

SOUTH AFRICA / JUDGMENT

Degueldre v Companies and Intellectual Property Commission (A211/23) [2024]

ZAWCHC 222 (26 August 2024)

[2024] ZAWCHC 222

COURT

Western Cape High Court, Cape Town

BEFORE

Henney, Lekhuleni, Allie

CASE / FILE NUMBER

A211/23

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE

DIVISION, CAPE TOWN)

CASE NO: A211/23

In the matter between:

JEAN-FRANCOIS

ERIC CHRISTIAN DEGUELDRE

Appellant

And

THE

COMPANIES AND INTELLECTUAL PROPERTY

Respondent

COMMISSION

Bench: Allie J, Henney J

et Lekhuleni J

Heard: 22 July 2024

Delivered: 26

August 2024

This judgment was handed

down electronically by circulation to the parties' representatives

via email. The date and time for hand-down

is deemed to be 26 August

2024 at 13h30.

JUDGMENT**HENNEY, J****Introduction:**

- [1] The appellant instituted an application in terms of section 83 (4) of the Companies Act, 71 of 2008 (“the Act”), against the respondent, the Companies and Intellectual Property Commission (“the CIPC”), for the reregistration of Time is Money Finance CC, a close corporation (“the close corporation”) of which he is the sole member.
- [2] The relief which he sought was, firstly, to declare the dissolution of the close corporation to be void; secondly an order directing that the respondent restore the close corporation’s name to the register of companies and thirdly an order declaring that the assets of the corporation to be no longer bona vacantia and revested in the close corporation in terms of the provisions of section 83 of the new Companies Act. His application was dismissed with costs by the court a quo. This is an appeal against that decision with the leave of the court a quo. I shall briefly set out the background facts underpinning this appeal.

Background:

- [3] The close corporation was deregistered on 26 August 2016 by reason of its failure to submit annual returns. The respondent didn’t oppose the application. On Friday, 6 September 2019, Thulare AJ (as he then was), granted a rule nisi, returnable on 7 October 2019 as follows:

3.1 that all interested parties show cause as to why:

3.1.1 the dissolution of Time is Money Finance CC, Registration No.2007/112691/23 should not be declared void in terms of section 83 (4) of the Companies Act 71 of 2008;

3.1.2 Respondent should not be directed to restore Time is Money Finance CC’s name to the register of Companies;

3.1.3 the assets of Time is Money Finance CC should not be declared bona vacantia and for such assets to vest in Time is Money Finance CC.

- [4] Thereafter, and before the return date of the rule nisi, the appellant’s legal representatives served copies of the founding papers and a copy of the rule nisi on Mr. Renenthren Padayachee (“the intervening party”), the attorney of record for some of the purported foreign creditors, which attempted to prove claims against the insolvent estate of one, Paul Matthew Machin, a British citizen, who conducted business in this country (“the insolvent estate of Machin”). Subsequently, the intervening party in his own name, filed an answering affidavit in which the relief sought by the appellant was opposed.

