 17[2]). Thus, if it were to be apparent *ex facie* the award, or the reasons given for it, that it could not properly form the subject of an order of court, the application would be refused. A respondent in an application in terms of the sub-section is entitled to oppose the application on the ground that the award is not amenable to properly being made an order of court; it is not obliged to be proactive and take steps, in terms of s 33 of the Arbitration Act, to have the award set aside.

[10] This does not imply, however, that an unsuccessful party in arbitration proceedings may legitimately use its right to oppose an application by the successful party in terms of s 31(1) of the Act as a surrogate means to obtain an appeal to or review by a court. Save in cases in which evidence *dehors* the award might, as in *Vidavsky*,[3] demonstrate a fundamental failure of the arbitration process, the court's enquiry in a s 31(1) application will be limited to the award and any reasons given for it by the arbitrator if those reasons are furnished as part of the award. If the unsuccessful party should allege that what on its face might appear to be an unexceptionable award was obtained irregularly or improperly, then it would beincumbent on it, should it wish to avoid the effect, to make application in terms of s 33 of the Act for the setting aside of the award.

[11] In considering an application in terms of s 31(1) of the Arbitration Act a court will not concern itself with possible errors of fact or law by the arbitrator in making the award, but only with the propriety of lending the award the force of an order of the court. This approach reflects the policy of the courts, not only in this country, but also internationally, to strike the balance between party autonomy and judicial control (or curial intervention) in a way that attaches considerable weight to party autonomy (see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243, at para 4 -in the context of international commercial

[2] Citing Butler and Finsen, *Arbitration in South Africa* at p.273. An applicant for relief in terms of s 31(1) of the Arbitration Act ordinarily discharges the onus by proving the arbitration agreement and that the award was made consequent upon the implementation of the provisions of the agreement; cf. *Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC* 2006 (6) SA 91 (C), at para 27.

[3] *Vidavsky*, which involved a matter in which there had not been service of the notice of setdown in respect of the arbitration hearing, provides an example of a case in which evidence *dehors* the award was relevant to the determination of the question as to whether the award could properly form the subject of a court order.

arbitrations, and cf. *LufunoMphaphuli& Associates (Pty) Ltd v Andrewsand another* 2009 (4) SA 529 (CC) (2009 (6) BCLR 527) at paras 28 and 73 and *Road Accident Fund v Cloete NO and others* 2010 (6) SA 120 (SCA) at para 36 - in the context of domestic arbitrations).

[12] The allegation that the transaction in terms of which the applicant acquired the holding of shares in the respondent that was in dispute between the parties was a nullity,on the grounds that it infringed the prohibition in s 38 of the 1973 Companies Act, was not pleaded by the respondent in the arbitration. This, despite the fact that the parties had providedin their arbitration agreement that the issues referred to arbitration should be defined in pleadings to be exchanged between them, and also notwithstanding the principle that a person who relies on an illegality which is not apparent on the face of the transaction, but arises from its surrounding circumstances, must plead it (*Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G[4]). The arbitrator at first instance therefore, understandably, did not deal with the issue.

[13] The respondent sought to prevail upon the arbitrator to re-open the arbitration to deal with the implication of s 38 for which it contended, but he declined to do so. The respondent then applied to this court for an order reviewing and setting aside the arbitrator's refusal of its request and directing him '*to consider whether the provisions of s 38(1) of the Companies Act…apply to the contract concluded between [the respondent and the applicant] in and during June 2004, and if so, the impact of the said provisions on the validity of the said contract*'. The application was refused (by Riley AJ).

[14] The award made by the arbitrator was thereafter unsuccessfully taken on appeal, as mentioned earlier. It is evident from the reasons furnished by the appeal tribunal that the respondent argued the question of the application and effect of s 38(1) of the 1973 Companies Act at the hearing of the appeal. The appeal tribunal disposed of the respondent's contentions in this regard at para 29 of its reasons as follows ('NSC' denotes the respondent):

> NSC raises a further argument, namely that the 2004 transaction is illegal because it contravenes section 38 of the Companies Act. Two difficulties present themselves. First, a defence of illegality must be raised in the pleadings (*Yannakou v Apollo Club* 1974 (1) SA (A) 614, 623 G-H) which was not done in the instant case. Secondly, an appeal tribunal is not entitled to adjudicate on issues not included in the dispute referred to it unless the parties have

[4]See also *F & I Advisors (Edms) Bpk en 'n Ander v EersteNasionale Bank van SuidelikeAfrikaBpk* 1999 (1) SA 515 (A) ([1998] 4 All SA 480) at 525H – 526A and 526D – E.

> expressly or tacitly agreed to extend the scope and terms of reference of the arbitration (*Allied Mineral Development Corporation (Pty) Ltd. v Gemsbok VleiKwartsietEiendomsBeperk* 1968 (1) SA 7 (C) at 14 to 15). An arbitration tribunal does not enjoy the jurisdiction the High Court has to decide issues which, although not raised on the pleadings, have been fully canvassed in the evidence *Hos+Med Medical Aid Scheme v Thebe YA Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) at 617 para 31 to 32). The section 38 issue was not included in the disputes referred to arbitration or, for that matter, raised on the pleadings. We are thus precluded from considering it.

The correctness of the appeal tribunal's conclusion in this respect is supported not only by the authority cited by it, but also by the subsequentlydelivered judgment of the Supreme Court of Appeal in *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* [2012] ZASCA 4 (8 March 2012), [2012] JOL 28579 at para 18(c).

[15] Section 38(1) of the 1973 Companies Act (which has been repealed by Act 71 of 2008, but was still in force at the time applicant acquired its disputed shareholding in the respondent company) provided:

> No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.

[16] It is well known that the application of s 38(1) - which has not been replicated in the 2008 Companies Act - and its equivalent in the English statutes was frequently not free of difficulty, and also the subject of trenchant criticism, both here and elsewhere. The Jenkins Company Law Committee (1962) reportedlyremarkedof the then equivalent provision on the English statute book that it had '*proved to be an occasional embarrassment to the honest without being a serious inconvenience to the unscrupulous*'.[5] The provision required an enquiry into whether the transaction under consideration involved the provision of financial assistance by the company,[6] and if so, whether the direct object of such assistance had been for the purpose of, or in connection with the purchase of the company's shares.

[17] It is unnecessary for the purposes of this judgment to traverse the import of s 38(1) in any detail. That has already been done in a number of authoritative

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[5]See *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 797G-H.
[6]The import of the term '*financial assistance*' in the context of the provision was also problematic. See *Lipshitz NO* (note 5) at 798-9.

decisions, including notably *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A)[7] and more recently *Gardner v Margo* [2006] 3 All SA 229 (SCA). In the latter case, van Heerden JA stated[8] '*In Lipschitz NO v UDC Bank Ltd this court appears to have accepted the distinction drawn by Schreiner JA in Gradwell (Pty) Ltd v Rostra Printers Ltd*[9] *between the "ultimate goal" of the transaction in question and its "direct object", and to accept that it is only the direct object of the transaction that is relevant. If the direct object is not the provision of financial assistance by the company for the purpose of or in connection with a purchase of its shares, then it is irrelevant that the ultimate goal of the transaction was to enable a person to purchase such shares. Moreover, financial assistance within the meaning of section 38(1) is given only when the direct object of the transaction is to assist another financially – the section 38 prohibition is not contravened when the direct object of the transaction is merely to give another that to which he or she is already entitled.*'[10][11]Suffice it to say that it is evident from the relevant jurisprudence that in all but the most straightforward cases a detailed factual enquiry was needed to determine whether the transaction amounted to the giving of financial assistance and, if so, whether the direct object, as distinct from the ultimate goal, of the giving of such assistance was the purchase of the company's shares. Both elements were linked to form a single prohibition.[12]

[18] Applying the principles described earlier, the only facts to which regard can be had by this court to decide in the current context whether the application should be refused on the basis for which the respondent contends are those apparent from the factual findings reflected in the reasons furnished by the arbitrator and the appeal tribunal. Consideration of the first instance arbitrator's reasons shows that he found that the applicant was 'essentially an association of ophthalmic surgeons' which used the theatre facilities at the surgical clinic operated by the respondent. The use of the facilities by the applicant generated a 'substantial income' for the respondent company. To encourage the use of its facilities by surgeons, such as those belonging to the applicant, the respondent companyat the end of every financial year provided

[7] The judgment in *Lipshitz NO* treated of the import of s 86 bis (2) of the 1926 Companies Act, which was replicated in s 38(1) of the 1973 Act.
[8]tpara 47.
[9]1959 (4) SA 419 (A).
[10]Footnotes omitted.
[11]The facts in *Gradwell*, which afford an illustration of the distinction between '*direct object*' and '*ultimate goal*', are succinctly summarised in the judgment in *Lipshitz NO* at 799A-D.
[12]*Lipshitz NO* at 799E.

financial rewards to the users calculated with reference to the extent of their usage. These payments were opprobriously described as ‘kickbacks’ in the arbitrator’s reasons, but nothing turns on that. The respondent was under no obligation to make them, but the reference in the appeal tribunal’s reasons to the payments as having been incentives that it was ‘customary’ ‘up until the end of the twentieth century’ for privately owned hospitals to make suggests that they were made, and so no doubt also expected, in the context of a wide-spread practice.

