DLA CLIFFE DEKKER HOFMEYR

CORPORATE AND COMMERCIAL ALERT

27 November 2013

THE CONSEQUENCES OF RE-REGISTRATION OF DEREGISTERED COMPANIES: LATEST INSTALMENTS IN THE ON-GOING DEBATE

An important issue that has been a source of much debate since the Companies Act, No 71 of 2008 (Companies Act) came into force on 1 May 2011 involves the consequences of re-registering a deregistered company or close corporation (CC). A company or CC may be deregistered by the Companies and Intellectual Property Commission (CIPC) if it failed to timeously lodge its annual returns with the CIPC or if it has been inactive for a number of years (s82). When a company or CC is deregistered, it ceases to exist as a separate juristic person and its assets and rights vest automatically in the State as *bona vacantia*. There are of course ways of procuring re-registration, whether by application to the CIPC or to the high court (s82(4) and s83). The question then is, what are the consequences of re-registration, having regard to the fact that upon deregistration the company's assets had become *bona vacantia*?

The previous Companies Act, No 61 of 1973 and the Close Corporations Act, No 69 of 1984 (CC Act) (prior to its amendment by the new Companies Act) contained provisions that were clear(er) that the reinstatement of companies and CCs was fully retrospective, and the effect was as if the entity was not deregistered in the first place. The new Companies Act however does not contain a similar express provision, and this remains a major bone of contention more than two and half years into the new Act, and has been addressed in perhaps a dozen cases with varying and conflicting views in various provincial divisions. Two of the latest instalments in this string of cases are the Supreme Court of Appeal (SCA) case of *CA Focus CC v Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA) (27 September 2013) and the Western Cape High Court case of *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* (21325/11) [2013] ZAWCHC 156 (22 October 2013).

IN THIS ISSUE

The position prior to the new Act: *Kadoma and CA Focus*

First some background on the position under the previous Companies Act regarding deregistration and re-registration. Two cases decided this year (but still applying the previous regime, as the matters arose back then) sum up the position:

In *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA) (28 March 2013) the Supreme Court of Appeal (SCA) pronounced upon the effect of the (now amended) provisions of s26(7) of the CC Act. S26 regulates the deregistration of CCs (it was amended by the new Companies Act and now cross-refers to the latter with respect to deregistration). In particular, s26(7) included a so-called 'deeming provision', which stipulated that where a CC had been deregistered and was thereafter re-registered, it was deemed to have existed as a legal entity from the date of deregistration as if it had not been deregistered. The same regime applied to companies (s73 of the Companies Act, 1973).

continued

In *Kadoma*, the parties had concluded two agreements: a sale agreement and a franchise agreement in terms of which the appellant acquired the respondent's business. Having paid the initial purchase consideration, the appellant became dissatisfied with the acquisition (for reasons that are not relevant for present purposes). The appellant then discovered that at the time that the parties had concluded the agreements, the respondent was deregistered. Before the SCA the nub of the dispute turned on the following legal question: whether agreements concluded with a CC are void if at the time they were concluded the CC was deregistered, but is thereafter restored?

In determining the proper approach to s26(7) of the CC Act the SCA referred to the provisions of s73(6)(a) and s73(6A) of the Companies Act, 1973, from which s26(7) of the CC Act originated, and cases dealing with the approach to these sections. The SCA noted that in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) it had held (in the context of the foregoing provisions of the previous Companies Act) that *"…a restoration order seems to validate, retrospectively, all acts done since deregistration – including for example, the institution of legal proceedings – on behalf of a company that did not exist"*. The SCA held that there was no reason for it to depart from this reasoning in the context of the CC Act and, accordingly, confirmed that acts taken by a corporation performed 'in good faith' during its period of deregistration are saved from invalidity by s26(7) of the CC Act where it is subsequently restored.

The same line of reasoning was accepted and adopted by the SCA six months later in *CA Focus*, but the following remark at the end of the judgement is significant (although not binding as it is merely *obiter*):

"In conclusion it is interesting to note that ss26(7) of the Act and 73(6) of the 1973 Companies Act were repealed by s224 of the Companies Act 71 of 2008, which came into operation on 1 May 2011. 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."

