THE DEREGISTRATION OF COMPANY FOR FAILING TO SUBMIT ANNUAL RETURNS IN TERMS OF SECTION 82(3) OF THE COMPANIES ACT 71 OF 2008, AND THE RESTORATION OF THE COMPANY TO THE COMPANIES REGISTER IN TERMS OF SECTION 82(4) AND SECTION 83(4) BY A CREDITOR.

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Chapter 1: Introduction

A company is a juristic person from the date its incorporation is registered, and exists until the date upon which its name is removed from the companies register. It has legal powers and capacity to act in its own name.\(^1\) When a company is removed from the register of companies it ceases to exist as a juristic person and is dissolved from that date.\(^2\)

During a profit company’s life it uses the juristic personality to further its business objectives. The company can enter into contracts in its own name, incur debt, and become liable in legal action. It is because of this that at the end of a company’s life the people the company contracted with have the opportunity to claim what is legally owed to them in a proper manner as stipulated in terms of the Companies Act 71 of 2008.\(^3\) These procedures are in place for both voluntary winding up of a solvent company\(^4\) and the winding up of a solvent company by court order.\(^5\) After the process and procedures in section 80 or 81 of the Act are followed, the Master must file a certificate of winding up, but only once the affairs of the company are completely wound up.\(^6\) Creditors’ rights are protected and they have a reasonable opportunity to claim what is legally owed to them.

However, in terms of section 82(3)(a)(i) of the Act, the commission may remove a company from the companies register if it has failed to file an annual return for two or more years. The commission can demand reasons from the company for why it failed to file its returns as it is required to do in terms of section 33 of the Act, or otherwise show satisfactory cause for the company to remain registered.\(^7\)

In terms of section 83(1) of the Act, a company is dissolved as of the date its name is removed from the companies register unless it has been removed so that a company may be transferred to a foreign jurisdiction. This means that the company no longer stands as a juristic person.

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\(^1\) Section 19(1)(a) and (b) of Act 71 of 2008
\(^2\) Section 83(1) of Act 71 of 2008
\(^3\) Hereafter referred to as the Act
\(^4\) Section 80 of the Act
\(^5\) Section 81 of the Act
\(^6\) Section 82(1) of the Act
\(^7\) Section 82(3)(a)(ii) of the Act
When the procedures intended for the winding up of a company have not been followed, as would be the case if a company’s name was removed from the register for failing to file its annual returns, none of the creditors’ rights have been taken into account. The property owned by the company at the time it was removed from the register, be it movable property, immovable property, or debt owed to the company, become *bona vacanti* to the state. The company loses its legal standing, and as such it cannot own property or enforce debt owed to it as it no longer has a name to act in. The creditors of a company that has been dissolved in terms of section 82(3)(a)(i) of the Act have no direct claim to the assets formerly held by the company. The only way in which their claims can be satisfied is for the company to be reinstated so that they can institute claims against a legal person with the capacity to be a party to legal proceedings. Whether the creditors intend on winding the company up after reinstatement or proceeding with a liquidation application, there are ways in which the creditors can recover at least some of the debt owed to them.

The creditors at this point sit with the task of having to return the company’s juristic personality, as its name must be placed on the companies register in order for a company to exist. The creditors have a remedy in terms of section 82(4) of the Act to reinstate the registration of the company. A *prima facie* read of this section suggests a ‘quick fix’ to a potentially disastrous situation for the creditors. However, this is far from the case. In terms of Regulation 40, specifically 40(6), the commission may reinstate the company to the register once it has filed its outstanding annual returns and paid the outstanding prescribed fee. The fact that the returns were not filed and the company failed to respond to the demands of the commission made prior to its deregistration might indicate that obtaining the outstanding annual returns will be an almost impossible task for a creditor who has no connection to the company other than the debt owed by it.

Section 83(4) of the Act allows the court to make an order declaring that the dissolution of the company is void, or that any other order that is just and equitable in the circumstances. If the court declares the dissolution to be void then any proceedings may be taken against the company as if it had not been dissolved. This section can potentially help the creditor, if interpreted to include dissolution by deregistration of the company in terms of section 82(3)(a)(i) of the Act.

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8 Companies Act 71 of 2008 regulations
The purpose of this dissertation is to closely analyse the impact of deregistration of a company for failing to file its annual returns. Furthermore, it will investigate the remedies that a creditor might enact in order to reinstate the company’s name on the register, the sole purpose being to be able to institute legal proceedings against the company so as to collect the debt owed to that creditor.

In doing this I will look at recent case law dealing with the particular sections involved in the deregistration, dissolution, and reinstatement of companies to the register, as well as the remedies available and to what extent they may be used. I will look at the Companies Act 61 of 1973 briefly and purely as a tool for interpretation where relevant. I will also look at the English Law regarding deregistration and dissolution of companies.
Chapter 2: 1973 Companies Act

2.1 Introduction

In order to ascertain if the 1973 Act\textsuperscript{9} can be of any assistance with regard to the interpretation of section 83(4)\textsuperscript{10} and section 82(4)\textsuperscript{11}, one must first look to see if there is a material difference in wording between the sections relevant to deregistration of a company failing to hand in annual general returns in terms of the 1973 Act\textsuperscript{12} and in terms of the new Act. A material difference in wording or interpretation could also indicate a change in the legislature’s intention, which could also be a useful tool in finding the true implications of section 82(4) and section 83(4) of the new Act. However, in the \textit{ABSA bank}\textsuperscript{13} Appeal case the court made the following comment that aptly explains the brevity of this chapter;

\textit{The distinction in the repealed legislation can be relevant only if there is a basis for inferring that the provisions of the new legislation intended to maintain the distinction. I do not believe there is such a basis. The 2008 Companies Act is not a codification of the 1973 Act. The new Act is a complete re-writing of our corporate law. There are many new provisions and procedures. While some other provisions are, unsurprisingly, similar to those in the old Act, there is in many instances a change in language.}

2.2 Section 73(6)

In terms of the 1973 Act\textsuperscript{14}, the sections that dealt with deregistration and reregistration after a company had been removed from the register for failing to submit annual general returns are section 73(6), section 73(6A) and section 420 of the old Act.

In terms of section 73(6) of the old Act:

\begin{itemize}
  \item [9] Act 61 of 1973
  \item [10] Act 71 of 2008
  \item [11] Act 71 of 2008 hereafter referred to as the new Act
  \item [12] Act 61 of 1973
  \item [13] \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 47
  \item [14] Act 61 of 1973 hereafter referred to as the old Act
\end{itemize}
(6) (a) The Court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

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

The old Act states in section 73(6)(a) that ‘a Court may’ grant an order restoring the company. This implies that the court has the discretion to grant the order, even if all the prerequisites imposed by the section are satisfied. In exercising this discretion, the court will have the opportunity to assess the potential harm to third parties that an order restoring the company might bring.\textsuperscript{15}

In terms of section 73(6), it seems that the old Act empowered the court to restore a company and validate all the actions taken by the company whilst it was deregistered\textsuperscript{16}. Thus, if a company is restored to the register it is done so with retrospective effect to the actions of the company during the time it was deregistered. However as the Judges in \textit{Insamcor}\textsuperscript{17} found, making an order in terms of section 73(6) of the old Act cannot be oversimplified, automatically restoring the company to what it was, as this could severely prejudice third parties.\textsuperscript{18} As the court has a discretion it may listen to third parties who might persuade the court to make an order that does or does not restore the company, and such discretion may serve to alleviate the prejudicial consequences.\textsuperscript{19}

\textsuperscript{15} Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA)
\textsuperscript{16} Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA) at para 23
\textsuperscript{17} Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA) at para 26
\textsuperscript{18} Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA) at para 24
\textsuperscript{19} Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd 2007 (4) SA 467 (SCA) at para 27
2.3 Section 73(6A)

In terms of section 73(6A) of the old Act:

(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.