- [5] In the appellant's reply thereto, he made it clear that the intervening party holds no interest in the outcome of the appellant's application to have the close corporation restored into business such as to permit him to oppose the application.
- [6] The close corporation is a proven creditor in the insolvent estate of Machin who was sequestrated as far back as 2013. The intervening party is a practising attorney a creditor in the insolvent estate and is also acting for the purported creditors, who allegedly have claims against insolvent estate of Machin. These creditors attempted to prove claims against the insolvent estate of Machin, and their claims were all disallowed by the presiding officer, at the Verulam Magistrate's Court, where the meeting of creditors of the insolvent estate of Machin was held.
- [7] The claims of those creditors all of whom are peregrini of our South African Courts were disallowed because none of them complied with the rules regarding commissioning of affidavits that finds application in our courts, and which makes it obligatory for any legal document when commissioned outside of the borders of this country, to be signed by a notary public.
- [8] Subsequent to the presiding officer disallowing the claims of these creditors, the intervening party on behalf of these creditors filed an application in the KwaZulu- Natal Division of the High Court in which he sought to have the decision of the presiding officer disallowing these claims, be reviewed and set aside.
- [9] In answer to this application, the creditors of the insolvent estate including the close corporation filed an application in terms of rule 47 demanding of the said peregrine creditors to furnish the close corporation and other creditors, with security for costs. On 5 January 2016, the court granted an order in favour of the close corporation and the other creditors. The intervening party on behalf of the said creditors filed an application for leave to appeal the decision which was dismissed with costs.
- [10] The intervening party thereafter applied to the SCA for leave to appeal, which application was also dismissed with costs. As a result of this, the registrar of the Pietermaritzburg Division of the High Court then made a ruling to the effect that the peregrine creditors are to furnish the close corporation with security for costs in the amount of R200,000. On 02 June 2017, after the order of security for costs was granted, the six peregrine creditors filed a notice of withdrawal of their application to review the presiding officer's decision with the appropriate tender of costs.
- [11] At that stage the review application had been pending for more than 5 years and because of it not being brought to finalisation, the winding up of the insolvent estate could also not be proceeded with.
- [12] As a result of the failure of the intervening party, as attorney, to proceed with the review application, the appellant on behalf of the close corporation set the matter down for the purposes of it being dismissed.

- [13] The intervening party responded to the review application being set down for hearing with an application for the close corporation to furnish him with security for costs and raised the issue of the close corporation being deregistered. It was only then that the appellant realised that the close corporation had been deregistered in the last 14 days prior to launching of the application.
- [14] The appellant alleges that the only reason why the intervening party raised this was because he was aware that if he raised this successfully, the close corporation would no longer be in any position to oppose the fraudulent claims of those peregrine which he was purportedly representing, being proven.
- [15] According to the appellant, the intervening party would do anything possible for the close corporation not to be restored back into business. The appellant admitted that the peregrine creditors filed a notice of withdrawal of their application but contended that the Intervening Party did not withdraw his application. According to the appellant, the intervening party, wanted to proceed with a baseless and ill-founded application. As a result of this, the appellant proceeded with an application for the reregistration of close corporation in the court a quo.
- [16] The appellant contends that this was a bona fide application for the close corporation's deregistration to be declared void and for it to be restored back into business, as a result of a bona fide mistake made by the appellant, in that, it was deregistered pursuant to section 82 of the new Companies Act.
- [18] In respect of the last-mentioned amount, an order was granted by this court in favour of the Close Corporation on 6 October 2014, by Engers AJ against three defendants, who seems to be a firm of attorneys (Van Der Hoven Van Zyl Attorneys) and two attorneys attached to that firm.
- [19] The applicant in the court a quo alleged that in the event of this application not being successful, those assets would be forfeited to the state as bona vacantia. The appellant, therefore, as sole member of the close corporation would suffer enormously if it were not restored back into business, and on the other hand, the intervening party would not suffer any prejudice at all in the event of it being restored.
- [20] The CIPC on the other hand, didn't oppose the application, but in response to the rule nisi, having been served on it, it apparently erroneously, restored the close corporation back into business.
- [21] On 22 April 2021, the matter served before Dolamo J, who considered the application as moot due to the respondent having already restored the close corporation back into business. The matter was then postponed the 26 October 2021 to afford the intervening party the opportunity to apply to have the respondent's restoration of the close corporation's registration, set aside.

[22] Whilst the intervening party filed an application in the North Gauteng Division of the High Court for the restoration of the close corporation's registration to be set aside, he didn't proceed with such an application. Eventually on 24 February 2022, the matter was set down for hearing before Le Roux AJ where the court had to consider the following:

- 1) the intervening party's application to intervene in the main application.
- 2) the intervening party's application to have proceedings stayed pending the outcome of his application in the North Gauteng Division.
- 3) the main application to have the close corporation restored back into business.

