IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

27/6/2014 R Koji Stey 4/8/2014

DATE **SIGNATURE**

Case No.: 32179/13

In the matter between:

PALALA RESOURCES (PTY) LTD	Applicant
and	
MINISTER OF MINERAL RESOURCES AND ENERGY	First Respondent
REGIONAL MANAGER: LIMPOPO REGION	Second Respondent
HECTOCORP (PTY) LTD	Third Respondent

JUDGMENT

KEIGHTLEY AJ

INTRODUCTION

[1] This is an application for the review and setting aside of a decision of the first respondent, the Minister of Mineral Resources and Energy ("the Minister" and "the Minister's decision"), to uphold an appeal by the third respondent, Hectocorp (Pty) Ltd ("Hectocorp") in terms of section 96(b) of the Mineral and Petroleum Resources Development Act[1] ("the MPRDA" or "the Act"). In the appeal the Minister overturned a decision of the Acting Director-General: Department of Mineral Resources ("the Acting Director-General" and "the Department")) to accept the applicant's application for a renewal of its prospecting right, identified as LP1488PR, for gold and pyrite in respect of a portion of the farm Malamulele 234 LT, Limpopo.

[2] As is often the case in matters of this nature, and as my summary of the facts set out later demonstrates, the underlying dispute is essentially between Hectocorp and the applicant, Palala Resources (Pty) Ltd, both of which wish to exercise prospecting rights on the land in question. The Minister and second respondent played no active role in the court proceedings.

[3] The review throws into sharp relief two particular legal provisions with different statutory origins, viz. section 56(c) of the MPRDA on the one hand and, on the other, section 73(6A) of the Companies Act ("the Companies Act").[2]

[4] Section 56(c) of the MPRDA reads 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

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1 Act 28 of 2002

2 Act 61 of 1973. It is common cause that the 1973 Companies Act applies in this case rather than the Companies Act 71 of 2008.

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;" (emphasis added)

[5] Section 73(6A) of the Companies Act provides that:

"*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.*" (emphasis added)

[6] As I indicate in more detail shortly, the applicant was deregistered under section 73 of the Companies Act while it was the holder of, among others, a prospecting right, granted under the MPRDA. The applicant subsequently had its registration restored.

[7] The crisp question that is raised in this case is whether the deeming provision contained in section 73(6A) of the Companies Act, which applies on the subsequent restoration of a company's registration, has the legal effect of reviving a prospecting right that lapsed, by virtue of section 56(c) of the MPRDA, on deregistration of the company.

[8] The success of the applicant's application for review depends on whether this interpretation and application of section 73(6A) is correct. The applicant contends that it is, and that in terms of section 73(6A) all of its rights, including the prospecting right granted to it under the MPRDA, revived once the applicant's registration was restored. The Minister took a different view in making her decision; she took the view that "*the inescapable consequence*"

of the applicant's deregistration was that its prospecting right had lapsed in terms of section 56(c). In her view, section 73(6A) of the Companies Act did not change this situation. The applicant's case is that the Minister's decision was materially influenced by an error of law in this regard and that it falls to be reviewed and set aside.

THE RELEVANT FACTS

[9] It is common cause that the applicant was deregistered in 2010 by reason of the fact that it had failed to lodge annual returns for a period of more than six months. In effecting the deregistration, the Registrar of Companies acted pursuant to his powers under sections 73(1), 73(3) and 73(5) of the Companies Act. It is also common cause that the deregistration process was initiated at least on 9 November 2009,[3] and was finalised on 10 July 2010 when the requisite notice under section 73(5) was published in the Government Gazette.

[10] At the time of its deregistration, the applicant was the holder of various prospecting and mining rights, including the right held under LP1488PR ("prospecting right LP1488"). This latter right was granted on 20 May 2009 for a period of two years. The other rights appear to have been granted on 31 March 2008, for a period of four years. For reasons that I will explain later, and despite the applicant purporting to seek relief in respect of the other rights as well, it is only prospecting right LP1488 that is properly the subject of this application.

[11] The applicant successfully applied to the Registrar of Companies for the restoration of its registration under section 73(6A) of the Companies Act, with effect from 13 September 2010. However, by the time that it did so, Hectocorp had taken formal steps to note its interest in prospecting for the

[3] Hectocorp contended, on the basis of the applicant's registration history, that the applicant's deregistration process actually stretched back to 2006. It is not necessary to make any factual finding in this regard.

same minerals on the same land covered by prospecting right LP1488. During 2010 (the exact date is not on record in these proceedings) Hectocorp applied for prospecting rights for gold on the property. However, the second respondent, the Department's Regional Manager: Limpopo Region ("the Regional Manager"), rejected its initial application on 31 August 2010 on the basis that the prospecting rights had already been issued to another entity, presumably the applicant, for the same minerals and area. Hectocorp avers that at this stage the Regional Manager did not know that the applicant had been deregistered on 16 July 2010.