The old Act distinguished between dissolution and when and how it could be avoided, as well as deregistration and when and how a company could be restored to the register. Although the circumstances that triggered both applications as well as the requirements to succeed differed, both applications could be made to the court, as the old Act gave the court a wide direction.\(^{20}\) The restoration of a company was to restore its status and restoration in terms of section 73 of the old Act automatically voided dissolution.\(^{21}\)

2.4 General discussion of section 73(6) and section 73(6A)

The appeal court for the *ABSA bank Appeal case\(^ {22}\)* made for an apt summary of what the different grounds were for a company, which had been deregistered as a result of failing to hand in its annual returns, to be restored by the court or by the registrar in terms of section 73(6) and section 73(6A) of the old Act:

*Such a company could have its registration restored by the court in terms of s 73(6) or by the Registrar in terms of s 73(6A). However, the grounds on which the court and the Registrar respectively could restore the company differed: [a] A court could restore the company (regardless of the basis of deregistration) if satisfied that at the time of deregistration the company had been carrying on business or had been in*

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\(^{20}\) *Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 14\(^{21}\) *Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 15\(^ {22}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA*
operation or that it was otherwise just and equitable to do so. [b] The Registrar could restore the company only if the company had been deregistered due to failure to lodge an annual return and only after the company had lodged the outstanding return and paid the prescribed fee.\textsuperscript{23}

The word ‘dissolution’ is not used in section 73 of the old Act. A company ceases to exist when it is deregistered, but this was subject to the fact that the company could later be restored.\textsuperscript{24} The stated effect of restoration of registration in terms of these provisions was that the company would be ‘deemed to have continued in existence as if it had not been deregistered’.\textsuperscript{25} It has recently been confirmed by the Supreme Court of Appeal that this means that the company’s actions and conduct during the period of deregistration are deemed to have been undertaken by an existing company according to the \textit{Kadoma Trading} case.\textsuperscript{26}

2.5 Section 420

According to section 420 of the old Act:

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

Voiding dissolution in terms of the old Act did not automatically restore registration in terms of the old Act. However, section 420 of the old Act did give the court the flexibility to make an order it deemed fit, and it also allowed for any proceeding to be taken against the

\begin{flushleft}
\textsuperscript{23}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 19
\textsuperscript{24}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 22
\textsuperscript{25}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 21
\textsuperscript{26}\textit{Kadoma Trading (Pty) Ltd v Noble Crest CC} [2013] ZASC 52
\end{flushleft}
company as if it had not been dissolved. Section 420 read with section 73 of the old Act empowered the court when it made an order in terms of section 420 to direct the registrar to restore registration.\(^{27}\)

The difference between section 73 and section 420 of the old Act was that if a company had been dissolved and the dissolution was voided, then all of the assets and liabilities the company had prior to its dissolution would be re-vested but the actions of the company during the time it was dissolved would not be validated.\(^{28}\) In terms of section 420 of the old Act the dissolved company’s existence as a legal person is restored but its corporate activity is during the time it was dissolved is not. This means that voiding the dissolution has retrospective effect on the legal personality but it in no way ratifies or retrospectively validates any corporate activity.\(^{29}\)

The word ‘deregistered’ is not used in section 420 of the old Act the event that brought the company’s life to an end was the registrars recording of the dissolution.\(^{30}\) This is perhaps one of the big differences between the new Act and the old Act. In the old Act the concepts of ‘dissolution’ and ‘deregistration’ are dealt with completely separately, they are not part and parcel of each other as they are in the new Act\(^{31}\) section 420 of the old Act was triggered by either one of two events, the voluntary winding up by the company or by creditors or winding up and liquidation by court order.\(^{32}\) Restoring the registration of a company that had been deregistered for failing to deliver its annual returns was dealt with under section 73.\(^{33}\)

\(^{27}\)&lt;cite&gt;Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 16\(^{28}\)&lt;cite&gt;Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 25\(^{29}\)&lt;cite&gt;Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 42\(^{30}\)&lt;cite&gt;Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 26\(^{31}\)&lt;cite&gt;Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 20\(^{32}\)&lt;cite&gt;Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 11\(^{33}\)&lt;cite&gt;Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 12
2.6 Concluding remarks

Some believe that the new Act is an improvement of the old Act in some respects however the legislature’s departure from the old Act has still allowed some of the old problems to transfer into the new Act. From the restructuring and wording change new problems have appeared in the new Act. 34

It can be seen from the above short synopsis that the old Act gave the court a very wide discretion; the court had the final word in terms of section 73 of the old Act to make a judgment that the court deemed just. The old Act specifically allowed for retrospective effect by using the phrase, ‘deemed to have continued in existence as if it had not been deregistered’ and ‘taken if the company had not been dissolved.’ However, the old Act allowed the court to temper any prejudicial effect that retrospectively could have on third parties by giving the court the discretion to allow certain acts to be retrospective and others not to be retrospective.

34 de Lange and Sutherland, Deregistrasie sonder likwidasie van maatskappye en beslote korporasies ingevolge die 2008 maatskappywet, STELL LR 2014 2 at page 266
Chapter 3: Sections dealing with deregistration and restoration in terms of the Companies Act 2008

3.1 Introduction

In order to understand the interpretations of the courts with regard to sections 82(3) and (4), as well as section 83(4) of the Companies Act, a short outline of the wording of the sections must be given. This chapter will look very briefly at the relevant sections dealing with deregistration as a consequence of a company failing to submit annual returns for two years, as well as give a somewhat superficial explanation and face value interpretation of each of the sections. As such, this chapter serves more as a prologue to the subsequent two chapters than as a chapter on its own, and will thus be kept brief.

3.2 Section 82(3)

In terms of section 82(3) of the new Act, the commission may remove a company from the companies register if the company has transferred its registration to a foreign jurisdiction, or has failed to file its annual returns, as is required, for a period of two or more years in succession. The commission has formalities to follow in terms of this removal and must demand satisfactory reasons for the failure to file the required returns, or be given reasons why the company should remain on the register. Deregistration in terms of section 82(3) of the new Act is the only deregistration this dissertation will look at. Deregistration as a consequence of the winding up of a solvent or insolvent company for other reasons will as such not be the focus.

If a company has been deregistered in terms of section 82(3) of the new Act, and an interested person would like the company to be returned to the companies’ register, for whatever reason, that interested person must do so in terms of section 82(4) or, potentially, depending on the interpretation, section 83(4). This return or restoration onto the register is the focus of this dissertation, and the specific consequences of the return or restoration are of the utmost importance in answering the question posed by this academic piece.

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35 Act 71 of 2008 hereafter referred to as the new Act
36 Companies and Intellectual Property Commission hereafter referred to as the commission
3.3 Section 82(4)

There are two potential methods of reviving a deregistered company, namely section 82(4) and section 83(4) of the new Act. Section 82(4) of the new Act gives a mechanism whereby the commission reinstates the company to the companies register. Section 83(4) of the new Act gives an interested party an opportunity to approach the court to void the dissolution. These two methods, subject to the interpretation of the courts in relevant case law, as well as the differences between them, will be dealt with in depth the subsequent chapter.

Section 82(4) of the new Act reads as follows:

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.

In terms of this section, an interested person may apply to the commission to reinstate the company to the register. The exact meaning of reinstatement of a deregistered company will be fully discussed in the subsequent chapters. This section depicts an administrative reinstatement of a company without any intervention of the court. This section also deals specifically with a situation where a company is deregistered due to its failure to submit its annual returns for two years. Section 82(4) of the new Act does not give a clear indication of whether or not this reinstatement is retrospective.

3.4 Section 83(4)

Section 83(4) of the new Act reads as follows:

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.
This section allows the court to intervene if a company has been dissolved. The section specifically deals with dissolution and declaring the dissolution void. It is on face value uncertain whether this section allows a court to place the company on the companies’ register again. This section is clearly not the same as section 82(4) of the new Act, and it seems that it is in no way another means of achieving an administrative reinstatement. It clearly depicts court intervention, but a superficial interpretation cannot specify to what extent.

