REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2012/24467

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

8 OCTOBER 2012 **FHD VAN OOSTEN**

In the matter between

FINTECH (PTY) LTD	**APPLICANT**
and	
AWAKE SOLUTIONS (PTY) LTD	**FIRST RESPONDENT**
ALAN LAWRENCE WALKER	**SECOND RESPONDENT**
CHOICE DECISIONS 162 (PTY) LTD	**THIRD RESPONDENT**
ALTRON ONE FINANCE SOLUTIONS (PTY) LTD	**FOURTH RESPONDENT**
PETER CHARLES BOTHOMLEY NO	**FIFTH RESPONDENT**
ENVER MOHAMMED MOTALA NO	**SIXTH RESPONDENT**

Insolvency – Company - deregistration of in terms of Companies Act 61 of 1973 due to non-payment of annual returns as required in section 173 - effect of - "cancellation" of deregistration by the Companies and Intellectual Property Commission - meaning and effect of.

Companies - Companies Act 71 of 2008 - re-instatement of deregistered company in terms of section 82(4) read with regulation 40(6) and (7) of the Companies Regulations, 2011 - although no provision in 2008 Act for application to Court in regard to the status of the effected company during period of deregistration Court retaining its inherent jurisdiction on application or otherwise, to validate anything done by or against the effected company, between deregistration and its re-instatement and to make such order it considers appropriate - declarator issued validating all acts done by or against the effected company from the date of its de-registration until the date of its re-instatement.

J U D G M E N T

VAN OOSTEN J:

[1] The company known as Awake Solutions (Pty) Ltd, the first respondent in this application (Awake), as a consequence of its failure to file annual financial returns was deregistered in terms of the Companies Act 61 of 1973 (the 1973 Act) by the then Registrar of Companies, commencing from 1 March 2008 and finally from 16 July 2010. On 17 April 2012 the deregistration of Awake was "cancelled" by the Companies and Intellectual Property Commission (the Commission) under the provisions of the Companies Act 71 of 2008 (the 2008 Act). This application in essence concerns the validity and effect of certain actions taken by or against Awake during the period of its deregistration.

[2] The application is a voluminous one. Nevertheless, the events having occurred during the period of Awake's deregistration, that are relevant for purposes of this application, may be briefly stated. They are the following: on 4 April 2008 Awake was placed in provisional liquidation by an order of this Court, with return date 30 June 2008. The rule, in the absence of reliable evidence whether it was confirmed,[1] it must be accepted, has lapsed. On 6 July 2009 the fifth and sixth respondents were appointed by the Master as the joint provisional liquidators of Awake. They are joined as interested parties to the application and do not oppose this application. During 2010 the second respondent (Walker) applied for and successfully on 26 October 2012 obtained an order (*per* Makume J) in terms of which the provisional winding up order of 4 April 2008 was

[1] There is no record at the Registrar's office of such an order.

set aside and wake was consequently discharged from liquidation. Walker was, and still is, the sole shareholder in and director of Awake. He is also the sole shareholder in and director of the third respondent (Choice).

[3] The essence of the applicant's claim concerns an agreement styled Co-operation Agreement, entered into between the fourth respondent (then known as Corporate Finance Solutions (Pty) Ltd) (Altron) and Awake (then known as Alan Walker & Associates) on 4 March 2002 (the co-operation agreement). It provides for a facility component and a profit-sharing component. In terms of the facility component clients of Awake would be referred to Altron for purposes of financing certain safety equipment supplied by Awake. The profit-sharing component regulated the sharing of profits made by Altron between the parties. On 13 February 2004 Altron, in terms of a written agreement of sale and assignment, assigned all its rights and obligations under certain agreements, including the co-operation agreement, to the applicant (Fintech). No relief is sought in this application against Altron and it has not entered the fray.

[4] During March 2011 Awake launched an application in this court against Altron, as first respondent, and Fintech, as second respondent, in which it seeks an order *inter alia* for payment of the amounts of R72 310-20, allegedly being the profit share payable to Awake, and R437 622-60, allegedly being interest payable to Awake, both arising from the co-operation agreement (the Awake application). A further order is sought for the furnishing of certain information arising from "a joint venture agreement" (*ie* the co-operation agreement). Fintech noted its opposition to the application and filed an answering affidavit. On 12 May 2011 a meeting took place between Fintech, Awake and their respective attorneys. At the meeting Pieterse, on behalf of Fintech, agreed to pay to Awake the amount of R72 310-20 claimed in respect of profit sharing and an amount of R251 920-31 towards the interest claimed. Both these amounts were duly paid on 17 May 2011. I interpose at this juncture to refer to one further payment made by Fintech to Awake which is relevant to this application: on 17 December 2010 Fintech paid to Awake the sum of R 1 186 196-39 being Awake's share in profit sharing pursuant to the co-operation agreement. The total of the three amounts thus paid to Awake is R1 510 426-90.