[19] The arbitrator noted that at some stage (the context suggests that it must have been in 1999 or 2000) the Health Professions Council published ‘draft guidelines’, the effect of which would be to prohibit the giving of so-called ‘perverse incentives’. The loyalty incentives or ‘kickbacks’ mentioned earlier would fall within the ambit of this proposed prohibition. The respondent thereupon ceased to make any further loyalty incentive payments, but indicated its willingness to give the applicant equivalent financial rewards, provided this could be done in a manner structured to avoid the prohibition contemplated in terms of the aforementioned draft guidelines.

[20] The applicant’s claim to the 10% shareholding in issue rested on an allegation that it had purchased the shares in the respondentfrom the company for R570 000 in January 2002. The respondent contended, however, that the transaction relied upon by the applicant was nothing more than a disguised ‘perverse incentive’ of the nature stigmatised by the prohibition in the draft guidelines.[13]It was apparent, however, that the respondent’s directors were concerned that the transaction should bear scrutiny and not be susceptible to characterisation as having offended against the prohibition. The respondent was subsequently advised by its auditors that the transaction did offend against the prohibition and attention was then given to devising an alternative means of financially rewarding the applicant for its loyalty. This led to the conclusion of an agreement in terms of which the applicant would pass ownership in certain equipment used by it at the respondent’s clinic to the respondent company in exchange for shares in the respondent. For the purpose of the substitute transaction, which was effected in 2004, the equipment was accorded an attributed value of R570 000 by the parties. The net effect of both the 2002 and 2004 transactions was that in monetary terms the applicant paid the respondent R570 000 for the shares, but was compensated by a balancing transaction which resulted in the applicant obtaining

[13] It is not apparent from the award whether the draft guidelines had been adopted and put into effect by 2002. The appeal tribunal’s reasons mention a process of the formulation of guidelines, which culminated in the publication of a set of guidelines in July 2002.

the shares in lieu of the amount it would have been paid in loyalty incentives for the period 1999-2001. In 2006, the respondent purported to cancel the 2004 transaction on the grounds of misrepresentation by the applicant. The respondent alleged that the transaction had been concluded on the basis of a representation by the applicant that the equipment was valued at R570 000, whereas it had been discovered to be worth considerably less.

[21] The arbitrator found that the acquisition by the applicant of additional shares in the respondent company had been under discussion since 2001. The notes surviving of discussions in this connection confirmed that consideration had been given by the parties to offsetting the loyalty reward which the respondent would traditionally have made to the applicant against the purchase price of the shares to be acquired. The arbitrator also found that these discussions were affected by the perceived need to structure the transaction in a manner that would not infringe any prohibition against perverse incentives. He found the means used in this regard to have entailed the sudden raising of charges by the applicant against the respondent which conveniently tallied with the price of the shares. These transactions, which were part and parcel of the aforementioned 2002 transaction, aroused the suspicions of the respondent's auditors. The arbitrator regarded the 2002 transaction as one which was intended to give effect to the applicant's desire to obtain shares in the respondent company '*gratis*'. In context it is clear that what the arbitrator meant by 'gratis' was in lieu of the monetary payment which the respondent would have made to it in terms of the historical loyalty reward relationship described earlier. As a consequence of the concerns raised by the auditors, the parties revisited the transaction, and the respondent advised its auditors that it was no longer proceeding with the sale of shares to the applicant in terms of the 2002 transaction.

[22] The arbitrator then proceeded as follows at para 13 – 21 of his reasons for the award ('PEC' denotes the applicant):

> 13. The subsequent conduct of the parties, in particular the conduct of Drs.Scholtz and Stephenson, further confirms my impression that the sale of the shares in 2002 had been linked to the fate of the kickbacks. Although the proposed way to pass the kickbacks had not passed muster, both parties still intended to exchange the shares for the kickbacks but they had to find a different accounting method to achieve their purpose. So far, then, I accept the scenario contended for by NSC.

14. The (unsigned) minute of a directors' meeting of PEC on 19 January 2004 at which Dr.Scholtz and Mr. Hobbs were present reflects a discussion of the problem which had arisen because NSC's auditors had queried the 2002 transaction. Paragraph 5 of the minute is particularly relevant and merits quotation here:

> "5. That the PEC directors considered alternative options to the share acquisition/deal with respect to the apparent perverse incentives concerns by either suggesting
> (a) that NSC and its auditors suggest options of managing the deal to promote progress
> (b) that PEC directors consider outright purchase of the remaining 10 percent of shares by dropping our claim to two years' worth of consultancy fees/dividends.
> (c) that PEC directors consider extracting the PEC from the whole deal and instruct NSC to repay the money paid to them in lieu of shares in NSC"

15. Even more compelling is a letter dated 23 February 2004 from Dr. Scholtz to Dr. Stephenson. It reads as follows:

> "Dear Hugh,
> Re: Acquisition of 10% shares in Newlands Surgical Clinic (Pty) Ltd (NSC)
> We write with regard to the several meetings we have had concerning the above.
> N S C is unable to issue the agreed shares (despite the shares having been paid for two years ago!), on the grounds that your auditors are of the opinion that the transaction, as structured, may be perceived to be a contravention of the guidelines issued by the Health Professions Council with regard to so called "perverse incentives".
> We have no intention of contravening the above legislation. Nevertheless, we do have a serious intention to acquire an interest in NSC and believe that we have a justifiable expectation in this regard.
> Accordingly we propose the following:
> - The transaction as structured be set aside and funds paid and received be set-off in our respective books of account,
> - Fresh negotiations be entered into for the acquisition of 10% of the shares in NSC,
> - The 6% shares purchased from individual members of NSC, and the price paid therefore, must be addressed as an integral part of the acquisition of the additional 10% referred to above.
> - Your auditors must be party to this process, and
> - These negotiations must be completed and the transaction fully concluded by 30 June 2004.
>
> We place on record that we have, in good faith, incurred significant costs in connection with the failed acquisition of shares in NSC and we reserve our rights in this regard.
> We look forward to an early resumption of negotiations.
> Yours sincerely,"

16. In the light of this it is abundantly clear that both parties now regarded the 2002 transaction as dead and were looking for an alternative way of achieving their object. On 15 March 2004 Dr. Stephenson wrote to Dr. Scholtz in the following terms:

> "Dear Raoul,
> Please find enclosed our cheque for R56,250 being repayment of loan accounts attributed to Drs.Maske (R6,250), Rogers R12,500), Steven (R12,500) and Wilson (R25,000) in 2001.
> You may recall that, at the time, there was uncertainty as to whether payment should be made to the individual or to P.E.C. as you were currently engaged in buying their shares and thereafter the matter slipped my mind.
> In addition I have enclosed P.E.C.'s share certificate in anticipation of finding a solution to our dilemma.
> We at N.S.C. feel strongly that whatever we agree should be in the spirit of our original plan and I think I might have found a way to achieve that.
> With this in mind I'd like to get together with you and Neil in the very near future.
> Yours sincerely".

The alternative that Dr. Stephenson had in mind was an exchange of PEC equipment for NSC shares. In the light of these two letters it is clear that the delivery of the share certificate did not occur in pursuance of the 2002 deal but in anticipation of a new deal yet to be concluded.

17. The idea to exchange equipment for shares was acceptable to PEC and a list of equipment was compiled during June 2004.