Here, the court in *CA Focus* was alluding to its concern that, despite its obvious merits and practical utility, automatic retrospective reinstatement could, in a given set of circumstances, bring about its own potential difficulties and inequities for other parties.

The latest on the 2008 Act: *Peninsula Eye Clinic*

A month after *CA Focus*, the Cape Town High Court in *Peninsula Eye Clinic* had to address the question head-on under the new Companies Act, as the case concerned whether an arbitration award, granted against a company that was at the time deregistered (under the processes of the new Act), was retroactively resuscitated upon re-registration of the company. After a lengthy and reasoned analysis, the following conclusions were reached:

- Where a company is re-registered on application to the CIPC (which is permissible in instances where the CIPC initially deregistered the company due to failure to lodge annual returns or inactivity), such reinstatement has the effect that the assets of the company retrospectively re-vest in the company (this is a significant statement), but corporate activity by the company (eg entering into transactions) during the time that it was deregistered is not validated upon re-registration;

- Application may however be made to the high court under s83 of the Companies Act for any 'just and equitable order' in relation to the reinstatement of the company, and given that this wording is very wide in its ambit, an order granting more extensive retrospective validation is available provided that the applicant can motivate same. The court's judicial oversight in this regard will serve to balance the interests of the company and third parties. Interested and affected third parties should have a right to be heard these matters;

- The ability of a party to make an application to the high court is not precluded by the fact that the company has already been reinstated by the CIPC; and

- The liabilities of a company do not cease to exist upon its deregistration and may continue to be enforced against the company after its re-registration.

The court in *Peninsula Eye Clinic* in effect struck a balance between the concerns and interests of the company (and its stakeholders) and third parties in circumstances where a deregistered company is re-registered. This then is the latest pronouncement on this issue by our courts and it remains interesting to see whether, and to what extent, future cases in other divisions of the high court will agree with the reasoning in *Peninsula Eye Clinic*.

Justine Krige and Yaniv Kleitman

CALLING UP OF BANK GUARANTEES IN TRANCHES

There are a number of ways in which a party to a commercial agreement can secure the counterparty's contractual obligations. Security can take the form of suretyships, guarantees, pledges and cessions in security, amongst others. Bank guarantees feature regularly, and are very often perceived as 'standard' or 'template' documents in respect of which little if any negotiation is encountered insofar as legal drafting is concerned. However, the recent Supreme Court of Appeal (SCA) judgement of *Nedbank v Procprops* (108/13) [2013] ZASCA 153 (20 November 2013) brings to the fore some critical considerations to be borne in mind when parties are agreeing to the form of a bank guarantee in the context of agreements that involve multiple/on-going payments.

The case dealt with the question of whether a bank guarantee could be enforced by the beneficiary of the guarantee in a series of demands or tranches. The facts were as follows: Procprops leased premises to Top CD. The lease entitled Procprops to a guarantee for the rental. Top CD arranged a bank guarantee from Nedbank. The guarantee read:

"At the instance of the lessee we…hold at the landlord's disposal and undertake to pay to the landlord an amount not exceeding R313 845,53… subject to the terms and conditions stated below…
Payment shall be made upon receipt by the bank… of the landlord's first written demand, which written demand shall be accompanied by this original guarantee and which will state that the lessee had failed to comply with its obligations in respect of the lease and that, accordingly, the amount of R313 845,53, or any lesser portion thereof, is now due and payable"

Top CD paid rental in terms of the lease up to 1 December 2010 but vacated the premises during December 2010 and made no further payment of rental. Procprops demanded payment of the amount of some R72 000 from Nedbank in terms of the guarantee. In this letter of demand it was stated that Top CD had failed to comply with the lease and that accordingly the said amount was due and payable. This amount represented only the rental payable on 1 January 2011. The letter was accompanied by the original guarantee and concluded as follows: "*Could you also please consider the fact that this letter calls upon you to perform only partially in terms of the guarantee and accordingly our client's rights in respect thereof are not extinguished. Could you please in view thereof return the original guarantee…*" Nedbank duly paid the amount.

