

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. EL 639/2024

In the matter between:

GIDEON JOUBERT GOOSEN

Applicant

and

MINISTER OF TRADE AND INDUSTRY

First Respondent

MINISTER OF FINANCE

Second Respondent

BLUE LABEL DISTRIBUTION (PTY) LTD

Third Respondent

RECEIVER OF REVENUE

Fourth Respondent

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Fifth Respondent

JUDGEMENT (URGENT APPLICATION)

HARTLE J

[1] The applicant, acting as an interested party, sought an order before me on an urgent basis that Goosen Marketing CC (with registration number 1999/0513069/23), recently deregistered evidently due to a systematic annual return final deregistration

process,¹ be re-registered and/or reinstated to the database of registered companies maintained by the registrar of the Companies and Intellectual Property Commission (“CIPC”).

[2] The clear purpose for the order is that he be placed in a position to continue with litigation that is underway in the trial court (“*the trial*”). By arrangement the trial which is part-heard before Gwala AJ was set down to be completed during the Easter recess.

[3] In that matter (Case No EL 763/14), the applicant is sued by the third respondent (“*Blue Label*”) as a co-surety together with the close corporation in a contractual dispute. The latter entity has a counterclaim against the third respondent which it self-evidently cannot presently prosecute through the applicant who, together with his wife as co-member of the close corporation, had initiated the counterclaim on its behalf and was conducting its defence (as well as his own) in the action.

[4] The action was commenced in 2014 but the actual trial, which as I have indicated is part-heard, only commenced in April 2023 when there was no impediment of the close corporation having been de-registered.

[5] The applicant claims to have been unaware of the de-registration which took effect on 20 January 2024. It was however brought to the attention of the trial judge on 9 April 2024 by Mr. Schultz (who appears on behalf of Blue Label in the trial and the present application) that such impediment is now at play and affects the continuation of the trial.²

¹ See CIPC Notice 3 of 2024, which was foreshadowed by Notice 74 of 2023.

² It is a trite principle that the effect of the deregistration of a company is that all its property, including any claims it might have against third parties, thereupon vest in the State as *bona vacantia*. Thus without any need for an act of cession or anything of the like, the State has the right, should it so decide, to prosecute the action against the defendant. See *Rainbow Diamonds EDMS Bpk en Andere v Suid-Afrikaanse Nasionale Lewensassuransiematskappy* 1984 (3) SA 1 (A) at 10C-12G.

[6] It is common cause that the de-registration occurred due to a failure of those responsible on behalf of the close corporation to have submitted annual returns in respect of it to the CIPC.³

[7] The applicant launched these proceedings without reference to any provision of the Companies Act, No. 71 of 2008 merely contending that it was a simple matter to have the close corporation re-registered pronto and that all it requires is that the proposed order which I have been called upon to make is emailed to the CIPC using a specified designated email address. In the notice of motion he asks the court to condone his failure to comply with the time limits and forms prescribed by the rules of court, permitting the matter to be entertained on an urgent basis, and for further orders that the property of the close corporation be declared not to be *bona vacantia* and that it be re-registered and restored to the registrar of the CIPC.

[8] The applicant has made it clear that the only reason he asks for the order is so that he can continue to take the proceedings in the trial on behalf of the close corporation.

[9] The first, second, fourth and fifth respondents were served (albeit on very short notice) by electronic mail according to my first directive issued and *via* the office of the State Attorney (also by electronic mail) in a supplementary directive which I issued. There was no appearance on their behalf and indeed the fifth respondent (the CIPC) has acknowledged receipt of the application and indicated in effect that it will act on the order of the court provided that the unique identifier for its purposes (i.e. the registration number of the relevant entity concerned) is indicated so that it can effectively implement the terms of whatever order is issued by this court.

³ See footnote 1. The CIPC website reports a systematic failure on the part of entities to have lodged annual returns for a period in excess of 3 years which, as of 19 January 2024, culminated in a final annual return deregistration process. Evidently the CIPC has as a result since then been inundated with requests by affected entities for reinstatement. This is reported in Notice 9 of 2024 on its website.

[10] The third respondent, Blue Label, vociferously opposed the application. Its concerns relate predominantly to matters that would concern the other respondents, the notional interests of third parties and creditors that would be impacted by the relief sought without having been served, and the form of the relief sought. Mr. Schultz contended on its behalf that it was inappropriate to apply for final relief pointing out that an “*order of restoration*” should, as a matter of practice, be preceded by a rule *nisi* calling upon all interested parties to show cause why the close corporation’s registration should be restored.⁴ In making the latter submission the parties were *ad idem* that the applicant was intent on relying on the provisions of section 83 (4) of the Companies Act in respect of the order sought by him.