The value of the 10% shareholding was still put at R570 000.00 (i.e. the same amount as the unpaid kickbacks) and obviously the value of the equipment had to be put at the same figure in order to make the exchange appear a genuine one.

18. In his evidence Dr. Stephenson was adamant that NSC wanted payment for its shares and that he had insisted on the equipment being in actual use at the clinic and of being to the value of R570 000.00. I accept that Dr. Stephenson insisted that the exchanged equipment had to be equipment in use at the clinic but cannot accept his evidence that it also had to have a market value of R570 000.00. As to the equipment being in use, that is a factor which would have lent credibility to the transaction. There is no indication however that the parties intended a result which differed totocaelo from that which they had sought in 2002, namely balancing payment for the shares by transferring the "outstanding" kickbacks. Indeed, the words of Dr Stephenson in his letter of 15 March 2004, that "whatever we agree should be in the spirit of our original plan" confirms my impression. When I asked Dr. Stephenson what had happened to the kickbacks in 2004 he replied that the kickbacks were built into the reduced price of the shares, namely R570 000.00 (record p.1581). In giving this reply he however lost sight of the fact that the price was the same as in 2002 and that in NSC had then in addition been debited with R570 000.00. Thus the kickbacks were obviously not taken care of in the price of the shares; in fact, the price of the shares was pitched in order to set off the kickbacks.

19. Accordingly I reject Dr. Stephenson's contention that the agreement was to transfer equipment with a market value of R570 000.00 to NSC in exchange for the 10% shareholding. The transfer of the equipment and the value put on it was in my view only meant to camouflage the true intention of the parties namely to pay for the shares by cancelling the kickbacks. The surrounding circumstances support my conclusion. Thus, NSC did not ask for verification of the values placed on the equipment by PEC or itself attempt to verify the value of the equipment tendered by PEC, which one would expect if this were an arms length transaction involving the transfer of assets to the value of R570 000.00. Furthermore, it was intended that this equipment would continue to be used by PEC members free of charge and NSC would derive no income at all from such use. It must have been obvious that the equipment would depreciate and would also in due course be replaced by equipment to which NSC would have no claim so that at best the value of these "assets" would fairly rapidly have wasted away to zero. Clearly, therefore this equipment was not intended to represent true value to NSC, like money in the bank. My conclusion on this point is that the exchange of equipment in 2004 had no more substance than the sale coupled with the debiting of charges against NSC in 2002.

20. In 2004 the parties were still contemplating a long association in the future and the exchange transaction was intended to cement it. Circumstances changed in 2005, however, and the relationship soured when NSC commenced negotiations for a sale

> for the clinic business. PEC applied in January 2006 for a hospital licence, and this was opposed by NSC. A parting of the ways now loomed. In the course of having its assets valued for purposed of the sale of business NSC was informed that the equipment it had received from PEC had very little value in the market. It is only on the strength of this information that NSC then sought to cancel the 2004 exchange deal, contending that there had been material misrepresentation as regards its value on the part of PEC. I may add here by way of a footnote that in my respectful view the proper categorisation of the complaint should perhaps be breach of contract and not misrepresentation, but niceties of pleading are irrelevant as long as the true issues for decision have been thoroughly canvassed, which is certainly the case here.
>
> 21. As I am of the view that it was never seriously intended by NSC that PEC was obliged to deliver equipment with a market value of R570 000.00 it follows that NSC's contention must be rejected. As between PEC and NSC, the 2004 transaction is unimpeachable.

[23] Turning next to the reasons of the appeal tribunal. These essentially upheld the reasoning of the arbitrator at first instance and endorsed his factual findings on the evidence. The appeal tribunal regarded the 2002 and 2004 transactions as a work in progress with the sole object of achieving the transfer of a 10% shareholding in the respondent company to the applicant in lieu of the amount that would have been paid over as kickbacks by the respondent to the applicant for the period from 1999 to 2001 in a manner that would withstand scrutiny in the context of the guidelines of the Health Professions Council. The appeal tribunal found that the work in progress achieved its culmination in the 2004 '*equipment arrangement*'.

[24] In my judgment it does not appear from the reasons given for the arbitral award that the respondent gave the applicant financial assistance. The valuable consideration given to the applicant was in substitution for the payment which the respondent would otherwise have made to the applicant as a loyalty incentive. The direct object of the transaction was to satisfy the applicant's insistence on compensation for its contribution to the respondent's business. The fact that the respondent was not under any obligation to make the incentive payment does not transmute its provision of an equivalent loyalty reward into '*financial assistance*' within the meaning of s 38(1) of the 1973 Companies Act. The fact that the purchase of equipment from the applicant in 2004 was a sham also does not implicate s 38(1) if it is accepted, as I consider it has to be on the facts ascertainable from the arbitrators' reasons, that the object of the sham was to disguise the provision by the respondent to the applicant of what in undisguised form stood to be stigmatised as by the Health

Professions Council as a 'perverse incentive'. Stripped of its disguise, the transaction is revealed to have entailed the payment by therespondent to the applicant of R570 000 as a customer loyalty reward and the use by the applicant of the accrual to purchase shares in the respondent. While the transaction might render the parties susceptible to disciplinary action for acting contrary to guidelines laid down by the Health Professions Council, it did not give rise to a contravention of s 38(1) of the 1973 Companies Act. The first respondent's ground for opposing the application in terms of s 31 of the Arbitration Act thus cannot be upheld.

Was the reinstatement of the respondent's registration in terms of s 82(4) of the Companies Act 2008 of retrospective effect?

[25] Turning then to address the effect of the reinstatement of the respondent company's registration in terms of s 82(4) of the Companies Act, 2008. As mentioned at the beginning of this judgment, the aspect in issue is whether it was retrospective in effect, and if so, whether that validated the conduct of the arbitration proceedings during the period that the respondent's name had not been on the register. As observed in the previous judgment in this application, the status of the respondentas an existing company is obviously a material issue.[14] If the apparent extinction of the company with effect from January 2008 has not been, or cannot now be, effectively reversed with retrospective effect in the respects relevant, the arbitration awards might have been nullities because the respondent, as an ostensible party in those proceedings, had legally not been in existence at the relevant times.

[26] The differences between the manner in which the deregistration and dissolution of companies are treated in the 1973 and 2008 Companies Acts were touched on in the previous judgment in this application, in particular as between s 82 of the current statute and s 73(6) and (6A) of its predecessor.[15] Theywere also discussed in the subsequent judgment of the full court (per Rogers J, Yekiso and Cloete JJ concurring) in *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA 34, but there was no determinative finding in either judgment of the retrospectivity question presented in the current case.[16] The question was left open in the previous judgment because the

[14]See *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* supra, at para 20.
[15]At para 5-6, 9, 12,19, 21 and 23-24.
[16]In *Absa Bank v CPIC* (at para 63), Rogers J was prepared to assume that a court might make an order in terms of its powers in terms of s 83(4) of the 2008 Companies Act to 'to validate things that happened during the period of dissolution', but found it unnecessary on the facts of the case that any such order should be made.

court had not heard argument on the point and the fact of the reinstatement of the respondent's registration as a company had in any event not yet been confirmed to the court's satisfaction. I didnevertheless make some passing observations about features of s 82, which, it seemed to me*prima facie*, might support a construction of the provision to the effect that reinstatement in terms of s 82(4) was retrospective in effect. In *Absa Bank v CPIC*the discussion on the point was incidental to the central question before the court in that case, which was whether s 83(4) of the 2008 Companies Act, which provides that a court may declare the dissolution of a company to have been void,or make any other order that is just and equitable in the circumstances, is available in a case in which the dissolution has happened consequent upon the company's deregistration in terms of s 82(3), rather than upon its winding up in liquidation. The full court answered that question affirmatively.

