THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 086/2014

In the matter between:

NEWLANDS SURGICAL CLINIC (PTY) LTD **APPELLANT**

and

PENINSULA EYE CLINIC (PTY) LTD **RESPONDENT**

Neutral citation:	*Newlands Surgical Clinic v Peninsula Eye Clinic* (086/2014) [2015] ZASCA 25 (20 March 2015).
Coram:	Brand, Lewis, Pillay JJA and Dambuza and Mayat AJJA
Heard:	**5 March 2015**
Delivered:	**20 March 2015**

Summary: Jurisdiction of SCA – confined to grounds upon which leave to appeal had been granted – no inherent jurisdiction to go beyond these grounds. Companies Act 71 of 2008 – reinstatement of deregistered company by virtue of s 82(4) has complete retrospective effect – including validation of corporate activities during period of deregistration – parties prejudiced by complete reinstatement afforded the opportunity to seek relief under s 83(4) of the Act.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J sitting as court of first instance):

1 Paragraphs (a) and (b) of the order of the court a quo are set aside and replaced by the following:
'(a) It is declared that the reinstatement of the first respondent as a company in terms of s 82(4) of the Companies Act 71 of 2008 had retrospective effect from the date of its deregistration which included the retrospective validation of its corporate activities during that period.'
2 Paragraphs (c) and (d) of the order of the court a quo are renumbered to (b) and (c) respectively.
3 Save for the aforegoing amendment, the order of the court a quo is confirmed and the appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Brand JA (Lewis, Pillay JJA and Dambuza and Mayat AJJA concurring):

[1] This appeal turns on the interpretation of s 82(4) of the Companies Act 71 of 2008 (the Act) as juxtaposed with s 83(4) of the Act. Both sections are concerned with the restoration of the name of a company onto the companies register after its previous deregistration. More pertinently the issues are, first, whether the reinstatement of a company by the Companies and Intellectual Property Commission (CIPC) under s 82(4) operates retrospectively so as to validate actions performed on behalf of the company during its period of deregistration. Secondly, if not, whether this reinstatement can be afforded such retrospective effect by the court

in the exercise of its powers in terms of s 83(4). When the matter came before Binns-Ward J in the Western Cape Division of the High Court, Cape Town, he decided on the first issue that, in the main, the effect of reinstatement under s 82(4) is not automatically retrospective. On the second issue he held, however, that the court indeed has the power under s 83(4) to render the reinstatement of the company retrospective to the extent that it is just and equitable and thereupon proceeded to exercise that power in favour of the respondent. The appeal against that judgment, which has since been reported *sub nom Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic & others* 2014 (1) SA 381 (WCC), is with the leave of the court a quo.

Background

[2] The appeal is another round in a long lasting legal contest between the parties over a sum of money which has clearly by now been far outstripped by the costs of litigation. Be that as it may, for present purposes the background facts can be confined to the following broad outline. The appellant, Newlands Surgical Clinic (Pty) Ltd (Newlands), operated a surgical clinic in Newlands, Cape Town. The respondent, Peninsula Eye Clinic (Pty) Ltd (Peninsula), is essentially an incorporated association of ophthalmic surgeons. Since Peninsula did not have its own clinic, its members made use of the facilities offered by Newlands. To encourage the use of its clinic, Newlands evolved an informal system of incentives, referred to in the course of the proceedings as kickbacks, by which payments were made to Peninsula at the end of each financial year in accordance with the income generated by its doctors for Newlands.