[12] Undeterred, Hectocorp lodged a second application for prospecting rights in respect of the property. Once again, the exact date of this second application is unknown. Presumably, by this stage, the Department had been alerted to the applicant's deregistration, because on 4 October 2010, the Regional Manager notified Hectocorp that its application for a prospecting right on the property in question had been accepted.

[13] The applicant was not idle during the unfolding of these events. Having caught wind of Hectocorp's application for a prospecting right on the land, the applicant wrote to the Regional Manager on 27 September 2010 objecting to the application. In this letter, the applicant noted that Hectocorp's application "*is premised on the allegations that Palala Resources (PTY) Ltd is/was deregistered with CIPRO; and as such the rights already granted to Palala Resources automatically lapsed, and thus became available to any interested entity or individual to apply for the same right.*" The applicant went on to state that: "*We refute those allegations about Palala deregistration (sic) and reject them with the contempt they deserve. Palala Resources (Pty) Ltd was never deregistered at any stage in the strict sense of the word i.e.* ***stricto sensu***." (emphasis in the original) The applicant further requested the Regional Manager to provide it with an undertaking that its rights would not be interfered with on the basis of the allegations that the applicant had been deregistered. It reserved its rights to approach the High

Court for a declaratory order in this regard. No response was forthcoming from the Regional Manager.

[14] On the 4 November 2010, the applicant again wrote to the Minister, the Director-General and the Regional Manager regarding the acceptance of Hectocorp's application for a prospecting right on Malamulele 234 LT. In its second letter, the applicant asserted that: "*The right granted to Palala Resources (PTY) Ltd is still valid and was never cancelled at any stage and is still in full legal force and effect.*" Accordingly, so it contended, the letter of acceptance issued to Hectocorp on 4 October 2010 was unlawful and in contravention of section 16 (2)(b) of the MPRDA.[4] The applicant demanded a written undertaking by 5 November 2010 from the Department that the rights already held by the applicant would not be adversely affected, failing which it would approach the High Court for appropriate relief.

[15] There is no record of any response from the Department to this second letter. For whatever reason, the applicant did not approach the High Court for relief. It appears, instead, to have placed its faith in a parallel, alternative process; on 27 October 2010 (shortly before delivering its second letter to the Department), the applicant purported to apply for a renewal of its prospecting right LP1488 for a further period of 3 years. Section 18 (1) of the MPRDA permits a "*holder of a prospecting right*" to apply for the renewal of the right. The right may be renewed once for a period not exceeding three years.[5] Once an application for renewal has been lodged, the right will remain in force, despite its expiry date, until such time as the application has been granted or refused.[6]

[16] The applicant does not explain why it sought to renew its prospecting right LP1488 at this stage, when the right was only due to expire on 19 March

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4 Section 16(2)(b) provides that a Regional Manager must accept an application for a prospecting right if "*no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.*"

5 Section 18(4)

6 Section 18(5)

2011. Presumably, the applicant intended that its application for renewal would act as an assertion of its rights and prevent the Department from processing Hectocorp's application any further.

[17] However, this strategy did not meet with any initial success. The Regional Manager refused to accept the applicant's application for renewal on the basis that the effect of section 56(c) of the MPRDA was that on deregistration the applicant had lost prospecting right LP 1488. Consequently, it could not apply for the renewal of the right.

[18] Almost a year later, on 21 September 2011, the applicant instituted an internal appeal to the Acting Director-General against the Regional Manager's decision to refuse to accept its renewal application. In its appeal, the applicant contended that the Regional Manager had incorrectly applied section 56(c) of the MPRDA, and had failed to appreciate that under the deeming provision contained in section 73(6A) of the Companies Act, on the restoration of the applicant's registration, its prospecting and mining rights reverted to it. In addition, the applicant emphatically denied that it had been deregistered. It asserted that: "*Needless to overemphasize that in this case, Palala Resources was in the process of deregistration and the process was cancelled by CIPRO itself upon payment of annual returns by Palala Resources, as such Palala Resources did not lose any of its rights and obligations as alleged by the Regional Manager.*" (emphasis added)

[19] This amounted to an obfuscation of the true state of affairs by the applicant, as it had, in fact, been deregistrated. What the applicant correctly could have pointed out, is that it had succeeded subsequently in having its registration restored. The express assertion in its appeal to the Acting Director-General that the applicant's deregistration process had been cancelled, implicitly prior to finalisation, had the unfortunate consequence of misleading that decision-maker. The Acting Director-General overturned the Regional Manager's rejection of the applicant's renewal application on the basis that: "*... there*

was no sufficient proof (sic) that the Appellant was finally deregistered, the deregistration process having been cancelled and thus it has not been proven that the Appellant's prospecting rights have lapsed in terms of section 56(c) of the Act." (emphasis added)

[20] This decision prompted the appeal by Hectocorp to the Minister, resulting in the Minister's decision that is now under review. In her decision, the Minister found that the Acting Director-General had been incorrectly persuaded by the "*misplaced contention*" that the applicant's deregistration process had not been finalised. The Minister went further in her decision and expressed her view, as I outlined earlier, that the applicant's restoration under section 73(6A) of the Companies Act did not alter the inescapable consequence that its prospecting right LP 1488 had lapsed by virtue of the provisions of section 56(c) of the MPRDA. On this basis, the Minister overturned the Acting Director-General's decision to accept the applicant's application for renewal of its prospecting right LP1488.

