Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

[Reportable]

CASE NO: 8250/12

In the matter between:

ABSA BANK LIMITED	**Applicant**
And	
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA	**First Respondent**
	Second Respondent
THE MINISTER OF TRADE AND INDUSTRY N.O.	**Third Respondent**
THE MINISTER OF FINANCE N.O.	**Fourth Respondent**
THE MINISTER OF PUBLIC WORKS N.O.	**Fifth Respondent**
THE REGISTRAR OF DEEDS, CAPE TOWN	**Sixth Respondent**
THE SHERIFF OF THE MAGISTRATE'S COURT, KNYSNA	**Seventh Respondent**
ANDREW JOHNSTONE	**Eighth Respondent**
THE KNYSNA MUNICIPALITY	**Ninth Respondent**
NIKKEL TRADING (PTY) LTD	

AND

CASE NO: 6601/2012

In the matter between:

ABSA BANK LIMITED **Applicant**

And

VOIGRO INVESTMENTS 19 CC **Respondent**
(Registration no 2004/055360/23)

JUDGMENT DELIVERED ON 14 NOVEMBER 2012

HENNEY, J:

Introduction

[1] This is an application under Case No. 8250/12 for the reinstatement of a close corporation known as Voigro Investments 19 CC with registration number 2004/055360/23 ("the close corporation") in terms of section 83(4)(a) of the Companies Act, no 71 of 2008, read with section 26 of the Close Corporations Act, no 69 of 1984.

[2] The Applicant further seeks that it be declared that upon re-instatement of the close corporation;

2.1 the assets of the close corporation are no longer bona vacantia;

2.2 the assets of the close corporation will vest in the close corporation with retrospective effect;

2.3 all liabilities of the close corporation continue and may be enforced as against the close corporation.

[3] The Applicant seeks alternative relief that;

3.1 the Applicant be declared the rightful owner of certain immovable property known as Erf 506 Knysna, in the Municipality and District of Knysna;

3.2 the Registrar of Deeds, Cape Town, be authorised and ordered to register the immovable property into the Applicant's name;

3.3 the execution sale on 14 October 2011 by the Sheriff of Knysna to Nikkel Trading (Pty) Ltd of the immovable property be declared null and void ab initio.

This application is unopposed.

[4] Should this application be successful the Applicant in a related matter seeks an additional order for the liquidation of the close corporation under Case No: 6601/2012.

[5] The Respondents

[5.1] First and Second Respondents are cited herein as the entities commissioned with the functioning and administration of the Companies Office.

[5.2] Third and Fourth Respondents are cited herein in their capacities as the governmental departments commissioned with and responsible for all governmental financial issues and the asset management of the Republic of South Africa. It is necessary to cite these parties because ancillary relief is sought that it be declared that the assets of the Close Corporation would no longer *bona vacantia*, upon reinstatement, which relates to financial and asset management issues of the Republic of South Africa.

[5.3] Fifth Respondent is cited herein by virtue of the provisions of section 97(1) of the Deeds Registries Act 47 of 1937.

[5.4] Sixth Respondent is cited herein in his capacity as the seller of the close corporation's immovable property pursuant to a sale in execution as more fully set out hereunder.

[5.5] Seventh Respondent is ANDREW JOHNSTONE, a major male with identity number 6204265182081, whose full and further particulars are to Applicant unknown, of last known address at 71 Lower Duthi Drive, Belvedere Estate, Knysna.

[5.6] Seventh Respondent is cited in his capacity as former active member of the close corporation and for any interest he might have in these proceedings. I annex hereto a CIPRO search printout dated 23 April 2012 marked "A".

[5.7] Eighth Respondent is THE KNYSNA MUNICIPALITY, a duly established municipality as described in section 2 in terms of the Local Government: Municipal Systems Act no 32 of 2000, of Clyde Street, Knysna.

[5.8] Ninth Respondent is NIKKEL TRADING (PTY) LTD, a duly registered private company according to the laws of the Republic of South Africa, with its registered address at Misty Mountains, Sinksa Bridge, Goedehoop, George, c/o Goussard Attorneys, 33 Victoria Street, George.

[6] The Facts and events underpinning this application

Absa Bank on 12 April 2006 advanced a loan in the amount of R2 880 737,45 to Voigro Investments 19 CC ("Voigro Investments"). This mortgage loan was secured by a mortgage bond B35046/2006 ("mortgage bond") in favour of Absa Bank for the amount of R2 250 000,00 over the Close Corporation's immovable property in Knysna. Voigro Investments defaulted in their loan repayments. As a result of this the full balance of the outstanding amount due by Voigro Investments in terms of the agreement became due and payable.