[3] The situation changed when the Health Professions Council of South Africa (HPCSA) adopted a policy prohibiting the payment of incentives of this kind which it conveyed by means of draft guidelines that were published during or about 2000. So it happened that the last incentives or kickbacks were paid to Peninsula during 1999. By 2001 there was an accumulation of kickbacks that had not been paid. The attitude of Newlands was that it would not in these circumstances pay kickbacks, but

that it was willing to make an equivalent payment provided that it could avoid the stigma of acting in contravention of the HPCSA policy formulated in the draft guidelines. The initial solution explored was that Peninsula would purchase ten per cent of the shares in Newlands for the amount of R570 000, which was the equivalent of the accumulated kickbacks it would by then have received, but that Newlands would pay the same amount to Peninsula disguised as some sort of charge raised by Peninsula against Newlands. Not surprisingly in the circumstances, the auditors of Newlands indicated that they would treat these payments as kickbacks. A new idea was then conceived by the parties, which was to exchange the ten per cent shares for equipment belonging to Peninsula in actual use at the Newlands clinic to be valued at R570 000 though its true value was far less. Subsequently the relationship between the parties soured. In the event, Newlands purported to cancel this sale agreement on the basis that the value of the equipment sold was nowhere near R570 000.

[4] Peninsula then launched an application in the Western Cape Division to assert its rights. But the parties agreed to refer their dispute to a single arbitrator, who eventually upheld Peninsula's claim for the ten per cent shares. He also ordered Newlands to pay dividends on these shares, together with interest and the costs of both the arbitration and the earlier proceedings in the high court. The ratio for the arbitrator's decision appears from the following passage in his award:

'Accordingly I reject [Newlands'] contention that the agreement was to transfer equipment with a market value of R570 000.00 to [Newlands] 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.'

[5] After the arbitrator had published his award, Newlands sought to introduce a new issue which relied on s 38 of the old Companies Act 61 of 1973 (the 1973 Act) that essentially barred a company from rendering financial assistance in the acquisition of its own shares. When the arbitrator declined to entertain the s 38 issue, Newlands brought an application in the high court to review his decision not to

do so. In the event, the court upheld the arbitrator's decision and in consequence the review application was dismissed with costs. Newlands then exerted its right in terms of the arbitration agreement to appeal against the arbitrator's award to an arbitration panel of three members. Newlands was, however, again unsuccessful in that the appeal tribunal confirmed the arbitrator's award and in consequence dismissed the appeal with costs.

[6] At that point in time, it came to Peninsula's notice that on 4 January 2008, which was before the commencement of the arbitration proceedings, Newlands had been deregistered as a company, in terms of s 73 of the 1973 Act, for failure to submit its annual returns to the Registrar of Companies. Peninsula then made application to the CIPC in terms of s 82(4) of the Act for the reinstatement of Newlands' registration as a company. The response it received from the CIPC led to its belief that the application was successful. On that premise Peninsula brought an application in the high court, inter alia, for an order declaring that Newlands had been reinstated as a company retrospectively as from the date of its deregistration. The matter came before Binns-Ward J in February 2012. In a judgment since reported as *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) (Ltd) & others* 2012 (4) SA 484 (WCC), he dismissed the application, essentially for lack of proof by Peninsula that Newlands had in fact been reinstated. But he gave Peninsula leave to apply again on the same papers once that fact had been established.

[7] Eventually, Newlands' registration was formally reinstated by the CIPC in terms of s 82(4) on 3 April 2012. When this happened, Peninsula renewed its application in the court a quo for an order (a) affording the reinstatement retrospective effect so as to validate the arbitration proceedings during its period of deregistration and (b) declaring the arbitration awards to be orders of court, as contemplated in terms of s 31 of the Arbitration Act 42 of 1965. As I have said by way of introduction, the matter again came before Binns-Ward J who granted both orders sought. Although Newlands applied for leave to appeal in respect of both

aspects, the court a quo essentially confined its leave to appeal to (a) alone. As Newlands did not subsequently seek this court's leave to appeal the order in (b), proceedings on appeal were confined to (a).