[21] This somewhat protracted history of events brings us to the heart of the present application, viz. the question of whether it is the Minister's interpretation of these two statutory provisions, or, conversely, that of the applicant, that is correct.

[22] If the applicant's interpretation is correct, it remained the holder of prospecting right LP1488, it was entitled to apply for its renewal, and the Department ought to have accepted its application. On the applicant's interpretation, the Regional Manager's acceptance of Hectocorp's application for prospecting rights for the same minerals on the same land was contrary to section 16(2)(b) of the MPRDA in that the applicant's prospecting right had revived on the restoration of applicant's registration on 13 September 2010. This being the case, so applicant contends, the Regional Manager ought

properly to have rejected Hectocorp's application, rather than accepting it on 4 October 2010.[7]

THE PROPER GROUNDS OF REVIEW

[23] Before dealing with the substance of the applicant's review, I regard it as appropriate to highlight and deal with certain shortcomings in the review grounds set out in the applicant's founding papers.

[24] Neither of the parties suggests that this is not a review governed by the Promotion of Administrative Justice Act ("PAJA").[8] It is unquestionably such a review. What is extraordinary, in my view, is that nowhere in the papers filed in support of the application, or indeed in the applicant's written heads of argument, is any reference made to PAJA, or to the specific provisions of PAJA relied upon.

[25] The Constitutional Court has held in this regard that:

> "*... it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of complaint.*"[9]

[26] Our High Courts have described the failure by an applicant's legal advisers to recognise that PAJA is applicable as "*deplorable*".[10] In the present case, the

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7 Section 16(2)(b) provides that:
> "*The Regional Manager must accept an application for a prospecting right if ... no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral on the same land.*" (emphasis added)

The converse statement of the rule established under this section is that the Regional Manager may not accept an application for a prospecting right if another person already holds one for the same mineral on the same land.

8 Act 3 of 2000

9 *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 27

10 *Cele v South African Social Security Agency* 2009 (5) SA 105 (D&CLD) at para 47; *Sibiya v Director-General, Home Affairs* 2009 (5) SA 145 (KZP) at para 15

shortcomings in the applicant's papers extended beyond a mere failure to mention PAJA. The grounds of review described in the founding affidavit bear little *prima facie* resemblance to those set out in section 6 of PAJA. The applicant contends in the founding affidavit that the Minister committed a "*fundamental misunderstanding of the nature of the enquiry before her*"; that she committed a "*fundamental misdirection or mistake vitiating her decision*"; this mistake demonstrated that the Minister had failed to apply her mind to the issues and her decision was irrational because it was so fundamentally flawed.

[27] It is little wonder that Hectocorp countered in its answering affidavit that the application bore a closer resemblance to an appeal than a review.

[28] It was only in the applicant's heads of argument that the grounds of review appeal were crystallised. In the written heads, and in the oral submissions before me, counsel for the applicant indicated that applicant was relying primarily on the following grounds of review:

[28.1] The Minister's decision was materially influenced by an error of law.

[28.2] The Minister took into account irrelevant considerations and did not consider relevant considerations when making her decision (what these were was not specified).

[28.3] The Minister's decision contravenes the law and is not authorised by the empowering provision.

[28.4] The Minister's decision is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the Minister or the reasons given by the Minister.

[29] Unfortunately, by virtue of the fact that these grounds were not dealt with in the founding papers, it was left to the court to work out which are the relevant grounds, and what facts speak properly to those grounds. This is not acceptable. It is the duty of the legal representatives of litigants to ensure that their clients' cases are properly formulated and advanced before the courts. Clients should not be left vulnerable to the risk of having their cases dismissed because their lawyers have not properly prepared their cases. This is particularly so in cases like this one involving constitutional rights. It is now almost 15 years since PAJA was enacted; there is a substantial body of jurisprudence on judicial review under PAJA; and it is taught in every law school. There is no acceptable reason for founding papers in a review application to fall short of identifying the facts and grounds of review clearly and with appropriate reference to the relevant sections of PAJA that are relied upon. The papers should also draw the necessary link between the material facts and the identified grounds of review.

[30] Despite these shortcomings, I am very mindful, as I must be, of the applicant's constitutional right to administrative action that is lawful, reasonable and procedurally fair.[11] The Bill of Rights binds the judiciary,[12] and courts must conduct themselves in a manner that is compliant with it.[13] Accordingly, I should not lightly permit flaws in the founding papers to non-suit the applicant in a case of this nature. Notwithstanding the flaws I have described, and subject to the proviso I make immediately below, I am satisfied that the founding papers do set out sufficient material facts and averments to support a case for review. Whether the applicant should succeed in its case remains to be considered.