[27] The wording common to both s 73(6) and s 73(6A) of the 1973 Act that was pertinent to retrospectivity was contained in the phrase that upon the restoration of its registration under either provision '*the company shall be deemed to have continued in existence as if it had not been deregistered*'.[17] In *Kadoma Trading (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA), [2013] 3 All SA 126 (SCA) it was held, with reference to essentially identical wording in s 26(7) of the Close Corporations Act 69 of 1984[18], that its effect was that upon the restoration of the corporation to the register by the registrar all rights and obligations that had been extinguished by its deregistration were *ipso facto* revived with retrospective effect. The court also held (at para 14-15) that the observation in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*2007 (4) SA 467 (SCA), at para 23,concerning the effect of s 73(6) of the 1973 Companies Act that re-registration '*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*'[19] applied upon an administratively determined restoration of a corporation to the register in

[17]The *en passant* remark in para 20 of the full court's judgment in *Absa Bank Ltd v CPIC* supra 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*' was plainly made *per incuriam*. Section 73(6A) of the 1973 Companies Act provided for an application to the Registrar of Companies only by the deregistered company itself, and not by an '*interested party*'. Section 26(6) of the Close Corporations Act (which predated the introduction of s 73(6A) of the Companies Act) provided by contrast for an application for the re-registration of a deregistered close corporation to be made on the application of 'any interested person'. The structure of s 26(6) and (7) of the Close Corporations Act appears to have been directed at facilitating the achievement by administrative means what s 73(6) of the Companies Act required to be done judicially.

[18]Before its substitution in terms of s 224(2) of Act 71 of 2008 with effect from 1 May 2011.

terms of s 26(6) and (7) of the Close Corporations Act. The judgment in *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136 (27 September 2013), which was delivered after argument had been heard in the current matter, is to the same effect.

[28] The express retrospectivity provision that provided the basis for the court's reasoning in cases like *CA Focus*,[20]*Kadoma Trading*, *Insamcor* and *Ex Parte SengolInvestments (Pty) Ltd*[21]is, however,absent from ss 82 and 83 of the 2008 Companies Act.

[29] In a recent judgment of this courtit was held that the omission of any equivalent in the new Companies Act of the expressly provided retrospectivity provisions in s 73(6) and (6A) of the 1973 Act plainly manifested an intention by the legislature to exclude any retrospective effect upon the reinstatement of a company's registration in terms of s 82(4); see *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC). (The learned judge was not invited to consider, as I have been, whether s 83(4) invests the court with the power to direct that an administrative reinstatement of registration shall have retrospective effect.) It would thus ordinarily be a simple matter of following the precedent established by the judgment in *Bright Bay Property Service* unless I were of the view that it was clearly wrong. Counsel for the applicant advanced various criticisms of the decision in *Bright Bay Property Service*. On closer consideration I have been persuaded that the judgment does not afford safe authority for the meaning and effect of subsection 82(4) with regard to retrospectivity. The deregistered company's application for the restoration of its registration in that case had been made in terms of s 73(6A) of the 1973 Act before the commencement of the 2008 Act. The reinstatement of the company's registration therefore fell to be determined under the old Act, and the effect of the differently worded equivalent provisions of the new Act thus did not properly arise for consideration in that case. This follows clearly, I think, from item 3(1) inSchedule 5 to the 2008 Act, which provides that matters pending before the

[19]The observation in *Insamcor*was described in *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136 (27 September 2013), at para 7, as '*an obiter dictum…somewhat tentatively*' made. See also *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC), [2012] 3 All SA 183, at para 23.

[20]In *CA Focus*,Cachalia JA ventured *en passant* and obiter that the omission from s 82(4) of the express retrospectivity clause might be indicative of a realisation by the legislature that the retrospective restoration of the registration of companies in a manner that deemed them not ever to have been deregistered could give rise to 'potential anomalies' (at para 22).An example of a potential anomalous consequence was given at para 20 of the judgment.

[21]1982 (3) SA 474 (T) at 477 C-D.

Registrar of Companies at the date of the repeal of the 1973 Act fell to be disposed of under that Act. (Such an interpretation would also be supported by the provisions of s 12(2) of the Interpretation Act 33 of 1957.) I thus find myself in respectful disagreement with the reasoning at para32-35 of the judgment in *Bright Bay Property Service* and am impelled in the result to conclude that the case was decided on the basis of an incorrect appreciation of the applicable statutory regime.

[30] Whereas the absence fromss 82(4) and 83(4) of the 2008 Act of any express equivalent of the express retrospectivity provisions found in s 73(6) and (6A) of the 1973 Act is indeed an important pointer to support an argument that the legislature intended to radically alter the regime applicable under the old Act, I am, with respect, unable to subscribe to the approach that, by itself, the omission plainly and unambiguously establishes the meaning the learned judge arrived at by it in *Bright Bay Property Service*. As the applicant's counsel point out in their written argument, 'the question arises why the legislature should have intended such a drastic departure from the 1973 Act', especially in the context of the practical issues that fall to be addressed when a company that has been deregistered is resurrected. The absence of an obvious or certain answer to that question serves as a reminder that the legislative intention falls to be established primarily upon a contextual reading of the provisions of the new Act, bearing in mind also the provisions of ss 5 and 7 of the statute, to which the learned judge in *Bright Bay Property* made no reference.[22]They enjoin a purposive construction of the provisions of the 2008 Act. The omission of the expressly provided retrospectivity clauses in the earlier statute is but one of the factors to be considered in the broader context. In my view, for the reasons discussed later in this judgment, a cogent argument can be made out on a purposive reading of the provisions of s 82 that there has not in fact been a change of legislative intention and that subsection 82(4), properly interpreted, does give rise to reinstatement of registration with at least some retrospective effect. The difficulty is that an argument to the opposite effect can also be advanced persuasively.

[31] In the result the unsatisfactory position is that the courts are left in the position of having to decide between two very arguable, but opposite meanings.Moreover,

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[22]Section 5 provides in the respect most relevant for present purposes that the Act '*must be interpreted and applied in a manner that gives effect to the purposes set out in section 7*'. It also permits, to the extent appropriate, the consideration of foreign law for the purposes of interpreting and applying the Act. Section 7 sets out the purposes of the Act with an emphasis on simplicity, flexibility, efficiency and predictability.

when regard is had to the relevant history of the equivalent provisions in the previous Companies Act and its English equivalents[23] the question arises, if one is to construe a reinstatement in terms of s 82(4) of the current Act as retrospectively effective, whether such retrospectivity pertains merely to the company's corporate personality and the restoration to it of its property, or whether it also includes any corporate activity undertaken purportedly on its behalf and in its name during the period that it was deregistered. (Under the 1973 Act a restoration to the register in terms of s 73 had a fully retrospective effect, whereas an order in terms of s 420 declaring the dissolution of a company to have been void did not retrospectively validate any corporate activity of the company between the date of its dissolution and the avoidance order.[24])As Rogers J pointed out in *Absa Bank Ltd v CPIC* (at para 37), the 2008 Act brings together the concepts of dissolution and removal from the register,in contradistinction to their disparate treatment under the 1973 Act. It does not, however, expressly provide which (if indeed either) of the different consequences that attended the resurrection of a company under the old Act, whether by voiding the dissolution or restoring the registration, should apply under the new regime. It is perhaps hardly surprising therefore that the early jurisprudence on ss 82 and 83 of the 2008 Act has been inconsistent and somewhat tentative.

[32] Apart from the judgments in this court already mentioned, the question of whether the reinstatement of a company's registration in terms of s 82(4) of the 2008 Companies Act is with retrospective effect has also been touched on in some of the other divisions of the High Court.

[33] In *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ), van Oosten J remarked on the evident practical necessity for at least some such effect and expressed his agreement with the *prima facie* view expressed by me in the earlier judgment in this matter that the import of the word '*reinstate*' in the sub-section, with its connotation of putting something back in its previous state, is indicative of a legislative intention that the restoration of a company to the register in terms of the provision is with retrospective effect. The learned judge found it unnecessary, however, to come to a firm determination of the question because he found on the facts of the case that the deregistration process of the company

[23]The relevant history is usefully related in the full court's judgment in *Absa Bank Ltd v CPIC* supra.
[24]See *Absa Bank Ltd v CPIC* supra, at para 25 and the other authority cited there.

concerned had been 'cancelled', with the result, as I understand it, that the company had never in fact been deregistered.