Newlands' application to file supplementary heads

[8] This is where matters stood some two weeks before the hearing of the appeal. At that stage Newlands brought an application in which it purported to seek no more than permission to file supplementary heads of argument. Why I say purported is that, in reality, the import of the relief sought went much deeper. What Newlands actually sought to introduce by means of these supplementary heads, was the substantive defence that the share sale agreement on which Peninsula's claim rested was *contra bonos mores,* in that it was in conflict with the HPCSA policy against incentives; and that the contract relied upon by Peninsula was in consequence invalid and unenforceable. As the first gateway for the introduction of this defence, Newlands contended that, on a proper interpretation of the court a quo's order in the application for leave to appeal, it was afforded permission to do so. This contention relied exclusively on paragraph 1 of that order which provided: 'The application for leave to appeal to the Supreme Court of Appeal is granted only against this court's finding that the applicant in the principal case was entitled to obtain further relief from the court in terms of s 83(4) of the Companies Act 71 of 2008 subsequent to the administrative reinstatement of the respondent company's registration at its instance in terms of s 82(4) of the said Act.'

[9] Building on the foundation of this paragraph, Newlands argued as follows. In its application of s 83(4) – to which reference is made in the paragraph – the court a quo held that it was just and equitable – as contemplated by the section – that the arbitration proceedings, which were concluded during Newlands' period of deregistration, should be declared valid retrospectively. In considering what was just and equitable, the court failed to take into account, however, that the share sale transaction which formed the basis of Peninsula's claim, was a simulated transaction. Its real import was to camouflage the payment of accumulated kickbacks which was in conflict with HPCSA policy. Had this consideration been

taken into account, so the argument went, the court would have concluded that it was not just and equitable to give its imprimatur to an agreement which was *contra bonos mores* and therefore illegal and void.

[10] The flaw in the argument, as I see it, is that it loses sight of the principle that a court order, as in the case of any other document, must be read in the context of the judgment as a whole and particularly in the light of the court's reasons for that order (see eg *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-F). Approached in this way, it is clear to me that the court a quo never intended to and never did afford Newlands leave to appeal on the just and equitable issue or, for that matter, on the issue whether or not the share sale agreement could be characterised as *contra bonos mores.* On the contrary, it is obvious that leave to appeal on those issues was pertinently refused. That much appears from various statements in the carefully formulated judgment on leave to appeal, of which the order forms an integral part. Included amongst these are the following:

'The grounds upon which the application for leave to appeal is made are fourfold, namely (i) that this court erred in finding that the contract which underpinned the arbitral award that was the subject of the application in terms of s 31 of the Arbitration Act had not been shown to have been one in contravention of s 38 of the 1973 Companies Act, (ii) that the court erred in failing to consider whether the underlying transaction was *contra bonos mores,* and thus enforceable, (iii) that the court erred in not holding that [Peninsula], which had obtained the administrative reinstatement of the registration of [Newlands] in terms of s 82(4) of the 2008 Companies Act, was thereby precluded from subsequently applying for any relief in terms of s 83(4) of the said Act and (iv) that even if the judgment were correct in its interpretation of the pertinent statutory provisions, the court erred by finding that it was just and equitable to validate the arbitration proceedings conducted while [Newlands] was "in a state of deregistration".

As described in the judgment in the principal case, the proper construction and effect of sections 82 and 83 of the 2008 Companies Act is a matter on which divergent views have been expressed in a number of judgments in the High Court. It is thus evident that the interpretation of those provisions has given rise to sufficient difficulty for there to be a reasonable prospect that another court might well determine on a proper construction different from that propounded in the judgment in the principal case. . .

I do not consider, however, that there is a reasonable prospect that another court would be persuaded to come to the applicant's assistance on any of the other three grounds on which the application for leave to appeal has been brought.'

And:

'I do not consider therefore that this court was qualified on the evidence before it in the application in terms of s 31 of the Arbitration Act to determine whether the contract was in fact in contravention of the guidelines [of the HPCSA] or, if it had been, what the legal consequences would be. An appeal court will be in no better position than I was, and thus equally disabled from dealing with the argument on the record before it.'

[11] The alternative basis relied upon by Newlands for the introduction of the *contra bonos mores* or illegality defence rested on the proposition that, even if it should be held – as I did – that the leave granted by the court a quo was insufficiently broad to permit an enquiry into the validity of the underlying share sale agreement, this court should '. . . in any event, in terms of its inherent power, decline to validate those arbitration proceedings.' In support of this proposition Newlands sought to rely on the principle thus formulated by Trollip JA in *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G-H:

'. . . It is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the legality appears *ex facie* the transaction or from the evidence before it, and, in the latter event, it is also satisfied that all the necessary and relevant facts are before it.'