[11] It also objected to the applicant’s approach on the basis of urgency despite recognizing the stalemate in the trial court and Mr. Cole’s attempts to effectively utilise the opportunity that the trial judge has given them during recess to finalise the matter. The application was advanced on the basis that no costs order would be asked for and evidently it was not envisaged that it would be opposed by any of the respondents since the granting of the proposed relief, so the applicant’s argument went, would be in everyone’s best interest.

[12] As far as I can tell there is no real objection to the close corporation’s particulars being reinstated on the CIPC database vis-à-vis the third respondent and the applicant being placed in a position where the proceedings on behalf of the close corporation can continue to be taken.

[13] The question left begging though was what the route was that was required to be taken in the ordinary course and what the necessary requirements are in this respect. I was concerned that this was not spelt out in the application papers and I especially required the assistance of the parties in this connection.

⁴ *Ex Parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T), which was followed in *Ex Parte Jacobson: In re Alec Jacobson Holdings* 1984 (2) SA 372 (W).

[14] The wherewithal and the peculiar procedures lie in the provisions of sections 82 and 83 of the Companies Act,⁵ read together with regulation 40 of the Companies Regulations⁶ and the current Practice Note of the CIPC. Mr. Schultz also referred me to authorities applicable to applications for “*restoration*” generally and the requirement that the public at large should be given an opportunity to oppose relief sought under the caption of an application premised on the provisions of section 83 (4) of the Companies Act.

[15] I set out below the full provisions of section 82, so that the various scenarios under which deregistration (brought on a par with dissolution) can occur, are kept in mind. I have however italicized the portions that appear to apply in this instance.

“82. Dissolution of companies *and removal from register.* — (1) The Master must file a certificate of winding up of a company in the prescribed form when the affairs of the company have been completely wound up.

2) Upon receiving a certificate in terms of subsection (1), the Commission must—

- (a) record the dissolution of the company in the prescribed manner; and
- (b) remove the company’s name from the companies register.

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

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

⁵ In terms of section 26 of the Close Corporations Act, No. 69 of 1984, sections 81 (1)(f), 81 (3), 82 (3) and (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation.

⁶ GNR.351 of 26 April 2011: Companies Regulations, 2011 (*Government Gazette* No. 34239), as amended

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

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

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

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

(b) the Commission—

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

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

(aa) has ceased to carry on business; and

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

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

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

(a) the shareholders have adopted a special resolution approving such an application and transfer of registration; and

(b) the company has satisfied the prescribed requirements for doing so.

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

[16] Firstly to appreciate the source of the obligation on an entity to provide annual returns as well as the costs implication thereby, it is necessary to set out the provisions of section 33 of the Companies Act:

“33. Annual return. —(1) *Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return—*

(a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30 (2) or the regulations contemplated in section 30 (7);

(aA) a copy of the company’s securities register as required in terms of section 50;

(aB) a copy of the register of the disclosure of beneficial interest as required in terms of section 56 (7) (aA); and

(b) any other prescribed information.

(1A) (a) The Commission must make the annual return contemplated in subsection (1) available electronically to any person as prescribed.

(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).

(2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of section 23 (1).

(3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company’s compliance with the requirements of this Part, and Chapter 3, if it applies to the company.”

[17] The entitlement to apply for reinstatement of the close corporation’s registration despite its failure to have provided annual returns is clearly envisaged by section 82 (4) and is promoted on the CIPC website for all affected entities who have in similar circumstances recently found themselves removed from the database by the systematic annual return final deregistration process. The subsection however obviously contemplates an administrative process, that is an application on the prescribed form

that envisages the provision of stipulated information and/or documentation required which the CIPC considers necessary for its essential purposes. It is evident that this process will take its own time.

[18] Section 83(4) of the Companies Act however provides that the liquidator of a company or a person with an interest in it may apply to a court for an order declaring the dissolution to have been void (in my view such a situation can hardly pertain here where the close corporation was deregistered due to non-submission of annual returns), or any other order that it is just and equitable in all the circumstances. I set out the entire section so that it is understood contextually:

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

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

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

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

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

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

[19] Next it is necessary to have regard to provisions of regulation 40 (6) of the Companies Regulations which pertains to applications to reinstate registration of

deregistered entities made administratively in terms of section 82(4). The relevant regulation (which also highlights the peculiar process that was adopted against the applicant in this instance leading up to the de-registration)⁷ provides as follows:

“40. Winding-up, dissolution and de-registration of companies and external companies. —See s. 79 to 83— (1) *A resolution by a solvent company to wind up must be filed with Form CoR 40.1.*

(2) *If a company or external company has failed to file an annual return for two years in succession, as contemplated in section 82 (3) (a), the Commission may deliver a demand in Form CoR 40.3 to the company or external company by registered post, or other means of verified communication, requiring the company or external company to provide the satisfactory information contemplated in section 82 (3) (a) (ii).*

