CASES / VONNISSE

A BIBLICAL LAZARUS: DEREGISTRATION OF A COMPANY AND THE REVIVAL OF RIGHT TO MINERALS

A discussion of *Palala Resources (Pty) Ltd v Minister of Mineral* Resources and Energy 2016 (6) SA 121 (SCA)

1 Introduction

The notion of death and resurrection is intriguing. As part of a religious teaching, rising from the dead is often associated with an act of a deity for the salvation of humankind. Holding the ultimate power of having defeated death, the resurrected deity often has the ability to perform the miracle of commanding others to rise from the dead. For some, these religious beliefs are of the utmost importance and, frequently, take centre stage in the believer's life. While it is generally accepted that people have the freedom to choose their religious beliefs, we should tread cautiously when the law assumes the characteristic of performing miracles. This need to tread cautiously is well illustrated in *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA) (hereinafter "*Palala Resources* (SCA)").

The case concerns the interpretation of section 56(c) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and section 73(6A) of the Companies Act 61 of 1973 (hereinafter "1973 Companies Act"). According to section 56(c) of the MPRDA, rights to minerals lapse when a company is deregistered. Section 73(6A) of the 1973 Companies Act provides an opportunity for a company that was deregistered *for failing to submit annual returns* (authors' own emphasis) to be restored to the companies register (hereinafter "the register"). According to the Supreme Court of Appeal (SCA), the restoration of a company according to section 73(6A) constitutes a "Biblical Lazarus moment" (par 5 and 12) for a prospecting right that lapsed according to section 56(c) of the MPRDA: upon restoration of the company, the prospecting right miraculously revives from the dead.

In this case discussion, we investigate whether the revival of rights to minerals in the manner allowed in the *Palala* case accords with the

objectives of the MPRDA. We specifically investigate the correct interpretation of section 56(c) of the MPRDA in the particular circumstances of the case, namely, when companies that hold prospecting rights are deregistered for failing to submit annual returns. Although not discussed here, our arguments can be extended to all rights to minerals and to all scenarios envisaged in section 73 of the 1973 Companies Act; i.e., where companies are removed from the register *without* being wound up (authors' own emphasis). Our arguments *do not* cover the voluntary or involuntary winding up of solvent companies (s 80 and 81 of the Companies Act 71 of 2008 (the 2008 Companies Act)) or the winding up of insolvent companies (s 344 of the 1973 Companies Act).

At all material times during the dispute, the 1973 Companies Act, and not the 2008 Companies Act, was operational. We compare the position in the 2008 Companies Act throughout the discussion.

2 Facts and background

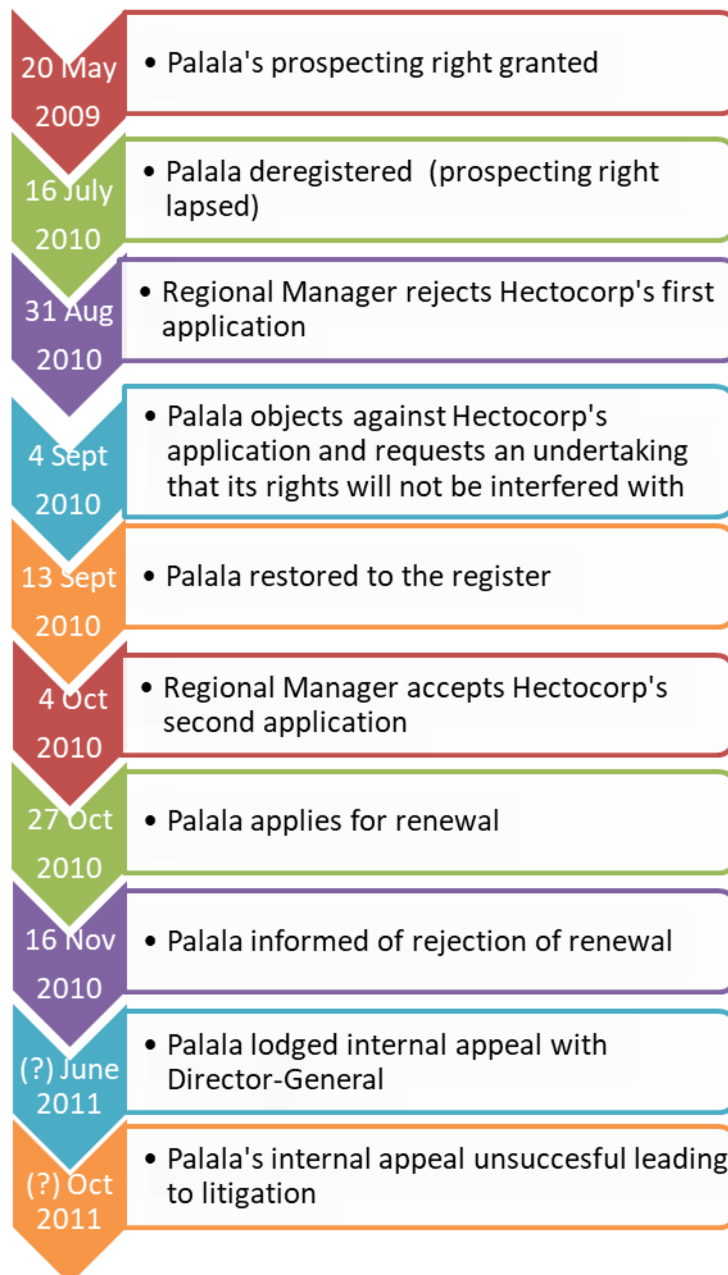
On 20 May 2009, Palala Resources (Pty) Ltd (hereinafter "Palala") was granted a prospecting right in terms of section 17 of the MPRDA (*Palala Resources* (SCA) par 3). According to this right, Palala was entitled for a period of two years, until 19 May 2011, to prospect for gold and pyrite on a portion of the farm Malamulele 234 LT in Limpopo (*Palala Resources* (SCA) par 3). On 16 July 2010, almost a year before the expiry of the prospecting right, Palala was deregistered from the register for failing to submit annual returns (*Palala Resources* (SCA) par 3).

