

THE DANGERS OF DEREGISTRATION

The Companies and Intellectual Properties Office deregistered over one million companies and close corporations for failing to submit annual returns in the twelve months prior to the Companies Act, 2008 (the new act) coming into force. Many of these were still trading. Some were restored to the relevant registers prior to the new act coming into force. Many were not, even though their owners continued to run them as if they were still in existence. Some of these have been reinstated to the register in terms of the new act.

The legality of these deregistrations has been questioned. That is not the focus of this article. The purpose of this article is to consider the effect of the deregistration of a company or close corporation arising from a failure to file an annual return and the consequence of a subsequent reinstatement to the register under the new act.

Deregistration brings an entity to an end. It ceases to exist. Its property, if any, vests in the state as bona vacantia. Section 83(1) of the new act states that a deregistered company (and thus a close corporation as well) must be treated on the same basis as an entity whose winding up is complete. The entity is thus dissolved. Dissolution is the final step that consigns a juristic personality to oblivion. All rights and obligations which once vested in the entity are brought to an end. They do not exist in limbo, awaiting a possible restoration, as was the case prior to the new act coming into force.

Oblivion has important consequences. Everything ends. Contacts are terminated. Relationships, including employment relationships, cease to exist. Litigation stops. The entity is wiped from existence. All that is left apart from the vesting of property in the state are the rights and obligations described in Section 83 of the new act. These are:

- The obligations of any person for acts or omissions committed prior to deregistration remain in force as does any liability that flows from this.
- The right of any person who has an interest in the entity to apply to court for an order declaring the dissolution void or such other equitable relief that may be appropriate.

One does not have to apply to court to resurrect an entity. An interested party may apply to the Companies and Intellectual Properties Commission (CIPC) to restore the entity to the register. This has the effect of restoring to it the property that vested in the state. It does not in my opinion, as was the case prior to the new act coming into force, operate retrospectively. The restoration takes place with effect from the date it is granted.

The entity is reborn, but save for property, is shorn of its previous life. It is not, as was the case in the past, reinstated to the register as if the entity had never been deregistered. Restoration does not bring the contracts and other relationships that were terminated on deregistration back to life.

This can have serious consequences for the entity and for those with whom the entity deals. In many cases the full impact of those consequences may be mitigated by the parties' conduct. Contracts and other relationships that were terminated by deregistration may be restored as a result of that conduct. It may be possible in other instances to retrieve what was lost. Income tax and VAT registrations may, for example be reinstated as may domain names and other accounts. For many ignorance of the fact of deregistration may make this a *fait accompli*. However there will also be issues that cannot be resolved. Some could suffer serious and irreparable prejudice as a result of deregistration.

The remedy in these cases is to be found in Section 83 of the new act and the power the court enjoys to declare deregistration void or grant other equitable relief. It will be interesting to see how our courts exercise this right. These orders will not be easy to obtain. All interested parties must be notified of the application. This will include those with whom the entity transacted. Competing interests will need to be weighed up. My sense is that the time elapsed after deregistration will be an important factor in deciding these matters as will the risk of prejudice to third parties. I do not think that our courts will be sympathetic to those who seek to use deregistration to avoid their obligations. The courts should respond favourably to the entreaties of parties who have acted on the basis that the entity has been deregistered.

The legal status of the entity's transactions during the hiatus caused by deregistration is will give rise to a considerable amount of uncertainty.

The risk that owners and managers will incur personal liability during this time will be very considerable.

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