[7] On 7 November 2011, Absa obtained a judgment by default against Voigro Investments in respect of the mortgage debt for the amount of R1 517 122,09 together with interest of 8,5% p.a (calculated and capitalised monthly) from 18 March 2010 to the date of payment. The property was also declared executable, and on 13 December 2011, the Applicant caused the property to be attached in execution.

[8] The property was Absa's only security in respect of its claim against the Close Corporation.

[9] Subsequent to the granting of Default Judgment in its favour, the Applicant obtained knowledge of events which had occurred prior to the granting of Default Judgment and unbeknownst to it.

[10] On 1 April 2008, the Municipality of Knysna was granted judgment by default for an amount of R11 704,08 plus costs of R641,21 against the Close Corporation. On 1 July 2011 a writ of execution was issued against the immovable property in question. On 26 September 2011 the Sheriff of Knysna informed a representative of the Applicant at its branch in Knysna, Lindie Blaauw, that a Warrant of Execution against the property over which a mortgage bond was granted in its favour was issued on 1 July 2011. Copies of the re-attachment and Notice of Sale in Execution were served on the Knysna branch. On 14 October 2011, the Sheriff in numerous telephone discussions with a Natasha at the Knysna branch of the Applicant as well as a further discussion held earlier on the morning of 14 October 2011, advised the Applicant that it must protect its interest at the sale in execution, that would take place later in the day. The Sheriff also mentioned that documents had been sent through earlier that morning at 06h52. The Applicant explained its failure to protect its interests at the sale of execution as follows. The Applicant contended that its employees at its Knysna Branch who had received the notices and advice from the Sheriff had not been trained in the foreclosure of mortgage bonds and/ or the attachment of immoveable property bonded to the Applicant. As a consequence thereof they were ignorant as to the procedure and consequences of the sale in execution to which they were alerted by the Sheriff.

[11] The Applicant drew attention to the fact that foreclosures are dealt with by a centralized department in Johannesburg. It is the applicant's contention that it "was too late" and the sale in execution had already taken place by the time the conditions of sale and the letter dated 14 October 2011 in which the Sheriff advised of the sale to take place that morning had reached the foreclosures office and it could be processed.

[12] Subsequent to learning of the above, the Applicant launched a winding-up application for Voigro Investment's liquidation on an urgent basis, under case number 6601/12. At such a time the Applicant was in arrears of R924 350,31. A provisional winding-up order was granted on 3 April 2012, with a return date 9 May 2012. However, prior to the return date it was discovered that the Close Corporation had been deregistered for its failure to file its annual returns. This prompted the present application, the stated purpose being to resurrect the corporation and restore the immoveable property thereto. Once this had been done, the winding-up process could be finalized.

[13] <u>The Applicant's Case</u>

As a consequence of the deregistration which occurred prior to the institution of the Application for winding up, Voigro Investments was dissolved and ceased to exist as a corporate entity. The property that belonged to it became bona vacantia and, as such, vested in the state as

represented by the Third and Fourth Respondents.

[14] The sole reason for the deregistration of Voigro Investments was the fact that it had failed to file its annual returns (and to pay the outstanding prescribed fee in respect thereof) as was required in terms of the Companies Act 71 of 2008 as well as the repealed Companies Act 61 of 1973.

[15] Mr Viviers argues that as a consequence of this deregistration process, which is primarily punitive in nature and aimed at enforcing compliance by corporate entities in respect of filing annual returns, ABSA has effectively been denuded of its real right of security against Voigro Investments, to which it was entitled in terms of its mortgage bond.

[16] He therefore argues that the only way to restore the status quo ante would be to obtain the reinstatement of the registration of Voigro Investments so that it could be restored to life. This would have as a result that ownership of the property again vests in the corporation.

[17] The Applicant cannot bring an application for restoration of the registration of the corporation in terms of Section 82(4) of the 2008 Companies Act, due to the fact that it is impossible for the Applicant to comply with the formalities required by this procedure. Section 82(4) requires that any interested person may apply in the prescribed manner and form to the

commissioner for the reinstatement of the registration of a company (or corporation, in the light of Section 26 of the Close Corporations Act, no. 69 of 1984). The Applicant is not able to file the outstanding annual returns as required by Regulation 40(6) of the Companies Regulations published under GNR 351 in GG 34239 dated 26 April 2011.