Section 173 of the 1973 Companies Act requires companies to submit annual returns (compare s 33 of the 2008 Companies Act). Failure to submit these returns for a period of more than six months gives the Registrar of Companies (hereinafter "the registrar"), upon following the prescribed procedure, the authority to deregister the company (s 73(1), (3) and (5) of the 1973 Companies Act; compare s 82(3) of the 2008 Companies Act that requires failing to submit annual returns for a period of at least two years before deregistration can occur). The procedure for deregistration entails that the registrar must send a letter by registered post, inquiring whether the company is carrying on business or is in operation. If the registrar does not receive an answer or receives an answer that the company is not carrying on business, it must notify the company that it will be deregistered after two months of the date of the notice unless good cause is shown to the contrary. According to section 82(3)(a) of the 2008 Companies Act, the Company and Intellectual Property Commission (hereinafter "the commission") may remove a solvent company from the register for failure to file an annual return if, on demand by the commission, the company gives no satisfactory reasons as to why it failed to file its annual return or why it should remain registered). Creditors of the company are at no point in the process informed of the company's deregistration, nor are their interests taken into account (Marx *The Deregistration of a Company for failing to submit Annual Returns in terms of Section 82(3) of the Companies Act 71 of 2008, and the Restoration of the Company to the Companies Register in terms of Section 82(4) and Section 83(4) by a Creditor* (Unpublished LLM dissertation, University of

Pretoria 2014 5 14). The effect of deregistration is that the company loses its legal personality (par 5).

Despite losing its legal personality, deregistration for failing to submit annual returns does not signify the end of the road for the deregistered company in the same manner as winding up of a solvent or an insolvent company. According to section 73(6A) the deregistered company can, upon submitting the outstanding returns and paying the prescribed fee, apply to the registrar to be restored to the register (compare s 82(4) of the 2008 Companies Act, according to which any interested party may apply to the commission to reinstate a company that was deregistered for failing to submit annual returns. S 73(6)(a) of the 1973 Companies Act and s 83(4) of the 2008 Companies Act provide for a court application for the reinstatement of a company that was deregistered for reasons wider than failure to submit annual returns). Section 73(6A) contains a "deeming clause" (*Palala Resources* (SCA) par 6 and 8) according to which a company that has been restored to the register "shall be deemed to have continued in existence as if it had not been deregistered" (compare s 82(4) of the 2008 Companies Act discussed below in s 4.2).

Not even two months after the company's deregistration, Palala successfully invoked section 73(6A) of the 1973 Companies Act and, subsequently, on 13 September 2010, was restored to the register *Palala Resources* (SCA) par 4. Following restoration, on 27 October 2010, Palala applied for renewal of the prospecting right (*Palala Resources* (SCA) par 4). Palala presumably took this step as a strategy to affirm its rights in respect of the prospecting area and to prevent the Department of Mineral Resources (DMR) from processing Hectocorp's application (*Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) par 17) (hereinafter *Palala Resources* (GP)"). Palala's strategy proved unsuccessful when on 16 November 2010, the DMR informed the company that, since its prospecting right had lapsed on 16 July 2010 due to deregistration in terms of section 56(c) of the MPRDA, it could not apply for renewal (*Palala Resources* (GP) par 17; see *Palala Resources* (SCA) par 4). A number of internal appeals and a review application to the High Court (HC) (*Palala Resources* (GP)) followed this rejection. The rejection was also closely linked to an application by another company, Hectocorp Pty (Ltd) (hereinafter "Hectocorp"), for a prospecting right for the same minerals on the same land. A timeline is drawn to assist the discussion of these events:


20 May 2009
Palala's prospecting right granted
16 July 2010
Palala deregistered (prospecting right lapsed)
31 Aug 2010
Regional Manager rejects Hectocorp's first application
4 Sept 2010
Palala objects against Hectocorp's application and requests an undertaking that its rights will not be interfered with
13 Sept 2010
Palala restored to the register
4 Oct 2010
Regional Manager accepts Hectocorp's second application
27 Oct 2010
Palala applies for renewal
16 Nov 2010
Palala informed of rejection of renewal
(?) June 2011
Palala lodged internal appeal with Director-General
(?) Oct 2011
Palala's internal appeal unsuccesful leading to litigation

During 2010, Hectocorp lodged an application for a prospecting right for the same minerals on the same land with the Department of Mineral Resources (DMR), the exact date of which is unknown (*Palala Resources* (SCA) par 3). The DMR's Regional Manager rejected this application on 31 August 2010 on the basis that Palala (*Palala Resources* (SCA) par 3) held the rights. Hectocorp avers that the application was rejected because the DMR was not aware of Palala's deregistration (*Palala Resources* (GP) par 11). Undeterred, Hectocorp proceeded to submit a second application to the Regional Manager, the exact date of which is also unknown (*Palala Resources* (GP) par 12; *Palala Resources* (SCA) par 4). Having gained knowledge of Palala's deregistration, on 4 October 2010, the Regional Manager notified Hectocorp that its second application was accepted (*Palala Resources* (GP) par 12; *Palala Resources* (SCA) par 4).

Palala gained knowledge of Hectocorp's application and lodged an objection with the Regional Manager on 27 September 2010 (*Palala Resources* (GP) par 13). The basis of Palala's objection was that the company was never "deregistered in the 'strict sense of the word'" (*Palala Resources* (GP) par 13). Palala requested an undertaking from the Regional Manager that its rights would not be interfered with based on the company's deregistration (*Palala Resources* (GP) par 13). The Regional Manager never responded to this request (*Palala Resources* (GP) par 13).

In June of the following year (2011), according to the internal appeal procedures prescribed by section 96 of the MPRDA, Palala lodged an appeal with the Director-General against the DMR's refusal to renew the prospecting right (*Palala Resources* (SCA) par 4). The Director-General upheld the appeal in October 2011, deciding that there was insufficient proof that Palala was "finally" deregistered and that the prospecting right, therefore, did not lapse (*Palala Resources* (SCA) par 4). Hectocorp lodged an appeal against the Director-General's decision with the Minister of Mineral Resources and Energy (hereinafter "the Minister") (*Palala Resources* (SCA) par 4). The Minister upheld the appeal, deciding that the right did indeed lapse when Palala was deregistered and could therefore not be renewed (*Palala Resources* (SCA) par 4). Having exhausted its internal remedies, Palala, in turn, lodged a review application in the North Gauteng High Court (*Palala Resources* (SCA) par 4). The court dismissed the application, deciding that Palala's prospecting right lapsed on deregistration and that its subsequent restoration did not retrospectively revive the lapsed right (*Palala Resources* (SCA) par 4). The SCA overturned the HC's decision, holding that the lapsed prospecting right revived and re-vested in Palala when the company was restored to the register (*Palala Resources* (SCA) par 12). The reasons for the decisions are discussed in section 4 below.

3 Legal question

The legal question identified by the HC is whether the "deeming clause" in section 73(6A) of the 1973 Companies Act had the effect of reviving Palala's prospecting right when it was restored to the register (*Palala Resources* (GP) par 7). The Supreme Court of Appeal (SCA) crisply formulated the

question as to whether Palala's restoration resulted in a "Biblical Lazarus moment for a lapsed … prospecting right" (*Palala Resources* (SCA) par 5). Accordingly, if the prospecting right was resurrected when Palala was restored to the register, the appeal had to succeed and the prospecting right once again vested in Palala. If the restoration to the companies' register is not capable of miracles and the prospecting right did not revive, the appeal had to fail and the DMR could consider Hectocorp's application for the prospecting right.

4 Judgment

For reasons discussed below, we accept the outcome of the SCA's decision. We do however, not agree with the court's reasoning regarding the interpretation of section 56(c) of the MPRDA. Although we do not agree with the outcome of the HC's decision, we agree with the HC's reasoning about the broader objectives of the MPRDA. For these reasons, the following sections provide a discussion of the judgments of both courts.

4 1 High Court

The HC decided that Palala's prospecting right lapsed when the company was deregistered and did not revive when the company was restored to the register. The HC's decision was grounded on the interpretation of the wording of the two legislative provisions, according to the rules of statutory interpretation and on the overall scheme and objectives of the MPRDA. It is beyond the scope of this work to provide a detailed discussion of the rules of statutory interpretation that applied in the case. In the following paragraphs, we provide only a broad overview of the HC's reasoning regarding the interpretation of the two legislative provisions. This overview is followed by a detailed discussion of the HC's reasoning regarding the broader objectives of the MPRDA.