[23] The judge a quo dismissed the intervening party's application to intervene in the main application and struck from the roll his application to have the proceedings stayed pending the outcome of the application filed in the North Gauteng High Court. The court a quo also dismissed the appellant's application to have the close corporation restored back into business with costs, holding that the court did not have jurisdiction to do so.

[24] On 5 September 2023, the court considered both the appellant's application for leave to appeal as well as the intervening party's application for leave to appeal. Leave was granted to both parties.

[25] Prior to the hearing of the appeal on 22 July 2024, the intervening party failed to proceed with his appeal. The appeal has subsequently lapsed, because the intervening party failed to deliver a notice of appeal within 20 days after the date upon which leave to appeal was granted or within such longer period as might on good cause shown be permitted in terms of the provision of rule 49(2). However, at the eleventh hour on the morning of the hearing of the appeal on 22 July 2024, the intervening party filed an application for condonation for the late delivery of the notice of appeal and heads of argument.

[26] This application was heard during the hearing and was subsequently dismissed with costs on an attorney and client scale. This being the case, the only case to be considered in this appeal is that of the appellant in the main application.

This appeal:

[27] The appeal falls to be decided on two issues. The first is whether the non-joinder of the Minister of Finance and the Department of Public Works is fatal to the case of the appellant. The second issue to be considered in this appeal is, whether the court a quo was correct in dismissing the application because it found that it did not have the necessary jurisdiction to hear the application in this court.

[28] Before dealing with these two issues, it would be appropriate to have regard to the provisions of section 83 (4) of the Act which regulates the position of a company after it had been dissolved. The section states that "... (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.”
- [29] In terms section 26 of the Close Corporations Act 69 of 1984, the provisions of section 83 of the Act, is applicable with respect to the deregistration of close corporations. It further makes it possible for a company that has been dissolved or as in this case a close corporation that has been dissolved, which resulted in its name being removed from the company’s register to be restored back into business by an order of court.
- [30] The liquidator of the company or in this case, a close corporation or any other person, in the position of the appellant with an interest in the company or close corporation may apply for an order declaring the dissolution to have been void.
- [31] In the case where the court declares the dissolution to be void, any proceedings may be taken against the company or in this case, the close corporation, as if had not been dissolved. As was held in *Absa Bank v Companies and Intellectual Property Commission of South Africa and Others*[1] (“Absa Bank WCC”), in a case such as this where a company’s name has been removed from the register for failure to submit annual returns, an interested party may apply to the CIPC for the restoration in terms of section 82(4), to the CIPC directly or for an order of court in terms of section 83(4) of the Act to have the company’s name restored to the register. No case has been made out in these proceedings, to prevent have the close corporation’s name restored being to the register, even though the court a quo dismissed the application for restoration on different grounds i.e. because the court was of the view that it did not have the necessary jurisdiction.

The Joinder of the Minister of Finance

- [32] Regarding the first issue for consideration, the appellant contends that even though it initially stated in its heads of argument that the state should be joined through the Minister of Finance and the Department of Public Works[2] who are necessary parties unless it waives its right to be joined and the Appellant has undertaken to be bound by the court decision, he now contends that he reconsidered his position because since 1 May 2011, when the Companies Act of 2008 came into operation, the state is no longer a necessary party any more in an application such as this. On behalf of Appellant, it was argued, that therefore, there is no need to join the state through the Minister of Finance in this case and similar cases.
- [33] In this regard, Appellant’s counsel relies on two decisions of this division the first one being the *Absa Bank* case which was referred to earlier, where Rogers J stated at paragraph 47:

“The new Act is a complete reworking of corporate law... The organisation of the new Act and the arrangement of its provisions are completely different.”

[34] In a follow up note after the hearing of the appeal, the judges raised certain queries about the correctness of the appellant’s

stance on the absence of the joinder of the Minister of Finance, the appellant in support of his contention refers to the following

quotation of Brand JA in *Newlands Surgical Clinic v Peninsula Eye Clinic*[3] at para [24], ... “the indication of a different intent that usually follows from a change of wording in amending legislation, is diluted by the fact that the new Act is not merely an amendment to the 1973 Act. It is a complete reinvention of our corporate law. The organisation and arrangement of its provisions are completely different, particularly with regard to deregistration and reinstatement.”