[12] I do not believe, however, that Newlands' reliance on the legality principle can be sustained. The reason appears from the following succinct statement by Hefer JA in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E-G:

'The short answer is that the court's "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice" (per Corbett JA in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G), does not extend to the assumption of jurisdiction not conferred upon it by statute. . .

Nowadays [this court's] jurisdiction derives from the Supreme Court Act [59 of 1959] and other statutes but the position remains basically the same.'

[13] Since the decision in *Moch*, the statutory basis for this court's jurisdiction has been superseded by the Superior Courts Act 10 of 2013. It is now to be found in s 16(1)(*a*) of that Act, which provides that an appeal against a decision of the high court as a court of first instance lies '. . . upon leave being granted . . . either to the Supreme Court of Appeal or to a full court of that division . . .'. Leave to appeal therefore constitutes what has become known, particularly in administrative law parlance, as a jurisdictional fact. Without the required leave, this court simply has no jurisdiction to entertain the dispute. Section 17 of the Superior Courts Act then proceeds to govern the ways in which the required leave can be obtained. In essence, s 17(2) provides that it may be granted by the court of first instance and, if refused, it may be granted on application to this court.

[14] It has by now become well-settled that, when a high court grants leave to appeal it may limit the grounds of appeal or it may grant leave generally. In the latter event, all relevant issues may be canvassed, including – so it was held in *Yannakou* and other cases – issues of legality albeit that those had not been pleaded or raised by the defendant, as long as they appear from the evidence before the court. But when the high court has limited the grounds of appeal, as it did in this case, this court has no jurisdiction to entertain an appeal on grounds which had been specifically excluded. The fact that these excluded grounds involve issues of illegality does not detract from this principle. If an appellant is dissatisfied with the high court's decision to limit the grounds of appeal, its remedy is to petition this court to do away with the limitation. Since Newlands has failed to do so, it follows that this court has no jurisdiction to entertain the ground of appeal resting on public policy or illegality, which had specifically been excluded from the ambit of leave granted by the court a quo.

The retrospective effect of reinstatement

[15] This brings me to the issues relating to the retrospective effect of Newlands' reinstatement as a company under s 82(4) of the Act, those being the only ones arising from the ground upon which leave to appeal was obtained and hence the

only ones open for reconsideration. The issues thus arising must be understood in the context of the established principle that deregistration puts an end to the existence of a company. It brings an end to its corporate personality 'in the same way that a natural person ceases to exist at death' (see *Miller & others v Nafcoc Investment Holding Co Ltd & others* 2010 (6) SA 390; (324/09) [2010] ZASCA 25 (SCA) para 11). All subsequent actions purportedly taken on behalf of the deregistered company are consequently void and of no effect. Its property passes automatically – ie without any form of delivery – into the ownership of the State as *bona vacantia* (see eg *Rainbow Diamonds (Edms) Bpk & andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (A) at 10-11). It follows that unless the reinstatement of Newlands has, or is afforded, retrospective effect, (a) the arbitration proceedings, (b) the associated court proceedings, together with (c) the orders and awards that were made in favour of Peninsula against Newlands in those proceedings, would simply be null and void. This is so because, as far as dates are concerned, we know that Newlands was deregistered on 4 January 2008 and that all these proceedings occurred before it was reinstated on 3 April 2012. To say that a conclusion of non-retrospectivity would have a seriously detrimental effect on Peninsula would clearly be an understatement.

