IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 10760/12

In the matter of:

NULANDIS (PTY) LIMITED	**APPLICANT**
and	
THE NATIONAL MINISTER OF FINANCE	**FIRST RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSIONER	**SECOND RESPONDENT**

JUDGMENT

Date of hearing: 20 February 2013
Date judgment delivered: 24 May 2013

D. PILLAY J

Introduction

[1] The applicant, Nulandis (Pty) Ltd, formerly known as Plaaskem (Pty) Ltd, seeks an order confirming that the registration of Greenacres Management Services (Pty) Ltd (Greenacres), previously known as Brangus Ranchina (Pty) Ltd, is restored to the companies register in terms of section 83(4)(a) of the Companies Act 71 of 2008 (the new Act). It also asks for confirmation that the assets of Greenacres be declared not to be *bona vacantia* to the state.

[2] The background to this application is that Nulandis obtained judgment against Greenacres for R369 328.25 plus interest and costs. Without paying Nulandis' claim Greenacres was deregistered for failing to render annual returns. In this application

Nulandis wants to recover payment. It assumes that in order to do so it has to restore Greenacres to the companies register.

[3] The Minister of Finance, the first respondent abides by the decision of the court. The second respondent, the Companies and Intellectual Property Commissioner (the Commissioner) has not responded to the application. Although the application was returned with a non-service on the Commissioner because the state attorney had no mandate to accept service, the rule *nisi* was served on the Commissioner's officials. Such service plus the publication of the rule *nisi* in the *Witness* and Government Gazette is sufficient notice to the Commissioner to join the proceedings.[1]

[4] Gary Patrick Porrit, a former director, shareholder and beneficiary of Greenacres responded to the rule *nisi* served on Greenacres at its business address. In his affidavit he protests that Nulandis has not cited Greenacres in this application, that based on s 82(3) of the new Act as applied in *ABSA Bank Ltd v Companies and Intellectual Property Commissioner and Others; ABSA Bank Ltd v Voigro Investment* 19CC (8250/12, 6601/12) [2012] ZAWCHC 182 and *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and Others 2012 (4) SA 484 (WCC)* ([2012] 3 ALL SA 183 (WCC)) the court has no powers to restore the registration of Greenacres. In any event no assets vested in the state on deregistration allegedly because none existed. He does not oppose the application.

[5] As Greenacres does not exist as a company and has no legal standing, Nulandis could obviously not litigate against it. Whether there are assets is a matter for Nulandis to pursue. I doubt that it would trouble itself to launch this costly litigation if it had nothing to gain from it. Besides, Mr Porrit alleged that 'the ultimate shareholder' of Greenacres was a trust of which he was a beneficiary. That trust, once identified, might throw some light on the assets of Greenacres in due course. The rest of this judgment discusses the point of law Mr Porrit and Mr R M van Rooyen, counsel for Nulandis raise.

[1] *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 477F-G.

[6] The technical nature of the topic and the inter-connectedness of the provisions I am about to discuss lend themselves unavoidably to repetition for the sake of clarity. The resulting turgidity is regretted.

[7] Nulandis relies on s 83(4). Section 83(4) does not provide for the restoration of a company on the companies register. It enables a court to void dissolution of a company in the following terms:

> '(4) At any time after a company has been dissolved-
>
> (a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and
>
> (b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'

[8] What Nulandis actually seeks is to avoid the dissolution of Greenacres. At the outset therefore the distinction between deregistration and dissolution must be clarified. For reasons that will emerge below it is also necessary to compare their treatments under the Companies Act 61 of 1973 (the old Act) and new Act.

<u>The old Act</u>

[9] The old Act de-linked deregistration from dissolution. Citing *Henochsberg* on the old Act (issue 32) and other authorities, *ABSA Bank* para 38-39 distinguishes, correctly with respect, between restoring registration in terms of s 73(6)(a) and voiding dissolution in terms of s 420 following a winding up in terms of s 419 of the old Act. Deregistration terminated the legal status of the company. Dissolution by winding up and liquidation terminated the company.[2] After deregistration and before dissolution the company existed as an association of members who remained

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[2] *Miller and Others v Nafcoc Investment Holding Company Ltd and Others* 2010 (6) SA 390 (SCA) para 11 the consequence of winding up was not deregistration but dissolution in terms of s 419 of the old Act.

personally liable for its debts.[3] Its assets vested automatically in the state represented by the Minister of Finance.

[10] Section 420 of the old Act gave the court wide powers in the following terms to void dissolution:

> 'Court may declare dissolution void.— 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.'

[11] Located in the chapter titled 'Winding up of Companies' avoiding dissolution in s 420 was triggered by either one of the following events:

(a) voluntary winding up by the company or by creditors; or

(b) winding up and liquidation by court order.

[12] Restoring the registration of a company deregistered for failing to render annual returns was regulated under s 73 of the old Act which fell under the chapter titled 'Formation, Objects, Capacity, Powers, Names, Registration And Incorporation Of Companies, Matters Incidental Thereto and Deregistration'. Section 73(6) of the old Act also gave the courts wide powers in the following terms to restore registration:

> '(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.