(3) *If a company or external company responds to a demand sent to it in terms of sub-regulation (2), the Commission—*

(a) *may deregister the company or external company if the information received in response to the demand confirms that the company or external company is no longer active; or*

(b) *if the information received in response to the demand confirms that the company or external company is active—*

(i) *may require additional information if the information provided is unsatisfactory in terms of section 82 (3) (a) (ii); or*

(ii) *may issue a compliance notice requiring the company or external company to file an annual return for every year that it has failed to do so; or*

(iii) *must issue a compliance certificate, if the information is satisfactory and the company or external company has filed an annual return for every year that it had failed to do so.*

(4) *If a company or external company fails to respond within 20 business days after receiving a demand under sub-regulation 2 (a) or a request or, in*

⁷ Sub-regulation (4) by obvious import refers.

responding, fails to provide satisfactory additional information required in terms of sub-regulation (3) (b) (i), the Commission may—

(a) issue a Notice of Pending Deregistration in Form CoR 40.4 to the company or external company; and

(b) deregister the company or external company at any time more than 20 business days after delivering the Notice of Pending Deregistration, unless during that time the company or external company has filed its annual return for every year that it had failed to file.

(5) When any company or external company has been deregistered the books and papers of the company or external company may be disposed of in such way as the Commission may direct.

(6) The Commission may re-instate a deregistered company or external company only after it has filed the outstanding annual returns and paid the outstanding prescribed fee in respect thereof.

(7) An application to re-instate a de-registered company or external company must be made in Form CoR 40.5 and must comply with such conditions as the Commission may determine.

(8) A notice by a company to transfer its registration to a jurisdiction outside the Republic, as contemplated in section 82 (5), must be filed in Form CoR 40.2, and must be accompanied by—

(a) a copy of a special resolution approving the transfer of the company's registration to that jurisdiction;

(b) satisfactory evidence that the company satisfies the requirements to register in that jurisdiction; and

(c) The fee set out in Table CR 1.”

(Emphasis added)

[20] Finally the provisions of the relevant Practice Note, which emphasises the conditions which the Commission has indicated would be of application, are set out below:

“GN 1213 of 3 November 2017: Practice Note (8/2017): Requirements for Re-instatement in terms of Regulation 4 (2) (b) (Government Gazette No. 41224)

DEPARTMENT OF TRADE AND INDUSTRY

Note that PRACTICE Notice 6 of 2008 is hereby withdrawn on 1 May 2017 and replace(d) with Practice Note 08 of 2017.⁸

⁸ The earlier Practice Note, which evidently attracted more onerous requirements, provided as follows:

*“In order to re-instate a company or close corporation from **1 November 2012**, the re-instatement application on an original signed form CoR40.5 must comply with the following requirements **regardless** of the cause or date of deregistration—*

- (1) Certified ID copy of the applicant (director/member);*
- (2) Certified ID copy of the customer filing the application;*
- (3) Deed search (reflecting ownership of immovable property or not);*
- (4) Letters from National Treasury and the Department of Public Works, indicating that such departments have no objection to the re-instatement, if it has immovable property;*
- (5) Advertisement in a local newspaper giving 21 days’ notice of proposed application for re-instatement;*
- (6) Affidavit indicating the reasons for the non-filing of annual returns, if deregistration was due to non-compliance in relation to annual returns;*
- (7) Affidavit indicating the reason for the original request for deregistration, if the company or close corporation itself applied for deregistration; and*
- (8) Sufficient **documentary** proof indicating that the company or close corporation was in business or that it had any outstanding assets or liabilities (e.g. property, intellectual property rights) **at the time of deregistration**.*

Upon the successful processing of the re-instatement application, all outstanding annual returns must be filed in order to complete the process. If the close corporation or company fails to file all outstanding annual returns within 30 business days from date of the re-instatement, the company or close corporation will be finally deregistered, without any further notification.

It should be noted that the CIPC will no longer re-instate a company or close corporation solely based on a statement that the company or close corporation is in business or will be in business in the near future. The re-instatement process is reserved for companies and close corporations that can prove that it was in business at the time of deregistration, have outstanding assets and/or liabilities which must be transferred or liquidated.

For purposes of determining whether a company or close corporation is in business, it is sufficient to prove that the company or close corporation has been conducting business related activities at the time of

This practice note is issued in terms of Regulation 4 (2) (b) of the Companies Regulations, 2011, and is applicable to the re-instatement of companies and close corporations in terms of Companies Regulation 40 (6) and (7).