According to the HC, the review of the Minister's decision of refusing to revive Palala's prospecting right "throws into sharp relief" section 56(c) of the MPRDA and section 73(6A) of the 1973 Companies Act (*Palala Resources* (GP) par 3). The language of both legislative provisions must be taken into account to determine their meaning, instead of one provision taking precedence over the other from the outset (*Palala Resources* (GP) par 39–40). The HC decided that the effect of section 56(c) of the MPRDA is clear; upon deregistration of a company, rights to minerals lapse (*Palala Resources* (GP) par 43). The only exception to a deregistered company losing its rights is found in section 56(c) itself. According to this exception, a deregistered company does not lose its rights to minerals, if prior to the deregistration, the company applied for the Minister's consent to transfer the right in terms of section 11 of the MPRDA or if such permission was refused (s 11 of the MPRDA regulates an array of transactions, including cession, transfer, letting, subletting, assignment, alienation or any form of disposal of prospecting rights and mining rights).

The HC reasoned that the express exception in section 56(c) of the MPRDA is a strong indication that the legislator intended this as the only

scenario in which rights to minerals survive the deregistration of a holder-company (*Palala Resources* (GP) par 45). Thus, the legislator did not intend restoration to the register to serve as an exception to the lapsing of rights upon a company's deregistration. Furthermore, an interpretation according to which rights to minerals revive when a company is deregistered does not accord with section 73(6A) of the 1973 Companies Act (*Palala Resources* (GP) par 47). According to the HC, the deeming clause in section 73(6A) revives the company's legal personality and not rights that lose their legal validity and become void (*Palala Resources* (GP) par 49). The deeming provision cannot "give legal life to rights that, because they have lapsed, are legally dead" (*Palala Resources* (GP) par 49). The HC found justification for this interpretation in specific rules and presumptions of statutory interpretation (see *Palala Resources* (GP) par 52–55).

The HC found further support for its decision in the purpose and scheme of the MPRDA (*Palala Resources* (GP) par 57). The HC placed emphasis on the "foundational premise" of the MPRDA according to which the State is the custodian of the country's mineral and petroleum resources for the benefit of all South Africans (*Palala Resources* (GP) par 58). The objectives of the MPRDA are stated expressly in section 2 and include equitable access to mineral resources, economic growth, mining resource development, promoting employment and advancing the socio-economic development of all South Africans (*Palala Resources* (GP) par 60, 62 and 63). To achieve these objectives, the MPRDA abolished private ownership of minerals on the basis of land ownership or the holding of real rights to minerals that existed in the regime preceding the Act and the Constitution of the Republic of South Africa, 1996 (*Palala Resources* (GP) par 59). Instead, in the current regulatory regime, the Minister, as representative of the State, has the authority to grant, issue, refuse, control, administer, and manage prospecting rights and mining rights (*Palala Resources* (GP) par 61).

In pursuing its objectives, an important feature of rights to minerals in the current regulatory regime is that they "must be put into practical effect", meaning that right holders can no longer choose to let their rights lie fallow (*Palala Resources* (GP) par 63). The intention to prevent dormant rights is clear from various provisions of the MPRDA. For example, section 19(2)(b) of the MPRDA obliges holders of prospecting rights to start prospecting activities within 120 days of the date on which rights come into effect (*Palala Resources* (GP) par 63; see s 25(2)(b) for mining rights). Furthermore, section 19(2)(c) requires holders of prospecting rights to conduct prospecting operations "continuously and actively" in accordance with the prospecting work programme for the duration of the right (*Palala Resources* (GP) par 63; see s 25(2)(c) for mining rights).

According to the HC, by providing that rights to minerals lapse when a holder-company is deregistered, section 56(c) accords with the overall purpose and objectives of the MPRDA (*Palala Resources* (GP) par 64). Upon deregistration of a company, lapsed rights revert to the custodianship of the State (*Palala Resources* (GP) par 65). The State then assumes the power to grant the right to an entity that has the capacity to exploit the right, thus ensuring that the MPRDA's objectives are met (*Palala Resources* (GP) par 65). The exception, where the company applied for the section 11

consent to transfer the right to a third party prior to deregistration, has a similar outcome (*Palala Resources* (GP) par 65): the right does not lie dormant but is transferred to an entity that has the ability to continue prospecting operations. According to the HC, an alternative interpretation according to which rights revive when a company is restored to the register will compel the DMR to treat rights as "frozen" every time that a holder-company is deregistered (*Palala Resources* (GP) par 66). Consequently, the Minister will not have the power to grant rights to another entity to achieve the objectives of the MPRDA. As discussed below, despite not agreeing with the outcome of the HC's decision, we agree that the broader objectives of the MPRDA must be taken into account when interpreting section 56(c) of the MPRDA (s 5 below).

Consistent with meeting the objectives of the MPRDA, the HC expressly rejected the notion that the rights to minerals become *bona vacantia* and vest in the State when a company is deregistered (*Palala Resources* (GP) par 70). An interpretation grounded on the rules of *bona vacantia* would mean that, similar to other assets, the rights would revert back to the company upon its restoration to the register (*Palala Resources (GP)* par 70). The HC reasoned that since rights to minerals are specifically created under, and regulated by, the MPRDA, these rights do not fall in the "ordinary 'basket'" of assets that become *bona vacantia* (*Palala Resources* (GP) par 70). As discussed below, although on different grounds, we agree that rights to minerals do not become *bona vacantia* when a holder-company is deregistered (s 5 below).