Procprops sent a further letter of demand to Nedbank. In this letter, payment in terms of the guarantee of a further amount of R72 000 was demanded. Without having received any response from Nedbank, Procprops demanded payment of yet further amounts. Nedbank then responded that it had duly performed under the guarantee, accepted the return of the original thereof and that the guarantee had been cancelled as a result.

The court made the following points:

- The bank guarantee established a contractual obligation on the part of Nedbank to pay to Procprops which is wholly independent of the underlying lease between Procprops and Top CD. Disputes arising between Nedbank's customer (Top CD) and Procprops in relation to the lease, did not detract from Nedbank's obligation to make payment to Procprops provided only that the conditions for payment specified in the guarantee were met.
- These conditions were the receipt by Nedbank of a written demand with the contents set out in the guarantee.
- If these documents were presented, Nedbank could escape liability only upon proof of fraud on the part of Procprops.
- The central issue then is whether on a proper interpretation of the guarantee it provided for more than one payment by Nedbank.
- The provision that the demand must be accompanied by the original guarantee strongly indicated that only one payment was envisaged.
- The purpose of the provision must therefore have been for Procprops to give up the security of the guarantee to ensure that it could not be presented for payment again.
- In addition, a meaning must be ascribed to the phrase 'first demand' which is used in the guarantee. In the court's view, the phrase excluded further demands.

continued

- Procprops attempted to rely on the last part of its letter of demand, namely the request by Procprops that after payment of the first demand Nedbank should return the guarantee to enable Procprops to call on the guarantee should it become necessary in future. The argument was that both Procprops and Nedbank understood the guarantee in this manner and that it should therefore be given this meaning. This argument was rejected by the court as evidence of subsequent conduct of parties to an agreement is only admissible when the document is ambiguous on the face of it. Here, the guarantee was clear and unambiguous.

In the context of agreements that involve on-going payments (such as leases), careful consideration must be given to the wording of the guarantee and whether it is capable of being drawn down in tranches. Alternatively, the agreement between the creditor and debtor can be drafted such that the creditor may present the guarantee for payment in its entirety and then hold any balance as a cash deposit. The requisite cash deposit clauses should then be included in the agreement.

Yaniv Kleitman

EXCLUSIVE JURISDICTION CLAUSES NOT AS 'EXCLUSIVE' AS ONE MIGHT THINK

Africa's rise as an investment destination has meant that parties investing in Africa through joint ventures or partnerships with local entities will often seek to include clauses in the commercial contracts that govern their investments to expressly provide that disputes concerning their investments are to be settled exclusively in the United Kingdom, or South Africa.

In this regard, it is common that contracting parties will agree on the jurisdiction of courts and the applicable law of a third party country, rather than the country in which either or both of the parties is domiciled or where the contract is performed. For example, one may have a South African registered company concluding an agreement with a company based in Europe and agree that any disputes arising from the agreement fall to be adjudicated upon in London exclusively.

The recent decision of the South African Supreme Court of Appeal (SCA) in the case of *Foize Africa (Pty) Ltd v Foize Beheer BV & Others*[1] has, however, confirmed that although parties can agree on the jurisdiction of a particular country and applicable law which they wish to govern the agreement 'exclusively', the South African courts still retain a discretion to exercise, or refrain from exercising, jurisdiction over a particular matter based on certain considerations – and where there is some jurisdictional link to the South African courts.

In *Foize Africa* the Supreme Court of Appeal (SCA) expressly confirmed that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. In this regard the SCA held as follows:

[21] *"It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called upon to exercise its discretion as to whether or not to enforce the clause in question…"*[2] [Underlining added; internal citations omitted].