[5] During August 2011 Awake, in the Awake application, filed a notice of amendment in which it sought to substitute the prayers in the notice of motion with new prayers now seeking payment of the amounts of R72 310-20, together with interest, and R251 920-20 together with interest, as well as an order for the furnishing of certain itemised information. The amendment was opposed and came up for hearing before Maluleke J who, on 21 October 2011, granted an order in terms of which firstly, two points that were argued *in limine* were dismissed, secondly, it was noted that Awake's claims for payment had been settled by the parties, thirdly, Fintech and Altron were ordered to furnish certain information to Awake, and fourthly, Fintech and Altron were ordered to pay the costs of the application on the opposed scale.

[6] Against this background Fintech in this application seeks an order, in summary, firstly, nullifying alternatively setting aside both the orders of Makume J and Maluleke J, secondly, for payment by Walker of Fintech's costs of opposing the Awake application, on the scale as between attorney and own client, thirdly, for payment by Awake, Walker and Choice, jointly and severally, of the amount of R1 764 641-34, together with interest thereon and, finally, that the costs of this application, on the attorney and client scale, be paid by Walker.

[7] Before proceeding any further it is necessary to comment on prayers 7.4 to 7.12 of the notice of motion in which Fintech claims interest on various amounts from different dates to date of final payment. In the preparation of this judgment I was unable to find in the affidavits filed in this application a reference to any of these amounts, or the basis for claiming interest on those amounts. I accordingly directed a request to the parties to furnish supplementary heads of argument on this and other related matters. In response to my request both counsel, who had appeared at the hearing of the matter, filed supplementary heads of argument. Concerning this issue counsel for the applicants conceded that the affidavits in this application fall short of dealing with either the payments or the interest claimed. Counsel however submitted that those amounts were in fact paid to Awake which he extracted by way of some crafty arithmetic applied in regard to the total amount claimed, which as I have already mentioned, is R1 764 641-34, in contrast to the total amount of R1 510 426-90 which is referred to above. The submission is untenable. The applicant was required to establish its case in

the founding papers which, concerning these amounts and the interest, it has simply failed to do. It is not for the court to conduct a search for particulars and factual allegations that are necessary to sustain a cause of action. For this reason alone, the relief sought in prayers 7.4 to 7.12 falls to be dismissed.

[8] This brings me to the real issue between the parties, which concerns the status of Awake in the period from its deregistration to the cancellation thereof. The sole premise for the applicant's claims in this application is that Awake was not a legal *persona* in that period with the result firstly, that it could not have acted as it ostensibly did in the litigation I have referred to, and secondly, that the applicant's payments to Awake were made to a non-existing entity in the *bona fide* and reasonable belief that the entity in fact did exist.

[9] The cancellation of the deregistration of Awake appears from a so-called "Windeed' Company Report issued by the Commission which is freely available on and was downloaded from the Commission's internet website. The report reflects the particulars and history of Awake since its incorporation. Of relevance for present purposes is the entry under the heading "History", next to the date 2012/04/17, which reads "Cancellation of Deregistration Process. (No information to display)". In argument before me I raised with counsel for the applicant the difficulties arising in regard to firstly, the correctness of, and, secondly, the interpretation to be afforded to the rather cryptic recordal. Counsel however intimated that no further information could be obtained and that the application should proceed on the acceptance of the correctness of the recordal, as it stands. I should add that Walker has annexed to the respondents' answering affidavit a similar form, except that it seems to have been obtained from the companies and intellectual property registration office (CIPRO) website, indicating that the cancellation of Awake's de-registration process occurred on 12 June 2012. The difference in the two documents concerning the date of cancellation of the deregistration process, however, except to serve as an example of how unreliable information downloaded from the internet can be, is of no particular relevance to the issues in the present matter and I accordingly refrain from commenting any further on it.

[10] The documents pertaining to the application for the re-registration of Awake by Walker are not before me. In the answering affidavit of Walker, on behalf of the first second and third respondents, he mentions the application "to have the deregistration cancelled" he had made to the Commission upon learning of the deregistration of Awake. This prompted the applicant to serve on the respondents a notice in terms of rule 35 (12) requiring the production of *inter alia* the documents pertaining to that application. I was informed from the bar that there was neither a response to the notice nor did the applicant take any steps to enforce compliance therewith.

[11] On the terse information available concerning the deregistration process of Awake it is at the outset necessary to attribute a meaning to the words "cancellation of deregistration process". It is common cause that the re-instatement of Awake was effected under the 2008 Act. The only pertinent section of the 2008 Act, in this regard, is s 82 (4)[2] read with reg 40 (6) of the Companies Regulations, 2011 which provide for *re-instatement* of registration by the commission. In the present matter however, the deregistration process of Awake was *cancelled*. The question arising is whether there is any difference in meaning between the two concepts. In my view there is this difference: the cancellation of the process connotes an elimination of the entire process, including the initial deregistration, as if it had never occurred, whereas re-instatement implies putting it back in its former position, prior to deregistration. On this construction I am driven to conclude that by the cancellation of the deregistration process Awake, at all times, remained a corporate entity which of course decides the fate of the application.