In order to re-instate a company or close corporation from 1 May 2017, the re-instatement application on a form CoR40.5 must comply with the following requirements regardless of the cause or date of deregistration—

- (1) Certified identity copy of the applicant;*
- (2) Certified identity copy of the owner of the customer code;*
- (3) Multiple Deed search (deed search of each of the 10 regional deeds offices);*
- (4) Letter from the Department of Public Works, ONLY if the multiple deed search reflects immovable property;*
- (5) Sufficient **documentary** proof indicating that the company or close corporation was in business or that it had any outstanding assets or liabilities (e.g property, intellectual property rights), **at the time of deregistration**;*
- (6) Mandate from the applicant confirming that the customer may submit on his/her behalf.*

CIPC will only consider re-instating a company or close corporation if it can provide proof that it was conducting business at the time of deregistration, or has any other economic value.

Upon the successful processing of the re-instatement application, all outstanding annual returns must be filed in order to complete the process. If the close corporation or company fails to file all outstanding annual returns within 30 business days from date of the re-instatement, the company or close corporation will be finally deregistered again without any further notification.”

[21] The applicant has confirmed that the close corporation owns no immovable property and that it has not traded since 2017. He cannot ignore that it has liabilities, including a judgment debt owing to Nedbank that was revealed by a director of the third

deregistration, e.g. selling and buying of goods and services, leasing or renting property or equipment, marketing of goods and services, and/or an active bank account.”

respondent's attorneys acting on its behalf in the present application who coincidentally happened to know of it.⁹

[22] The applicant asserts that the close corporation has no assets other than the contingent claim being prosecuted by way of the counterclaim in the action which might provide "*economic value*" for its re-registration so that the applicant can pursue the claim to finality on its behalf. That is however for the Commissioner to decide.

[23] The applicant was evidently in pursuit of the close corporation's interests in the action at the time of its deregistration even if only to dispose of the remaining litigation and for this reason it certainly appears vital that its registration be reinstated.

[24] The only question though is whether an order in final terms should issue on the papers before me as currently framed and whether the CIPC's requirements for reinstatement can be averted given the unique reason for the close corporation's deregistration in the first place. In both *ABSA Bank Limited v Companies and Intellectual Property Commission of South Africa and others*; *ABSA Bank Limited v Voigro Investments 19 CC*¹⁰ and *Nulandis (Pty) Limited v National Minister of Finance and another*¹¹ the respective courts held that where an entity has been deregistered for failing to file its annual returns, the registration thereof can be reinstated only by the Commissioner and only administratively in terms of section 82 (4) of the Companies Act. In *Nulandis* the court found that section 84 (3) does not provide for restoration of a company on the companies' register. It held further that it cannot order the reinstatement of registration where the Commission's requirements have not been met. Section 83 (4) provides a remedy to avoid dissolution at the instance of creditors who hope to avoid dissolution and recover their debts.

⁹ It further has the contingent liability which is the subject matter of the trial action and might have incurred costs in prosecuting its claim since 2014.

¹⁰ [2013] 2 All SA 137 (WCC).

¹¹ [2013] JOL 30396 (KZP).

[25] In this instance the applicant appears to have conflated the two remedies.

[26] He acknowledged however that he will be obliged to attend to the outstanding annual returns and pay whatever is due by way of prescribed fees, suggesting that he is inclined to go along with what the Commissioner will expect the close corporation to do if he wishes it to be reinstated on the CIPC's register.

[27] It is not open to this court to give the applicant a pass from following the administrative processes that are applicable. Even if I were inclined to issue a declarator that he is on the right track however, reinstatement will not come in time to promote a continuation of the trial in the short term. As commendable as it is for the parties to make the best use of Gwala AJ's availability to conclude the trial in the forthcoming week, I do not believe that it is possible for the procedure to be fast tracked to meet that exigency at the expense of the applicant first addressing the CIPC's administrative requirements for its standards of record keeping.

[28] In conclusion I am unable to come to the applicant's assistance on the basis requested.

[29] Further, I am inclined to uphold the argument advanced on behalf of the third respondent that the launching of the present application on an urgent basis with extremely truncated time limits was self-serving to the applicant and ill conceived. I agree that no case was made out that he would not have been afforded substantial redress in due course, a fundamental requirement for urgency. The issues between the parties arising from the late realisation as to the defunct status of the close corporation should have been worked out consensually in the trial court or ruled upon by the presiding judge. As advised to the parties when the matter was argued before me, I felt extremely uncomfortable by hearing argument in an urgent application literally next door to my colleague in respect of issues that should have been ruled upon by him.

[30] I need go no further than that in justifying my order to dismiss the application with a costs order to follow that result.

[31] In conclusion I issue the following order:

1. The application is dismissed.
2. The applicant is liable for the costs of the application.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 12 April 2024
DATE OF JUDGMENT : 15 April 2024

Appearances:

For the applicants: Mr. S Cole instructed by Vaughn Holmes & Associates, East London (ref. Mr. Armstrong).

For the first, second, fourth and fifth respondents: Mr. N Schultz instructed by Bate Chubb & Dickson, East London (ref. Ms Kopke)