[3] Cilliers, Benade and De Villiers *Company Law* 3rd edition p 440; *Miller and Others* v *Nafcoc Investment Holding Co. Ltd and Others* 2010 (6) SA 390 SCA at 395A-E, para 11.

(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.'

[13] Whereas the court could restore a company to the register on any grounds as long as it was just, the Registrar, the predecessor of the Commissioner, could only restore a company administratively i.e. if the company that had been deregistered for not lodging annual returns, had since lodged them.[4] Practically, if an administrative reinstatement was sought the Registrar would have been the first port of call. If that failed, then the court could be approached either in terms of s 73(6) or, at worst, on review. A criterion decisive for restoring to the register, whether by the Registrar or the court, was that at the time of its deregistration the company was carrying on business or was in operation. Under the old Act and, as will be seen, in terms of s 82 (3), regulation 40 and Practice Note 6 of 2012 issued under the new Act, the emphasis on this criterion for the administration of the companies register cannot be missed.

[14] Manifestly, the old Act distinguished clearly between, on the one hand, dissolution and when and how it could be avoided and, on the other hand, deregistration and when and how a company could be restored to the register. Although the circumstances that triggered both applications and the requirements to succeed differed, both applications could be made to the court. For both applications the old Act gave the court wide discretion.

[15] The consequence of a restoration application was to restore the status *ante quo*. Restoration automatically voided dissolution. By statute, the company was 'deemed to have continued in existence as if it had not been deregistered'.[5]

[4] S 73 (6A) of the old Act provides: 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.'

[5] S 76 (6) and s 73(6A) of the old Act.

[16] In contrast, the consequence of voiding dissolution was open to interpretation. Voiding dissolution did not automatically restore registration. However, s 420 empowered the court with the flexibility 'to make an order, upon such terms as the Court thinks fit.' It also permitted 'any proceedings [to] be taken against the company as might have been taken if the company had not been dissolved.' These provisions coupled with s 73(6) and 6 (A) enabled the court, when exercising its discretion under s 420, to direct the Registrar to restore the registration. In granting a s 420 application in order for a liquidator to be reappointed, the court in *Ex Parte Bowman: In Re International Rock Products (Pty) Ltd* [1985] 3 All SA 123 (W) (1985 (1) SA 70 (W)) at 125 observed:

> 'It seems to me that the power to make an order upon such terms as the Court thinks fit is related specifically to the power to declare the dissolution void and to revive the company, and is not a general power.' [6]

And

> 'The company is to be brought back to life for a very limited purpose only. There is no question of trading, and there is no question of enjoying any of the other rights of a company on the register.'[7]

Significantly the court did not restore the company to the register but ordered:

> 'The dissolution of the company is declared to have been void and the company in liquidation is revived.'[8]

If by 'revived' the court meant 'restored on the register', the court would have so ordered, given that restoration or reinstatement is a distinct juridical act, which practically, would have had to be effected by the Registrar.

[17] The authorities differed on the retrospective effect of s 420. [9] However, that is not a debate pertinent to the decision in this case.

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[6] *Ex Parte Bowman: In Re International Rock Products (Pty) Ltd* 1985 (1) SA 70 (W) at 73B-C.
[7] Above at 73G-H.

[8] Above at 73H-I.
[9] Meskin *Henochsberg on the Companies Act* vol 1 Butterworths at 900 (1-901); *Pieterse v Kramer N.O.* 1977 (1) 589 (AD) at 601F-G; *Sandton Town Council v Sanddown Extension 2 (Pty) Ltd* 1991 (3) SA 486 (W); Morris v Harris 1927 AC 252 (HL) at 257-258 268-269

<u>The new Act</u>

[18] Turning to the new Act, its Explanatory Memorandum, 2007 states its aim as not to:

> 'unreasonably [jettison] the body of jurisprudence built up over more than a century [but] to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy. Where current law meets these objectives, it should remain as part of company law.' [10]

[19] Consistent with this aim dissolution was conceived as being triggered in the same way as in the old Act i.e. by winding up and liquidation. [11]However, between 2007 when the Explanatory Memorandum was published and 2008 when the new Act was promulgated, this conception under the old Act was jettisoned.

[20] The new Act differs materially from the old Act. Firstly, deregistration and dissolution of companies are conflated in ss 82 and 83(1) of the new Act. Section 82(2) requires the Commission, on receiving a certificate of winding up of a company to record the dissolution of the company and remove the company's name from the companies register. This section anticipates dissolution followed by deregistration as the natural consequences of a company being wound up.

[21] More pertinently for this application, s 82(3) empowers the Commission to remove a company from the companies register if the company has failed to file an annual return for two or more years in succession. This section does not anticipate dissolution as an automatic consequence of deregistration. But s 83(1) does.

[22] Section 83(1) unequivocally conflates deregistration with dissolution of a company in providing as follows:

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

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[10]Page 6 of the *Explanatory Memorandum* to the new Act.

[11]Part D of Chapter 3 – Dissolving and De-registering Companies clauses 28-29 of the *Explanatory Memorandum* of 2007.