[34] Van Oosten J did nevertheless also postulate in *Fintech*that there was '*no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of an enabling statutory provision under the 2008 Act, on application or otherwise, to validate anything done by or against the affected company between deregistration and its reinstatement, and to make such order as it makes appropriate'*. Counsel for both sides in the current matter were *ad idem*, correctly in my respectful view, that the court does not have an inherent jurisdiction, in the ordinarily understood sense of that term,to make such orders.[25][26]They were agreed that the only source of a power of the nature postulated by van Oosten J lay in s 83(4) of the Act. As mentioned, counsel were at odds with each other, however, as to the availability of that power in respect of a reinstatement of a company's registration already effected by the Commission in terms of s 82(4). It was the contention of the respondent's counsel (Mr *Albertus*SC) that the power was available only to a court seized of an application for the a declaration that a company's dissolution had been void, and that it was not available, as a means independently of such an application, for a court to supplement or vary the effect of an administrative reinstatement by the Commission in terms of s 82(4). The respondent's counsel effectively submitted that the administrative reinstatement of a company's registration in terms of s 82(4) of the 2008 Act had the limited effect of restoring retrospectively the company's corporate personality and its property, but not of validating any activity conducted in its name while it had been deregistered (in other words an effect like that which followed an order in terms of s 420 of the 1973 Act).

[35] In *AmarelAfrica Distributors (Pty) Ltd v Padayache*[2013] ZAGPPHC 87 (28 March 2013), the point was taken by the defendant that the proceedings had been incompetent by virtue of the plaintiff company having not been on the register of

[25]In *Bright Bay Property Service* supra, at para 28, Henney J also rejected the notion that the court could exercise an inherent jurisdiction. The learned judge appears to have done so, however, on the basis that the exercise of such a jurisdiction would negate an unambiguous expression of legislative will. The 'legislative will' identified by Henney J was an intention to do away with the retrospectivity provision in s 73(6A) of the 1973 Companies Act. As apparent in this judgment, I do not share the learned judge's view that such a legislative will is unambiguously manifest in the provisions of the 2008 Companies Act.

[26]In *Re M. Belmont & Co., Ltd* [1952] Ch. 10, [1951] All ER 898, Wynn-Parry J used the expression '*inherent jurisdiction*' to describe the powers conferred by the phrase '*order, upon such terms as the court thinks fit*' in s 352(1) of the 1948 English Companies Act. Used in the same manner the expression could apply equally to the phrase '*any other order that is just and equitable in the circumstances*' in s 83(4)(a) of the 2008 Companies Act.

companies when the action had been instituted. It had been removed from the register in 2010 for being in default with the lodging of its annual returns. Before the action came to trial in October 2011, the plaintiff company obtained the reinstatement of its registration administratively.[27] It appears that the application for reinstatement had been submitted in September 2011 (that is after the commencement of the 2008 Companies Act), and dealt with by the Commission in terms of s 82(4). The trial judge (Legodi J) rehearsed the differences between s 73 of the 1973 Companies Act and the regime in terms of s 82 of the 2008 Act and appears to have determined (i) that the reinstatement of the plaintiff's company's registration had beenof retrospective effect and (ii) that it had validatedthe company's institution of the action, subject to the right of the defendant to raise in defence any prejudice it might have sustained as a consequence of the retrospective reinstatement. As the defendant had failed to raise any issue of prejudice, apparently despite an invitation by the courtto do so, the court proceeded to determine the action on the merits of the contractual dispute between the parties. The basis for the court's conclusion that the reinstatement of registration had been of retrospective effect – including a validation of its corporate activity while it had been deregistered - is, however, not apparent from the judgment, and noris the provenance of the power the learned judgeappears to have imputed to the court to curtail the effects of retrospectivity with regard to its prejudicial effect on third parties. It seems to me that if such a power exists, its source must lie in s 83(4) of the 2008 Companies Act, which, certainly on a literal construction, requires an application for relief by an interested party.

[36] In *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294 (KZP), the applicant nominally sought an order in terms of s 83(4)(a) confirming that the registration of a company against which it had obtained a judgment had been restored and that the company's assets had re-vested in it. The court treated the application as being one to avoid the dissolution of the company, which had occurred consequent upon its deregistration for failure to file its annual returns. Much of the judgment in *Nulandis* concerning the proper construction of ss 82 and 83 is in conflict with the full court judgment in *Absa Bank Ltd v CPIC* and thus, by virtue of the binding character of the latter in this division, need not detain me. On the issue of retrospectivity, however,D. Pillay J did express the view (at para 53) that '*any*

[27]The anomaly of the reinstatement having occurred upon the application of the deregistered (and therefore legally non-existent) company itself does not appear to have been considered by the court of the parties.

interested person who wants reinstatement and avoidance [i.e. a declaration that a company's dissolution has been void]*retrospectively will have to motivate fully for such effect in an application to court to either review the Commission's decision about registration or void dissolution by relying on the 'just and equitable' test in terms of s 83(4) of the new Act*', thereby suggesting that the only ways in which reinstatement of registration with retrospective effect could be obtained under the 2008 Companies Act would be either by way of application to court for a review - presumably in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 - of the Commission's decision to remove the company from the register under s 82, orby applying foran order with that effectunder s 83(4). Thesecond part of that approach to the interpretation of the 2008 Act - that is with reference to s 83(4) - seems essentially in keeping with the construction contended for by the respondent's counsel in the current matter. The bases for Pillay J's interpretationappear to have been the absence of any express provision in s 82 concerning the retrospective effect of the reinstatement of a company's registration, such as that found in s 73(6A) of the 1973 Act, and the powers given to the court in terms of s 83(4) of the new Act of a nature comparable to those under s 73(6)(b) of the old Act.

[37] Pillay Jalso appears to have found fortification for her viewpoint in a comparative consideration of the equivalent provisions concerning administrative reinstatement of registration in terms of the English Companies Act, 2006 (c.46), where there is provision for an application to court by an interested party within three years of the company's administrative reinstatement on the register for such directions and provisions as might be 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. (That provision – in subsections 1028(3) and (4) of the English Act –stands alongside and is supplementary to the provision in subsection (1) that '*The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register*.'[28]) Of course, the difficulty is that the wording of the English Companies Act

[28]In *Fabb&Ors v Peters &Ors* [2013] EWHC 296 (Ch) (18 January 2013) (at para 20) the effect of s 1028(1) was considered to render effective proceedings commenced in the name of the company before its restoration to the register. The proceedings were, however, struck out for reasons that are of no relevance in the current matter. The effect of the juxtapositioning of provisions equivalent to sub-sections 1028(1), (3) and (4) in the 1985 English Companies Act was explained by the Court of Appeal in *Top Creative Ltd and another v St Albans District Council*[2000] 2 BCLC 379 (CA); see also *Tyman's Ltd v Craven* [1952] 1 All ER 613 (CA), [1952] 2 QB 100. It is doubtful that the reasoning in those judgments can be applied in respect of reinstatement of a company's registration in terms of

provisions is materially different from that of ss 82 and 83 of our new Companies Act. If the intention of the legislature had been that the local dispensation should replicate that under the current English statute, the easiest manner of achieving that would have been to faithfully copy the English provisions(an approachmanifested in many provisions of the earlier Companies Acts).Appropriate reference to foreign law for interpretative purposes is enjoined in terms of s 5(2) of the 2008 Act. In my view, however, the only value to be gained from an examination of the relevant broadly equivalent, but very differently worded, statutory provisions in other jurisdictions in which the company law is of the same ancestry as ours is the confirmation to be obtained thereby of the nature of the generally accepted practical needs and considerations related to the effects of the reversal of the dissolution or deregistration of companies. Having regard to the provisions of ss 5 and 7 of the 2008 Companies Act, it would be acceptable to construe our statute purposively in a manner that would effectively address such generally recognised needs and considerations unless the language clearly excludes that.

[38] But what then is one to make of the omission from the 2008 statute of the express provisions concerning the retrospective effect of restoration to the register that, in common with equivalent provisions in the English,[29] Australian[30] and Canadian[31] companies legislation, was evident in the 1973 Companies Act? Seeking an answer requires as a first step a close analysis of the remedies provided in terms of ss 82 and 83 of the 2008 Companies Act. To assist in that exerciseit is worthwhile to set out the relevant provisions in full.

[39] Section 82 provides:

> **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.

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s 82(4) of the 2008 Companies Act because of the effect of s 83(1), which clearly provides that the effect of deregistration is *ipso facto* to dissolve the company and the absence of any provision with an expressly retrospective deeming provision such as that in s 1028(1) of the English statute.

[29]Sections 1028 and 1032 of the Companies Act, 2006 (c.46).