[18] Regulation 40 which sets out the application process, stipulates that the application must be made by way of submitting Form Co R 40.5. Practice Note 2 of 2011, issued by the Deputy Commissioner of the First Respondent, sets out the requirements for the submission of such a form.

[19] It is required in terms of the Practice Note inter alia that:

a) Certified copies of the identity documents of all the members of the Close Corporation be submitted. The Applicant has no access to this.

b) Letters be submitted from the Treasury and Public Works wherein they declare their non-interest in the immovable property. The Applicant contends that this will cause a delay.

c) An advertisement must be published in a local newspaper giving 21 days clear notice of the application. The Applicant contends that this will cause a further delay and it will stand in the way of the Applicant to

urgently attend to the present situation.

[20] While the Applicant qualifies as an "interested person" who can apply for the restoration, it will never be able to comply with the relevant requirements of restoration. Regulation 40(6) clearly prescribes that the Commissioner may re-instate a deregistered Close Corporation only after it has filed the outstanding annual returns and paid the outstanding fee in respect thereof. The only individuals who can comply with this provision are the Seventh and Eighth Respondents and/or an auditor appointed by them.

[21] Mr Viviers submitted that the only manner in which the Applicant could cause the property to be restored to the ownership of Voigro Investments, so that it can again be subject to the Applicant's mortgage bond, would be by means of an order for the reinstatement of the registration of Voigro Investments in terms of Section 83(4)(a) of the 2008 Companies Act (read with Section 26 of the Close Corporations Act) on the basis that it is just and equitable to grant such an order.

[22] Mr Viviers drew the Court's attention to the following dicta of Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd & Others 2012 (4) SA 484 (WCC) [para 5].*

> *"Furthermore, under the 2008 Companies Act, the reinstatement of the registration' of companies deregistered in terms of s 82(3) of the Act falls exclusively within the*

province of the Companies and Intellectual Property Commission ('the Commission'). There is no provision in the 2008 Act for the restoration of the registration of a company by order, on application to a court".

[23] Mr Viviers submitted that the statement by *Binns-Ward J* quoted above should be seen in the context of the Court's discussion and consideration of the Section 82(4) procedure for administrative restoration of a company (read with Regulation 40(6) and (7) of the 2008 Companies Act).

[24] According to Mr Viviers the Court in the *Peninsula Eye Clinic* matter was not called upon to determine the ambit of Section 83(4)(a) of the 2008 Companies Act, nor the nature of the relief that could be granted in terms of Section 83(4)(a) (or any other order that is just and equitable in the circumstances). In the present matter the Section 82(4) procedure does not find application.

[25] Mr Viviers on behalf of the Applicant pointed out that the type of relief that is sought in this Application could have been obtained in terms of the repealed 1973 Companies Act.

[26] The repealed Section 73(6)(a) and Section 73(6A) of 1973 Companies Act stated that:

"(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.

(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, *on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof".*

[27] He argued that the court may order the restoration of the registration of a Company that had been deregistered in terms of the new Companies Act. He submitted further that Section 82(4) of the 2008 Companies Act is the equivalent of Section 73(6A) of the 1973 Companies Act, and Section 83(4) of the 2008 Companies Act is equivalent to Section 73(6)(a) of the 1973 Companies Act, even though the wording of the subsections in the 2008 Act are different to those of the 1973 Companies Act.

[28] According to Mr Viviers, there is no reason why the legislature could have intended to exclude from a Court the power to restore the registration of

a company (which had been deregistered as a result of its failure to file annual returns), a power that it previously enjoyed in terms of Section 73(6)(a) of the 1973 Companies Act.

Analysis

[29] The relevant provisions of 82(3) are:

> *"(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 ..., or -*
>
> *(i) has failed to file an annual return in terms of section 33 for two or more years in succession."*

[30] Section 82(4) states:

> *"(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".*

[31] Section 83(4) states:

> *"(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".*

[32] In terms of Section 26(1)[1] as amended of the Close Corporations Act. Sections 81(f), 81(3), 82(3) to (4) and 83 of the Companies Act, read together with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of the Act.