Prior to its amendment[12] as recently as 19 April 2011, s 83(1) read as follows:

> 'A company is dissolved as of the date its name is removed from the companies register.'

The qualification that came with the amendment confirms that conceptually the new Act delinks deregistration from dissolution. A deregistered but not dissolved company can exist in order to be transferred to a foreign jurisdiction.

[23] Even though the legislature reconsidered s 83(1) three years after its initial promulgation, albeit for the purpose of the qualification, it persisted with conflating deregistration of a company with its dissolution. Although conceptually distinct, deregistration is fused with dissolution in the clear text of s 83(1).

[24] 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 dissolved. By not distinguishing in s 83(1) of the new Act between the causes of deregistration, and consequent dissolution, the new Act differs from the old Act, giving rise to the second difference.

[25] The third difference between the old and the new Act is that the court's power to order restoration of registration in terms of s 73(6) of the old Act has not survived in the new Act. Instead, s 82(4) provides:

> '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.'

[12] Amended by s 52 of Companies Amendment Act No. 3 of 2011.

[26] With similar clarity as s 83(1), 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). Furthermore, s 82(4) strips the court of the power it previously had under s 73(6) of the old Act to reinstate the registration of a company. In the result, neither the Commission nor the court is empowered under the new Act to restore to the register of companies a company that has been wound up. Thus if assets are discovered after a company is wound up and deregistered, neither the Commission nor the court can reinstate the registration of the company; an application to court to avoid dissolution would be the only option available to a liquidator or other interested person.[13] This is another example of the new Act conceptually disaggregating registration from voiding dissolution.

[27] The fourth difference is a policy shift. Applications in terms of ss 73(6)(a) and 420 of the old Act could be made to court. In contrast, the new Act strives to separate the administrative powers of the Commission from the judicial powers of the court.

<u>Separation of Powers</u>

[28] This intention is born out firstly, in the following extract from the Explanatory Memorandum.

> ‘Chapter 8 of this draft proposes the migration of CIPRO, as well as the enforcement functions currently within the dti, into a newly established organ of state, with significantly expanded functions and powers, to be known as the Companies and Intellectual Property Commission. In particular, most of the administrative functions currently assigned to the Minister under the Companies Act, apart from the appointment of members of the institutions, and the making of regulations, are placed within the jurisdiction of the Commission, although the Minister would retain the ability to issue policy directives to the Commission, and to require the Commission to conduct an investigation in terms of the Act.

[13] S 83(4)(a)

The Explanatory Memorandum also anticipated that parties would have a constitutional right of access to a court for review.'[14]

[29] Secondly, the new Act accomplishes the aim of separating powers in s 82(4) above by repealing s 73(6) of the old Act and conferring the power to reinstate registration exclusively on the Commission, albeit that such registration is limited to administrative reinstatements only. Reinstatement of registration automatically voids dissolution. Implicit in registration is the existence of the company, even if such existence is on paper only. Intuitively one anticipates that the converse must also be true. But that is not the case. Voiding dissolution does not restore registration, automatically or otherwise. On dissolution, nothing of the company as a company exists. It may exist as an unregistered entity with or without assets and liabilities. Nothing in s 83 expresses that on voiding dissolution, the company is reinstated on the register. The words 'any proceedings may be taken against the company as might have been taken if the company had not been dissolved'[15] could imply that voiding dissolution automatically reinstates registration, save that such an interpretation does not address the separation of powers conundrum created in the new Act, which did not exist in the old Act. It begs the question whether the legislature intended to grant to the courts the power to reinstate registration. If it did, then it has not said so with the same clarity as s 82(4) and 83(1) of the new Act. Furthermore, s 83(4)(b), without more, expressly enables litigation against the 'revived' but unregistered company. Reinstating registration of the company is therefore unnecessary unless the company has to be joined as a litigant.

[30] Section 83(4)(b) was imported from s 420. However, because the new Act strips the courts of their power to reinstate companies on the register, the words 'any proceedings may be taken against the company as might have been taken if the company had not been dissolved' common to both sections, call for a fresh interpretation in the new Act. Under the new Act the court can no longer void dissolution by reinstating registration, a power now vested exclusively in the hands of the Commission. However, the court can void dissolution without reinstating registration. I will return to this shortly.

[14]Page 8 of Explanatory Memorandum.
[15]S 83 (4)(b) of the new Act.

[31] The third way in which separation of powers is maintained is that decisions of the Commission, including its failure or refusal to decide any matter that it is empowered to decide remains the subject of review by the court by virtue of the court's inherent power of review, reinforced by the Promotion of Administrative Justice Act, 2000 or in terms of s 156 of the new Act. In this regard I respectfully agree with the judgments in *ABSA Bank* and *Peninsula Eye Clinic* above which also conclude that the power to reinstate the registration of a deregistered company or close corporation vests exclusively in the Commission,[16] leaving the power of review with the courts.[17]

[32] Fourthly, the separation of powers is also achieved in s 83(4) of the new Act. Whereas reinstating the registration of a deregistered company is a power vested exclusively in the Commission under s 82(4), voiding the dissolution of a company under s 83(4) is a power vested exclusively in the court, except insofar as the dissolution is voided automatically by the Commission upon restoring registration administratively.