3.5 Life of the company section 19(1)

At this point it might be wise to investigate what removal from the companies register means with regard to the corporate personality of the company. According to section 19(1) (a) of the new Act, from the time and date a company is registered it exists continuously until its name is removed from the companies register. As such, when a company is removed from the register it ceases to exist and will not have all the powers and capacity of an individual; thus it will no longer be a juristic person. One can therefore assume that once a company is removed from the register it is dissolved, as it no longer exists.

3.6 Concluding remarks

The wording in section 83(4) of the new Act does not give a clear explanation of what the court can and cannot do when it voids dissolution, and whether the new Act allows a court to return a company to the companies register, if it deems it just and equitable to do so. The fact that this section is vague with regard to the exact ability of the court gives stronger weight to the interpretation of the court in case law to define the exact extent and parameters of the power granted in terms of section 83(4) of the new Act. From this point the following chapter focuses on what the case law has determined the courts’ powers to be.

37 Section 19(b) of the new Act
Chapter 4: Interpretations of section 82(4) and section 83(4)

4.1 Introduction

In terms of the Companies Act, a company can be deregistered as a consequence of failing to submit its annual returns for a period of two or more years by the commission, this deregistration is done without application to court and in many cases without the knowledge of creditors. This procedure can and in most cases does, severally prejudice creditor or other interested persons. As previously discussed a company ceases to exist when it is removed from the register of companies, leaving the creditors of the company with very few remedies when attempting to enforce its debt. Rationally if the company is restored to the register and regains its corporate personality a creditor can use the many remedies available to collect such debt. Reviving the company is thus the goal of a creditor; this chapter will look at the processes the new Act has put in place for the reviving of a company that has been deregistered. The company is deregistered to punish the company for failing to submit its annual returns and the legislature failed to take the creditor into account.

4.2 Section 82(4) reinstatement

Section 82(4) empowers the commission to reinstate a company’s registration if its name was removed from the register on any of the permitted grounds other than pursuant to the company’s liquidation as a solvent company. The effect of reinstatement is not specified, there is no mention of whether or not the company will upon reinstatement be deemed to have continued in existence as if it had not been deregistered.

The circumstances in which a person will seek reinstatement in terms of section 82(4) are situations in which an interested person only seeks to restore the formal existence of the

38 Act 71 of 2008 hereafter referred to as the new Act
39 Companies and Intellectual Property Commission hereafter referred to as the commission
40 de Lange and Sutherland, Deregistrasie sonder likwidasie van maatskappye en beslote korporasies ingevolge die 2008 maatskappywet, STELL LR 2014 2 at page 272
41 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 37
42 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 37
company.\textsuperscript{43} This administrative reinstatement must logically include the restoration of the company’s legal personality and its title in its property.\textsuperscript{44}

The court in \textit{Nulandis} postulated the following with regards to section 82(4) of the new Act;\textsuperscript{45}

\begin{quote}
the text of s 82(4) lends itself to one meaning only: The Commission, not the court, has the power to reinstate a deregistered company. Similarly to the old Act, this power of the Commission is limited to s 82(3) administrative de-registrations, i.e. for failing to file returns. Section 82(4) does not empower the Commission to restore a company deregistered after being wound up in terms of s 82(1) and (2).
\end{quote}

This interpretation of the section shows that the commission has no discretion whether or not to deregister a company,\textsuperscript{46} and furthermore that section 82(4) does not allow the commission any discretion when to reinstate a deregistered company to the companies register.\textsuperscript{47}

\section*{4.3 Section 83(4) void dissolution}

The guiding question when looking whether or not section 83(4) of the new Act can be used if a company was deregistered because it failed to file its annual returns in terms of section 82(3) is whether or not section 83(1) applies to companies deregistered as a result of section 82(3).

In the \textit{ABSA bank}\textsuperscript{48} Appeal case, the court drew the conclusion that it must have been the legislature’s intention to allow section 83(4) to apply to companies that have been administratively deregistered in terms of section 82(3) as section 83(1) expressly excludes from dissolution the case of a company whose name has been removed from the register on

\begin{footnotes}
\footnotetext{43}{Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 44}
\footnotetext{44}{Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 44}
\footnotetext{45}{Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 26}
\footnotetext{46}{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported) at para 26}
\footnotetext{47}{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported) at para 26 read with Regulation 40(6) of the Companies Act 71 of 2008}
\footnotetext{48}{Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 45}
\end{footnotes}
its own application because it has moved its registration to a foreign jurisdiction.\textsuperscript{49} If section 83(1) applied only to companies dissolved pursuant to liquidation, it would not have been necessary for the lawmaker specifically to exclude section 83(1)’s operation in the case of companies deregistered in terms of section 82(5).\textsuperscript{50} The fact that this special exclusion was created shows that section 83(1) applies in general to companies whose names have been removed from the register, and not only to those deregistered pursuant to liquidation.\textsuperscript{51} If section 83(1) applies to all cases of removal from the register, the same must be true of section 83(4).\textsuperscript{52} Section 83(4) applies in all cases where a company or corporation’s name has been removed from the register and where the company has as a result been dissolved.\textsuperscript{53}

In terms of the old Act the dissolution of a company could only have been achieved by wounding-up of the company, section 83(4) has reference to a company that has been dissolved the reason for the dissolution is now unimportant.\textsuperscript{54} Section 83(4) applies to any company which has been dissolved and is in broadly similar terms to the old Act’s section 420, with the exception that the relief which may be sought and granted is not confined to an order declaring the dissolution void; the court may also grant ‘\textit{any other order that is just and equitable in the circumstances}’.\textsuperscript{55} Muller AJ stated that the ambit of section 83(4) of the Companies Act is wider than section 420 of the old Act.\textsuperscript{56}

According to the court in \textit{Nulandis} \textsuperscript{57} section 83(4) does not provide for the restoration of a company on the companies register, it only enables a court to void dissolution of a

\textsuperscript{49} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 45
\textsuperscript{50} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 45
\textsuperscript{51} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 45
\textsuperscript{52} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 45
\textsuperscript{53} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 52
\textsuperscript{54} \textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 18
\textsuperscript{55} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 37
\textsuperscript{56} \textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 18
\textsuperscript{57} \textit{Nulandis (Pty) Ltd v Minister of Finance and Others} 2013 (5) SA 294(KZP)
The `company' as such, after the voiding of the dissolution exists as an association of members. This view was however heavily criticised by authors, the main contention is that however, this interpretation is not be correct as section 83(4)(b) of the new Act expressly provides that that action may be taken as against the company and not the association of members. If a dissolution is therefore voided, and it is accepted that the assets now vest in the association of members, section 83(4)(b) does not authorise action against the members.

The court in *Nulandis* had the following final comments on section 83(4).

> My interpretation is that s 83(4) empowers a court to declare the dissolution of a company to be void. However, the discretion to make any order that is `just and equitable' does not go far enough to confer power on the court to order the reinstatement of Greenacres on the register of companies. That power remains exclusively within the realm of the Commission.

The power given to the court in section 83(4) to declare the dissolution of a company void is not a review power to be exercised only upon proof of some irregularity or unlawfulness in the act of removing the company's name from the register, if this were the case the courts would not have to use section 83(4) as the court has an ordinary power of review.

According to the court in *Du Rand* The words `or other person with an interest in the company' in section 83(4)(a) of the new Act, must be given the widest possible interpretation to include any person with a financial interest in the company. In terms of section 83(4)(a) the court may grant any order that is just and equitable, this should mean that if the removal of a company's name from the register is the event bringing about its

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58 *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294(KZP) at para 7
59 *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294(KZP) at para 42
60 PA Delport *et al.*, Henochsburg on the Companies Act, 71 of 2008 (Service issue 8) at page 332(10)
61 *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294(KZP) at para 59
62 *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 58
63 *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported)
64 *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 19
dissolution, an order that the dissolution is void would necessarily imply that the company’s name must be restored to the register.65

4.4 Difference between dissolution and deregistration

According to the court in *Nulandis*66 in terms of the old Act distinction was made between dissolution and deregistration, deregistration terminated the legal status of the company and dissolution by winding up and liquidation terminated the company.67 The *ABSA Bank*68 Appeal case stated that in terms of the new Act the concepts of dissolution and removal from the register are brought together by the provision in section 83(1) in that a company is dissolved as of the date its name is removed from the register.