4 2 Supreme Court of Appeal

Relying on *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) (hereinafter "*Newlands Surgical*"), the SCA in *Palala Resources* found that a provision in the 2008 Companies Act (s 82(4)) that is similar to section 73(6A) in the 1973 Companies Act, has a full retrospective effect (*Palala Resources* SCA par 7). In *Newlands Surgical*, the court decided that the full retrospective effect of section 82(4) means not only re-vesting the company's property but validating a company's corporate activity during the period of deregistration (*Palala Resources* (SCA) par 7). According to the court in *Newlands Surgical*, section 82(4) does not allow distinguishing between re-vesting of property and re-vesting the company with the capacity to continue operating (*Palala Resources* (SCA) par 7). It follows that in *Palala Resources*, the capacity to continue operating required the re-vesting of the prospecting right.

In coming to the conclusion, the SCA rejected the HC's decision that although reinstatement revived the legal personality of the company, it did not revive rights that became void as a result of the company's deregistration (*Palala Resources* (SCA) par 10). The court also rejected the HC's reasoning that the overall objectives of the MPRDA require rights to minerals to lapse upon deregistration and revert to the State to be allocated to others (*Palala Resources* (SCA) par 11). As explained, according to the HC, an alternative interpretation, in terms of which rights to minerals lie dormant in anticipation of a possible restoration of the company, will not

advance the objectives of economic and social development as well as equitable access to mineral resources (s 4.1 above).

As regards the relationship between section 56(c) of the MPRDA and section 73(6A) of the 1973 Companies Act, the SCA rejected the HC's decision and Hectocorp's argument that there is tension between the two sections (*Palala Resources* (SCA) par 10). This perceived tension, according to the SCA, was the reason why the HC held that section 73(6A) only revived legal personality and not lapsed rights (*Palala Resources* (SCA) par 10). According to the SCA, there is no reason why the two sections cannot co-exist harmoniously (*Palala Resources* (SCA) par 10). This harmony requires accepting that the two sections concern two different situations at two different points in time (*Palala Resources* (SCA) par 10). Section 56(c) concerns the legal situation at the time of deregistration, while section 73(6A) operates at the point in time when a deregistered company is restored to the register (*Palala Resources* (SCA) par 10). In the latter scenario, the company's legal personality and all its corporate activities are retrospectively validated as if the company was never deregistered (*Palala Resources* (SCA) par 10).

Restoration to the register fully restores the *status quo ante* and all assets and rights re-vest in the company (*Palala Resources* (SCA) par 10). In the Palala case, the *status quo ante* required the revival of the lapsed prospecting right. According to the SCA, it would be anomalous if a deregistered company gains legal personality upon restoration, but not the assets that it lost when it was deregistered (*Palala Resources* (SCA) par 10). Furthermore, the short period between deregistration and restoration warrants an 'irresistible' inference that the company's deregistration was a result of an administrative oversight (*Palala Resources* (SCA) par 12). Therefore, according to the SCA, it is not plausible to argue that Palala should lose a potentially valuable prospecting right, although it regained its other assets and rights upon restoration (*Palala Resources* (SCA) par 12).

According to the SCA, the MPRDA provides no support for the conclusion that section 73(6A) does not retrospectively revive rights that lapsed in terms of section 56(c) (*Palala Resources* (SCA) par 11). The legislature is presumed to know the law and when it enacted section 56(c) of the MPRDA it must have been aware that companies that had been deregistered could have automatic retrospective reregistration (*Palala Resources* (SCA) par 11). If the legislature wanted to ensure the final lapsing of rights to minerals upon deregistration, it could have easily excluded these rights from the rights restored to a company on reregistration (*Palala Resources* (SCA) par 11). The court further dismissed a suggestion that rights to minerals under the MPRDA must be treated differently for purposes of retrospective validation (*Palala Resources* (SCA) par 10).

One of the arguments raised by Hectocorp is that the retrospective validation of a company's corporate activities during the period of deregistration is that it would cause "potential grave prejudice to *bona fide* third parties" (*Palala Resources* (SCA) par 8). Third parties may be unaware of the deregistration since companies often carry on with business as if the deregistration never occurred (*Palala Resources* (SCA) par 9). Despite the

potential risk to *bona fide* third parties, the SCA found that the "deeming clause" in section 73(6A) "compelled the conclusion" of full retrospectivity (*Palala Resources* (SCA) par 8). The deeming clause thus compelled the conclusion that the prospecting right revived and vested in Palala when the company was restored to the register. In support of this conclusion, the court argued that refusing to validate a company's corporate activities undertaken during the period of its deregistration can also have a prejudicial effect on third parties (*Palala Resources* (SCA) par 9)