[16] Peninsula submitted (a) that the court a quo had erred in finding that reinstatement by the CIPC in terms of s 82(4) did not automatically validate the arbitration proceedings with retrospective effect; but (b) that the court was right in holding that it was authorised and that it should afford the reinstatement such retrospective effect in terms of s 83(4). Newlands' contentions, on the other hand, were a mirror image of these, in that it submitted (a) that the court was right in finding that the reinstatement in terms of s 82(4) did not automatically operate retrospectively so as to validate the arbitration proceedings; but (b) that the court erred in finding that it was authorised in terms of s 83(4) to afford the reinstatement under s 82(4) such retrospective effect. Evaluation of these contentions clearly revolves primarily around the provisions of these two sub-sections. But before I turn to them, it is appropriate to deal with their legislative background.

Legislative history

[17] Under the 1973 Act, deregistration and subsequent restoration of the registration of a company so deregistered were governed by s 73. In terms of sections 73(1) - (3), a company was liable to be deregistered by the Registrar of Companies if it had failed, for a period of more than six months, to lodge an annual return in compliance with s 173 of that Act or if the Registrar had reasonable cause to believe that the company was not carrying on business, and the company failed to respond adequately to the Registrar's consequent inquiries. As to restoration of a company so deregistered, s 73(6)(*a*) and 73(6A) provided:

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

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

. . .

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

[18] On the basis of these provisions this court held 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; (63/06, 319/06) [2007] ZASCA 6 (SCA) para 23 that the consequence of restoring a deregistered company to the register under s 73(6) was *ipso facto* to revive all rights and obligations of the company that had been extinguished by deregistration with retrospective effect. More recently it was

held in *CA Focus CC v Village Freezer t/a Ashmel Spar* 2013 (6) SA 549; (731/12) [2013] ZASCA 136 (SCA) para 10-21, with reference to the virtually identically worded s 26(7) of the Close Corporations Act 69 of 1984, that the consequence of restoration was to validate retrospectively all acts done on behalf of the company during the interim period as if deregistration had never occurred (see also *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338; (452/2012) [2013] ZASCA 52 (SCA) paras 13 and 14). In all these cases it was recognised at the same time that the indiscriminate automatic retrospective reinstatement of all corporate activity could have a severely detrimental effect on third parties. So it was said, for example, in *Insamcor* (para 24):

'. . . it is an oversimplification to regard a restoration order as no more than an 'as you were'. It can clearly cause severe prejudice to third parties. In [*Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 477C] Van Dijkhorst J gave the example of those who, upon deregistration, acquired rights to company property, who will lose those rights when the registration of the company is restored. Examples of such prejudice have also been recognised in other jurisdictions. . . .'

And that in consequence (para 27):

'. . . it is, in my view, self-evident that third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the Court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the Court to make the order subject to such directions under s 73(6)(*b*) as may serve to alleviate its prejudicial consequences.'

[19] Despite these potentially prejudicial consequences resulting from automatic retrospective validation, it was held, however, that this construction of s 73(6) and s 73(6A) could not be avoided. What compelled this conclusion was, of course, the pertinent provision contained in both subsections (and in s 26(7) of the Close Corporations Act) that upon restoration, '. . . the company shall be deemed to have continued in existence as if it had not been deregistered.' Unlike s 73(6)(*b*), however, and similar to s 73(6A) of the 1973 Act, s 26(7) of the Close Corporations Act left no room for alleviation of these consequences by court order or otherwise.

[20] It will be observed that neither s 73(6) nor s 73(6A) pertained to the deregistration of companies that were wound up after liquidation, nor to the possible restoration of a company deregistered in this way. These matters were dealt with in chapter XIV of the 1973 Act under the heading 'Winding-up of companies'. More pertinently, s 419 in this chapter provided for the dissolution of companies after they had been completely wound up. In terms of s 420, the court was then afforded the authority to declare '. . . the dissolution [under s 419] to have been void and, thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.' Unlike s 73(6) and 73(6A) this section therefore made no express reference to retrospectivity. Section 420, incidentally, still governs the position with regard to companies wound up by reason of insolvency. This is so because, despite the repeal of the 1973 Act, chapter XIV of that Act – including s 420 – remains in force with regard to insolvent companies until further notice, by virtue of para 9, schedule 5 of the 2008 Act. Nonetheless, because the wording of s 420 is so different from the provisions that are of direct concern to us, the section fortunately does not have to detain us. I say fortunately because the construction of s 420 is known to have given rise to problems of its own (see eg *Motala & others v Master of the High Court (North Gauteng) & others* [2014] 2 All SA 154; (313/13) [2013] ZASCA 185 (SCA)).