[33] A similarity between the old and new Acts is that the power to void dissolution for reasons other than administrative deregistration, remains the exclusive prerogative of the court. Under the old Act, the court could avoid dissolution in one of two ways: Either the court could restore registration in terms of 73(6) after the Registrar of Companies administratively removed the company from the register; the order restoring registration had the effect of deeming the company 'to have continued in existence as if it had not been deregistered'. Or, the court could avoid dissolution in terms of s 420 after the company has been wound up. So, no matter what the cause of deregistration, the power to void dissolution vested in the courts then under ss 73(6) (by restoring registration) and 420 and now only under s 83(4).

[34] In a nutshell, between entrusting to the Commission the exclusive power to reinstate registration administratively in terms of s 82(4) and to the court the exclusive power to void dissolution in terms of s 83(4), the power to reinstate registration for causes other than administrative and because 'it is just' (the old s 73

[16] *ABSA Bank* para 43.
[17] *Peninsula Eye Clinic* para 25-26.

power), has fallen between the cracks. This lacuna is structurally entrenched and practically enforced by the Commission, as the discussion below will show.

Registration requirements

[35] The Commission's function is to establish and maintain the companies register. It must also make the information from those registers 'efficiently and effectively available to the public'.[18] If the information in the registers is inaccurate it will be neither efficient nor effective. The Commission steadfastly insists on compliance with its requirements for reinstating registration which, for creditors, is onerous. Recently, the Commission reinforced its requirements in Practice Note 6 of 2012 which directs that as from 01 November 2012 a reinstatement application must be made in form CoR40.5 and, regardless of the cause or date of deregistration, the documents to be submitted to the Commission must include the following:

a. certified identity copies of directors and the applicant,
b. deeds search reports to prove ownership (or otherwise) of immovable property,
c. an affidavit explaining the reasons for non-filing annual returns, and
d. sufficient documentary proof that the company was in business or that it had outstanding assets or liabilities at the time of deregistration.

[36] All this information must be relevant to the Commission to exercise its discretion to grant or refuse an application for reinstatement of the registration of a deregistered company in terms of s 82(4), otherwise the Commission would not insist on it as it emphatically does in Practice Note 6 of 2012.

[37] As observed above, lodging annual returns remains a perquisite for a company being registered. This requirement is compelled by the Commission's function to provide information to the public and other organs of state efficiently and effectively. That other organs of state may depend on such information could have macro-economic implications. For instance, it would be misleading to have many companies registered but only a few that are economically active. But the Commissioner's priorities do not always intersect with creditors' interests.

[18] S 187 (4) (c) of the new Act.

[38] Creditors, as interested persons referred to in s 83(1), may apply to reinstate the registration of a company. However, despite being persons most likely to have an interest, their right to apply to the Commission is merely a theoretical veneer for a practical impossibility. Creditors generally and Nulandis specifically do not have information to fulfil the registration requirements compelled by the Commission.

[39] The Commission must be aware of the difficulties creditors would have in complying with the requirements for reinstating registration, if not before, then through the applications in *ABSA Bank* and *Peninsula Eye Clinic* which preceded the Practice Note. Still, the Commission insists on compliance with its reinstatement requirements. This fortifies my view that compliance with the requisites for registration is not a mere procedural formality but a substantive necessity for efficient management of the companies register.

[40] In these circumstances, the court cannot order the reinstatement of registration when the Commission's requirements are not fulfilled, moderated or waived by the Commissioner. It would be trenching on the powers of the executive and administrative arm of government in the face of clear evidence of what the Commission's strict requirements are for restoring registration. It will also undermine the principle of the separation of powers.

<u>Voiding dispenses with registration</u>

[41] However, as I intimated above, reinstatement of registration is neither a prerequisite for nor a consequence of avoiding dissolution under the new Act. Section 83(4) is confined to voiding dissolution only without referring to deregistration. All that creditors require is an order voiding dissolution because s 83(4)(b) enables proceedings to be taken against the company as if it had not been dissolved.

[42] As stated above, when a company is deregistered but not dissolved, it exists as an association of members. The same position must obtain on avoiding dissolution and before reinstatement of registration. On dissolution being avoided the *bona vacantia* vesting in the Treasury reverts to the association of members of the deregistered company. Such an association exists for the limited purpose of remedying the harm or adversity for which the voiding application was granted. Many of the requirements for registration are superfluous to the needs of creditors seeking

satisfaction of their claims from deregistered and dissolved companies. Lodging annual returns is not as vital to the needs of creditors as uncovering the assets and sources of revenue of the dissolved entity.[19]

[43] If there are no assets and the company is no longer in business then the application by a creditor could be an exercise in futility. It would be just as well that the entity is not automatically reinstated as a company on the register. If there are assets then other creditors would have an interest in avoiding dissolution. Shareholders and other officials of the dissolved entity would have an interest in saving the assets from creditors. It would be up to them to reinstate the registration of the company if they wish to join it to the proceedings as a party with legal standing. Hence they are notified of the application and its outcome. If the company is not participating in legal proceedings, it does not have to be reinstated on the register.

