**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 479/15

In the matter between Reportable

**PALALA RESOURCES (PTY) LTD** **APPELLANT**

and

**MINISTER OF MINERAL RESOURCES AND ENERGY** **FIRST RESPONDENT**

**REGIONAL MANAGER: LIMPOPO REGION** **SECOND RESPONDENT**

**HECTOCORP (PTY) LTD** **THIRD RESPONDENT**

**Neutral citation:** *Palala Resources v Minister of Mineral Resources and Energy* (479/15) [2016] ZASCA 80 (30 May 2016)

**Coram**: Maya DP, Tshiqi, Majiedt, Wallis and Zondi JJA

**Heard:** 12 May 2016

**Delivered:** 30 May 2016

**Summary:** Mining and minerals – Companies – interpretation and application of s 56(*c*) of the Mineral and Petroleum Resources Development Act 28 of 2002 and s 73(6A) of the Companies Act 61 of 1973 – deregistration of a company which is the holder of a mineral prospecting right does not result in that company irretrievably losing that right – subsequent restoration of company's registration having the legal effect of retrospectively reviving the lapsed prospecting right.

---

**ORDER**

---

**On appeal from:** Gauteng Division of the High Court, Pretoria (Keightley AJ, sitting as court of first instance)

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and substituted with the following:

'1 The first respondent's decision on 30 April 2014, upholding the third respondent's appeal, is reviewed and set aside;

2 It is declared that the prospecting right (registered under the number LP1488) granted to the applicant was retrospectively restored to it by virtue of the restoration of the applicant's registration as a company on 13 September 2010;

3 The first and second respondents are directed to take the necessary and reasonable steps to give effect to the order in paragraph 2;

4 The third respondent is to pay the applicant's costs of the application.'

---

**JUDGMENT**

---

**Majiedt JA (Maya DP and Tshiqi, Wallis and Zondi JJA concurring):**

[1] This appeal turns on the interpretation and the application of s 56(*c*) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) and s 73(6A) of the previous Companies Act 61 of 1973 (the Companies Act), which was in force at all material times. The appellant, Palala Resources (Pty) Ltd (Palala), appeals against an order of the Gauteng Division of the High Court, Pretoria, that Palala's mineral prospecting right had irretrievably lapsed upon Palala's deregistration as a company and that the subsequent restoration of its registration did not retrospectively revive the

lapsed right. The judgment of the court a quo is reported *sub nom Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy & others* 2014 (6) SA 403 (GP). This appeal is with the leave of the court a quo.

[2] Prior to the hearing the parties' attention was drawn to this court's judgment in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA). At our request they filed supplementary heads of argument on the question 'whether the appeal has not become moot due to the expiry of the right despite the restoration exercise'. I shall deal with that aspect presently.

[3] The common cause material facts are as follows. Palala was granted a mineral prospecting permit on 20 May 2009 in terms of s 17 of the MPRDA. It was thereby permitted to prospect for gold and pyrite on a designated prospecting area on a portion of the farm Malamulele 234 LT in Limpopo (the prospecting area). The mineral prospecting right was stipulated to endure for a period of two years, ie until 19 May 2011. As a consequence of its failure to timeously file its company returns, Palala's company registration was cancelled in terms of s 73(5) of the Companies Act with effect from 16 July 2010, when a notice to that effect was published in the Government Gazette and on the website portal of the Companies and Intellectual Property Registration Office (CIPRO). During 2010 (the exact date is not apparent from the papers), the third respondent, Hectocorp (Pty) Ltd (Hectocorp), had lodged with the Department of Mineral Resources (the Department) its first application for the same prospecting rights previously granted to Palala. This application was rejected by the Department's regional manager on 31 August 2010 by reason of the fact that the 'rights have already been issued to another entity for the same minerals on the same area under application'.

[4] Palala's company registration was restored on 13 September 2010 in terms of s 73(6A) of the Companies Act. In the interim (again the exact date cannot be discerned from the papers), Hectocorp had submitted a second application to the Department for prospecting rights over the same property. Despite Palala's objection in this regard, Hectocorp was notified by the