The court in *Nulandis*69 held that the new Act materially differs from the old Act as dissolution and deregistration are combined in section 82 and section 83(1) as can be seen from section 83(1) of the new Act, the effect of removal of a company from the register is that the company is dissolved as of the date its name is removed from the companies register unless the company is being moved to a foreign jurisdiction.70

As stated in *Nulandis*;71

*Conflating deregistration with dissolution in s 83(1) is the consequence of the figurative stroke of a single pen by the same authority, i.e. the Commission. Irrespective of whether the cause of the deregistration is the winding up of the company in terms of s 82(1) and (2) or the company’s failure to file its annual returns in terms of s 82(3), deregistration ensues, triggering the automatic dissolution of the company. Thus it may happen that a company is deregistered for failing to lodge returns. Even though that company still has assets and is trading, it could be*

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65 Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported) at para 19
66 Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP)
67 Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 9
68 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 37
69 Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 20
70 Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 22
71 Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 24
dissolved. By not distinguishing in s 83(1) of the new Act between the causes of deregistration, and consequent dissolution.

4.5 Section 82(4) retrospective effect

In Peninsula eye clinic the court looked specifically at the retrospective effect of section 82(4) of the new Act. In the facts of the case after deregistration had taken place in terms of section 82(3) of the new Act an award was granted to the Applicants in the matter, as a result of an arbitration, granted after the company was deregistered. The Applicants contended that the reinstatement of the company onto the companies register had retrospective effect, thus validating any acts done by the company during the time it was deregistered.

The Judge in the Peninsula eye clinic case, looked at the fact that in terms of the Old Companies Act sections 73(6) and section 73(6A) gave express retrospective effect and the absence of this specific retrospective effect in section 82(4) did not mean that the legislature intended for the section not to be retrospective. The question then arises whether this retrospectivity, should it be agreed that section 82(4) is indeed retrospective, is in relation to the company’s juristic personality and the restoration to it of its property or if it also includes the corporate activity undertaken on its behalf and its name during the period it was deregistered.

The court in Peninsular Eye Clinic which was also agreed on the same interpretation in the Fintech case found that the prima facie interpretation of reinstate means to put something

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72 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 25
73 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 25
74 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 25
75 Act 61 of 1973 hereafter referred to as the old Act
76 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 30
77 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 31
78 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 33
79 Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others 2013 (1) SA 570(GSJ) at para 12
back to its previous state, thus it is indicative of the legislative intention to restore a company with retrospective effect.

Administrative reinstatement in terms of section 82(4) of the new Act does not give retrospective effect to the corporate activity of the company, if it did there could be potentially undesirable effects attached to that retrospectivity. However third parties may apply to the courts for an order in terms of section 83(4) of the new Act for an order that is just and equitable to retrospectively validate specific acts, this would allow the courts judicial regulation of the potentially hazardous effects of automatic retrospectivity.

The Supreme Court of Appeal gave the following comment on the reason why restoration cannot run retrospectively;

Section 82(4) of the 2008 Act now allows the registration of deregistered company or close corporation to be reinstated, but the provision permitting the restoration to operate retrospectively was omitted, perhaps because the lawmaker is now aware of potential anomalies.

4.6 Section 83(4) retrospective effect

According to the court in the Peninsular Eye Clinic case, section 83(4)(b) of the new Act is in all material respects identical to the provisions of section 420 of the old Act, and the sections should be interpreted in the same manner, the court stated the following;

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 restored with effect from the date of its dissolution, but not its ‘corporate activity.'

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80 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 44
81 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 44
82 CA Focus CC v Village Freezer t/a Ashmel Spar [2013] ZASCA 136 at para 22
83 Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 42
The court in the *ABSA bank*\(^84\) Appeal case, found that in terms of an order in terms of section 83(4) the assets will no longer be *bona vacantia* and will vest in the company again. The court made it clear that it in no way vested these assets with retrospective effect, a retrospective order whereby a company is deemed to have somehow existed during the time it was dissolved, would go against the ordinary effect of declaring that the dissolution was void.\(^85\) However the court found that it did have the discretion to make an order that is just and equitable and this order may include a power to validate things that happened during the time the company was dissolved.\(^86\) Furthermore the court stated that the liabilities the company had prior to its dissolution would vest in the company once again, unless the court used its discretion to allow some debts during the time that the company was dissolved to form part of the debts of the restored company.\(^87\)

The companies were dissolved due to contrivance on the part of the directors or shareholders not to render the annual returns in terms of the provisions of the Companies Act so that the companies may be dissolved to the prejudice of applicants or other contingent creditors.\(^88\) The dissolution of the companies brought about the end of their existence and effectively defeated the claim of applicants against the companies.\(^89\) The directors or shareholders succeeded not to be subjected to proceedings that might follow as a result of a winding-up order.\(^90\) It is not in the interest of justice and will be prejudicial to creditors to allow such a state of affairs to continue when the dissolution has become an instrument of injustice.\(^91\) When the dissolution is voided the company will by necessary implication be restored with retrospective effect.\(^92\)

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\(^{84}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA

\(^{85}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 63

\(^{86}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 63

\(^{87}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 64

\(^{88}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 22

\(^{89}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 22

\(^{90}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 22

\(^{91}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 22

\(^{92}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 22
The court in the *Peninsular Eye Clinic* case commented on the scope of section 83(4) of the new Act in the following way;

*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.*

4.7 An order that is just and equitable

The court in the *Peninsula Eye Clinic* case interpreted this part of section 83(4) of the new Act to be a remedy on its own and a remedy that can be used with section 82(3) or section 83(4) of the new Act. This view is also the view held by Rogers J in the *ABSA Bank* case where he stated that;

*An order that is just and equitable may entail a declaration that the dissolution is void together with ancillary relief.*

This remedy is thus very wide, it can include an order stating that some third parties be placed in the same position they would have been in had the company not been deregistered.

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93 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 41
94 *ABSA Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 48
95 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 43
An order that is just and equitable in terms of section 83(4) of the new Act gives a court a wide discretion to decide each application on its own merits.\textsuperscript{96} The Court has an unencumbered discretion to come to the aid of interested persons in appropriate this discretion is given to it by section 83(4).\textsuperscript{97} It may not only declare the dissolution of a company void \textit{ab initio}, but is also able to make any other order that is just and equitable, this discretion must be exercised judicially taking into account all relevant factors.\textsuperscript{98}

As the court in \textit{Du Rand}\textsuperscript{99} did, I too quote the words of the Constitutional Court in the \textit{Weare}\textsuperscript{100} case regarding what the ambit of an order that is just and equitable must be;

\begin{quote}
This Court may make any order that is just and equitable. The duty to give just and equitable relief recognises that the position dictated by the objective doctrine may not always be a feasible one in practice. A decision as to what is just and equitable involves a balancing of the interests of the individuals affected with the interests of good governance and the smooth administration of justice.
\end{quote}

The important modification made by the lawmaker when dissolution and deregistration are brought together is that the court is now not confined to making an order declaring the dissolution void; it may make any other order that is just and equitable in the circumstances.\textsuperscript{101}

4.8 \textbf{Use of both section 82(4) and section 83(4)}

In the \textit{Fintech} case the court looked to see if it may intervene in a reinstatement in terms of section 82(4), van Oosten J stated the following\textsuperscript{102};

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{96} \textit{Nulandis (Pty) Ltd v Minister of Finance and Others} 2013 (5) SA 294(KZP) at para 61
\item \textsuperscript{97} \textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 20
\item \textsuperscript{98} \textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 20
\item \textsuperscript{99} \textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 20
\item \textsuperscript{100} \textit{Weare and Another v Ndebele NO and Others} 2009 (1) SA 600 (CC) at para 42
\item \textsuperscript{101} \textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 48
\item \textsuperscript{102} \textit{Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others} 2013 (1) SA 570(GSJ) at para 14
\end{itemize}
\end{footnotesize}
'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.'