[30]Section 601AH(5) of the Corporations Act, 2001

[31]For examples of the relevant provisions in Canadian legislation, which are contained in the provincial statutes, see e.g. *The Queen v. Lincoln Mining Syndicate Ltd.*, 1959 CanLII 44 (SCC), [1959] SCR 736, *Royal Bank of Canada v. Cressler Hotels Ltd.*, 1980 CanLII 1072 (AB QB) and *Willow Green Developments Ltd. v. Lucas Anderson Construction (1993) Co. Ltd.*, 1998 CanLII 4518 (BC SC).

(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) ….

(6) ….

[40] Section 83 provides:

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.

[41] Whereas the current legislation draws together in two provisions in the same part of the Act the consequences of the deregistration of companies and the winding up of solvent companies, it provides three different remedies for any interested party seeking to avoid or reverse the consequences of those dissolving actions:

(i) administrative reinstatement of registration in terms of s 82(4) – this remedy is available only when a company has been dissolved in terms of s 82(3) read with s 83(1),

(ii) a court order declaring the company's dissolution to have been void in terms of s 83(4), or

(iii) any order - also in terms of s 83(4) - that would be just and equitable in the circumstances, which, on the authority of *Absa Bank v CPIC*, might include an order restoring a company that had been administratively deregistered to the register and regulating the consequences thereof.

As confirmed in the full court's judgment in *Absa Bank Ltd v CIPC* the remedies are not mutually exclusive.

[42] The second of the aforementioned remedies seems, when considered with the attendant provisions in s 83(4)(b) of the Act, to be in all material respects identical to that provided in s 420 of the 1973 Act and, on the principle that the legislature is deemed to be cognisant of the judicial interpretation of its language, falls to be interpreted in the same manner as that provision has been.[32]The wording of paragraph (b) of s 83(4) makes it plain, for the same reasons given for the interpretation of s 420 of the 1973 Act and its equivalents in successive English Companies Acts, that an order declaring the dissolution of a company to have been void does not affect the fact of the dissolution or give validity to acts purportedly carried on by, with or against the company between the date of the company's dissolution and the making of the order declaring the dissolution to have been void.The company's corporate existence is

[32]Cf. e.g. *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) ((2007) 28 ILJ 2405; 2008 (2) BCLR 158; [2007] 12 BLLR 1097 at para 245;*Shoprite Checkers (Pty) Ltd v Ramdaw NO* 2001 (4) SA 1038 (LAC) (2001) 22 ILJ 1603; [2001] 9 BLLR 1011) at para 57; and *R v Padsha* 1923 AD 281 at 312

restored with effect from the date of its dissolution, but not its 'corporate activity'.[33] Much turned for purpose of that interpretation on the word '*thereupon*' in s 420 and its equivalents.[34] The omission of that word from s 83(4) does not appear to me to be of any significance, however, for its effect is replicated by the conditional '*if*' which prefaces paragraph (b) of the sub-section. If the order declaring a company's dissolution 'to have been void' in terms of the first part of s 83(4)(a) were not intended to bear the restricted consequences that attended orders under s 420 of the 1973 Act, the provisions of paragraph (b) of the sub-section would be superfluous. In the result it is only the possibly retrospective effects of the first and third remedies that have to be settled.

[43] The third category of remedy is very broad and flexible. The court may make any order that is just and equitable in the circumstances. Despite its wording, which included a provision expressly declaring the dissolution of the close corporation to be void, I consider that the order made by the full court in *Absa Bank Ltd v CIPC* resorted under this category. That much is evident from the fact that the order did not employ wording declaring the dissolution of the corporation '<u>to have been</u> void', as it would were it to have followed the wording of s 83(4) in respect of the second of the aforementioned remedies. It is also confirmed, I think, in the observation by Rogers J (at para 48) that '*An order that is just and equitable* [i.e. the third category of remedy] *may entail a declaration that the dissolution is void together with ancillary relief*'. The third category of remedy is certainly broad enough to include an order directing the restoration of a company to the register coupled with directions formulated to put the affected parties in the position they would have been had the company not been deregistered, or simply directing that the company should be deemed never to have been deregistered.An example of the type of ancillary relief that might be required and which a court might be empowered to grant under the third category of remedy was postulated in connection with the equivalent English legislation in *Re The People's Restaurant Group Ltd*, [2012] EWHC B33 (Comm) (30 November 2012), at para 52, being to suspend the prescription period for creditors whose claims were not time barred at the date of dissolution, but would otherwise be so when the company

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[33]See the speech of Lord Sumner in *Morris v Harris* [1927] AC 252, at 257.

[34]See *Pieterse v Kramer N.O.* 1977 (1) SA 589 (A), at 600-601H. The court in *Pieterse* was dealing with the interpretation of s 191(1) of the Companies Act 46 of 1926, which was closely similar to s 420 of the 1973 Act and its equivalents in the successive English statutes discussed in *Peaktone Ltd v Joddrell* [2013] 1 All ER 13 (CA).

was restored.[35] (It is not necessary to determine in this case whether the particular relief postulated in *The People's Restaurant Group* could competently be granted under our law in view of the effect of the Prescription Act 68 of 1969.[36]). It might also include orders validating and corporate activity purportedly conducted on the company's behalf during the period of its deregistration.

[44] The circumstances in which the administrative dissolution and reinstatement of a company are permitted in terms of s 82(3) and (4) of the 2008 Act are mostly of a nature that reinstatement (i.e. by resort to the first category of remedy) is likely to be sought only for the purposes of restoring formal existence to a company that has remained operative notwithstanding its deregistration. The circumstances contemplated in terms of s 82(3)(a) (failure to lodge annual returns) are, as the current matter illustrates, more often than not symptomatic of administrative neglect by a company's management rather than a cessation by the company of its corporate enterprise. The purposes of the Act set forth in s 7 would not be furthered by treating the administrative reinstatement of the registration of the company in such circumstances as effective only from the date of the reinstatement and not from the date of the dissolution. Certainly, there would be little practical purpose in administrative reinstatement if it did not have the effect of retrospectively restoring the company's personality and reinvesting it with title to its property. As to the validation of its corporate activity, an argument could be made that if that were not to be implied, there would be a need in many cases also for an application to court in terms of s 83(4) for an order regularising and validating the company's corporate activity during the period that it had been legally, but not factually, moribund, and that to imply such a requirement would be subversive of the objects of simplicity, costs saving and business efficiency evidently contemplated by the very provision of the administrative remedy as an alternative to an application to a court. Against that argument is the consideration that the potentially undesirable effects of the automatic retrospective validation of invalid acts on third parties is a powerful factor weighing in favour of judicial regulationof any such acts as might be too contentious to be catered for by voluntary ratification by the affected parties.

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[35]See also *Re Donald Kenyon Ltd* [1956]3 All ER 596 (Ch), approved by the Court of Appeal in *Regent Leisuretime Ltd. v Natwest Finance Ltd* [2003] EWCA Civ 391, and compare *Re Huntingdon Poultry Ltd* [1969] 1 All ER 328 (Ch).

[36]Cf*Berrange v Registrar of Companies* [2008] JOL 21225 (N), [2007] ZAKZHC 35 and contrast *Village Freeezer t/a Ashmel Spar v CA Focus CC* 2012 (6) SA 80 (ECG) at para 27-28.

[45] Dissolution in terms of s 82(3)(b)(i) is likely to occur only when all the objectively determinable indications are that the company has been inactive for a long period and no person would have any interest in its continued existence. It is probable that reinstatement of the registration of a company that has been struck off the register for this reason will most commonly be sought in circumstances in which the deregistration has occurred in error because the company has in fact been active, or there was in fact a person who had - and retains - an interest in its continued existence. Therefore, in such a case too, practical considerations suggest that any person applying for the reinstatement of the registration would obtain effective relief only if the reinstatement were with retrospective effect, thereby acknowledging the fact of the actual corporate activity of the company after its deregistration, or the actual interest of the person concerned that the company should not have been struck from the register. A consideration of the position with ss 5 and 7 of the Act in mind would thus also in this category militate in favour of construing the effect of reinstatement in terms of s 82(4) to be retrospective, with the result that upon reinstatement to the register the company would be regarded as if it had not been dissolved. The fact that parties other than the person who is sufficiently interested to obtain the reinstatement of the company's registration might have conducted themselves on the basis that the company had ceased to exist and might be prejudiced by the indiscriminate restoration of an 'as you were' situation weighs equally in this division of the first category cases in favour of an interpretation that the company's corporate activity while it was deregistered should not be treated as having been automatically validated upon the reinstatement of the company's registration; being an issue that, if necessary, is better regulated in terms of s 83(4) by a court according to what might appear to be just and equitable in the circumstances.