[33] In the Peninsula Eye Clinic matter at paragraph 6, the Court held that there is no express provision in the 2008 Act for the restoration of a company that was deregistered in terms of the 1973 Act. The court however was of the view that *"the only manner of giving sensible effect to paragraph (c) of the definition of Company in Section 1 of the 2008 Companies Act, which relates to 'a juristic person that, immediately before the effective date- ...was deregistered in terms of the Companies Act, 1973 (Act 61 of1973), and has subsequently been re-registered in terms of this Act, is to read into s 82(4) of the statute, after the words 'as contemplated in subsection (3)\ the words 'or a company has been deregistered in terms of section 73(5) read with section 73(3) of the Companies Act, 1973 (Act 61 of 1973),'. The result is that a company that has been deregistered in terms of the 1973 Companies Act for failing to file its annual returns may be reinstated on the register by the Commission on application in terms of s 82(4) of the 2008 Companies Act".*

[1] Deregistration. – Sections 81(1)(f), 81(3), 82(3) to (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, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.

I am of the view that the same reasoning applies to the reinstatement of a close corporation.

[34] In my view, if a close corporation has been deregistered for failing to file its annual returns, the registration thereof can be re-instated only by the commissioner and only in terms of Section 82(4) of the Companies Act of 2008. In my view there is no other manner in which reinstatement can occur. No provision is made for the restoration of a deregistered company, or in this case deregistered Close Corporation, by order, on application to a court.

[35] Mr Viviers conceded this but, as previously mentioned, is of the view the *dictum* of *Binns-Ward J* should be seen in this context of the Court's discussion and consideration of Section 82(4) that deals with the administrative restoration of a company (read with regulation 40(6) and (71) of the 2008 Companies Act).

[36] He argued that provision is made for the court to restore the registration of a company, or in this case a Close Corporation, in terms Section 83(4). In relying on the provisions of Section 83(4), Mr Viviers argued that a company (in this case a Close Corporation) is dissolved as of the date its name is removed from the companies (Close Corporations) register. It is immaterial

whether such removal was as a consequence of winding up resulting in its dissolution or as a consequence of failure to fill its annual returns. The effect would be the same.[2] In such a case the liquidator or any person with an interest in the company (Close Corporation) such as the Applicant, may apply to a court to declare the dissolution to have been void, or any order that is just and equitable.

[37] I disagree with Mr Vivier's contention that Section 83(4) of the 2008 Act is equivalent to Section 73(6)(a) of the 1973 Companies Act. In fact the provision of the old Act to which Section 83(4) is most similar is Section 420 which deals with and is applicable to the dissolution of a company following its winding up. Section 420 reads as follows:

> *"**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 might have been taken if the company had not been dissolved."*

[38] It is clear that in this case the court is dealing with a deregistration and not a dissolution. It is trite that there is a difference between dissolution and deregistration. Henochsberg on the 1973 Companies Act (issue 32) at

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[2] 83 (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)

140 Vol 1 states that:

> *"Deregistration in terms of s 73 is to be distinguished from dissolution of a company following its winding-up in terms of s 419 (although each leads to the cessation of the existence of the company as a legal persona (see the Jacobson case supra at 377)) and dissolution by order of the Court in the context of a reconstruction or an amalgamation (as to dissolution following winding-up, see s 419 and the notes thereon; as to dissolution in the context of amalgamation or reconstruction, see s 313(1)(d)). As was pointed out in R Miller v Nafcoc Investment Holding Company Ltd [2010] 4 All SA 44 (SCA) at para 11, the deregistration of a company in winding-up in terms of s 73 is not competent since "the consequence of a winding-up is not deregistration but a dissolution in terms of s 419 of the Companies Act . . . ".*

[39] In *Ex-Parte Jacobson: In re Jacobson Holdings (Pty) Ltd 1984 (2) SA 372 WLD at 375 B – F* the court refers to a decision of *Melamet J* in *ITC 1306, 42 SATC 139* at *145* where it was held:

> *"Dissolution and deregistration, in company law in South Africa, are two different concepts, with different procedures and different results. Deregistration is defined in s 1 of Act 61 of 1973 and the procedure in regard thereto is contained in s 73 of the Act. The various methods of winding-up a company are set out in s 343 of the Act and the result of such a winding-up is dealt with in ss 419 and 420 of the Act. After winding-up, the company's existence is terminated for all purposes, while on deregistration the company ceases to exist as a corporation. Silver Sands Transport (Pty) Ltd v S A Linde (Pty) Ltd1973 (3) SA 548 (W) at 549; Hahlo SA Company Law through the Cases 3rd ed at 143. The position is succinctly summarized by the authors of Cilliers, Benade and De Villiers Company Law 3rd ed as follows at 440: 'Neither winding-up nor dissolution should be confused with deregistration, which is an act which does not affect the existence of the company, but deprives the company of its legal personality, so that it can continue to exist as an association whose members are personally liable for its debts.'*
>
> *At 511:*
>
> *'Should a deregistered "company" nevertheless continue with its business, it is no*

longer a company doing so but an association without legal personality, in which event, in the opinion of the Van Wyk de Vries Commission "the members of the 'company' will during the time of deregistration be personally liable for the debts of the company".'