The court in *Peninsular Eye Clinic* however disagreed with this notion stating that the only source of this power is in terms of section 83(4) of the new Act and that the court did not have the inherent jurisdiction to make an order to declare acts retrospective in terms of section 82(4) of the new Act.

The view that a court does not have an inherent jurisdiction to make orders that declare certain acts retrospective during the time a company is deregistered is also adopted in the *Bay Bright Property Services* case, this case however held that a court doesn’t have this inherent jurisdiction not because it was provided for in terms of section 83(4) of the new Act but because it went against the express legislative will.

In the *Peninsula Eye Clinic* case the court did supplement its statement that the source of the court’s power to make any order making some acts retrospective cannot come from section 82(3) by stating the following, this view is also followed in the *ABSA Bank* Appeal case;

*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:*

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103 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC))
104 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 34
105 *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa 2013 (3) SA 78 (WCC) at para 28
106 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 41
107 *Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA
(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.

As stated above the judges in the **ABSA bank** Appeal case the court decided on whether the section 83(4) remedy is available to and applies to a company or close corporation which has been deregistered in terms of section 82(3) of the new Act. The court had no difficulty in concluding that section 83(4) applies as much to a company or corporation dissolved pursuant to administrative deregistration as to one dissolved pursuant to its liquidation as a solvent company. The liquidation of solvent companies and the administrative deregistration of companies are dealt with together in the same part of Chapter 2. The court further concluded that in all the cases dealt with in Part G the term used to denote the termination of the company’s existence is ‘dissolution’, and in terms of section 83(1) this occurs in all instances on the date the company’s name is removed from the register, whether this is done pursuant to section 82(2)(b) in the case of winding up or section 82(3) in the case of administrative deregistration. Deregistration and removal of a

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108 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
109 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
110 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
111 Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
company’s name from the register, are terms which are used interchangeably and mean the same thing in terms of the new Act.\textsuperscript{112} If section 83(1) applies to all companies dissolved by the removal of their names from the register, there is no reason that section 83(4), which forms part of the same section and applies ‘at any time after a company has been dissolved’, should not apply to a company dissolved by the removal of its name from the register pursuant to section 82(3).\textsuperscript{113}

Where a company has been deregistered by the CIPC in terms of section 82(3) an interested party may either apply to the CIPC for restoration in terms of section 82(4) or to the court in terms of section 83(4), this is especially true where the interested party finds it impossible or practically difficult to comply with the prescribed requirements relating to restoration in terms of section 82(4), an application to court in terms of section 83(4) is available as an alternative.\textsuperscript{114}

4.9 Concluding remarks

In the \textit{ABSA bank}\textsuperscript{115} Appeal case the court came to the final conclusion that it could restore a company to the companies register, without meeting the requirements of section 82(4), by using section 83(4) and could in an order it held to be just and equitable, not allow the CIPC to insist on the requirements in terms of section 82(4) of the new Act be met.\textsuperscript{116}

The court in the \textit{Du Rand}\textsuperscript{117} case made the following comment with regards to the effects of section 82(4) and the requirements it required to be met before a company could be re-registered to the company register;

\begin{quote}
There can be little doubt that the legislature is aware that in punishing recalcitrant companies with deregistration and dissolution for their failure to render annual returns, third parties will be detrimentally effected.
\end{quote}

\textsuperscript{112}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
\textsuperscript{113}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43
\textsuperscript{114}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 52
\textsuperscript{115}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA
\textsuperscript{116}\textit{Absa Bank Ltd v Companies and Intellectual Property Commission and Others} 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 60
\textsuperscript{117}\textit{Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa} Case 71624/2012 NGHC (unreported) at para 12
It is clear that the courts believe that section 82(4) and section 83(4) both apply to companies deregistered in terms of section 82(3). The courts believe as stated by a quorum of the Western Cape High Court, that section 83(4) can come to the aid of interested persons unable to comply with section 82(4).\footnote{Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 60}

The question of retrospective reinstatement of the section 82(3) was answered to mean that the corporate activity of the company during the time it was deregistered would not be valid, but that the property would again vest in the company as well as its juristic personality.\footnote{Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43} An interested party could however apply to the court for an order that is just and equitable in terms of section 83(4), which may allow certain acts committed by the representatives of the company to be valid.\footnote{Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 43}

The court in terms of section 83(4) can make an order to return a company to the register, the discretion given to the court from the Act is interpreted widely. Section 83(4) however is not automatically retrospective, an order in terms of section 83(4) must include an order that is just and equitable ordering that selective acts be allowed to be retrospective.\footnote{Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 43}
Chapter 5: UK Act and case law

5.1 Introduction

The court in *Nulandis*\(^{122}\) gave reasons as to why it would be instructive to briefly investigate the United Kingdom’s 2006 Companies Act\(^{123}\) with regard to the deregistration and dissolution of companies in terms of section 82(3) of the new Act\(^{124}\). The court stated the following in this regard:\(^{125}\)

*I digress briefly to compare provisions of the Companies Act, 2006 of the United Kingdom (the UK Act) relating to deregistration and dissolution to show the extent to which the new Act converges and diverges from the UK Act. Considering that the UK Act is also new, the similarities could point to external, objective conditions in modern society to which both statutes seek to respond. The dissimilarities remind starkly of the differences in the internal, local conditions of both jurisdictions, the size of each and their histories being obvious points of departure. Comparison is necessary in the age of globalisation in order that like situations attract like remedies, with due deference to difference. This would cultivate predictability and certainty in law across jurisdictions.*

I agree with the court in this respect and will thus submit a brief chapter on the subject of the UK Act and its interpretation through case law. The first port of call should be to see if the UK Act has similar wording to new Act with regard to sections dealing with deregistration of companies and later restoration or reinstatement of a company to the companies register.

5.2 Comparison of the wording in the UK Act and the new Act

Under the UK Act the registrar can remove a company from the companies register after making certain inquiries regarding the company’s operation.\(^{126}\) Once the company has been removed from the register and this removal is published in the Gazette the company is

\(^{122}\) *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294(KZP)

\(^{123}\) Hereafter referred to as the UK Act

\(^{124}\) Act 71 of 2008, hereafter referred to as the new Act

\(^{125}\) *Nulandis (Pty) Ltd v Minister of Finance and Others* 2013 (5) SA 294(KZP) at para 46

\(^{126}\) Section 1000 of the UK Act, 2006
considered to be dissolved.\textsuperscript{127} When a company is dissolved, all property and rights whatsoever vested in the company immediately before its dissolution are deemed to be \textit{bona vacantia}.\textsuperscript{128} This is the consequence in terms of the new Act, though it is not specifically stated that this is the case. An application for administrative restoration to the companies register can only be made by a director or a member of the company.\textsuperscript{129} This differs from the new Act’s section 82(4) where the application can be made by any interested person. The UK Act states that an application for administrative restoration may be made whether or not the company has in consequence been dissolved.\textsuperscript{130} Here the UK Act separates the removal of a company’s name from the register and the dissolution. The new Act, however, does not specifically separate the two, although the court in \textit{Nulandis}\textsuperscript{131} felt that the two concepts were separated, this view is not repeated in other similar case law.