5 Comments

Palala's objection against the Regional Manager's decision to accept Hectocorp's second application, coupled with the company's rapid restoration to the register, is convincing to accept the SCA's decision. These circumstances substantiate the SCA's inference that Palala's deregistration occurred as an administrative oversight. In these circumstances, it would be unreasonable to divest Palala of its prospecting right and to grant the right to Hectocorp. We agree that the prejudice faced by *bona fide* third parties, if Palala's prospecting right lapsed indefinitely, must be given the required consideration. It is easy to imagine, for example, the unenviable position of a mortgagee that, without any notice, loses the real security registered over a prospecting right, if the right lapsed permanently upon Palala's deregistration (see Dale, Bekker, Bashall, Chaskalson, Dixon, Grobler, Loxton, Ash, Cox and Gildenhyus *South African Mineral and Petroleum Law* (2013) MPRDA–165). The correctness of the outcome is reinforced by the practicality of the effect of deregistration for failing to submit annual returns. Unlike the winding up of companies, the Companies Acts do not foresee that deregistration for failing to submit annual returns is the end of the road for a company. Instead, the 1973 and 2008 Companies Acts provide opportunities for the reinstatement of these companies (see s 2 above). Furthermore, nothing in the facts indicate any financial or other restraints on the part of Palala to conduct its prospecting activities or to comply with its obligations in terms of the MPRDA.

However, the difficulty that we foresee with the SCA's reasoning is that it does not address the prevention of similar situations in future cases. In particular, the decision does not address the interests of *bona fide* parties that obtain rights to the same minerals on the same land during the period of deregistration (subsequent holders). One cannot lose sight of the reality that the magical revival of rights to minerals upon restoration of a company may have severe negative consequences for subsequent right holders. Our concern lies mainly with the courts' interpretation of section 56(c) of the MPRDA and not with the question of the retrospective effect of restoration in terms of section 73(6A) of the 1973 Companies Act. In our view, a correct interpretation of section 56(c) of the MPRDA nullifies the need to resort to section 73(6A) of the 1973 Companies Act to perform miracles.

As explained above, the SCA opted for an interpretation according to which section 56(c) of the MPRDA and section 73(6A) of the 1973 Companies Act concern different situations at different points in time. We cannot agree with such an artificial interpretation focussed on a specific

outcome that treats section 56(c) of the MPRDA in isolation and that loses sight of the broader objectives of the MPRDA. We agree with the HC that the broader objectives of the MPRDA must be taken into account when interpreting the two legislative provisions. As the HC observed, in general, the MPRDA's objectives of transformation and social and economic development require optimal exploitation of the country's mineral resources and will not be advanced if rights to minerals lie dormant when a holder-company is deregistered for failing to submit annual returns.

The SCA's reasoning regarding the magical revival of rights can be criticised for two reasons that are discussed in the following paragraphs. The first point of criticism is that dormant rights are not the only threat to harnessing the potential of optimal exploitation of the country's mineral resources. The second point of criticism is that section 56(c) of the MPRDA lends itself to an interpretation that does not require immobilising rights when companies are deregistered without being wound up.

Similar to dormant rights, an unattractive investment environment is also not conducive to a thriving mining industry that can promote the objectives of the MPRDA. When interpreting legislative provisions, it will be shortsighted not to take into account the interests of investors to develop mines profitably and to make the best possible return on their investment. It does not take a lot of persuasive argumentation to accept that the interests of investors such as Palala are not best served if the rights to minerals are allocated to another if companies are deregistered due to an administrative oversight. Simultaneously, the interests of investors are also not best served by allowing an entity like Hectocorp to use its resources to apply for and be granted rights that are abruptly terminated when the original holder-company is restored to the register.

The challenge for the regulatory regime is to balance the different interests. Ideally, the regulatory regime will promote optimal exploitation by not allowing mineral resources to lie fallow for extended periods of time. At the same time, an ideal regulatory regime will prevent the unreasonable loss of investors' rights. Moreover, the ideal regime will preclude situations that allow entities to apply for, and be granted rights while necessitating the abrupt termination of such rights. The following paragraphs explore an interpretation of section 56(c) of the MPRDA to meet this tall order of allowing Palala to hold on to its right, preventing Hectocorp from applying for the right, and to ensure that the mineral resources subject to the right do not lie fallow for an extended period of time.

A simple reading of section 56(c) of the MPRDA leaves one with the impression that the deregistration of a holder-company immediately results in the lapsing of the right. According to this simple reading, the SCA and the HC are correct in deciding that Palala's deregistration caused its prospecting right to lapse. However, legislative changes that were pending at the time of the judgments suggest that applying section 56(c) of the MPRDA may be more nuanced than this. These proposed amendments were in all likelihood the persuasive force behind the Director-General's decision that Palala's right did not lapse for lack of proof of "final" deregistration (*Palala Resources* (SCA) par 4; see s 2 above). Similarly, these proposed amendments may

provide clarity on Palala's argument that it was not deregistered "in the strict sense of the word" (*Palala Resources* (GP) par 13; see s 2 above).