[31] Before considering that question, I need to deal with the proviso I mentioned. In the written heads of argument, counsel for the applicant indicated that in

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11 In terms of section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution")

12 In terms of section 8(1) of the Constitution

13 I Currie & J de Waal *Bill of Rights Handbook* (5ed) p49

addition to the grounds I listed earlier, the applicant also intended relying on procedural unfairness as an additional ground of review. This ground was neither identified nor dealt with as a matter of substance in the founding papers filed by the applicant. None of the respondents was given any opportunity to deal with allegations of procedural unfairness. In short, this ground of review was not one prefaced by the applicant in the case it made out. In the circumstances, whether or not the Minister or the Regional Manager acted procedurally unfairly is not an issue that is properly before me, and I cannot make any finding on the issue.

THE PROPER INTERPRETATION AND APPLICATION OF THE RELEVANT STATUTORY PROVISIONS

[32] Was the Minister's decision influenced by a material error of law in that she based her decision on an incorrect interpretation and application of the two applicable statutory provisions, viz. section 56(c) of the MPRDA and section 73(6A) of the Companies Act? This is the central question I am required to determine.

[33] The applicant's starting point in making out its case is section 73(6A), and more specifically, the deeming provision contained in this section that provides that upon restoration of registration, "*the company shall be deemed to have continued in existence as if it had not been deregistered*". The applicant points to well-established jurisprudence in the company law context that analyses the meaning and effect of this deeming provision. For example, this court held in *Ex parte Sengol Investments (Pty) Ltd*[14] that:

> "*The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights*

[14] 1982 (3) SA 474 (T) at 477C-F

as the assets will revert to the company. This includes assets which have become bona vacantia and as such accrued to the State. Likewise debtors and creditors of the company at the time of deregistration may upon restoration find their obligations or rights resuscitated. It follows that the restoration of the registration of the company in terms of s 76(6) may have wide-ranging effects."

[34] The Supreme Court of Appeal pointed out in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*[15] that in reality the effect of the provision is not simple, and that during the period that has elapsed since deregistration, "*the moving finger*", may "*have moved on*":

> "*As a result of deregistration, third parties may have acquired or lost rights, or they may have decided not to exercise the rights against the company - precisely because the company did not exist. Through the operation of a restoration order obligations towards the company, which were extinguished because of deregistration, would revive with retrospective effect. What is more, a restoration order seems to validate, retrospectively, all acts done since deregistration - including, for example, the institution of legal proceedings - on behalf of a company that did not exist. In the light of all of this, it is an oversimplification to regard a restoration order as no more than an 'as you were'. It can clearly cause severe prejudice to third parties.*"

[35] While these dicta refer to section 73(6) of the Companies Act, rather than section 73(6A), which was only enacted subsequent to the judgments being delivered, the principles they lay down are applicable in the context of section 73(6A).

[36] The applicant overlooks the cautionary note sounded by the SCA in the *Insamcor* dictum cited above. It focuses instead on the emphasis placed by

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[15] 2007 (4) SA 467 (SCA) at 475E-H

the courts on the reviving effect of the deeming provision. The applicant's submissions in this regard may be conveniently summarised as follows:

[36.1] The courts have recognised that the effect of the deeming provision is to revive, retrospectively and seamlessly, not only a company's legal personality, but also all of its rights and other assets, as if it had never been divested of them.

[36.2] The effect of applicant's restoration was that from that date applicant's prospecting right LP1488, which is a limited real right and hence an asset in applicant's estate, was deemed to be restored to the applicant retrospectively as if the applicant had never been deregistered.

[36.3] There is nothing in section 56(c) of the MPRDA that excludes the retrospective effect of section 73(6A).

[36.4] The effect of section 73(6A) is that on restoration of registration, the applicant's prospecting right will be deemed not to have lapsed at all by operation of law.

[36.5] Section 56(c) must be interpreted as if it included a proviso to the effect that on restoration of registration, the affected permits, licenses and rights will revive.

[36.6] The Minister was influenced by a material error in law by failing to interpret section 56(c) in this way, and her decision therefore falls to be set aside on review.

[37] It is clear from the applicant's contentions that it proceeds from the premise that the Companies Act, and specifically section 73(6A), is the primary statute determining the legality of the Minister's decision. The applicant goes so far in its founding papers to suggest that insofar as section 56(c) of the

MPRDA "*purports*" to exclude the effect of restoration, governed by section 73(6A), it is "*ultra vires the Companies Act*". The stance adopted by the applicant in its interpretation of these statutory provisions clearly is that section 73(6A) is, as it were, the dominant provision, and that section 56(c) must yield to, and be interpreted so as to give effect to it.

[38] For a number of reasons I am unable to accept that the applicant's premise, and its consequent interpretation of the sections, is correct.

[39] To begin with, the applicant's argument commences, in my view, from the wrong starting point. There is no legitimate basis for the assumption that the starting point of the interpretive inquiry is section 73(6A), and that section 56(c) must be interpreted in light of that section.