[44] As stated above, reinstating registration would obviate an application to void dissolution in terms of s 83(4). Complying with the reinstatement requirements provides information as to whether the company had outstanding assets or liabilities at the time of deregistration. The deeds office search reports would be another indicator of the company's fixed assets and liabilities. If the company did not have assets or liabilities at the time of deregistration then the reinstatement of the registration could be an academic exercise, unless the applicant for reinstatement motivates otherwise.

[45] Nothing in 83(4)(b) implies that avoiding dissolution is *ab initio*, that is, retrospectively to the date of the dissolution.[20] In any event, this is not a question I need consider in this application.

<u>The UK Act</u>

[46] 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

[19] *Ex Parte Bowman: In Re International Rock Products (Pty) Ltd* 1985 (1) SA 70 (W) at 73F-H.

[20] Meskin *Henochsberg on the Companies Act* vol 1 Butterworths 900 (1-901).

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.

[47] Similarly to s 83(1) of the new Act, under the headings '**PART 31,** DISSOLUTION AND RESTORATION TO THE REGISTER, **CHAPTER 1,** STRIKING OFF, *Registrar's power to strike off defunct company*' the UK Act conflates deregistration with dissolution when dealing with administrative striking off of a company's name from the register. The registrar may either at her own instance[21] or at the voluntary instance of a company[22] strike off a defunct company, [23] i.e. a company not carrying on business or is not in operation, or a company that has been wound up. [24] After striking off the name of the company off the register, the registrar publishes notice to this effect in the Gazette. [25] On the publication of the notice the company is dissolved. [26]Like the new Act, the conceptual separation of registration from dissolution is entrenched, despite their conflation on deregistration and publication of notice.

[48] Similarly to s 83(2) and (3) of the new Act, the striking off does not affect the liability of every director, managing officer and member of the company which continues and may be enforced as if the company had not been dissolved.[27] Significantly, nothing in ss 1000, 1001 and 1003 affects the power of the court to wind up a company the name of which has been struck off the register.[28] Similarly, under s 83 (4)(a) of the new Act, a liquidator or any other interested person may apply to court to void dissolution of a company if it is just and equitable. For example, voiding dissolution for the purposes of winding up a company would be just and equitable.[29]

[21]S 1000 and 1001 of the UK Act.
[22]S 1003 of the UK Act.
[23]S 1000 of the UK Act.
[24]S 1001 of the UK Act.
[25]S 1000 (5), 1001 (3) and 1003 (4) of the UK Act.
[26]S 1000 (6), 1001 (4) and 1003 (5) of the UK Act.
[27]S 1000 (7) (a); 1003 (6) (a) of the UK Act.
[28]S 1000 (7) (b); 1003 (6) (b) of the UK Act
[29]*Ex Parte Bowman: In Re International Rock Products (Pty) Ltd* 1985 (1) SA 70 (W) at 73A.

[49] In terms of s 1012(1) under CHAPTER 2 titled 'PROPERTY OF DISSOLVED COMPANY -*Property vesting as bona vacantia*' of the UK Act,[30] when a company is dissolved, all property and rights of the company immediately before its dissolution are deemed to be *bona vacantia.* The UK Act expressly allows the court to do more than simply void dissolution. It may on application by a person who claims an interest in the disclaimed property[31] order the vesting of the disclaimed property in, or its delivery to a person entitled to it[32] on such terms as the court thinks fit. Although neither the old nor the new Acts mention '*bona vacantia*', our common law imports this concept into our jurisprudence.[33] Furthermore, the Appellate Division confirmed that it is the policy and practice that the state will not enrich itself at the cost of someone having an interest in the re-registration of the company. [34] The court's power to make 'just and equitable' orders under s 83(4) is sufficiently wide and flexible to order the vesting or delivery of property to persons who prove their clear entitlement to it. The absence of express powers as in the UK Act is therefore not an impediment to granting similar relief under the new Act.

[50] Interestingly, under CHAPTER 3 titled 'RESTORATION TO THE REGISTER-*Administrative restoration to the register',* the UK Act permits a former director or former member of a company to apply to the registrar to restore to the register a company that has been struck off the register under section 1000 whether or not the company has been dissolved.[35] Here, as in s 1029 of the UK Act below, is another indicator that notionally and practically in the UK as in SA, deregistration and dissolution are separable. Whereas deregistration determines identity, dissolution emphasises assets and liabilities. The insistence in both jurisdictions on the companies registers maintaining updated records points to the modern need to assure by registration the commercial viability of companies as intrinsic to their identity.

[30]S 1012 (1) of the UK Act.
[31]1017 (1) (a) of the UK Act.
[32]1017 (2) (a) and (4) of the UK Act. In terms of s 1021, similar powers apply to Scotland.
[33]*Antares International Limited and Others v Louw Coetzee & Malan Incorporated and Others* Case No. 11529/2011 (delivered on 2 SEPTEMBER 2011) (WC) para 36; *Rainbow Diamonds (Edms) Bpk En Andere v Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy* 1984 (3) SA 1 (A)
[34]*Rainbow Diamonds* headnote.
[35]S 1024 of the UK Act.