[46] Removal from the register in terms of s 82(3)(b)(ii) is an alternative to formal winding up. The provisionappears to bedirected at facilitating the discarding of deadwood from the register of companies in circumstances in which a company has ceased to carry on business and where, because its assets are non-existent or inadequate, a formal winding-up is unlikely to occur. The persons most likely to request deregistration in terms of s 82(3)(b)(ii) would be the same as those who in other circumstances would procure the company's voluntary liquidation. The persons most likely to apply for the reinstatement of a company deregistered for this reason would be those who had claims against the company which they considered could be

satisfied either by execution or in the context of a compulsory liquidation. They would be persons who could show that the deregistered company did have sufficient assets to warrant them pursuing either of those courses. Their purpose in obtaining the reinstatement of the company's registration would often not be served if the reinstatement were not with retrospective effect. However, in cases falling under this division of s 82(3) read with s 82(4), the need to validate post-deregistration corporate activity is unlikely to be a consideration in most cases.

[47] Counsel for the applicant pointed to other considerations that demonstrated the practical need for reinstatement in terms of s 82(4) to be accepted as being with retrospective effect. Theseincluded that if there were no retrospectivity the reinstatement of the registration of a company would give rise to the reconstitution of companies without their governance structures and the re-vesting in the company of its assets would be susceptible unduly to complications. The other considerations that counsel contended militated in favour of reinstatement operating with automatically retrospective effect were expressed in the following rhetorical questions posed in their heads of argument: '[I]*f the reinstatement occurs ex tunc, but not retrospectively (illogical as that may be), what of the rights and obligations that may have arisen in the interim? For example if (as here) money is held in an account, and interest accrues thereon, is no tax payable on the interest?*' and '*What is to occur to duties and obligations of directors that previously existed? The notion that the reinstatement is not retrospective would lead to the logical consequence that the company's directors who face claims could, by failing to file returns, cause the company to be deregistered and then upon reinstatement escape the obligations that they faced previously*'.

[48] Some (but not all) of the considerations identified by the applicant's counsel do afford support for the intended retrospective effect that I ventured tentativelyat para 21 of the earlier judgment might be denoted by the legislature's choice of the word 'reinstate' in s 82(4). I agree that there would ordinarily be little practical point in the reinstatement of the existence of a company if it were not thereby also to be reinvested with its assets, including any accretion to such assets as might have occurred during the period of deregistration. I also agree that in the absence of any statutory mechanism for the re-establishment of the company's board it would seem to be implied that,save as might otherwise be expressly directed (say, in terms of an order made in terms of s 83(4)), directors in position when the company was

administratively deregistered should be deemed to have remained in office upon the reinstatement of the company to existence.[37]However, the obligations of a company are not extinguished by its administrative dissolution[38] and the same applies in respect of the liability of natural persons who might have incurred such liability through the delinquent management of the company or through undertaking an accessory liability such as by way of suretyship.[39] So not all of the considerations offered by the applicant's counsel seem to me to offer support for their contextual construction of s 82(4) as having the blanket retrospectivity that the courts gave to restoration in terms of s 26(7) of the Close Corporations Act as it read prior to its recent substitution. None of the considerations argued by counsel would necessarily require that the corporate activity purportedly conducted in the name of the company during the period of deregistration should be automatically validated by virtue of the reinstatement of registration. On the contrary, the potentially prejudicial effect on third parties of a necessary or inevitable validation of purported corporate activity inherent in the indiscriminately automatic retrospective reinstatement of companies is a consideration weighing against the ready acceptance of giving reinstatement in terms of s 82(4) unqualified retrospective effect of the nature provided in terms of the materially differently worded s 73(6A) of the 1973 Act and s 26(7) of the Close Corporations Act prior to its substitution with effect from 1 May 2011. As a matter of general principle consequences with a potentially prejudicial effect on third parties should not be allowedto occur administratively without an opportunity for such parties first to be heard.

[49] Indeed, in the previous judgment (at footnotes 10 and 12) I noted the doubts expressed in *Henochsberg* about the constitutionality of s 73(6A) of the 1973 Companies Act[40] and observedthat by introducing the unqualified retrospectively

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[37]The editors of *Henochsberg on the Companies Act 71 of 2008* express a contrary view without any motivation. The general effect of the statute however goes against the notion of allowing that a company should be without directors; hence upon incorporation the incorporator is deemed to be a director until directors are elected thereafter in the ordinary course (see s 67 of the Act). The notion that the directors are reinstated as part of the reinstatement of the company's registration does not, however, imply that any conduct by them purportedly in that capacity during the company's period of deregistration would be validated. It would, however, be open to such directors to resolve to ratify their actions during this period. Any unjustly prejudicial effect of any such ratification would be amenable to amelioration by the court at the instance of any affected party in terms of s 83(4).

[38]See e.g. *Barclays National Bank Ltd v Kalk*1981 (4) SA 291 (W) at 295;*Boland Bank Bpk v Mouton* [1997] 4 All SA 67 (C) at 73i.

[39]See e.g. *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 633–634.

[40]See also *Insamcor*(*Pty*) *Ltd v Dorbyl Light and General Engineering* (*Pty*) *Ltd* 2006 (5) SA 306 (W) at para 27.

deeming provisions in the subsection the legislature could perhaps have unwittingly overlooked the potentially prejudicial consequences to third parties. That observation bears repetition:

> 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.

An administrative process is not as well suited as a judicial process to determine and afford appropriate remediesapplying justness and equity to address the prejudicial consequences to third parties that can arise as a consequence of the restoration of deregistered companies to the register. The need for some process to deal with such potential issues is manifest. Such a process was provided under s 73(6)(b) of the 1973 Act. It was a judicial process applied in the context of judicially directed re-registration. Judicial processes to address the consequences of administratively determined re-registration are afforded in terms of the comparable English and Australian statutes. The absence of any provision in the statutory framework in the 2008 Act for an administrative process to meet the need suggests that remedial relief, if required, falls to be given in s 83(4) of the Act, i.e. judicially.

[50] The ambit of s 83(4) is wide enough to empower a court to deal not only with the validation, conditionally or otherwise, of corporate activity purportedly conducted on behalf of the company during its period of deregistration, but also, if it is just and equitable to do so, with any prejudicial consequences of the ordinarily retrospective effects of reinstatement, viz. the re-establishment of corporate personality, the reinvestment of ownership of property and the reconstitution of the company's board of directors and general body of members. The wide breadth of the court's power in terms of the second category of remedy affords the ability to make the effect of any restoration of the company retrospective, whether generally or selectively.

[51] Construing the provisions of s 82(3) and s 82(4) to the effect that administrative reinstatement of a company's registration retrospectively re-establishes

its corporate personality and title to its property, but does not validate its corporate activity during the period that it was deregistered seems to me to give the preferred result given the choice of meanings available. It is a construction that acknowledges the probably intended significance of the omission from the currently applicable provisions of the phrase '*the company shall be deemed to have continued in existence as if it had not been deregistered*' in the statutory predecessors of the provisions, but still allows the inevitable practical needs bound up in the reinstatement exercise to be addressed while minimising the incidence of prejudicial 'anomalies' of the sort postulated in the Supreme Court of Appeal's judgment in *CA Focus CC* supra. When the subsections are construed contextually in that manner with s 83(4) they are seen to afford a basis for the role of judicial guidance or control that the judgment in *Kadoma Trading* supra (at para 15) regarded as generally desirable, but which the express retrospectivity provisions in s 26(7) of the Close Corporations Act and s 73(6A) of the 1973 Companies Act had excluded.

