

TRANSACTIONS WITH CLOSE CORPORATIONS – BEWARE THE CONSEQUENCES OF DEREGISTRATION

Part 2 of our new series

Of late, the alarming numbers of Close Corporations being deregistered by the Company and Intellectual Property Commission, have received increased attention in the media. Apart from having adverse effects on the close corporation's assets and activities, it places creditors of the corporation at a disadvantage, unless precautions were put in place. Let us explain.

Deregistration of Close Corporations after the commencement of the new Companies Act on 1 May 2011

Section 26 of the Close Corporations Act has been repealed and was replaced by a single subsection that makes the provisions of the Companies Act 2008 applicable to the deregistration of a Close Corporation ('CC'). The grounds on which the Commissioner may deregister a CC under the Companies Act are very similar to the grounds that existed under the Close Corporations Act. For purposes of this note, it is unnecessary to explore the differences between the two Acts in this regard and one only needs to mention that the most common reason for deregistration of a CC is a failure by the CC to render annual returns to the Company and Intellectual Property Commission ('CIPC'). The Companies Act now provides that, in the event that a CC fails to render annual returns for two successive years to CIPC, the Commissioner must deregister the CC.

Consequences of deregistration

1. The most significant consequence of a CC's deregistration is, of course, that the CC ceases to exist as a legal personality. The members no longer have any authority to act on the CC's behalf and cannot perform any legal acts (such as concluding agreements) on behalf of the CC. The Court has in addition now determined that a deregistered CC cannot validly issue a summons whilst it is deregistered, with the consequence that it will not be able to interrupt prescription running against it.
2. The Companies Act, similar to the provisions of Section 26 of the Close Corporations Act prior to its amendment, contains a provision that member's liability towards the CC or a third party that existed prior to the CC's deregistration, will continue to exist after the deregistration. The liability referred

to here is not a general liability, but a specific liability, where a member had become liable in terms of one of the provisions of the Close Corporations Act. These provisions are the ones dealing with the abuse of the CC's corporate personality or reckless trading. This liability must exist at the time of the CC's deregistration for the members to be liable.

- 3. The Companies Act places creditors of deregistered CCs at a disadvantage compared to the position they had earlier occupied under Section 26** of the Close Corporations Act, before its amendment. Section 26(5) provided that, where a CC was deregistered while having outstanding liabilities, the members of the CC as at the date of deregistration are jointly and severally liable with the deregistered CC for such liabilities. This section has now been repealed with the consequence that creditors of deregistered CCs no longer enjoy an automatic recourse against the members of the CC when the CC is deregistered. **It is therefore extremely important that parties contracting with CCs must ensure that they secure suretyships from the members of the CC for the obligations that the CC may have towards them. They must further ensure that the suretyships are drafted in such a manner that the sureties' liability will survive the deregistration of the CC.**

Reinstatement of a CC

Section 82(4) of the Companies Act provides that any interested person may apply in the prescribed manner and form to reinstate the registration of a CC. A member of the deregistered CC will clearly be such an interested person and, given the consequences of Section 26(5)'s repeal, one can argue that a creditor may even be such an interested person. Such application is made to the CIPC and must be made sooner rather than later as the process can take an extended period to be finalised.

It must be noted that an application for a CC's liquidation will be suspended until such time as the CC registration has been reinstated.

For assistance, speak to Jacques at JacquesB@stbb.co.za.

CONTACT US

- CAPE TOWN
Tel: 021 406 9100
- SOMERSET MALL
Tel: 021 850 6400
- TYGERVALLEY
Tel: 021 943 3800
- CLAREMONT
Tel: 021 673 4700
- TABLE VIEW
Tel: 021 521 4000
- JOHANNESBURG
Tel: 011 853 8300
- FISH HOEK
Tel: 021 784 1580