Department's regional manager that its second application to prospect for gold on the prospecting area had been accepted. On 27 October 2010 Palala submitted an application to the Department for the renewal of its prospecting right. In reply, the Department advised Palala on 16 November 2010 that Palala's prospecting right had lapsed due to Palala's deregistration. Palala lodged an appeal against this decision with the Department on 27 June 2011. The Acting Director-General upheld the appeal on 24 October 2011 on the following basis: '. . . there was no sufficient proof that the Appellant was finally deregistered, the deregistration process having been cancelled and thus it has not been proven that Appellant's prospecting rights have lapsed in terms of section 56(c) of the Act'. Hectocorp successfully appealed in terms of s 96(*b*) of the MPRDA against the Acting Director-General's decision to the first respondent, the Minister of Mineral Resources and Energy (the Minister). In upholding the appeal, the Minister concluded that the Acting Director-General's findings that the deregistration process was not finalised and that Palala's right had been restored upon its reinstatement as a company was 'clearly misguided and misleading'. Palala sought a review and setting aside of the Minister's decision. Keightley AJ dismissed the application with costs on the basis that Palala's prospecting right had lapsed upon its deregistration and that its subsequent restoration did not retrospectively revive the lapsed right.

[5] Section 56 of the MPRDA provides as follows:

'Any right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever . . . a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused.'

This court has held that deregistration has the effect of putting an end to a company's existence and that 'its corporate personality ends in the same way that a natural person ceases to exist on death' (per Cloete JA in *Miller & others v Nafcoc Investment Holding Company Ltd & others* [2010] ZASCA 25, [2010] 4 All SA 44 (SCA), 2010 (6) SA 390 (SCA) para 11). In the same vein Keightley AJ described the rights that have lapsed due to deregistration as 'legally dead' and incapable of being revived retrospectively by restoration.

The key question before us is whether the learned judge was correct in her finding that restoration does not constitute a Biblical Lazarus moment for a lapsed mining right.

[6] Section 73(6A) of the Companies Act reads:

'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.'

[7] In *Newlands Surgical Clinic*, which had not been decided when the court a quo was dealing with this application, this court had to consider the effect of company reinstatement in terms of s 82(4) of the present Companies Act 71 of 2008. That subsection reads as follows:

'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.'

Brand JA, writing for a unanimous court, referred to the various conflicting decisions in the respective divisions of the high court on this aspect. Those decisions ranged from findings of no retrospectivity at all, to partial retrospectivity and to full retrospectivity. One of the cases he alluded to was *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC) in which it was held that the section has no retrospective effect at all. Keightley AJ found support for her finding in that judgment. In overruling *Bright Bay* and the Western Cape Division's decision before it (which had held that the section has only partial retrospectivity) this court held that s 82(4) had full retrospective effect. Brand JA held as follows:

'As I see it, the wording of the section leaves no room for the pragmatic approach adopted by the court a quo. The only meaning available on that wording, as I see it, is that s 82(4) has automatic retrospective effect, not only in revesting the company with its property *but also in validating its corporate activities during the period of its*

*deregistration.* In short, there is no textual basis to distinguish between revesting of property and revesting the company with the capacity to continue operating' (own emphasis).

[8] It was contended with some force on behalf of Hectocorp that the potential grave prejudice to bona fide third parties militates against full retrospectivity. One of the main reasons why the Western Cape Division in *Newlands Surgical Clinic* had baulked at unqualified full retrospectivity was the potentially prejudicial effect on third parties. In addressing that concern, Brand JA pointed out that this court has held in a number of decisions that notwithstanding 'these potentially prejudicial consequences resulting from automatic retrospective validation . . . this construction of s 73(6) and s 73 (6A) could not be avoided'. Reference was made to: *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* [2007] ZASCA 6; 2007 (4) SA 467 (SCA) para 23; *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136; 2013 (6) SA 549 (SCA) paras 10-21; *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* [2013] ZASCA 52; 2013 (3) SA 338 (SCA) paras 13 and 14. These cases concerned s 73(6) and s 73(6A) of the Companies Act and the virtually identically worded s 26(7) of the Close Corporations Act 69 of 1984. Those provisions all include a deeming clause as set out in para 6 above, a feature which, as Brand JA correctly observed in *Newlands Surgical Clinic* (para 19)*, '*compelled this conclusion'.

[9] It is axiomatic that the retrospective validation of a company's corporate activities during its period of deregistration holds inherent risk to third parties, as was recognised in *Newlands Surgical Clinic*. Deregistered companies often continue carrying on business as if the deregistration had never occurred and while third parties are completely unaware of the deregistration. In this sense therefore, as was correctly observed in *Newlands Surgical Clinic*, it is not strictly correct to compare the effect of deregistration of a company to that following upon the death of a natural person. One must also be mindful that a refusal to validate a company's corporate activities

during the period of its deregistration can be just as severely prejudicial to third parties.