[40] The correct approach, in my view, is to have regard to the language of both sections in order to attempt to determine the legislative intent. This must be done in accordance with the current state of our law as regards the proper approach to the interpretation of statutes and other documents, which has been succinctly summarised by the Supreme Court of Appeal in the following dictum of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[16]

> "*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its*

[16] 2012 (4) SA 593 (SCA) at para 18

production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (emphasis added; citations excluded)

[41] I have already indicated what the courts have said as regards the meaning and general effect of the deeming provision in section 73(6), of the Companies Act, which is equivalent to that contained in section 73(6A). Generally, the legal personality of a company that is lost by its deregistration is revived retrospectively. This means that, in general terms, as regards its rights and obligations, it will, on restoration of its registration re-assume them as if they had not been lost in the first place.

[42] I stress that this is how the courts have interpreted the general effect of a deeming provision such as the one contained in section 73(6A). None of the dicta relied on by the applicant deal with the effect of the deeming provision when it comes into possible conflict with section 56(c) of the MPRDA. For this reason, the applicability of these dicta only goes so far. What needs to be determined, as a counter-balance to the general meaning and effect of section 73(6A), is the intended meaning and effect of section 56(c).

[43] In my view, the language of section 56(c) is plain: it states in clear terms that a right granted under the MPRDA "*shall lapse*" on the deregistration of the company to which it was granted. The Shorter Oxford English Dictionary defines the verb "*lapse*", in the context of a right or a privilege, to mean to "*become void, revert to someone, through non-fulfillment of conditions, absence of heirs etc*".[17] The same dictionary defines "*void*" as meaning to "*deprive of legal validity*". The ordinary meaning of section 56(c), then, is that a mining or prospecting right held by a company ceases to have any legal validity on deregistration of that company.

[44] Section 56(c) permits of only one exception to the lapsing of a right consequent on the deregistration of a company. This is when an application has been made to the Minister for consent in terms of section 11, and such consent has not been refused. Section 11 governs the cession, transfer, lease, sub-lease, assignment, alienation or other disposal of mining or prospecting rights granted under the MPRDA. It provides that such disposal may not be undertaken without the written consent of the Minister.

[45] It seems to me that the intended meaning and effect of section 56(c) is that mining and prospecting rights held by companies who are deregistered will lapse, i.e. become void or legally invalid, unless, prior to the deregistration, the company applies for the Minister's written consent to cede or otherwise dispose of the right. The fact that section 56(c) expressly provides for a section 11 application to act as an exception to a right lapsing on deregistration, coupled with the fact that restoration of registration is not identified as an exception, is in my view a strong indication that the legislature intended that only in the case of a section 11 application, and no other, will a mining or prospecting right be protected from becoming void on deregistration.[18]

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17 See also *Ex Parte Viviers et Uxor (Sattar Intervening)* 2001 (3) SA 240 (TPD) at 246, where a similar meaning was adopted in reference "lapse" in a different legal context.

18 *Minister of Law and Order & Others v Zondi* 1992 (1) SA 468 (NPD) at 471H-I

[46] Is there any merit in the applicant's contention that despite the lapsing of a mining or prospecting right on deregistration, the effect of the deeming provision in section 73(6A) is that the right revives by operation of law once a company's registration is restored? I think not.

[47] Firstly, in my view this contention is based on a misunderstanding of the legal effect of section 73(6A). The effect of deregistration of a company is that it loses its legal personality, and its existence as a legal *persona* ceases to exist.[19] Deregistration "*puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death.*"[20] Therefore, in the eyes of the law, it becomes incapable of being the bearer of legal rights and obligations. It is for this reason that it loses ownership of its assets, and no longer enjoys any rights. Critically, however, those rights and assets do not fall away or lose their legal validity altogether. The effect of deregistration is simply that for so long as the company remains deregistered, it has no claim to those rights. Its rights and assets are treated as *bona vacantia* i.e. "*unclaimed property, property without a claimant*", and as such, they automatically vest in the State.[21]

[48] The effect of the deeming provision in section 73(6A) is retrospectively to resurrect the company's legal personality; the company is deemed never to have lost its legal personality. The legal effect of this is that the company is deemed never to have lost its capacity to be the bearer of legal rights, and it is on this basis that the company's rights and assets revert to it on restoration of its registration as if they had never been lost.

[49] In my view, it is important to appreciate that what the deeming provision does is to revive legal personality; it does not revive rights that have lost their legal validity and have become void. Thus, while the effect of the provision is to reinvest in the company the rights and assets it previously held, this only

19 *Ex parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 (2) SA 372 (W) at 376-7
20 *R Miller v Nafcoc Investment Holding Company Ltd* [2010] 4 All SA 44 (SCA) at para 11
21 *Suid-Afrikaanse Nasionale Lewensassuransie-Maatskappy v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (C) at 637-638

applies insofar as those rights and assets still exist. The deeming provision cannot have the effect of giving legal life to rights that, because they have lapsed, are legally dead.