[35] I do not agree that these words justify an interpretation which the appellant seeks, which is that the requirement of joinder in an application like this, has been jettisoned by the new Companies Act. Those words were uttered in the context of whether the reinstatement of a company has any retrospective effect at all as provided for in the 1973 Act, whereas the new Companies Act of 2008, did not specifically make provision for retrospective effect once a company has been re-registered. The whole of paragraph [24] of that judgment has to be considered in its context.

[36] It actually contradicts what the appellant wants to show in the broader context of the interpretation of the new Act, where Brand JA, in the very next sentence of that section of the paragraph quoted says ... “In this light, different wording used in a completely different new scheme can hardly be construed, in itself, as complete reversal of intent.”

Sections 73(6) & (6A) of the Companies Act, 61 of 1973, provided expressly that National Treasury should be cited in applications for reinstatement of registration of Companies.

[37] The appellant’s counsel further referred to the decision of *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) and others Ltd*[4] (the PEC “case”) where Binns- Ward J at paragraph 12 stated that it was a standard requirement for the Minister of Finance to be joined in any application to court for the reversal of the dissolution of a company by reregistration. He further stated “...there is a curious omission in the current statutory scheme of any requirement for notice to be given to the Treasury of any application

for reinstatement to the register. The interests of the Treasury and other potentially interested parties (...) Presumably fall to be addressed by way of conditions to be imposed in respect of such applications in terms of regulation 40(7) of the Companies Act regulations.”

- [38] The appellant's counsel contends that based on those remarks made by Binns-Ward J, neither the Minister of Finance nor any other organ of state needed to be joined and the appellant is therefore properly before this court.
- [39] I do not agree with the appellant's submission. It seems that in the PEC case the court dealt with an application for declaratory relief in which the court was requested to issue an order that the respondent in that case (the NSC) had indeed been reregistered administratively by the CIPC in terms of section 82(4) of the new Companies Act by a shareholder which was the PEC in that case.
- [40] It further seems that for the purpose of the declaratory relief in that case, the Minister of Finance was joined because of the well-established principle in our law that the property of a dissolved company goes as bona vacantia to the state. In the very same paragraph 12, Binns-Ward J further states that "it became a standard requirement that the Minister of Finance responsible for the Treasury, be joined in an application for reversal of a dissolution of a company by re-registration."
- [41] The appellant is clearly wrong in their understanding of what the learned judge stated regarding the requirement that the state in the form of the Minister of Finance, or the Treasury should be joined in proceedings in terms of section 83(4) of the Act. What the learned judge states is that it seems that in the case of an administrative application in terms of section 82(4) made directly to the CIPC there is a curious omission in terms of the new Companies Act that notice should be given to the Minister of Finance and the Treasury by a party seeking to reregister an already de-registered company.
- [42] The learned judge did not refer to an application in terms of section 83(4) of the Act for re-registration. The court states... "The Minister would therefore have essentially the same interest in the declaratory relief sought by PEC, more especially that in terms of paragraph 1.2 of the notice of motion.[5] He would have the same interest in the administrative application submitted by PEC to the Commission on Form CoR 40.5, but there is no indication that any notice was given to the third respondent, or indeed to any third parties."
- [43] After the judgment in Peninsula Eye Clinic was handed down on 2 May 2012, this omission was rectified by the CIPC with the issuing of CIPC Practice Note 6 of 2012 on 23 October 2012 wherein the requirements for an application for administrative reinstatement as from 1 November 2012 were set out. One of these requirements that were included in item (4) deals with notice that must be given to the state through the Treasury and the Department of Public Works. It states that ... "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."

Under item (6) there is a further requirement that "... 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."