The UK Act also states that certain requirements must be fulfilled before the registrar will administratively restore a company’s name to the companies register. The new Act also has certain requirements in terms of section 82(4) and Regulation 40(6) of the new Act. The UK Act’s conditions are as follows:

1. That the company was carrying on business at the time of its name being removed;\textsuperscript{132}
2. If any property or right previously vested in the company has vested as \textit{bona vacantia}, the Crown representative has signified to the registrar consent to the company’s restoration to the register in writing;\textsuperscript{133}
3. The relevant parties have delivered to the registrar such documents relating to the company as are necessary to bring the records kept by the registrar up to date,\textsuperscript{134} and
4. That the penalties that are outstanding at the date of dissolution or striking off are then paid.\textsuperscript{135}

\textsuperscript{127} Section 1000(6), 1001(4), 1003(5) of the UK Act, 2006
\textsuperscript{128} Section 1012(1) of the UK Act, 2006
\textsuperscript{129} Section 1024 (3) of the UK Act, 2006
\textsuperscript{130} Section 1024(2) of the UK Act, 2006
\textsuperscript{131} \textit{Nulandis (Pty) Ltd v Minister of Finance and Others} 2013 (5) SA 294(KZP) at para 49
\textsuperscript{132} Section 1024(2) of the UK Act, 2006
\textsuperscript{133} Section 1024(3) of the UK Act, 2006
\textsuperscript{134} Section 1024(5)(a) of the UK Act, 2006
\textsuperscript{135}
The effect of a company being administratively restored in terms of the UK Act is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.\textsuperscript{136} The UK Act has a definitive answer to the question regarding the retrospective restoration of the company, unlike the new Act’s section 82. The UK Act also allows a court to have a discretion if required with regard to administrative restoration, by allowing a interested person to make an application to the court to give such directions and make such provision as seems just for placing the company and all other persons in the same position, as nearly as may be, as if the company had not been dissolved or struck off the register.\textsuperscript{137} This section in the UK Act allows a court to make an order that seems just, even if the restoration was done administratively, giving the same effect as if a company was reinstated in terms of section 82(4) of the new Act. The section in the UK Act furthermore allows the court to make an order that is just and equitable in terms of section 83(4) of the new Act, not just allowing one or the other, as has been suggested in some of the recent South African case law.\textsuperscript{138}

In terms of the UK Act, the court can restore a company to the register.\textsuperscript{139} The application can be made by any interested person\textsuperscript{140} unlike administrative restoration, which can only be made by a director or member.\textsuperscript{141} The UK Act makes allowances for if the registrar has refused the application, for whatever reason. The court can, in such circumstances, be approached by way of an application within 28 days of notice of the registrar’s decision being issued by the registrar.\textsuperscript{142} This part of the UK Act differs from the new Act as it allows the court to come to the rescue of the interested persons that cannot rely on administrative restoration. South African case law\textsuperscript{143} has moved towards including this into its law but it has not yet been confirmed by the Supreme Court of Appeal.

According to the UK Act the court may, by way of an application, order the restoration of the company to the register.\textsuperscript{144} The effect of an order by the court for 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.\textsuperscript{145} In terms of the UK Act the court can also require the company to fulfil the requirements in terms of administrative deregistration. This, however, is within the court’s discretion.\textsuperscript{146}

The new Act is in many ways similar to the UK Act. However, with regard to the interpretation of The South African courts, the remedies that are available in terms of the UK Act are far more diverse. The \textit{ABSA Bank}\textsuperscript{147} Appeal case did interpret our Act to mean that a court could supplement an administrative restoration. In terms of the UK Act, the courts are allowed to make orders to supplement the terms of administrative restoration, and can order the registrar to return a company to the companies register without fulfilling all of the requirements that are necessary for the registrar to administratively restore a company to the register. Our courts differ in this regard, stating that section 83(4) of the new Act cannot be used to circumvent the requirements of section 82(4) and regulation 40 of the new Act.\textsuperscript{148}

5.3 English case law

The question that should follow this brief comparison of the wording of the UK Act and the new Act is that of the UK case laws’ interpretation of the most important sections of the UK Act discussed above. The leading case, with regard to the retrospective effect of corporate activity of a company after it had been struck from the companies register, is the UK Appeal case of \textit{Peakstone Ltd v Joddrell}.\textsuperscript{149} In this case the Appeal Judges look specifically at the provisions of section 1032(1) and (3) of the UK Act which reads as follows:

\begin{quote}
(1) The general effect of an order by the court for 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.
\end{quote}

\textsuperscript{145} Section 1032(1) of the UK Act, 2006
\textsuperscript{146} Section 1032(4) of the UK Act, 2006
\textsuperscript{147}Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA
\textsuperscript{148}Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP); Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC))
\textsuperscript{149}Peakstone Ltd v Joddrell([2013] 1 All ER 13
(3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.

The court applied the judgment of *Tymans Ltd v Craven*\(^{150}\) with regard to the corresponding provision in section 353 of the 1948 Act, and stated that the court should regard the Court of Appeal’s majority decision in the *Tymans* case as determinative in respect of the retrospective nature of section 1032(1) of the UK Act. The court in *Peakstone Ltd v Joddrell*\(^{151}\) quoted these words from *Tymans Ltd v Craven*\(^{152}\) with regard to the question at hand:

> ... seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the “as you were position”, which, according to the ordinary sense of those general words, is prima facie their consequence.\(^{153}\)

The court in *Peakstone Ltd v Joddrell*\(^{154}\) stated the following in agreement with *Tymans Ltd v Craven*:\(^{155}\)

> The court held that an order under s 353 declaring that ‘the company shall be deemed to have continued in existence as if its name had not been struck off’, was effective to validate retrospectively all acts done in the name or on behalf of the company during the period between its dissolution and the restoration of its name to the register. In my judgment, the effect of s 1032(1) is retrospectively to validate an action purportedly commenced by or against a company during the period of its dissolution.

\(^{150}\)[1952] 1 All ER 613 at 619, [1952] 2 QB 100

\(^{151}\)*Peakstone Ltd v Joddrell*[2013] 1 All ER 13

\(^{152}\)*Tymans Ltd v Craven*[1952] 1 All ER 613 at 619, [1952] 2 QB 100

\(^{153}\)*Tymans Ltd v Craven*[1952] 1 All ER 613 at 619, [1952] 2 QB 100 at para 111

\(^{154}\)*Peakstone Ltd v Joddrell*[2013] 1 All ER 13 at para 21

\(^{155}\)*Tymans Ltd v Craven*[1952] 1 All ER 613 at 619, [1952] 2 QB 100 at para 113
In *Smith v White Knight Laundry Ltd*, the court made a crucial distinction between the corporate existence of the company on the one hand, which is restored as from the date of the dissolution, and, on the other hand, proceedings which had taken place during the period of dissolution. This interpretation accords with our case law were the acts of the company are not automatically retrospectively applied.

The court in *Peakstone Ltd v Joddrell* considered the case of *Morris v Harris*, however, and seemed to come to a conclusion that substantially differed from the case quoted below. It is interesting, however, to note the court’s view on a general retrospective order allowing all acts to be valid. Lord Blanesburgh postulated the following:

*I think that to automatically validate such acts as being the acts of a duly constituted officer on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged. They are avoided by the terms of the section. The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity.*

5.4 Concluding remarks

The UK Act and leading English case law show that the courts in the UK have the ability to supplement any administrative restoration of a company. The UK case law shows that an order made by the court to restore a company to the companies register retrospectively allows activities done on the part of the company to be validated. The court can then make any order it deems fair. Thus the acts are given retrospective effect, but the court can decide whether or not to order certain acts not to have retrospective effect. The court in *Peakstone Ltd v Joddrell* made the following ruling:

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156 *Smith v White Knight Laundry Ltd* [2001] EWCA Civ 660, [2001] 3 All ER 862, [2002] 1 WLR 616


158 *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 ALL SA

159 *Peakstone Ltd v Joddrell*[2013] 1 All ER 13 at para 19

160 *Morris v Harris* [1927] AC 252, HL

161 *Morris v Harris* [1927] AC 252, HL at para 269

162 *Peakstone Ltd v Joddrell*[2013] 1 All ER 13

163 *Peakstone Ltd v Joddrell*[2013] 1 All ER 13 at para 43
The sweeping effect of s 1032(1) is illustrated by s 1032(3), which enables the Companies Court to make directions ‘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’.\(^{164}\)

Our case law, specifically the *ABSA Bank*\(^{165}\) Appeal case, allows for the property to vest in the company again in terms of section 83(4) and section 82(4) of the new Act, as well as the company to have juristic personality restored. It does not automatically allow for corporate activity to be retrospectively validated unless the court makes an order that it is just and equitable to do so. This I believe is a better approach than a blanket approval as seen in the UK case law,\(^{166}\) which can be subjected to an order from the companies’ court in terms of section 1032(3) of the UK Act. A provision made in the UK Act, which the new Act specifically lacks, is the provision allowing the court to circumvent the requirements of that which the registrar has to follow when allowing an administrative restoration, although our case law\(^{167}\) has attempted to remedy this situation. The UK Act is thus a helpful indicator of what the new Act lacks and how the South African court’s interpret the new Act in a different way to the UK courts.