[50] For this reason, the applicant's contention that the effect of the deeming provision in section 73(6A) is retrospectively to revive a prospecting right that has lapsed by operation of section 56(c) is misdirected, and cannot be upheld.

[51] There are additional reasons for rejecting the applicant's contention.

[52] The amendment that introduced section 73(6A) into the Companies Act was effected in 2006.[22] This was after the MPRDA was enacted. To the extent that there may be any ambiguity in section 73(6A), and particularly as regards the question of whether the legislature intended, by its introduction, to alter the legal situation established under section 56(c) of the MPRDA, certain interpretive presumptions come into play.

[53] The maxim *lex posterior priori derogat* has the effect that a later statute that is clearly inconsistent and irreconcilable with an earlier one will be treated as having implicitly revoked the earlier statute to the extent of the inconsistency.[23] However, this maxim is invoked only with circumspection, as there are interpretive presumptions that work against it. One of these is the presumption that a statutory provision is not aimed at altering the existing law (both common law and statute law) more than is necessary. Another is the presumption encapsulated in the maxim *generalia specialibus non derogant*. In terms of this presumption subsequent general legislation does not revoke prior, specific legislation dealing with the same subject matter unless the general legislation professes to deal with this subject matter

22 Act 24 of 2006
23 Du Plessis, above p73

exhaustively.[24] Finally, there is the presumption that the legislature has dealt exhaustively with the subject matter of an enactment. The significance of this presumption is that:

> " *... it is therefore not for the courts to supply omissions in the provisions of a statute ... As a Court cannot act upon mere conjecture and speculate as to whether or not the Legislature might have overlooked something, it cannot supplement a statute by providing what it surmises the Legislature omitted. The Court therefore must give effect to what the Act says and not to what it thinks it ought to have said ... As a result ... a casus omissus 'cannot be supplemented by the Courts, whose sole duty is to construe the Act as it stands'.*"[25]

[54] This is consistent with the caution expressed in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, cited above, against courts being tempted to cross the divide between the task of interpretation and that of legislation.

[55] All of these presumptions work against the interpretation contended for by the applicant. In the first instance, I can find no irreconcilable conflict between section 73(6A) and section 56(c): reading the two provisions together, the effect is simply that while section 73(6A) retrospectively restores to a company those rights and assets that still have legal existence, it does not have the effect of restoring a right that has lapsed, and no longer exists by operation of section 56(c). In addition, both the *generalia specialibus non derogant* principle and the presumption against unnecessary alterations to the existing law point away from the conclusion that section 73(6A) implicitly altered section 56(c).

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24 Du Pless, loc cit, citing *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367

25 *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E), cited in JR de Ville *Constitutional and Statutory Interpretation* p219-20

[56] The same holds true for the injunction against courts applying their interpretive powers to supply possible omissions in statutes. This is essentially what the applicant has requested by seeking an interpretation of section 56(c) that supplies what the applicant says is an omission in section 56(c). The applicant submits that section 56(c) must be interpreted as if it includes a proviso to the effect that on restoration of registration, the lapsed rights will revive. In my view, I would be exceeding the proper ambit of the interpretive task, and crossing the prohibited divide, if I conceded to the applicant's request. There is no justification for going beyond what section 56(c) states in clear language by reading the section as if it contains an implicit proviso of this nature.

[57] A consideration of the purpose and scheme of the MPRDA reinforces my view. The changes introduced by the MPRDA have been described by the Supreme Court of Appeal as follows:

> *"It (the MPRDA) fundamentally altered the legal basis upon which rights to minerals in South Africa are acquired and exercised. Previously such rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals, subject to the person exploiting the minerals possessing a mining authorisation in terms of the Minerals Act 50 of 1991. Once the (MPRDA) came into operation all mineral resources vested in the state as the custodian of such resources on behalf of all South Africans. The right to exploit such minerals was thereafter to be conferred by the state by way of mining rights granted in terms of section 23 of the (MPRDA)."*[26]

[58] In similar terms, the Constitutional Court has described the foundational premise of the MPRDA as follows:

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[26] *Xstrata SA v SFF Association* 2012 (5) SA 60 (SCA) at 62B-D

"On behalf of all the people of South Africa, the state is now the custodian of the mineral and petroleum resources of this country which is their common heritage. One of the objects of the MPRDA is to give effect to this principle by granting various kinds of rights to successful applicants."[27]

[59] And further:

"The MPRDA abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the minerals, which existed under the mining law dispensation enacted prior to the Constitution. In its stead the MPRDA introduced a mineral law dispensation in terms of which the state became the custodian of mineral resource with the power to allow exploitative access to those resources to all the people of South Africa."[28]

[60] The MPRDA is explicit in its foundational purpose. Section 2 prescribes the objects of the Act. These include:

[60.1] recognising the internationally accepted right of the State to exercise sovereignty over all of the mineral and petroleum resources in the Republic;

[60.2] giving effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

[60.3] promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

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27 *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 25, per Mogoeng CJ

28 *Agri SA v Minister for Minerals and Energy*, above, per Froneman J at para 80. Although the judgment of Froneman J was a minority, dissenting judgment, this dictum is not at odds with the majority judgment.