[51] Under the UK Act, the registrar's requirements for administrative restoration are similar to those under the new Act. They include not only proof that the company was carrying on business or in operation at the time of its striking off, but also documents relating to the company to update the records kept by the registrar. [36]

[52] The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.[37] However, on application made within three years after the date of restoration of the company to the register, 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 if the company had not been dissolved or struck off the register.[38] In a case where the registrar has struck off a defunct company and refused the application to restore it to the register, an application to the court may be made within 28 days of notice of the registrar's decision.[39]

[53] Unlike the UK Act, the effect of reinstating registration is not express in the new Act; it is inferred from s 83(1) read with s 82(4) that an administrative reinstatement by the Commission automatically voids dissolution. Whether the reinstatement and avoidance will be retrospective is not prescribed in the new Act as it is in the UK Act. It follows therefore that any interested person who wants reinstatement and avoidance retrospectively will have to motivate fully for such effect in an application to court to either review the Commission's decision about registration or void dissolution by relying on the 'just and equitable' test in terms of s 83(4) of the new Act.

[54] Unlike the new Act, the UK Act vests in both the registrar and the court the power to restore registration of a company. On application under section 1029 of the UK Act, the court may order the restoration of the company to the register if the company was struck off the register under section 1000, 1001 or 1003 whether or not the company has in consequence been dissolved.[40] The court may order the restoration of the company to the register if the company was, at the time of the

[36] S1025 of the UK Act.
[37] 1028(1) of the UK Act.
[38] S 1028 (4) of the UK Act.
[39] S1030 (4) and (5) of the UK Act.
[40] S1029 (1) (c) of the UK Act.

striking off, carrying on business or in operation, and if, in any other case, the court considers it just to do so.[41]

[55] 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.[42]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. [43] Section 1032(4) of the UK Act enables the court to also give directions as to the delivery to the registrar of such documents relating to the company as are necessary to bring up to date the records kept by the registrar.

[56] Section 1034 allows the person in whom any property or right is vested as *bona vacantia* to dispose of, or of an interest in, that property or right despite the fact that the company may be restored to the register. If the company is restored to the register the restoration does not affect the disposition. Consideration is payable if property has been disposed of.

[57] The comparison above of the new Act with the UK Act fortifies my view that registration and dissolution of companies are separable. Conceptually, they are not two sides of the same coin. In voiding dissolution, reinstatement of registration is neither automatic nor necessary. Furthermore, the power of the court hearing a voiding application is wide enough to give directions that are just and equitable. Such directions may vary from case to case. In a case in which registration is necessary and practicable, the court may include directions in that regard without trenching on the Commission’s powers. For instance, the court may give directions as to whether the company should be joined in the proceedings and who should apply to reinstate its registration.

Final Analysis

[41]S1031 (1) (a) and (c) of the UK Act.
[42]S1032 (1) of the UK Act.
[43]S1032 (3) of the UK Act.

[58] To summarise my analysis of the new Act: With the conflation of deregistration and dissolution in s 83(1) and the clear text of 82(2), (3) and (4) and 83(4)(a) I cannot, with respect, agree with the opinion in *ABSA Bank* para 42 that s 83(4)(a) of the new Act is reserved for voiding dissolution following a winding up in terms of s 82(1) and (2) and not deregistration as contemplated in s 82(3) when a company has failed to file its annual returns. Accordingly, I respectfully disagree with the interpretation in *ABSA Bank* that s 83(4)(a) of the new Act:

> 'provides for the type of situation envisioned by section 420 of the old Act i.e. it gives a possible remedy to an interested party when a company is dissolved following a winding up in the circumstances set out in section 82(1) and (2).'

Such an interpretation leaves creditors without a remedy following dissolution after an administrative deregistration, as the courts in those cases concluded. Leaving creditors without a remedy would have the effect of denying them a right they had under the old Act.

[59] 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. Relying on s 158 to promote the purpose of the new Act, as Mr van Rooyen proffers, does not assist creditors because the clarity of the text of s 82(4) bars any interpretation suggesting that the court has the power to reinstate registration.

[60] Once the Commission is served with an order voiding dissolution it falls upon the Commission to determine whether the registration should be reinstated. Any other interested person who considers reinstatement of registration to be necessary may apply under s 82(4) to the Commission to reinstate the registration of Greenacres. As I said above, Nulandis is disinterested as to whether Greenacres is reinstated; its real interest is in Greenacres assets. If the Commission requires Greenacres to be reinstated then it could exercise its discretion on how that could be accomplished and whether the reinstatement would be conditional or unconditional. If the Commission does nothing, Nulandis should not be frustrated in pressing ahead

with locating, attaching and executing against Greenacres assets, subject to public notices to other creditors and persons interested in the assets attached.