[10] Both Keightley AJ as well as counsel for Hectocorp had approached the matter on the basis that there was tension between s 56(*c*) and s 73(6A). In addition, the learned judge stated that s 56(*c*), and not s 73(6A), must be the point of departure. On the basis of this approach the court a quo found that the deeming provision in s 73(6A) only revived legal personality but not lapsed rights. The court a quo also considered the effect of the maxim *lex posterior priori derogat* (a later statute takes away the effect of a prior one) inasmuch as s 73(6A) had been enacted later than s 56(*c*). This approach is unsound. As I see it, there is no reason why the two sections cannot harmoniously co-exist. They concern two different situations at two different points in time. Section 56(*c*) concerns the legal situation at deregistration, while s 73(6A) deals with the legal scenario that prevails when a company's registration is restored. In the latter instance the deeming provision is conclusive – upon restoration of the company's registration all the company's corporate activities are retrospectively validated as if the company was never deregistered. It is a complete restoration of the status quo ante. All its assets and rights revest in the company. It was faintly suggested on behalf of Hectocorp that mineral rights under the MPRDA should be treated differently than other rights as far as this retrospective validation was concerned. The contention lacked both conviction and motivation and can be dismissed without more. The court a quo's construction of s 73(6A) would lead to an anomalous situation in that while it permits a deregistered company to regain its legal personality upon restoration, it does not allow it to regain the assets it lost following deregistration.

[11] There is nothing in the scheme of the MPRDA which, as the court a quo found, buttresses the conclusion that s 73(6A) does not retrospectively revive rights which had lapsed in terms of s 56(*c*). The court a quo reasoned that a retrospective revival of rights would undermine the purpose and objectives of the MPRDA, since 'the Department would be compelled in every case where a company is deregistered to treat its MPRDA rights as frozen'. I

disagree. As stated, third parties are at risk in their dealings with a deregistered company, even where they have no knowledge of such deregistration. Restoration of registration operates retrospectively and ex post facto validates all the company's corporate activities (including its mineral prospecting rights), even to the detriment of third parties. The legislature is presumed to know the law and when it enacted s 56(c) of the MPRDA it must have been aware that companies and close corporations that had been deregistered could be restored to the register with automatic retrospective effect. Yet it did not qualify its reference to 'whenever a company or close corporation is deregistered' as a trigger for the lapsing of mineral rights, by saying that the right would not be restored if the company or close corporation was restored to the register. Had it wished to ensure the finality of the lapsing of a mineral right on deregistration, it could easily have done so. The legislature could have excluded mineral rights from the rights restored to a company or close corporation on being restored to the register.

[12] On the facts of this case a relatively short period had elapsed between Palala's deregistration and its restoration (16 July 2010 to 13 September 2010). The inference is irresistible that the deregistration was as a result of an administrative oversight. No sound reason exists why in such circumstances Palala should lose a potentially valuable mineral prospecting right, even though its other assets and other rights are revested upon restoration. In the circumstances and for the reasons set out above, the court a quo erred in its finding that Palala's restoration had not retrospectively restored its mineral prospecting right. The appeal must consequently succeed.

[13] Mootness does not arise. As stated, Palala had on 27 October 2010 applied to the Department for the renewal of its mineral prospecting right. That application was never finalised, instead a decision was taken that the right had lapsed. Appeals to the Acting Director-General and the Minister followed and the review application in the court a quo ensued thereafter. Palala's pending renewal application must be finalised by the Minister in accordance with the outcome of this appeal. In considering that renewal application there

are a number of factors to be considered by the Minister in terms of s 18 of the MPRDA.

[14] The following order is issued:

(a) The appeal is upheld with costs.

(b) The order of the court a quo is set aside and substituted with the following:

‘1 The first respondent’s decision on 30 April 2014, upholding the third respondent’s appeal, is reviewed and set aside;

2 It is declared that the prospecting right (registered under the number LP1488) granted to the applicant was retrospectively restored to it by virtue of the restoration of the applicant’s registration as a company on 13 September 2010;

3 The first and second respondents are directed to take the necessary and reasonable steps to give effect to the order in paragraph 2;

4 The third respondent is to pay the applicant’s costs of the application.’

_____

**S A MAJIEDT**
**JUDGE OF APPEAL**

APPEARANCES

| | |
|---|---|
| For Appellant: | A I S Redding SC |
| Instructed by: | Seleka Attorneys, Pretoria<br>Gerber Junius Attorneys,<br>Bloemfontein |
| For First and Second Respondents: | No appearance |
| For Third Respondent: | A F Arnoldi SC |
| Instructed by: | Couzyn Hertzog & Horak<br>Spangenberg Zietsman Attorneys,<br>Bloemfontein |