Although the court ruled that although no hard and fast rule can be laid down as to whether a court should exercise its discretion to enforce a foreign jurisdiction or arbitration clause, and furthermore, that each case will depend on its own particular facts and circumstances as well as the stage at which and manner in which the enforcement of the clause in question is raised, the court did provide a list of factors that can be considered.

In listing the factors to be considered, the court referred to the English decision of *The Eleftheria:*[3]

- In which country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the local and foreign courts;
- Whether the law of the foreign court applies and, if so, whether it differs from local law in material respects;
- With which country either party is connected, and how closely;

continued

[1] 2013 (3) SA 91 (SCA) [2] Ibid, at 21F-H [3] [1970] P 94 (English High Court)

- Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;

- Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived or security for that claim, be unable to enforce any judgement obtained, be faced with a time-bar not applicable (locally), or for political, racial, religious or other reasons be unlikely to get a fair trial.

Parties must therefore be aware that irrespective of what is agreed upon between them and recorded in an agreement as regards to the jurisdiction of courts and applicable law, where there is a jurisdictional link to South Africa, the South African courts have the ultimate say over whether an 'exclusive' jurisdiction clause really is exclusive as it was originally intended by the parties.

Justine Krige

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Corporate and Commercial practice and services, please contact:

Willem Jacobs
National Practice Head
Director
Corporate and Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@dlacdh.com

David Thompson
Cape Town Regional Practice Head
Director
Corporate and Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@dlacdh.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@dlacdh.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@dlacdh.com

Cézanne Britain-Renecke
Director
T +27 (0)21 481 6333
M +27 (0)82 674 1302
E cezanne.britain-renecke@dlacdh.com

Michael Bromley
Director
T +27 (0)21 405 6021
M +27 (0)82 826 3493
E michael.bromley@dlacdh.com

Andrew Curnow
Director
T +27 (0)11 562 1230
M +27 (0)83 728 7215
E andrew.curnow@dlacdh.com

André de Lange
Director
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@dlacdh.com

Chris Ewing
Director
T +27 (0)11 562 1158
M +27 (0)83 325 0588
E chris.ewing@dlacdh.com

Lilia Franca
Director
T +27 (0)11 562 1148
M +27 (0)82 564 1407
E lilia.franca@dlacdh.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@dlacdh.com

Allan Hannie
Director
T +27 (0)21 405 6010
M +27 (0)82 373 2895
E allan.hannie@dlacdh.com

Peter Hesseling
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesseling@dlacdh.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@dlacdh.com

Roelf Horn
Director
T +27 (0)21 405 6036
M +27 (0)82 458 3293
E roelf.horn@dlacdh.com

Johan Latsky
Director
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@dlacdh.com

Banzi Malinga
Director
T +27 (0)11 562 1100
M +27 (0)82 469 5758
E banzi.malinga@dlacdh.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@dlacdh.com

Matshipi Mongoai
Director
T +27 (0)11 562 1171
M +27 (0)83 601 7414
E matshipi.mongoai@dlacdh.com

Anita Moolman
Director
T +27 (0)21 405 6122
M +27 (0)72 252 1079
E anita.moolman@dlacdh.com

Jo Neser
Director
T +27 (0)21 481 6329
M +27 (0)82 577 3199
E jo.neser@dlacdh.com

Francis Newham
Director
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@dlacdh.com

Gasant Orrie
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@dlacdh.com

Verushca Pillay
Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@dlacdh.com

David Pinnock
Director
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@dlacdh.com

Peter Prinsloo
Director
T +27 (0)11 562 1212
M +27 (0)82 739 6284
E peter.prinsloo@dlacdh.com

Allan Reid
Director
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@dlacdh.com

Thina Siwendu
Director
T +27 (0)11 562 1326
M +27 (0)83 345 6679
E thina.siwendu@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
M +27 (0)72 190 9071
E ben.strauss@dlacdh.com

Roux van der Merwe
Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@dlacdh.com

Charl Williams
Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com

Cliffe Dekker Hofmeyr's Corporate and Commercial practice supports **Movember**

Cliffe Dekker Hofmeyr is a member of DLA Piper Group,
an alliance of legal practices