Just and equitable test

[61] All that remains now is to determine whether it is just and equitable to avoid dissolution of Greenacres. Effectively, an order on dissolution that 'the Court thinks fit' in terms of s 420 and 'one that is just and equitable' in terms of s 83(4)(a) are not different. Both give the court wide discretion to decide each application on its own merits. In *Ex parte Liquidator Natal Milling Co* (*Pty*) *Ltd* 1934 NPD 312 the interpretation by a single judge of this division of s 191 of the Companies Act, 1926 which was almost identical to s 420 of the old Act, remains good authority in summarising the approach as follows:

> 'According to my view the power of the Court to make an order declaring the dissolution to have been void is unlimited in any respect, and as the circumstances under which the section may be brought into operation are likely to vary in every case, it seems to me inadvisable to lay down any principle upon which the Court will act….
>
> Each case, I think should be decided on its merits.'

[62] In that case shareholders and the liquidator supported the voiding application. It was in the interests of shareholders. There were no creditors. No one was prejudiced.[44] The court cautioned against voiding dissolution unless for instance, new assets are discovered or some fraud comes to light, or the dissolution has become an instrument of injustice.[45]

[63] The effect of the dissolution and consequent vesting of Greenacres' assets, if any, in the national Treasury is an injustice to Nulandis as a creditor. Nulandis obtained judgment on 01 November 2007. Greenacres was unsuccessful in an application for rescission which was dismissed on 2 June 2008. Its appeal to the full bench was dismissed on 28 September 2010. That was after Greenacres was deregistered on 16 July 2010 for failing to submit annual returns. Nulandis obtained a valid judgment by default but could not enforce it until Greenacres' unsuccessful application to rescind the judgment and its appeal had been dismissed. Furthermore,

[44] At 314
[45] At 313

Greenacres persisted with the appeal even after it was deregistered and lost its legal status. Those proceedings denied Nulandis the remedies available to it under the old Act and propelled it into the regime of the new Act.

[64] This case is similar to *ABSA Bank* and *Peninsula Eye Clinic* in that in all three cases the applications were brought in terms of s 83(4) of the new Act. A material factual difference between this case and those two Cape cases is that the judgment debt the applicant seeks to enforce in this case is valid. It was obtained against Greenacres whilst its legal status as a registered company was still intact. In *ABSA Bank* the company was deregistered before it could be wound up by a creditor other than ABSA Bank. The latter's application for provisional winding up could therefore not be granted against a non-existent entity. In *Peninsula Eye Clinic* the arbitration award sought to be enforced was a nullity because the company persisted with the arbitration despite being stripped of its legal status by deregistration.

[65] Importantly, the effect of vesting the assets as *bona vacantia* in the Treasury would be unfair expropriation of the right of creditors to be paid if they do not have a right to recover their claims. As noted above, that has not been our practice under the common law and should be even less so under our constitutional democracy.[46] A creditor's right could be a real right such as a loan secured by a bond over immovable property as was the creditor's claim in *ABSA Bank*. Although Nulandis' judgment is a personal right for agricultural chemicals sold and delivered, it nevertheless is a valid judgment debt. Because of the manifest unfairness of denuding creditors of their right to have their claims paid, the new Act has to provide the means for them to recover payment from a deregistered and dissolved company. On the basis that dissolution is an instrument of injustice it is just and equitable in the circumstances to avoid dissolution.

[66] Mr van Rooyen submitted that Item 11 of Schedule 5 to the new Act entitled Nulandis to rely on s 73(6) of the old Act. Item 11 provides:

> '(1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the

[46] S 25 (2) of Constitution, 1996.

> date that the right, entitlement or obligation first arose, subject to the provisions of this Act.'

[67] Mr van Rooyen contended that Nulandis had the right under s 73(6)(a) of the old Act to apply to court for an order restoring the registration of Greenacres on the grounds that it is just. If that had happened then Greenacres would have been deemed to have continued to exist as if it had not been deregistered. Furthermore, s 73(6)(b) imbued the court with the flexibility to give directions and make such provisions to place, as nearly as may be, Greenacres and all other persons in the position as if the company had not been deregistered. These are the rights or entitlements Nulandis enjoyed in terms of the old Act but now are lost to it under the new Act, unless they are revived by Item 11 of Schedule 5 to the new Act.

[68] The main difficulty with this submission is that reinstatement of registration is 'subject to the provisions of this Act'. That hooks Item 11 back into s 82(4) if registration is required.

[69] Another difficulty that arises from Mr van Rooyen's submission is that even if Nulandis successfully invokes Item 11, because it has a valid judgment, and the deregistration occurred under the old Act, other creditors whose claims arise under the new Act have no realistic means of reinstating the registration of a deregistered company. Consequently an interpretation has to be found within the new Act to enable creditors under the old and new Acts to recover their claims.

[70] As I have found above, reinstating a company is not a prerequisite for voiding dissolution. Avoiding dissolution is the route creditors have to pursue to recover their claims. If my interpretation of s 83(4) above is incorrect and *ABSA Bank* and *Peninsula Eye Clinic* are correct, then Item 11 offers a remedy for Nulandis, albeit not by means of reinstatement of registration, as I pointed out above. Item 11 hooks back to s 83(4) to invoke the court's power to grant dissolution that is just and equitable. Nulandis' right or entitlement to avoid dissolution under the old Act has not been spent and s 83(4) being most closely comparable to s 420 of the old Act is activated.