\(^{164}\)Peakstone Ltd v Joddrell[2013] 1 All ER 13 at para 43

\(^{165}\)Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 ALL SA

\(^{166}\)Peakstone Ltd v Joddrell[2013] 1 All ER 13

\(^{167}\)Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 ALL SA; Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported)
Chapter 6: Conclusion

In terms of section 83(1) of the new Act\textsuperscript{168}, a company is dissolved as of the date its name is removed from the companies register unless it has been removed so that a company may be transferred to a foreign jurisdiction. When a company is deregistered it loses its legal standing.

If a company is deregistered by the commission\textsuperscript{169} due to the company’s failure to submit annual returns in terms of section 82(3)(a)(i) of the new Act, it has the effect as stated in section 83(1), in that the company ceases to exist as a legal entity. This administrative deregistration is done without notice to the creditors.

The creditors of a company that has been dissolved in terms of section 82(3)(a)(i) of the new Act have no direct claim to the assets formerly held by the company, as the company no longer has the capacity to own assets. The only way in which their claims can be satisfied is for the company to be reinstated so that they can institute claims against a legal person with the capacity to be a party to legal proceedings. Whether the creditors intend on winding the company up after reinstatement or proceeding with a liquidation application, there are ways in which the creditors can recover at least some of the debt owed to them.

It then seems clear that restoring the company to the companies register will allow the creditors to enforce the debts owed to them. It is at this point that the creditors’ problems begin. A company that has been administratively deregistered can be restored to the register by the commission, by application by an interested person in terms of section 82(4) of the new Act. An interested person must comply with the requirements required for reinstatement of a company onto the companies register. These requirements are set out in regulation 40 of the new Act. According to the regulation, an interested person must submit the outstanding returns, amongst other items of information that are commonly not available to persons who are not members of the company. The creditor, in most cases, cannot fulfil the requirements of section 82(4) of the new Act as they do not possess the relevant information to comply with regulation 40.

\textsuperscript{168} Companies Act 71 of 2008, hereafter referred to as the new Act
\textsuperscript{169} Companies and Intellectual Property Commission hereafter referred to as the commission
Section 83(4) of the new Act allows the court to make an order declaring that the dissolution of the company is void, or any other order that is just and equitable in the circumstances. This section can be broken into two parts; the first being the court voiding dissolution, and the second being the court making an order that is just and fair. If a court voids dissolution, it does not automatically place the company back onto the companies register. According to the court in *Nulandis*¹⁷⁰, section 83(4) does not provide for the restoration of a company on the companies register; it only enables a court to void dissolution of a company.¹⁷¹

In terms of section 83(4) (a), the court may grant any order that is just and equitable. This should mean that, if the removal of a company’s name from the register is the event bringing about its dissolution, an order that the dissolution is void would necessarily imply that the company’s name must be restored to the register.¹⁷² This decision in *Du Rand*¹⁷³ is in line with the court’s decision in the *ABSA bank*¹⁷⁴ Appeal case. This interpretation allows the creditor to be fully protected without forcing the creditor to obtain information that they will most likely never possess.

The court in the *Peninsula Eye Clinic* case interpreted this part of section 83(4) of the new Act to be a remedy on its own¹⁷⁵, and a remedy that can be used with section 82(3) or section 83(4) of the new Act. This view is also the view held by Rogers J in the *ABSA Bank*¹⁷⁶ Appeal case. An order that is just and equitable in terms of section 83(4) of the new Act gives a court a wide discretion to decide each application on its own merits.¹⁷⁷ The Court has an unencumbered discretion to come to the aid of interested persons in appropriate circumstances, this discretion is given to it by section 83(4).¹⁷⁸

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¹⁷⁰*Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP)*
¹⁷¹*Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 7*
¹⁷²*Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported) at para 19*
¹⁷³*Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported)*
¹⁷⁴*Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA*
¹⁷⁵*Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC)) at para 41*
¹⁷⁶*Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 48*
¹⁷⁷*Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP) at para 61*
¹⁷⁸*Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported) at para 20*
If a creditor has taken steps to claim its debt during the time the company was deregistered, then the question arises whether or not section 82(4) and section 83(4) have retrospective effect. The court in the *ABSA bank* Appeal case, found that, in terms of an order in terms of section 83(4), the assets will no longer be *bona vacantia* and will vest in the company again. The court made it clear that it in no way vested these assets with retrospective effect. A retrospective order whereby a company is deemed to have somehow existed during the time it was dissolved would go against the ordinary effect of declaring that the dissolution was void. However, the court found that it did have the discretion to make an order that is just and equitable, and this order may include a power to validate things that happened during the time the company was dissolved. Administrative reinstatement in terms of section 82(4) of the new Act does not give retrospective effect to the corporate activity of the company; if it did there could be potentially undesirable effects attached to that retroactivity. However, third parties may apply to the courts in terms of section 83(4) of the new Act for an order that is just and equitable to retrospectively validate specific acts. This would allow the courts judicial regulation of the potentially hazardous effects of automatic retrospection.

The creditor can thus always rely on an order that is just and equitable to make certain acts have retrospective effect. Section 82(4) and section 83(4) of the new Act are not retrospective automatically, however. An additional application in terms of the second part of section 83(4) (an order that is just and equitable) must be made. The court can validate any of the company’s actions when making an order that is just and equitable as this order is in the court’s discretion.

In terms of section 73(6), it seems that the old Act empowered the court to restore a company and validate all the actions taken by the company whilst it was deregistered. Thus, if a company is restored to the register it is done so with retrospective

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179 *Abser Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 63
180 *Abser Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 63
181 *Abser Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 63
182 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at para 44
183 *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others* 2012 (4) SA 484 (WCC) at para 44
184 *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at para 23
effect to the actions of the company during the time it was deregistered. However, as the Judges in *Insamcor*\(^{185}\) found, making an order in terms of section 73(6) of the old Act cannot be oversimplified, automatically restoring the company to what it was, as this could severely prejudice third parties.\(^{186}\) As the court has a discretion it may listen to third parties who might persuade the court to make an order that does or does not restore the company, and such discretion may serve to alleviate the prejudicial consequences.\(^{187}\)

The old Act gave the court a very wide discretion; the court had the final word in terms of section 73 of the old Act to make a judgment that the court deemed just. The old Act specifically allowed for retrospective effect by using the phrase, ‘*deemed to have continued in existence as if it had not been deregistered*’ and ‘*taken if the company had not been dissolved.*’ However, the old Act allowed the court to temper any prejudicial effect that retrospectively could have on third parties by giving the court the discretion to allow certain acts to be retrospective and others not to be retrospective.

Thus in terms of the old Act, creditors could approach the court to restore a company to the register. The old Act followed the same approach as the court in the *ABSA bank*\(^{188}\) Appeal case, in that the court had the discretion to make certain acts retrospective and other not.

In the *ABSA bank*\(^{189}\) Appeal case the court came to the final conclusion that it could restore a company to the companies register, without meeting the requirements of section 82(4), by using section 83(4), and could, in an order it held to be just and equitable, not allow the CIPC to insist on the requirements in terms of section 82(4) of the new Act be met.\(^{190}\)

The UK Act and leading English case law\(^ {191}\) show that the UK Act allows for the retrospective effect of reinstatement of a company to the companies register. This could then be supplemented by an order of the court which would disallow certain acts to be retrospective.