[52] This conclusion disposes in effect of the respondent's argument that s 83(4) is not available when the registration of a company has already been administratively reinstated in terms of s 82(4). In my judgment the interpretation contended for by the respondent that an interested person who obtains the reinstatement of a company's registration in terms of s 82(4) is thereby disqualified from subsequently obtaining additional relief, if such is required, under the just and equitable relief provision in s 83(4)in any event finds no support in the wording of the provision. Section 83(4) permits any interested person to apply for relief connected with or arising from the dissolution of a company and the court is empowered upon such application to make any order that is just and equitable in the circumstances. According to the tenor of the provision such an application can be made at any time after the company's dissolution. In my view the phrase '*at any time after a company has been dissolved*' is not bounded by the date of any subsequent revival of the company. There is also nothing in the provision to suggest that the concept of an '*interested person*' should be narrowly construed so as to exclude a person who had applied for and obtained a reinstatement of registration in terms of s 82(4). The remedy is directed at addressing any consequences of a company's dissolution in circumstances in which it would be just and equitable to do so.

[53] Some of the practical consequences of the dissolution of a company in terms of s 82(3) read with s 83(1) and the subsequent reinstatement of the company's

registration in terms of s 82(4) might only become apparent after the fact. Such a need, if it were to arise, would require to be addressed irrespective of whether the restoration had been effected judicially or administratively. It might also be just and equitable that such consequences be addressed at the instance of persons who had no knowledge of or involvement in the application for administrative reinstatement.

[54] The question thus arises whether it would be just and equitable to make an order declaring that the conduct of the arbitration purportedly on behalf of the respondent company during the period that it was removed from the register be deemed to have been valid and effective. In its supplemented notice of motion the applicant has actually sought an order declaring that all the respondent's corporate activity while it was not on the register should be validated, but I do not think that would be appropriate; certainly not without general notice to potentially affected parties. It is appropriate in the circumstances to confine the enquiry to the validation of the arbitration proceedings.

[55] In my judgment there is no doubt that it would be just and equitable that the arbitration proceedings should be declared valid. The respondent's directors were in *de facto* control of the conduct of the proceedings on the respondent's behalf and the respondent's interests were represented by senior counsel briefed to represent it at the arbitration hearings and in the application to court for the review of the arbitrator at first instance's decision to decline to reopen the arbitration. No doubt both parties incurred considerable expenditure in respect of the arbitration proceedings in the *bona fide* but mistaken belief that the respondent was legally existent. The only reason of which I am aware for the reinstatement of the respondent's registration was to allow for the current proceedings, which are directly related to the outcome of the arbitration proceedings, to go ahead and be effectively determined. A further consideration in favour of validating the arbitration proceedings between the applicant and the respondent is that the only reason the issue has arisen is because the company was deregistered through the failure of its directors to ensure that its annual returns were duly lodged. While it would be manifestly unjust to the applicant were the arbitration proceedings not rendered effective, deeming them to have been validly conducted would occasion the respondent no cognisable injustice whatsoever.

[56] In my view it is also necessary, by reason of the fact that the current proceedings were commenced during the period that the respondent company was

deregistered,that an order be made declaring that these proceedings be deemed to have been validly instituted and conducted.

The application for ancillary relief

[57] I turn now to deal with the application for ancillary relief.

[58] Section 31(1)(b) of the Companies Act 71 of 2008 entitles any person who holds securities therein on demand to receive without charge one copy of any annual financial statements of a company required by the Act. It is a criminal offence for a company to fail to comply with its obligations under the provision.

[59] The applicant had been given the financial statements and draft statements for 2011. It seeks an order directing the respondent to furnish it with a copy of its 'audited, signed financial statements for the year 2011'. The applicant was informed by the attorneys then purporting to act for the respondent company after its deregistration that 'Draft financial statements have been prepared, but they have not yet been signed off by the auditors because of the deregistration and furthermore the accountants are still working with SARS to resolve the issue of the refund that SARS has to pay our client'. I am not persuaded in the circumstances that an entitlement to a mandatory interdict has been established. The respondent had in any event not yet had its registration reinstated as at the date proceedings were commenced in October 2011. There is no evidence before court to suggest that subsequent to the reinstatement of its registration the company is not complying with its obligations in terms of s 31(1).

[60] I am also not persuaded that an order directing the respondent to comply with its obligation to lodge annual returns is indicated. It may well be that the company was deregistered because its management had been remiss in this regardhistorically, but there is no reason to believe that the omission will be repeated. Certainly, if the applicant were able later to make out a case that the directors of the company had sought to frustrate the arbitral awards or the effect of the this judgment by allowing the company to be administratively dissolvedagain by reason of a failure to lodge its statutory returns, the directors concerned could expect to find themselves in real danger of being held personally liable for any costs the applicant might incur to redress the situation.

Costs

[61] The applicant has achieved substantial success in the application and is entitled to costs against the respondent company. The applicant has sought a costs

order on the scale as between attorney and client. It has also sought an order directing that the respondent's liability for the applicant's costs should not be paid by the respondent 'out of any funds that are attributable to [the applicant] as a shareholder'. These special orders are sought because it is contended that the respondent's conduct has been vexatious. In this regard the applicant's counsel called in aid the judgment in *In Re Alluvial Creek, Ltd.* 1929 CPD 532 in which it was held (per Gardiner JP) that an attorney and client costs order might properly be made where the proceedings had had 'the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear'. It is an approach that has since been endorsed in a number of subsequent cases. I think it is apposite in the current matter.

[62] The parties had agreed that their dispute should be settled by arbitration and that the issues between them should be defined in pleadings before that forum. The respondent should have pleaded any reliance it wished to place on the alleged illegality of the underlying transaction. That much followed not only from the terms of their arbitration agreement - which was entered into specifically to deal with the dispute concerning the extent of the applicant's holding in the respondent company - but also as a matter of well-established law. The consequences of the respondent's failure to plead what has been the essential basis for its refusal to comply with the arbitral awards are something to which it should reasonably have reconciled itself before the current round of litigation. It should have done sowith regard to the outcome of the review application before Riley AJ and the reasoned determination of the arbitration appeal tribunal. I also consider it to have been objectively vexatious for the respondent to rely on its deregistration to try to avoid the outcome of the arbitration process when the deregistration had occurred as a result of the failure by its own directors to ensure that the company complied with its statutory obligations.

[63] In the circumstances I intend to accede to the applicant's prayer that costs be awarded on the attorney-client scale. I do not, however,consider that there is a proper basis to give any direction that would have the effect that the respondent's costs liability be determined in such a way as would not adversely affect any dividend that might accrue to the applicant qua shareholder in the respondent. Notwithstanding the order made in the review application - apparently with the intention of achieving such

effect -I doubt that it would be competent to make any such order. If the dividends to which the applicant might be entitled to receive from the respondent are diminished as a consequence of the effect on the company's revenue or financial position of delinquent conduct by the respondent's directors, the applicant may, if so advised, have resort to appropriate remedies to deal with the position. I do not consider that the costs order that the applicant seeks, so as todistinguishthe ultimate impactof a costs order against the respondent on itself from that on its fellow shareholders, is a proper surrogate for those remedies.

[64] In the result the following orders are made:

(a) It is declared that,insofar as the company's corporate personality and title to its property were concerned,the reinstatement in terms of s 82(4) of the Companies Act 71 of 2008 of the first respondent's registration as a company had retrospective effect from the date upon which the first respondent was deregistered, so that the property that was vested in it at the date of its deregistration is deemed to have remained as its property as if it had not been deregistered.

(b) It is further declared, in terms of s 83(4) of the said Act, that the arbitration proceedings between the applicant and the first respondent before Mr WG Burger SC at first instance and thereafter before Messrs SF Burger SC, HM Scholz SC and AC Oosthuizen SC, constituted as an arbitration appeal tribunal, during the period that the first respondent was not registered as a company, as well as the related review application proceedings in the High Court, and also the current proceedings shall be deemed to have been validly and effectively instituted and conducted.

(c) The arbitration award set forth in the 'Arbitrator's Award and Reasons', signed by W.G. Burger SC, dated 24 July 2008, and the costs provision in the arbitration award set out at para 32 of the 'Appeal Tribunal Award', signed by S.F. Burger SC, H.M. Scholtz SC and A.C. Oosthuizen SC, dated 18 October 2010, are made orders of court in terms of s 31(1) of the Arbitration Act 42 of 1965.

(d) The first respondent shall be liable for the applicant's costs of suit on the scale as between attorney and client, including the costs of two

counsel. (Such costs shall include the costs incurred in connection with the hearing on 27 February 2012.)

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