[71] If this interpretation is also incorrect then the concerns raised in *ABSA Bank* and *Peninsula Eye Clinic* must be addressed by the legislature and the Commission.

The interpretation in *ABSA Bank* and *Peninsula Eye Clinic* is that reinstating registration is a prerequisite for voiding dissolution and since the court has no power to reinstate, as only the Commission can reinstate, an interested person who cannot fulfil the requirements for reinstating registration is without a remedy. Reading in into the new Act as suggested in these judgments may be one of several ways in which to fix the deficiency. However, without having had the benefit of the Commissioner's participation in these proceedings to formulate the most appropriate intervention and evaluate its impact, I hesitate to suggest any amendment. It may turn out that the Commission might moderate the requirements for creditors to reinstate registration. Or, the Commission may establish a separate register for companies resurrected by a voiding application. Or both.

[72] The order I grant has immediate effect. Whether it should also have retrospective effect should be determined when a case for retrospectivity is made. For instance, if it transpires that Greenacres continued to trade as a company despite being deregistered then this order could have retrospective effect as the order in *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* [2012] JOL 29612 (GSJ) did.

[73] Since writing this judgment I have had the privilege of reading *ABSA Bank v CIPC and Others* Case No: A29/13 delivered on 19 April 2013, the judgment of the full bench which overturned *ABSA Bank*.

[74] Like the full bench of the Cape Division, I conclude that the new Act strikes out to be different from the old Act by combining deregistration and dissolution in s 83(1). I also respectfully agree that s 83(1) does not distinguish between deregistration triggered by winding up and administrative deregistration for failing to render returns. However, I disagree with the interpretation that the new Act does not distinguish at all between deregistration and dissolution.[47] Furthermore, based on the principle of separation of powers discussed above, I respectfully cannot agree with the interpretation that voiding dissolution in terms of s 83(4) authorises the automatic restoration of a company on the register, as the full bench proposed in the following extracts:

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[47] *ABSA Bank* (Full Bench) Para 43; 47, 52.

> 'If s 83(1) applies to all companies dissolved by the removal of their names from the register, there is no reason that s 83(4), which forms part of the same section and applies 'at any time after a company has been dissolved', should not apply to a company dissolved by the removal of its name from the register pursuant to s 82(3).'[48]

And

> 'The important modification is that the court is now not confined to making an order declaring the dissolution void; it may make any other order that is just and equitable in the circumstances. (Although the references in s 83(4)(a) to a declaration of voidness and to any other order that is just and equitable are linked by the word 'or', I do not believe that the court can grant only one or the other. An order that is just and equitable may entail a declaration that the dissolution is void together with ancillary relief.)' [49]

And further more:

> '[59] …I am inclined to think that if the removal of a company's name from the register is the event bringing about its dissolution, an order that the dissolution is void would necessarily imply that the company's name must be restored to the register …. If it were otherwise, how could such a revived company thereafter again be dissolved (since a company can only be dissolved by the removal of its name from the register)? However, I am reluctant to use the word 'reinstate' (the word used in s 82(4)) in case it should be thought to imply some effect not intended by the court order. I would rather use 'restore'.

In disagreeing with the full bench I do so cautiously but fortified by similar views of the two judges in *ABSA Bank* and *Peninsula Eye Clinic* on the bar against court ordered reinstatement of registration.

[75] The Commission ought to be alive to the controversy and possible shortcomings in the legislation and the regulations. Surprisingly, it has failed to participate in this case, the two Cape cases and the appeal to the full bench. Its silence is unhelpful at this formative stage of the development of jurisprudence on the new Act. Accordingly, I request Nulandis to serve a copy of this judgment on the

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[48] *ABSA Bank* (Full Bench) Para 43.
[49] *ABSA Bank* (Full Bench) Para 48.

Minister of Trade and Industry under whose watch the Commission falls with the view to alerting him to the controversy and to elicit the Commission's participation in resolving it.

[76] The order I grant is the following:

a. The dissolution of the Greenacres Management Services (Pty) Ltd (deregistered) is declared to be void.
b. Greenacres Management Services (Pty) Ltd (deregistered) is revived as an association of its members.
c. The assets of Greenacres Management Services (Pty) Ltd (deregistered) are no longer *bona vacantia.*
d. The members of Greenacres Management Services (Pty) Ltd (deregistered) are re-vested with its assets.
e. Any interested person may apply on these papers, supplemented insofar as is necessary for further relief.
f. The costs of this application shall be paid by Greenacres Management Services (Pty) Ltd (deregistered)
g. This order shall be published in English once in the Government Gazette and once in a newspaper circulating in KwaZulu-Natal.
h. This order shall be served on:
    i. Greenacres Management Services (Pty) Ltd (deregistered) at 218 Boom Street, Pietermaritzburg.
    ii. Mr Gary Patrick Porrit at 218 Boom Street, Pietermaritzburg.
    iii. The Minister of Trade and Industry, Pretoria
    iv. The Companies and Intellectual Property Commissioner, Pretoria.
    v. The Minister of Finance.

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D.Pillay J

<u>Appearances://</u>

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