\(^{185}\) *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at para 26

\(^{186}\) *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at para 24

\(^{187}\) *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) at para 27

\(^{188}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA

\(^{189}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA

\(^{190}\) *Absa Bank Ltd v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), [2013] 3 All SA at para 60

\(^{191}\) *Peakstone Ltd v Joddrell* [2013] 1 All ER 13
The law at this point regarding restoration of a company that has been deregistered due to failure to submit annual returns is unclear. The Supreme Court of Appeal must still make a ruling on this point of law to clarify the legal standpoint. I believe that, if the courts use the interpretation in the ABSA bank\textsuperscript{192} Appeal case in tandem with the court’s practical viewpoint in Du Rand\textsuperscript{193}, the consequences of the restoration will be fair to creditors. This is because creditors will be able to approach the court in terms of section 83(4) of the new Act for an order voiding dissolution and an order that is just and equitable, directing the court to restore the company to the register and validate certain acts done during the time the company was deregistered.

The regulations should be amended as well as the Act. The amendment I propose is that the Act should include a part of section 83(4) which would state that, if a court makes an order to restore a company to the companies register, the commission is compelled to comply with the court order. The retrospective effect of the order can be controlled by the court in order to avoid consequences that could be disastrous.

\textsuperscript{192}Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA

\textsuperscript{193}Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported)
Bibliography:

Case law:

South African case law

- Absa Bank Ltd v Companies and Intellectual Property Commission and Others 2013 (4) SA 194 (WCC), [2013] 3 All SA
- Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa 2013 (3) SA 78 (WCC)
- CA Focus CC v Village Freezer t/a Ashmel Spar [2013] ZASCA 136
- Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa Case 71624/2012 NGHC (unreported)
- Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others 2013 (1) SA 570(GSJ)
- Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd2007 (4) SA 467 (SCA)
- Nulandis (Pty) Ltd v Minister of Finance and Others 2013 (5) SA 294(KZP)
- Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC))
- Weare and Another v Ndebele NO and Others 2009 (1) SA 600 (CC)

UK case law

- Morris v Harris [1927] AC 252, HL
- Peakstone Ltd v Joddrell[2013] 1 All ER 13

Tymans Ltd v Craven[1952] 1 All ER 613 at 619, [1952] 2 QB 100

Journal articles

de Lange and Sutherland, Deregistrasie sonder likwidasie van maatskappye en beslote korporasies ingevolge die 2008 maatskappywet, STELL LR 2014 2

Legislation

South African

The Companies Act 61 of 1973
Close Corporations Act 69 of 1984 (only used in the addendum)
The Companies Act 71 of 2008

UK Legislation

The Companies Act, 2006

Books

PA Delport et al, Henochsburg on the Companies Act, 71 of 2008 (Service issue 8)
Addendum: Practical issues faced by creditors

(This section is merely for interest sake of the reader and in no way forms part of the dissertation handed in to be marked.)

A debt due to a creditor of a company or a closed corporation that has been deregistered is not extinguished, but it is rendered unenforceable against the corporation. If a creditor of a company wishes to sell in execution any immovable property owned by the company that has been deregistered, the creditor will not be able to do so, and will, in effect, lose its security.

Any summons served on a company that has been deregistered cannot be enforced. Similarly, a company that has been deregistered cannot issue summons against a defaulting debtor. Furthermore, the courts have also been known to grant punitive cost orders against legal practitioners who bring wasteful actions on behalf of deregistered corporations.

Deregistration terminates the authority of a person who was a lawful agent of the company prior to deregistration. An attorney who continues to act for the company may be held personally liable for the costs of the action from the date of deregistration.

There is an onerous duty on members and directors of corporate entities, as well as attorneys acting on behalf of such companies, to ensure that the entities are registered at all times when they engage in commercial transactions and in litigation. What this requires is that the aforementioned officers and agents have an obligation to check the status of the corporate entities with the CIPC.

Finally, it must be pointed out that, although liabilities are not enforceable against a CC while the deregistration of the corporation subsists, ‘if a CC is deregistered while having outstanding liabilities, the persons who are members of such corporation at the

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194 Hereafter referred to as a CC
195 Companies and Intellectual Property Commission
time of deregistration shall be jointly and severally liable for such liabilities’\textsuperscript{196}. However, this may not be of assistance to a creditor if the deregistered CC owned immovable property against which the creditor wished to execute.

The procedure to be followed in order to apply to the CIPC to reinstate a company or CC

On 17 October 2012 the CIPC issued a notice to customers of the CIPC to inform them that they are now required to refer to Practice Note 5 (sic – should be 6) of 2012 for the new requirements for reinstatement applications on form CoR40.5, which took effect on 1 November 2012.

The practical difficulties

With effect from 1 November 2012, one may no longer apply for ‘instant’ electronic restoration of companies and CCs deregistered due to non-compliance with submission of CIPC annual returns. This facility has been removed from the CIPC website. This means the processing time therefore increases from one day to approximately 30 days.\textsuperscript{197}

There are several costs involved to process the application; namely the party bringing the application must pay for every annual return not submitted, a restoration fee, and penalties.\textsuperscript{198} There are other practical difficulties to consider. For example, one has to produce certified copies of the identity documentation of directors or members which a creditor might not be in possession of.

One of the requirements is that one must submit documentation from the National Treasury and the Department of Public Works indicating that such departments have no objection to the reinstatement. If the CC has immovable property this seems patently unfair to creditors, but it is a requirement.

\textsuperscript{196} s 26(5) of the Close Corporations Act 69 of 1984
\textsuperscript{197} refer to Practice Note 6 of 2012
\textsuperscript{198} the CIPC have waived until March 2013 the penalty payable for the late filing of annual returns of companies and CCs, which should have been filed since 1May 2011
An affidavit must be filed indicating the reasons for non-filing of annual returns. This information is clearly not in the possession of a creditor wishing to protect his or her interests.

A person intending to apply for reinstatement of a deregister company has to file sufficient documentary proof indicating that the company or CC was in business or that it had outstanding assets or liabilities at the time of deregistration. Once again, this requirement effectively deprives a creditor of the opportunity to apply for the restoration of the company or CC via the CIPC.

If a creditor is somehow able to overcome all these hurdles and restore the company or CC, there are usually significant fees to be paid. The only way to recover these fees is to attempt to rely on an enrichment claim against the company or CC, probably in the form of the extended negotiorum gestio, which is based on enrichment and applies where the gestor is actually acting in his or her own interests.

The legislator should be called on to create an appropriate and relatively inexpensive procedure that permits creditors to reinstate a company or CC and to recover the associated costs from the company or CC.

Even if an Applicant is granted a court order stating that the company must be restored to the companies register the Applicant must still comply with Regulation 40(6) 199 which provides: “The Commission may reinstate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fee in respect thereof”.

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199 Of the Companies Act 71 of 2008
In the *Du Rand*\(^{200}\) case the court explained that its understanding of the contents of the letter in terms whereof the Commission abides the decision of the Court is that the Commission will only restore a company to the register if the documentation requested has been received by the Commission within 21 days from an order that requires the Commission to restore the company.

Regulation 40 regulates the administrative process the Commission has to embark upon when dealing with an application for deregistration or re-registration of a company in terms of s 82(4).\(^{201}\) Regulation 40 deprives the Commission of any discretion when dealing with an application for the reinstatement of a company who has failed to render its annual return.\(^{202}\)

According to Muller AJ,\(^{203}\) regulation 40(6) unjustifiably interferes with the independence and impartiality of the Commission in the exercise of its powers and is as a result *ultra vires* and invalid. Compliance with regulation can furthermore not be a condition precedent to an order under section 83(4). It renders an order in terms of section 83(4) ineffective if a company who has been restored by order of Court is unable to have its name entered into the register by virtue of regulation 40(6). It also unjustly curtails the power of the Court to make orders that is just and equitable in such a case. Such a result could hardly have been the intention of the legislature.\(^{204}\)

\(^{200}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 25

\(^{201}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 25

\(^{202}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 26

\(^{203}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 34

\(^{204}\) *Du Rand NO & Another v The Companies and Intellectual Property Commission of South Africa* Case 71624/2012 NGHC (unreported) at para 34