[60.4] promoting economic growth and mineral and petroleum resources development in the Republic;

[60.5] promoting employment and advancing the social and economic welfare of all South Africans;

[60.6] providing for security of tenure in respect of prospecting, exploration, mining and production operations; and

[60.7] ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[29]

[61] Section 3(2) empowers the Minister, as the representative of the State, which is the custodian of the nation's mineral resources, to among other things, grant, issue, refuse, control, administer and manage prospecting and mining rights. The Minister must do so within a framework of national environmental policy while promoting economic and social development.[30]

[62] To this end the Act establishes a detailed regulatory framework for the administration and management of mining and prospecting rights, from the initial application for the right, until the formal closure of operations. The SCA has noted that the MPRDA "*exhibits strong regulatory features*".[31] This is consistent with its underlying objective of exacting far-reaching changes to the pre-existing legal landscape with a view to ensuring greater and more equitable access to mineral resources in the interests of both the economic development of South Africa, and the socio-economic development of all South Africans. It is also consistent with the need for certainty in the administration and management of mining and prospecting rights.

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29 Sections 2(a) – (c); (e) – (g) and (i)

30 Section 3(3)

31 *Minister of Minerals and Energy v Agri-SA* 2012 (5) SA 1 (SCA) at para 15. Although the Constitutional Court on appeal (see *Agri-SA v Minister of Menerals and Energy*, above) differed from the rationale adopted by the SCA, it did not do so in this regard.

[63] The MPRDA expressly recognises that mining or prospecting rights are limited real rights. However, these rights are born out of, and their nature and ambit are determined by, the provisions of the MPRDA, rather than the common law. One of the features of mining or prospecting rights granted under the MPRDA is that they must be put into practical effect. Unlike mining rights under the common law, the holder of a right under the MPRDA can no longer choose to allow the right to remain a dormant asset in the holder's estate. So, for example, section 19(2)(b) obliges the holder of a prospecting right to commence with prospecting activities within 120 days from the date on which the right takes effect. In addition, section 19(2)(c) obliges the holder to "*continuously and actively conduct prospecting operations in accordance with the prospecting work programme*". These obligations are consistent with the express purpose of the MPRDA to ensure the promotion of economic growth, mining resources development, employment and the social and economic welfare of all South Africans. Dormant mining and prospecting rights do not contribute to achieving these objectives.

[64] In providing that a right granted under the MPRDA will lapse, i.e. become void on the deregistration of a company, section 56(c) is in alignment with the overall purpose and objectives of the Act. The effect of deregistration of a company is that it can no longer exercise the rights it enjoyed, nor can it be bound by the obligations it was subject to, while it still had legal personality. While the Companies Act recognises that it is not necessarily final, deregistration puts the company, as well as third parties who have an interest in the company's rights and obligations in limbo. This situation is not conducive to achieving the underlying purpose and objectives of the MPRDA.

[65] Accordingly, it is entirely consistent with the purpose and those objectives for section 56(c) to provide that a right granted under the MPRDA to a company that has been deregistered will lapse on deregistration. This creates legal and factual certainty. The right reverts to the custodianship of the State, which assumes the power to reallocate the right in terms of the MPRDA, and

thus to ensure that the objectives of the Act are met. Alternatively, a company facing deregisration may apply for the Minister's consent to cede the right to a third party, who is in a position to exploit it. In either event, the scheme envisaged under section 56(c) is aimed at ensuring that access to mineral rights and the economic and social development derived therefrom are not compromised as a result of the deregistration of a company that holds mining and prospecting rights.

[66] The applicant's interpretation is not consistent with these objectives or with the underlying purpose and scheme of the MPRDA. On its interpretation, the rights granted under the MPRDA must be treated in the same way as other rights and assets of a deregistered company. They cannot revert to the custodianship of the State for reallocation under the Act because, should the company succeed in restoring its registration, its rights under the MPRDA will be reinstated retrospectively, as if they had never lapsed. The effect of this interpretation is that the Department would be compelled in every case where a company is deregistered to treat its MPRDA rights as frozen. It could not reallocate those rights because of the risk that the company could have its registration subsequently restored. In that event, on the applicant's interpretation, the company would be deemed, retrospectively, to have remained the holder of the rights granted to it under the MPRDA throughout the period of deregistrtion. Consequently, any reallocation of those rights effected by the Department in the interim would be unlawful and vulnerable to being set aside review.

[67] The practical implications of this interpretation are manifest. Rights granted under the MPRDA to companies could remain frozen indefinitely, save for the eventual termination on the expiry of the original grant period.[32] This would not be conducive to economic and socio-economic development, nor would it advance equitable access to mineral resources. It would lead to grave

[32] In terms of section 56(a) a right, permit or license lapses "*when it expires*".

uncertainty as to the status of the rights in questions and the security of tenure in respect of them.