- [44] This is a clear indication that the requirement that notice should be given to the Treasury in circumstances where there is an application for the administrative reinstatement in terms of section 82(4) of the new Companies Act as well as in an application for reinstatement or reregistration by the court in terms of section 83(4) of the Act remains extant.
- [45] Whilst I agree with the sentiments expressed by the appellant's counsel that the new Act brought about a change in the legislative scheme of our corporate law at variance with the 1973 Act, as pointed out in the various judgments he referred to, in my view, it did not usher in a change concerning the property or assets of the deregistered company or close corporation being automatically declared bona vacantia, thereby attracting the interest of National Treasury as a party with a direct ad substantial interest.
- [46] To my mind, the legal position regarding joinder, of the state through the Minister of Finance has not changed. This view is also shared by Henochsberg[6], who ironically uses the judgment of Binns-Ward J at paragraph 12 in the PEC case as authority, ... "A type of case in which the application would be made is where property which was owned by the company at the date of its deregistration

requires to be administered. As, however, the property is owned by the State, it is necessary to seek not only the restoration of the registration but also a declaration that the property is no longer bona vacantia. In such a case the State is accordingly a necessary party and must be joined in the proceedings unless it has not only waived its right to be joined but has undertaken to be bound by the Court's decision (Ex Parte Sengol Investments (Pty) Ltd 1982 (3) SA 474 (T) at 478; and see Van der Ploeg v Vivier 1966 (3) SA 218 (SWA)).

"The mere fact that the [relevant Department of State and its officers] have knowledge of [the] proceedings and have intimated that they do not intend to oppose, does not make a judgment binding on them as res iudicata, nor can such non-intervention after receipt of notice of [the] application short of citation necessarily be treated as a representation that the State will submit to and undertakes to be bound by [the] judgment" (Sengol case supra at 478 per Van Dijkhorst J). The State should be joined through the Minister of the appropriate Department (the Department of Finance (National Treasury) and the Department of Public Works) (See Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd 2012 (4) SA 484 (WCC)

para 12; confirmed on appeal: 2015 (4) SA 34 (SCA); Missouri Trading CC and Another v ABSA Bank Ltd and Others 2014 (4) SA 55 (KZD) para 6; Rainbow Diamonds (Edms) Bpk v Suid-Afrikaanse Nasionale Lewensassuransmaatskappy 1984 (3) SA 1 (A) at 14; G Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape) [2011] JOL 27411 (WCC), 2011 (5) SA 14 (WCC) para 3. See eg Practice Note 6 of 2012 in respect of notification requirements for administrative reinstatement under s 82 (4)). In practice the State ordinarily does not oppose the making of the declaration, its policy being that it does not seek to

enrich itself at the expense of those interested in a deregistered company (ibid). Where the declaration sought relates to land, notice of the application should be given to the relevant Registrar of Deeds. In practice notice is also given to the relevant Receiver of Revenue. In all cases it is necessary to give notice of the application to the Companies and Intellectual Property Commission unless, of course, it is the applicant.

The State as a necessary party in the application that should be joined may be dispensed with, however, where the State waives its rights and undertakes to be bound by the order (ibid); see eg *Ex Parte Liquidators Lime Products (Pty) Ltd* 1942 CPD 402; *Ex Parte White NO and Smit NO* 1945 CPD 414. In *Ex Parte PJ Yelland & Co (Pty) Ltd* 1934 NPD 158 it appears that the Court dispensed with notice to the State: but this was on the basis of a conclusion that the property could not be regarded as *bona vacantia*.” (own emphasis)

[47] The non-joinder of the Minister of Finance and the Treasury is therefore an essential requirement and such non joinder in my view was fatal to the appellant’s case. Especially in the light of the admission by the appellant that the assets in the form of the claim against the firm of attorneys and the claim in the insolvent estate of Machin became *bona vacantia*. Absent that, this court is unable to find that the relief the applicant sought in the court a quo in terms of section 83(4) of the new Act should have been granted as set out in paragraph 2 of the Notice of Motion.