I am of the opinion, therefore, that it is not possible to equate dissolution or winding-up of a company with deregistration."

[40] In *Miller and Others v Nafcoc Investment Holding Co Ltd and Others 2010 (6) SA 390 SCA* at *395* para *11 Cloete JA* makes the following comments in this regard:

"I turn to consider whether there was a basis for the order setting aside the decision of the commissioner to continue or permit the continuation of the enquiry. Serveco was deregistered on 25 April 2008. The deregistration was effected by an official in the Companies and Intellectual Property Registration Office (CIPRO), purporting to act in terms of s 73 of the Companies Act and on behalf of the Registrar of Companies. Deregistration was incompetent inasmuch as Serveco had been wound up on 23 May 2006 - a fact which was pointed out to the official in a letter before Serveco was deregistered - and the consequence of a winding-up is not deregistration, but a dissolution in terms of s 419 of the Companies Act, ss (1) of which provides:

> *'In any winding-up, when the affairs of a company have been completely wound up, the Master shall transmit to the Registrar a certificate to that effect and send a copy thereof to the liquidator.'*

Deregistration, on the other hand, puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist at death. Once there has been deregistration there is obviously no purpose in a corporate post-mortem, and no one would have the authority to conduct one. Serveco was restored to the register on 10 August 2008 pursuant to an order of the Johannesburg High Court, after a rule nisi had been issued, published in newspapers and the Government Gazette and served on, inter alios, the applicants, requiring all interested persons to show cause why this should not be done".

[41] There is thus a clear difference between deregistration and dissolution as highlighted by the above court's finding that the consequence of a winding up is not deregistration but dissolution.

[42] In my opinion, the wording and the purpose of section 83(4)(a) of the new Companies Act is entirely different to that of section 73(6)(a) of the old Companies Act. Section 73(6)(a) of the old Act allowed an interested party or the registrar to approach a court **for an order restoring the registration** of the company after the company **had been deregistered for a failure to properly lodge annual returns**. If, however, a **company had been dissolved following a winding up**, the liquidator or and interested party could approach the court in terms of Section 420 of the old Act for an order declaring the dissolution to be void. The remedies were separate and distinct and catered for two separate and distinct scenarios[3]. In my view, as I have already mentioned, Section 83(4)(a) of the new Companies 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)**. It does not empower a court to reinstate a company that has been deregistered for a failure to lodge annual returns in the correct manner. In fact, there is a

[3] See the authors' comments in Henchsberg on the Companies Act of 1973 at 900(1) Issue 24 in respect of section 420:

> *"It is submitted that the intention is that the court's power under section 420 can be exercised only where the dissolution has occurred in the context of a winding-up of the company which has been completed."*

provision specifically dealing with the reinstatement of a company that has been deregistered in such circumstances. That provision is section 82(4) (read with regulation 40) and it sets out the specific requirements and process that must be followed. And in terms of section 82(4), a court is not empowered to grant a reinstatement of a deregistered company – that power lies exclusively in the hands of the Companies and Intellectual Property Commission.

[43] The relief the Applicant is seeking therefore cannot be found in the provisions of Section 83(4). Further, there is clearly no provision in the 2008 Companies Act for a court to re-instate the registration of a company or Close Corporation.

[44] I am not convinced that it would be impossible or that difficult for the Applicant as an "interested party" to apply to the Commission to reinstate the registration of the Close Corporation. An argument can be made out that within the ambit of Section 82(4) that such an application would be permissible.

In the light of this the relief the Applicant is seeking in paragraph 2 as well as the alternate relief as set out in paragraph 2.2 – 2.4 and paragraph 3 of the Notice of Motion cannot be granted in Case No. 8250/12. The order for the provisional winding-up of Voigro could not have been granted due to the fact that Voigro Investments was a non-existent entity.

Order

In the result therefore the following order is made:

The application in Case No. 8250/12 is dismissed with costs.

The *rule nisi* granted subsequent to the order of provisional winding-up of Voigro Investments under Case No. 6601/2012 is discharged with costs.

HENNEY, J
Judge of the High Court