[12] Should I however be wrong in my interpretation as set out above, I consider it necessary to decide the issue on the assumption that Awake was re-instated as provided for in the 2008 Act. In the discussion that follows I derived considerable assistance and direction from the judgment of Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and others* 2012 (4) SA 484 (WCC) ([2012] 3 ALL SA 183 (WCC) and the cases therein referred to. The learned Judge in the course of his judgment very comprehensively explored the provisions relating to de-

[2] The section provides as follows: "If the Commission deregisters a company as contemplated in sub-section (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company."

registration (as a consequence of a failure to file an annual return) and re-instatement of a company, as provided for in both the 1973 Act and its successor, the 2008 Act, which came into operation on 1 May 2011. In the present matter Awake was deregistered in terms of the 1973 Act, as a consequence of its failure to file an annual return, as required in terms of s 173 of that Act. It is by now settled law that deregistration puts an end to the existence of the company (see *Miller and others v Nafcoc Investment Holding Co Ltd and others* 2010 (6) SA 390 (SCA para 11; *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) 549C).[3]

[13] The re-instatement of registration of a deregistered company in terms of the 2008 Act follows upon an application therefore in terms of s 82 (4), read with reg 40 (6) and (7), and only after the filing of outstanding annual returns and payment of outstanding prescribed fees in respect of the deregistered company. The Act however does not expressly provide for retrospectivity in regard to re-instatement. I am in respectful agreement with the *prima facie* view expressed by Binns-Ward J in *Peninsula* (para 21) that the word "re-instate" as used in s 82 (4), implies that the restoration to the register is meant to be with retrospective effect. In the view I take of this matter I do not consider it necessary to decide whether retrospectivity follows *ipso facto* upon re-instatement, a question that was left open in *Peninsula.* The 1973 Act did however expressly provide for retrospectivity. Section 73 (6) provided as follows:

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

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

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[3] In terms of s 83 (1) of the 2008 Act a company "is dissolved" as of the date its name is removed from the company's register.

The section[4] has been repealed in the 2008 Act and no provision in the 2008 Act exists for an application to court or for the court to order restoration of a deregistered company.[5]

[14] The practical need to provide for the retrospective consequences of a re-instatement of a deregistered company is patently clear from the facts of this matter. Awake in the time it was deregistered, as I have alluded to, in all respects carried on business and was in operation as before, as if it was clothed with corporate personality. The payments made to Awake, that the applicant now seeks to revoke, were all made in respect of an admitted liability. The litigation involving Awake, I have referred to, was properly conducted. Counsel for the applicant contended that Awake was enriched by the payments made to it and sought to place reliance on the *condictio indebiti* the principles of which he submitted should be extended to include factual situations analogous to the present matter. Such reliance, in my view, is misplaced. This is not a case of payment made resulting from an *error in persona*. The position of a deregistered company is unique: although it is regarded as having come to an end, it, unlike human beings, is amenable to resurrection.[6] The principles of the *condictio indebiti* accordingly do not apply as there has not been enrichment. The applicant, in my view, should moreover not benefit solely from a procedural fiction, having resulted from deregistration. Once the deregistration came to the knowledge of Walker immediate steps were taken to effect Awake's re-instatement and all statutory requirements were complied with. The re-instatement of the registration was successful. I can see no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the 2008 Act,[7] on application or otherwise, to validate anything done by or against the effected company, between deregistration and its re-instatement and to make such order it considers appropriate.

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[4] As well as s 73(6A) of the 1973 Act which provided for the restoration of the registration of a deregistered company by the Registrar and contains a similar deeming provision that upon such restoration the "company shall be deemed to have continued in existence as if it had not been registered".
[5] Similar deeming provisions exist in the Australian Corporations Act 50 of 2001 and, in the United Kingdom, in terms of the UK Companies Act of 2006, as to which see *Peninsula* footnote 30.
[6] See *Peninsula* para 5.
[7] Section 83 (4) of the 2008 Act provides that a liquidator of a dissolved company, or any other person with an interest in the company, may apply to court for an order declaring the dissolution to have been void.

[15] I am mindful of the absence of a counter application by the respondents for declaratory relief concerning the deregistration status of Awake. All the aspects I have referred to have fully been dealt with both in the application and in argument. I am accordingly satisfied that the issue has been properly ventilated and that a declarator, in the terms I propose to order, is appropriate.

[16] In the result I make the following order:

1. The application is dismissed with costs, including the costs pertaining to the supplementary heads of argument filed by counsel for the first, second and third respondents.
2. It is declared that all acts done by or against Awake Solutions (Pty) Ltd from the date of its de-registration until the date of its re-instatement were validly done and that those acts are of full force and effect.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV JH DREYER SC***
APPLICANT'S ATTORNEYS	***JAY MOTHOBI INC***
COUNSEL FOR FIRST SECOND AND THIRD RESPONDENTS	***ADV W BEYTEL***
FIRST SECOND AND THIRD RESPONDENTS' ATTORNEYS	***HENNIE KOTZE ATTORNEY***
DATE OF HEARING	***12 SEPTEMBER 2012***
DATE OF JUDGMENT	***8 OCTOBER 2012***