[48] The appellant in his further note at the request of the court submitted that should the court not accept his arguments with regards to whether there should have been a joinder, he be granted leave to serve the papers on the Minister of Finance at this stage. Such a course of action in my view would be appropriate in these proceedings.

Whether the court a quo had jurisdiction to adjudicate this matter:

[49] I shall now deal with the second issue relating to the question whether the court a quo had the necessary jurisdiction to deal with this matter. As stated earlier, this was the basis upon which the application was dismissed.

[50] The court a quo gave the following as the reasons for its decision, firstly, that the CIPC has its offices in Pretoria Gauteng which is outside of the court’s area of jurisdiction. Secondly, that due to the close corporation’s removal from the register of companies and its consequent dissolution, it ceased to exist at the time when the proceedings, were instituted and even if the dissolution of the close corporation is declared void and it has retrospective effect from the date of its deregistration, it still cannot cloth the court with jurisdiction. For that same reason, the court a quo found that at the time of instituting the application, the court was not clothed with the necessary jurisdiction and in addition, the close corporation is not a party to the proceedings. Thirdly, the court was unable to find that the parties effectively agreed to the jurisdiction of this court even by way of the intervening party agreeing thereto by admitting the allegations in concerning jurisdiction contained in the appellant’s (applicant a quo’s) founding affidavit.

Such admission the court a quo found, cannot confer the court with necessary jurisdiction to adjudicate the matter.

- [51] The appellant's counsel in his heads of argument submits that the court a quo erred in its finding that when an application in terms of section 83 (4) of the Act was instituted that this court was not vested with the necessary jurisdiction. Secondly, that it erred in finding that because of this court not being vested with the necessary jurisdiction the main application should be dismissed with costs. Lastly, the appellant in his amended notice of appeal contended that the court a quo erred in not finding that the CIPC tacitly consented to the jurisdiction of this court in the main application.
- [52] This Division of the High Court has always dealt with applications of this nature even though the offices of the CIPC is situated in Sunnyside Pretoria, Gauteng. The jurisdiction of the High Court in its most basic form is regulated by section 21 of the Superior Courts Act[7] ("the Superior Courts Act"). Of particular importance in this case, is the provisions of section 21 (1) and (2) of the Superior Courts Act. In terms of ss(1) ... "A division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters which it may according to the law take cognizance..."
- (2) "A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third-party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division."
- [53] It seems however that the jurisdiction of a Superior Court is not only determined by these provisions. In this regard, it has been accepted that these provisions "materially corresponds with the position under section 19(1) of the Supreme Court Act 59 of 1959 prior to the repeal of this Act". In this regard Van Loggerenberg[8] states that 'as was the case with s19 of the now repealed Supreme Court Act 59 of 1959, the section does not contain a 'codification 'of the jurisdiction of the High Court.'

Thus, in *Veneta Mineraria Spa v Caroline Collleries (Pty) Ltd*[9] ("*Veneta Mineraria*") it was stated that ... "In view of the indefinite wording of s 19 of the Act and its predecessors, no doubt deliberately so couched because the intention

of the legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain competency each of the Supreme Court's in the Republic of South Africa possesses to effectively adjudicate and pronounce upon a matter brought before it and heard by it. In the course of time it seems that, as our law on jurisdiction developed, it was also influenced to a minor extent that the principles of the private international law applicable in other legal systems."

[54] The Appellate Division (as it then was) went on to state^[10] that there is a distinction between the so-called grounds of jurisdiction by virtue of which a court would normally have ipso jure jurisdiction and jurisdiction by virtue of which jurisdiction is conferred on a court. Where the court would normally have ipso jure jurisdiction, these are threefold, firstly by virtue of the defendant's domicile being in that court's jurisdiction,

secondly, by virtue of the contract having been entered into in the area of the court's jurisdiction or having been performed in the area of the court's jurisdiction. Lastly, by virtue of the subject matter in an action in rem being situated in the court's jurisdiction. Other cases where jurisdiction is conferred upon a court, are where there is an order of attachment of goods or arrest of a person to found jurisdiction. Finally, another circumstance in which jurisdiction is conferred, is where a party consents to the jurisdiction of a court.