Section 43 of the Mineral and Petroleum Resources Development Amendment Bill (B15D–2013) (hereinafter "2013 Amendment") aims to amend section 56(c) of the MPRDA to the extent that rights to minerals will lapse only if a company is *finally* deregistered (authors' own emphasis). The requirement of *final* deregistration suggests that while the possibility exists that the company can be restored to the register, rights to minerals will not lapse, but will continue in existence (authors' own emphasis). Thus, since section 73(6A) of the Companies Act left open the possibility for Palala to lodge the outstanding return, pay the prescribed fee, and subsequently to apply to the registrar for its restoration, the prospecting right did not lapse. This interpretation is not without theoretical difficulties.

The first difficulty is that Palala lost its legal personality when it was deregistered for failing to lodge its annual returns. Even if the deregistration was only "provisional", the company no longer had an estate in which assets, such as the prospecting right, and liabilities could vest (*Palala Resources* (SCA) par 5). This is true, however, not only of Palala's prospecting right, but also for all its assets and liabilities. The problem exists because a company that is deregistered for failing to submit annual returns may have valuable assets and liabilities at the time of the deregistration. The problem of remaining assets and liabilities will not exist if a solvent or insolvent company is wound up. An insolvent company will, by definition, not have any remaining assets to pay the company's creditors after the rules of insolvency law are applied (s 391 of the 1973 Companies Act; Sharrock, van der Linde, Smith *Hockly's Insolvency Law* (2016) 259). The assets that remain after a solvent's company creditors are paid, will be distributed amongst the shareholders (s 391 of the 1973 Companies Act; Sharrock *et al* *Hockly's Insolvency Law* 259).

Generally, when a company is deregistered, any remaining assets in the company's estate become unclaimed property (*bona vacantia*) and fall to the State (*Miller v Nafcoc Investment Holdings Co Ltd* 2010 (6) SA 390 (SCA) par 11) If the company is restored to the register, the existing assets re-vest in the company *ex lege* (*Newlands Surgical* par 29). The rules relating to *bona vacantia* seem to provide an easy solution: If Palala's prospecting right did not lapse when it was deregistered but became *bona vacantia*, the prospecting right would vest in the State. Upon Palala's restoration to the register, the prospecting right would be transferred back to Palala.

However, the rules relating to *bona vacantia* break down in the face of the regulatory regime established by the MPRDA. As a custodian of the country's mineral and petroleum resources, the State has the authority to grant rights to minerals to entities that become "holders" (s 3(1) MPRDA; s 1 of the MPRDA defines "holder" in relation to a prospecting right, mining right, mining permit, retention permit, exploration right, production right, reconnaissance permit or technical cooperation permit, as the person to whom such right or permit has been granted or such person's successor in title). The State cannot be the grantor and the holder of rights, i.e. the State cannot hold rights that it grants. Accordingly, any rights that are transferred

to the State when a company is deregistered will lapse due to the merger (Dale *et al South African Mineral and Petroleum Law* MPRDA–165). This means that Palala's prospecting right cannot vest in the State in a private law sense when the company is deregistered (contra Badenhorst "Lapsed Prospecting Rights: 'the Custodian giveth and the Custodian taketh away' Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy" 2016 37 *SALJ* 46–48).

Once Palala's right lapsed (as a result of s 56(c), or as a result of merger), the Regional Manager can accept application rights for the same minerals on the same land, such as Hectocorp's application (see s 16(2)(b) of the MPRDA; also see s 22(2)(b) and 27(3)(b) for mining rights and mining permits respectively). If Hectocorp's application could be accepted, the right could be granted to Hectocorp, resulting in the same scenario as the one that led to the litigation in *Palala Resources*. The breaking down of the rules of *bona vacantia* is yet another example of the inability of the rules of private law to solve legal problems in the regulatory regime, established by the MPRDA (for more examples see van Niekerk "Mineral Tenure Security, Registration and Enforceability of Rights: Debunking the Property-law Paradigm" forthcoming in 2018 1 *SALJ* where the author argues that in the current regulatory regime, a proprietary overlay to rights to minerals do not provide better protection to right holders; contra Badenhorst 2016 37 *SALJ* 49 where the author argues that reliance on private law concepts remain necessary, in particular, to prevent "large-scale free enlargement of the fiscus for eventual redistribution." It should be noted, however, that the concept "property" for purposes of expropriation is vastly different from "property" as understood in traditional property-law).

Rights to minerals that exist in the current regulatory regime are creatures of statute. Where the legislator chose to label some rights, for example, prospecting rights and mining rights as limited real rights, the rights are *statutory* real rights. As creatures of statutes, rights to minerals under the MPRDA must primarily, be construed to meet the objectives of the MPRDA. Indeed, section 4(1) of the MPRDA requires that when interpreting any provision of the Act, a reasonable interpretation that is consistent with its objectives must be preferred to an interpretation that is inconsistent with the Act (*Palala Resources* (GP) par 69). Furthermore, according to section 4(2), the MPRDA prevails in case of any inconsistencies with the common law.

