

Short notes on:

COMPANIES ACT 71 OF 2008: THE REPERCUSSIONS OF NOT FILING YOUR ANNUAL RETURN

Introduction

In terms of the Companies Act 71 of 2008, the annual return is a document which must be filed annually with CIPC. This is in addition to paying the customary fee. If this is not done – the repercussions can be very expensive, time consuming and sometimes dire, as is illustrated below.

The case

Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Other [2014]1 All SA 592 (WCC). According to Bassuday,¹ “a company, the respondent, was deregistered due to the non- submission of its annual returns as required by the Act. During this period, the respondent was party to arbitration where the applicant was granted an arbitration award in its favour. The respondent contended that the arbitration award had no bearing or validity, as the company, at the time of the award, had been deregistered, had no legal status, and did not have the authority to enter into the arbitration. In this instance, the fundamental question the court in Peninsula had to answer- was whether on re- instatement of the company by the CIPC, it would make the arbitration award and the participation of the previously deregistered company in the arbitration proceedings retrospectively valid.”

The balancing act

Determining whether or not to reinstate a company’s status as registered after it being deregistered, is a delicate balancing act. On the one side, the interests of the company, versus third parties (including creditors).

In the Peninsula case the court considered this balancing act and stated that:

The court, after consideration of all relevant factors, found that section 82(4) has the effect of administrative reinstatement of a company’s registration. The question is whether it is retrospective or not. Retrospective reinstatement would effectively validate all transactions during the deregistered period.

According to Bussaday, “the court took a piece-meal approach and in the present case, the court decided that it was just and equitable to make an order declaring that the conduct of the arbitration

¹ Bassuday K 2016: De Rebus April 2016: 24 – 25.

proceedings were valid and effective. It did not, however... think it would be appropriate in the circumstance to declare all the corporate activity valid especially without notice to third parties.”

On appeal, in the above case, the court evaluated the prejudices highlighted by the court a quo (first court as abovementioned). The court held that despite the concerns of prejudice, the 1973 Act (old companies Act) had consequences. These resulted in automatic retrospective reinstatements which could not be avoided.

The court further held that ‘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.’ The court held that the 2008 Act is a complete reinvention of South African corporate law. Furthermore that the ‘correct approach’ per Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), at 603-605 can be summed up in a sentence: ‘A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.’

In conclusion, the court held that the more significant view point was the consideration that refusal to validate corporate activity of a company during its period of deregistration (ie retrospective reinstatement), could be ‘equally devastating to the interests of bona fide third parties who were unaware of a company deregistration.’

So, a piecemeal approach simply cannot be considered a solution.

Conclusion

We recommend that companies ensure compliance and file their annual returns. In addition that parties contracting with companies ensure that they have complied. Where a company is deregistered or reregistration is in progress it is important to approach the correct forum swiftly for reinstatement. Contact an expert at SchoemanLaw today!