[55] The legal position with regards to whether a court had jurisdiction is that jurisdiction is not merely established by virtue of the parties being present within in the geographical jurisdiction of the Court. Processes and judgments of a High Court can be effectively executed by the Sheriff in another division of the High Court and that will satisfy the doctrine of effectiveness, but such effectiveness may be one factor to be taken into account with other factors, in considering whether some other common law ratio jurisdictiones do exist for conferring jurisdiction in respect of particular proceedings.

[56] In coming back to this case, it seems that the main reason why the court a quo found that it did not have jurisdiction was because of the fact that the CIPC, was situated in Gauteng and not the Western Cape and consequently this court had no jurisdiction. A further reason the court gave as to why it lacked jurisdiction was that the close corporation was not a party to these proceedings. The court a quo's reasoning in this regard seems to be flawed because it conflates locus standi to institute proceedings, with jurisdiction. This cannot be a sustainable reason for a court not to have jurisdiction to hear an application such as the one considered a quo. In any event, if that was the reason for finding that the court does not have jurisdiction, it seems that the new Companies Act

permits a liquidator or an interested party such as the appellant, as a member of the close corporation to bring such an application in the absence of the close corporation. For this reason alone, the court a quo's finding that it lacked jurisdiction, cannot be sustained.

[57] I will, however, proceed to deal with further reasons why I say that the court a quo was wrong to hold that it lacked jurisdiction because the CIPC, is not situated in this court's area of jurisdiction, in what follows. The nature of the relief in these proceedings is that the appellant in terms of the provisions of section 83 (4) of the new Companies Act, seeks to have the dissolution declared void and that it be reregistered as a close corporation.

[58] Our courts have given the wide and purposive interpretation to the words "in relation to all causes arising", not only to include 'causes of action arising', but 'legal proceedings duly arising', which means proceedings in which the court has jurisdiction under the common law. This resulted in our courts through the years interpreting the issue of jurisdiction in

terms of section 21 of the Superior Courts Act with reference to the common law or any relevant statute. According to Van Loggerenberg,[11] in such a determination, regard must, therefore, be had to the jurisdictional connecting factors or *rationes jurisdictiones* as recognised by the common law. As stated by the erstwhile Appellate Division in the matter of *Estate Agents Board v Lek*[12] (“Lek”) that was recognised and affirmed by the court in *Veneta Mineraria*: In the exercise to determine whether a court has jurisdiction and in considering the jurisdictional connecting factors the court should have regard to the following: firstly, whether there is a recognised ground of jurisdiction and secondly, if there is one, whether the court has the power to give effect to the judgment being sought. In *Lek*[13], the court held that the question whether the court has jurisdiction depends; (a) on the nature of the proceedings and (b) the nature of the relief claimed, or in some cases both (a) and (b).

- [59] The essence of the nature of the relief in these proceedings is that the appellant in terms of the provisions of section 83
- (4) of the new Companies Act, seeks an order to declare the dissolution of the close corporation to be void, which in my view, is crucial in determining whether this court is vested with the necessary jurisdiction.
- [60] The appellant being a member of the close corporation has a vested right and interest in the relief that is being sought and it is for this reason that the new Companies Act permits him to bring such an application. The deregistration and dissolution had a prejudicial effect on the appellant because at the time when the close corporation was deregistered, it was carrying on a business as a going concern as were shown by the financial statements attached to the founding affidavit of the appellant.
- [61] The appellant further stated that he had no other option but to seek redress in this court because the close corporation would lose its claim against the insolvent estate of Machin and he will be liable for the cost associated therewith. The appellant’s right to free trade and his business through the close corporation as a member has been affected by the decision to dissolve and deregister the close corporation, which effectively stopped the business from operating. This is a fact that the provisions in section 83(4) of the new Companies Act as well as the previous Act seems to recognise and give effect to.
- [62] The close corporation is situated within this court’s area of jurisdiction, which is in Melkbosstrand. The appellant’s right to exercise and to conduct his business here in the Western Cape, is affected by the decision of the CIPC, which is situated in Gauteng. Put differently, his right to conduct his business through the close corporation as a member has had an impact here in the Western Cape where this business is situated and not in Gauteng.
- [63] The appellant is a resident in this court’s area of jurisdiction, and it is this court which is easily accessible to him and to which he had to turn, to vindicate his rights as a member of the close corporation for the relief he may be entitled to as contemplated in section 83 (4) in