The pertinent provisions of the 2008 Act

[21] Subsections 82(4) and 83(4) both form part of chapter 2, part G, of the Act which appears under the heading 'Winding-up of solvent companies and deregistering companies'. Sections 79 to 81 are exclusively concerned with the winding-up of solvent companies (while the winding-up of insolvent companies, as I have said, are still governed by chapter XIV of the 1973 Act). Sections 82 and 83 thus constitute the main focus of our enquiry. For this reason a full quotation of the sections cannot be avoided. They provide:

'82 Dissolution of companies and removal from register

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

(2) Upon receiving a certificate in terms of subsection (1), the Commission [defined as the CIPC] must-

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

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

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

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

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

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

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

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

(*b*) the Commission-

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

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

(*aa*) has ceased to carry on business; and

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

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

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

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

83 Effect of removal of company from register

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

(2) The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.

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

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

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

(*b*) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved ‘

Decisions of different divisions of the high court

[22] The question as to the retrospective effect of reinstatement under s 82(4) has resulted in conflicting decisions in different divisions of the high court. In fact, interpretations given to the section in the various decisions cover the whole spectrum from no retrospectivity on the one hand, to complete retrospectivity on the other, with the concept of partial retrospectivity in between. An example of the first kind is to be found in *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC). Complete retrospectivity, on the other hand, appears to be supported by *Amarel Africa Distributors (Pty) Ltd v Padayache* (236/2011) [2013] ZAGPPHC 87 and the effect of the judgment of this court in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd & others* [2014] 3 All SA 664; (218/13) [2014] ZASCA 63 (SCA). But neither in *Amarel* nor in *Fintech* was the issue of retrospectivity fully considered. In the result, the construction that a reinstatement under s 82(4) has complete retrospectivity is not borne out by any fully reasoned authority. The concept of partial retrospectivity, on the other hand, is supported by

the court a quo in this matter, as will presently appear from the more detailed discussion of its judgment that is to follow. But what this thesis amounts to in short is that, while reinstatement brings in its wake retrospectivity to the extent of revesting the company with its former assets, it does not validate corporate activity purportedly conducted on behalf of the company during its period of deregistration. This approach also appears to be supported by *Missouri Trading CC & another v Absa Bank Ltd & others* 2014 (4) SA 55 (KZD) paras 37 and 42.

[23] Before us both parties, each for reasons of its own, contended that the court a quo was right in not subscribing to the proposition that reinstatement in terms of s 82(4) has no retrospective effect at all. In consequence we did not have the benefit of any argument to support this extreme. Nonetheless, I am quite confident to endorse the approach of the court a quo in this regard. It seems that the only decision that lends support to no retrospectivity is *Bright Bay Property Services*. That decision relies on one argument only, namely that the deeming provisions to the effect that the company had '. . . continued in existence as if it had not been deregistered' at all, which was found by the courts to indicate retrospectivity in s 73(6) and 73(6A) of the 1973 Act, was not repeated in s 82(4). I agree that, on the face of it, the omission of the deeming provision may be regarded as a pointer to a change of intent on the part of the legislature. But I believe it is not more than just an indication, which is outweighed by counter-indications.

[24] First of all, the indication of a different intent that usually follows from a change of wording in amending legislation, is diluted by the fact that the new Act is not merely an amendment to the 1973 Act. It is a complete reinvention of our corporate law. The organisation and arrangement of its provisions are completely different, particularly with regard to deregistration and reinstatement. In this light, different wording used in a completely new scheme can hardly be construed, in itself, as indicative of a complete reversal of intent. Secondly, the concept of reinstatement of the company's registration, as opposed to re-registration, appears to support the notion of placing the company in its former position. But most

significant of all, I think, is the consideration underscored by the court a quo (para 44) namely that reinstatement would hardly serve any practical purpose if it did not at least have the effect of retrospectively revesting the company with title to its property. Even after reinstatement, a company will still be deprived of its property and the whole reason for its continued existence. Its formerly secured creditors would remain unsecured. It will become no more than a name on the company register.