[68] Had the Legislature intended section 73(6A) to operate so as to revive mining and prospecting rights that have lapsed under section 56(c), this would have necessitated the inclusion in the MPRDA of a regulatory scheme to deal with the implications of this, and the provision of appropriate concomitant powers to the Minister or other functionaries. There is no such scheme in the Act, nor is any power extended to the Minister or other functionaries to give effect to a right that has lapsed under section 56(c). The sole power accorded to the Minister in this regard is the power to consent to, *inter alia*, a cession or a lease of a right held by a company facing possible deregistration.

[69] In my view, and for these reasons, the interpretation contended for by the applicant is inconsistent with the objects of the Act. In terms of section 4(1) of the Act, I must prefer any reasonable interpretation that is consistent with the objects of the Act over any interpretation that is inconsistent with them. Accordingly, I am unable to accept the interpretation upon which the applicant relies.

[70] I agree with the submissions of the respondent to the effect that on a proper interpretation of section 56(c), upon deregistration of a company that is the holder of rights under the MPRDA, those rights lapse, and become void by operation of law. They are rights specifically created under, and regulated by, the MPRDA. As such, they do not fall within the ordinary "basket" of rights that become *bona vacantia* on the deregistration of a company, and then revert retrospectively to the company on the restoration of its registration under section 73(6A). The effect of section 56(c) is quite clear: rights granted under the MPRDA become void on deregistration, they lose their legal validity. Although, section 73(6A) may retrospectively restore the legal

personality of a deregistered company, it does not have the effect of reviving the legal existence of rights that have lapsed by operation of section 56(c).

[71] In my view, this interpretation is consistent with the clear terms of section 56(c), it is supported by the applicable interpretational aids, and it is in accordance with the purpose and objectives of the MPRDA.

[72] I am supported in my view by the decision of the Western Cape High Court in the case of *Bright Bay Property Service (Pty) Ltd v Moravian Church of South Africa*.[33] Although the main thrust of the decision in that case was based on the premise that sections 82(4), read with section 82(3) and section 1(c) of the 2008 Companies Act were applicable, rather than section 73(6A) of the 1973 Companies Act, the court found that:

> *"Even if the argument is accepted that the retrospectivity provisions relating to the actions and conduct of the company in terms of s 73(6A) of the 1973 Act are applicable, on reregistration a lapsed permit in terms of the Mineral and Petroleum Resources Development Act cannot be validated. If regard is to be had to the provisions of s 56(c) of the Mineral and Petroleum Resources Development Act, such a permit would have no legal force and effect and would be void."*

[73] The Western Cape High Court did not expand on its reasons for this finding. However, it seems to me that the finding was based on a reading of the clear language of section 56(c). With respect, this accords with my own interpretation of this section.

CONCLUSION

[74] The applicant's case for the review and setting aside of the Minister's decision rested on this court accepting that its interpretation of section 56(c) and section 73(6A) is correct. The applicant contended that the Minister's

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[33] 2013 (3) SA 78 at para 46.

contrary interpretation led her to make a decision that was vitiated by a fundamental error of law. For all of the reasons set out above, I find that there is no merit in the applicant's case. The Minister was correct in her interpretation and application of section 56(c) and in her finding that section 73(6A) does not change the position.

[75] In the circumstances, I am of the view that there is no basis for reviewing and setting aside the Minister's decision. The effect of this finding is that the applicant's application for the renewal of its prospecting right was correctly rejected by the Department on the basis that its prospecting right LP1488 had lapsed on 16 July 2010, when the applicant was deregistered.

[76] For sake of completeness, I should point out that in its Notice of Motion the applicant sought in prayer 3 an order directing the Minister and the Regional Manager to restore all the rights acquired by the applicant. In addition to prospecting right LP 1488, the applicant identified in prayer 3 rights granted under protocols numbered LP 1399PR and LP 2303PR . The difficulty with this prayer is that the decision sought to be reviewed and set aside was the appeal decision of the Minister that only dealt with prospecting right LP 1488. The status of the other identified rights, and the manner in which the parties have dealt with those rights is not elucidated in the record before me. It is not clear whether the applicant sought a renewal of those rights, what the Department's response to any such application was, or whether or not those rights have by now in any event expired by effluxion of time.

[77] In the circumstances, it seems to me that there was no proper case before me for the relief sought in prayer 3, save insofar as it related to prospecting right LP1488. However, in view of the decision that I have reached regarding the proper interpretation of section 56(c) and section 73(6A), this issue is in any event academic.

[78] For the reasons set out fully above, the application falls to be dismissed.

[79] I make the following order:

[79.1] The application is dismissed.

[79.2] The applicant is directed to pay the costs of the third respondent.

R M KEIGHTLEY
ACTING JUDGE,
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING:	8 MAY 2014
DATE OF JUDGMENT:	~~27 JUNE 2014~~ 4/8/2014
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