the new Companies Act. In Lek[14] the court found that in our unitary judicial system of having a [High Court][15] with different divisions, convenience and commons sense are inter alia valid considerations in determining whether a particular division has jurisdiction to hear and determine a particular case. In this particular case, considerations of convenience and common sense is a further factor to determine that this court should have jurisdiction to hear the case.[16]

[64] A further consideration to determine whether this court has the necessary jurisdiction was the fact that the CIPC, didn't dispute, not only in this case but in all other cases of this nature that this court had geographical jurisdiction. The CIPC, albeit erroneously, administratively restored the close corporation back into business, after the grant of the rule nisi. That conduct together with its failure to oppose the application, are clear indications that it believed either this court has the necessary jurisdiction or consented to this court having jurisdiction. The court a quo's rejection of this ground to establish jurisdiction was in my view, also wrong.

[65] For all of these reasons, I am of the view that the court a quo had misdirected itself in finding that it did not have the necessary jurisdiction to adjudicate this matter. Given the fact however, that all the parties were not before the court in respect of the relief in the main application, these proceedings cannot be concluded as referred to earlier.

[66] In the result, I would make the following order:

66.1 The appeal, insofar as the ground of appeal that challenges the court a quo's finding on lack of jurisdiction, succeeds;

66.2 The appellant is granted leave to serve the papers on the Minister of Finance within 21 days of this order;

66.3 Once the necessary service has been affected, the appellant is granted leave to approach this court as currently constituted with a view to re-enrol the matter on the same papers duly supplemented to the extent necessary, for further consideration.

66.4 The appeal against the order granted in the court a quo dismissing the main application with cost is postponed sine die;

66.5 No order as to costs is made;

66.6 The application for condonation of late filing of the appeal by the intervening party is dismissed with costs on an attorney and client scale.

R.C.A. HENNEY

JUDGE OF THE HIGH COURT

I agree.

J. LEKHULENI

I agree, and it is so ordered.

R. ALLIE

Counsel for Appellant : Adv P B Hodes SC Adv J T Benadé Instructed by : Smit Kruger
Incorporated Counsel for Intervening party : Adv K Felix Instructed by : Padaychee and Partners,
Pietermaritzburg No appearance for the respondents.

- [1] 2013(4) SA 194 (WCC) at para 52.
- [2] It seems that it is widely accepted that the State should be represented by the Minister of Finance or the Treasury.
- [3] 2012
- (4) SA 484 (WCC).
- [4] 2012
- (4) SA 484
- [5] paragraph 1.2 of the notice of motion in that case was ... “That (sic) the assets of the first respondent which vested in first respondent prior to it being deregistered, have been re-vested in the first respondent with effect from the date upon which the respondent was deregistered.
- [6] Henochsberg on the Companies Act 71 of 2008: Online update at [332 (26); (27); (28)] Service Issue 34- May 2024.
- [7] 10 of 2013
- [8] In Erasmus: Superior Court Practice (3rd Ed) at D-192- Service 2023
- [9] 1987(4) SA 883 (AD) at 886 H-J
- [10] At 887
- [11] at D-192; D-193; D-194
- [12] 1979(3) SA 1048
- [13] At 1063F -1064A-D
- [14] At 1068 para E-F.
- [15] Reference in the Lek judgment is made to the Supreme Court to which the High Court was referred to under the previous Act.
- [16] See also Sonia (Pty) Ltd v Wheeler 1958(1) SA 555(A) at 562A-F; 564A.

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