[25] Once it is accepted that in principle revestment under s 82(4) operates retrospectively, the question arises – is there any basis for going only halfway? In other words, is there any basis for the interpretation of s 82(4) which found favour with the court a quo, that reinstatement of a company serves to revest it with its property but does not validate its corporate activity? The justification for the limitation found by the court a quo appears from the following statements in its judgment: (para 48):

'. . . [T]he 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 . . . . As a matter of general principle consequences with a potentially prejudicial effect on third parties should not be allowed to occur administratively without an opportunity for such parties first to be heard.'

And (para 49):

'An administrative process is not as well suited as a judicial process to determine and afford appropriate remedies applying 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.'

And (para 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.'

And (para 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.'

[26] There can be no doubt that retrospective validation of the corporate activities of a company during its period of deregistration as a matter of course holds the inherent risk of prejudice to third parties. That much had been recognised and discussed in cases like *Insamcor*, *CA Focus* and *Kadoma Trading.* What the court a quo's reasoning seems to lose sight of, however, is that, as pointed out in *Insamcor*, revesting the company with its property can have the same detrimental effect on third parties who have in the meantime acquired rights to that property. But, more significantly in my view, is the consideration that refusal to validate the corporate activities of a company during its period of demise can be equally devastating to the interests of bona fide third parties who were unaware of the deregistration. That much is well-illustrated by the facts of this case and by *Absa Bank Ltd v Companies and Intellectual Property Commission & others* 2013 (4) SA 194 (WCC). The truth is that deregistration of a company bears that inherent risk. It results from the fact that a comparison between the deregistration of a company, on the one hand, and the death of a person, on the other, is not entirely correct. Unlike a deceased person, a deregistered company often, as in this case, carries on with its business as if the deregistration never occurred and with third parties having no knowledge of its disability. Indiscriminate validation of corporate activities, on the one hand, and the indiscriminate refusal to validate these activities, on the other, therefore cut both ways. Potential prejudice to third parties therefore affords no reason to interpret s 82(4) so as to exclude retrospective validation in principle.

[27] Closely linked to its views on prejudice to third parties caused by complete retrospectivity, is the further consideration which weighed with the court a quo, namely, that in the light of the potential prejudice to third parties, reinstatement through an administrative process could not have been intended by the legislature to result in the automatic retrospective validation of corporate activities. It follows, so the court's reasoning went, that the legislature must have intended to reserve the power of retrospective validation to the courts to be exercised on the basis of what is just and equitable in terms of s 83(4). This means, of course, that those who seek retrospective validation are compelled to resort to the costly exercise of an application to court. That raises the rhetorical question – assuming that s 83(4) is available after administrative reinstatement under s 82(4) – why could the legislature not have intended it to be the other way around? Once it is recognised that validation and non-validation cut both ways, why could it not have been intended that the party who seeks to *prevent* validation of a particular transaction be afforded the opportunity to approach the court?

[28] In addition, the consequence which the court a quo found unlikely, namely that in the circumstances the legislature would have intended complete retrospectivity to result from an administrative process, was in fact the position that prevailed under previous legislation. The consequence of automatic retrospective validation of corporate activities did not only follow from reinstatement by the court in terms of s 73(6). It also resulted from the administrative process in terms of s 73(6A) and in terms of s 26(7) of the Close Corporations Act. Another more peripheral consideration that seems to have swayed the court a quo was that no provision is made for notice of the application for reinstatement to potentially interested third parties (see also *Missouri Trading* para 33). That, however, is fortunately not so. Although s 82(4) itself does not provide for notice of the application to third parties, regulation 40(7) of the Companies Regulations, GN R351 of 2011, *GG* 34239, 26 April 2011, promulgated under the Act, read with the practice note issued by the CIPC pursuant to the regulations, published as GenN 204, *GG* 36225, 15 March 2013, inter alia, requires for an application under s 82(4), an '[a]dvertisement in a

local newspaper giving 21 days' notice of proposed application for reinstatement'. Third parties are thus given the opportunity to prevent reinstatement.

[29] But what finally renders the position of partial retrospectivity held by the court a quo, in my view, untenable is that the wording of s 82(4) simply leaves no room for this construction. Once 'reinstatement' in s 82(4) is construed as indicating retrospective operation, there is no justification for construing it to mean that retrospective operation must stop halfway, in the sense that it pertains to revestment of the company's property only. As appears from the court a quo's judgment (para 51) it clearly held the view that its interpretation of s 82(4) read with 83(4) of the Act has 'the preferred result given the choice of meanings available'. Although the preference of outcome may be debatable, my real problem is that I do not think the wording of the section renders the meaning preferred by the court a quo available. As I see it, the wording of the section leaves no room for the pragmatic approach adopted by the court a quo. The only meaning available on that wording, as I see it, is that s 82(4) has automatic retrospective effect, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration. In short, there is no textual basis to distinguish between revesting of property and revesting the company with the capacity to continue operating. It follows that, in my view, the arbitration proceedings and related court proceedings during the period of deregistration, together with the awards and orders made in those proceedings, were automatically validated by the reinstatement of Newlands under s 82(4). Unlike the court a quo, I therefore do not think there was any need for a special declaratory order to that effect. To that extent, the order of the court a quo requires amendment, but as far as the dispute between the parties in this case is concerned, that seems to be the end of the matter.

[30] Yet, with regard to the interpretation of s 82(4), read in juxtaposition with s 83(4), something more should be said, particularly since the matter was fully argued in this court. As a starting point I agree with the view expressed by the court a quo (para 52) that s 83(4) is available even where the company has already been

administratively reinstated in terms of s 82(4) (cf *Absa Bank Ltd v CIPC* above paras 43-44). And like the court a quo, I do not believe that there is any support in the wording of s 83(4) for the contrary interpretation contended for by Newlands. Section 83(4)(*a*) allows any 'person with an interest in the company' to apply for relief connected with the dissolution of the company. Upon such application the court is afforded authority to make 'any . . . order that is just and equitable in the circumstances'. Moreover, s 83(4) expressly provides that this application can be brought '[a]t any time after the company had been dissolved'. In the light of this wide wording at every level, I find no justification to restrict this wide meaning so as to exclude a company, which had subsequent to dissolution been reinstated by administrative action, from the ambit of the section. Thus understood, the legislature had, in my view, intended to alleviate the prejudicial effect on third parties or even the company which may be brought about by the retrospective effect of reinstatement under s 82(4). Any party who is prejudiced by this automatic retrospective action, is afforded the opportunity to seek amelioration under s 83(4) of the Act, in which event the court is authorised to grant any relief it considers just and equitable.

[31] It follows that, in my view, the appeal should be dismissed with costs and the judgment of the court a quo confirmed, save for such amendments to its order (in para 64) that are necessitated by our different reasoning, albeit that this difference in reasoning leads to an outcome which is essentially the same. In the result it is ordered that:

1 Paragraphs (a) and (b) of the order of the court a quo are set aside and replaced by the following:

'(a) It is declared that the reinstatement of the first respondent as a company in terms of s 82(4) of the Companies Act 71 of 2008 had retrospective effect from the date of its deregistration which included the retrospective validation of its corporate activities during that period.'

2 Paragraphs (c) and (d) of the order of the court a quo are renumbered to (b) and (c) respectively.

3 Save for the aforegoing amendment, the order of the court a quo is confirmed and the appeal is dismissed with costs including the costs of two counsel.

F D J Brand

Judge of Appeal

Appearances

For the Appellant:	M A Albertus SC (with him G M Quixley)
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	Honey Attorneys, Bloemfontein
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