Based on the proposed amendment to section 56(c) of the MPRDA and the Act's broader objectives, the following construction is submitted: when a company that holds a prospecting right is deregistered without being wound up, the right does not lapse. The prospecting right "reverts" to the State as the custodian of the country's mineral and petroleum resources (it does not vest in the State in a private law sense). The State acts as safe-keeper of the right on behalf of the deregistered company and allows the continued exercise of the right (This is similar to the position where the State acts as safe-keeper ("bewaarhouer") of assets in a deceased estate where the intestate successor is unknown. See Sonnekus "Persoonlike Diensbaarhede en die Herregistrasie van die Deregistreerde Maatskappy as Reghebbende op Gespanne Voet" 2008 *TSAR* 130 134–135). In acting as safe-keeper, the State is complying with its responsibilities as the custodian of the country's

mineral resources to ensure optimal exploitation. If the company is restored to the register, there is no longer a need for the State to keep the right on behalf of the company and the right reverts back to the company. While the State is keeping the right on behalf of the deregistered company, it cannot allow another entity such as Hectocorp to apply for rights for the same mineral on the same land. For prospecting rights, this is prohibited expressly by section 16(2)(b) of the MPRDA (see s 22(2)(b) and 27(3)(b) for mining rights and mining permits respectively).

The difficulty that we foresee is that the 1973 and 2008 Companies Acts do not provide any indication of the time period allowed for the deregistered company to submit the outstanding annual returns and to pay the prescribed fee to be restored to the register. Thus, according to the Companies Acts, deregistered companies that are not wound up can indefinitely apply for restoration. The difficulty arises if one considers that it is reasonable to suspect that companies, which do not submit their annual returns are also not carrying on with their business (See de Lange and Sutherland "Deregistrasie sonder Likwidasie van Maatskappye en Beslote Korporasies ingevolge die 2008 Maatskappyewet" 2014 2 *Stell LR* 265 269–272; also see Main, "The Importance of Filing Annual Returns to Avoid De-registration: Accounting Technical – Annual Returns" 2015 *Professional Accountant* 20 where the authors argue that one of the reasons for the requirement to file annual returns is to serve as confirmation that the company is still active). If a mining or prospecting company is not carrying on with its business, the company is not engaged in optimal exploitation and, consequently, the objectives of the MPRDA cannot be realised. A possible solution to this difficulty can be found in section 47 of the MPRDA.

A mining or prospecting company that is not carrying on with its business is, in all likelihood, also not complying with the provisions of the MPRDA and the terms and conditions of the right. If this is the case, the Minister might ofcourse, invoke his powers to suspend and cancel rights in terms of section 47 of the MPRDA. The procedures in section 47 afford the right holder a reasonable opportunity to show why the right should not be cancelled, or suspended. Furthermore, the section 47 procedures provide some protection to, at least, mortgagees by requiring that the mortgagee must be notified of the Minister's intention to cancel or suspend rights.

The proposed construction depends on proper record keeping in the Mining Titles Registration Office. If records are up to date and the DMR consequently identifies an overlapping application, a proper investigation should reveal the reasons for the company's deregistration. Indeed, in *Palala Resources,* the reason for the Regional Manager's decision to accept Hectocorp second application was knowledge of the fact that Palala was deregistered (*Palala Resources* (GP) par 12). According to our proposed construction, instead of using that information to accept Hectocorp's second application, the DMR should have investigated the reasons for Palala's deregistration. The outcome of this investigation should have led to the Regional Manager rejecting Hectocorp's second application.

The best-case scenario for the proposed construction to be successful is that the registrar will inform not only the company of its deregistration but

also the DMR. If this is not practicable, at least, the DMR will conduct a proper investigation when it receives an overlapping application and is presented with the fact that the original holder of the right is a deregistered company.

6 Conclusion

Palala Resources illustrates the difficulties that arise when the law assumes the power to perform miracles by breathing legal life into lapsed prospecting rights. The negative consequences are illustrated by the SCA's interpretation according to which a prospecting right lapses when a company is deregistered for failing to submit annual returns and revives when the company is restored to the register. This interpretation poses risks to *bona fide* third parties who apply for the lapsed right during the holder-company's deregistration and who abruptly lose the right upon the company's restoration. These risks reduce investor-friendliness and may, in turn affect negatively on optimal exploitation of the country's mineral resources. At the same time, permanent loss of the right by the deregistered company, and the subsequent impossibility to carry on with its business upon restoration may also jeopardise investors' confidence in South Africa's mining industry. This case note furthermore illustrates that the rules of *bona vacantia* do not solve these difficulties.

In line with the proposed amendments in the 2013 Amendment Bill, this case note proposes an alternative interpretation of section 56(c) of the MPRDA that does not require section 73(6A) of the 1973 Companies Act (or s 82(4) of the 2008 Companies Act) to revive the prospecting right from the dead. This interpretation will create a friendlier investment environment and advance the MPRDA's objective of optimal exploitation of the country's mineral resources. According to the construction proposed, prospecting rights do not lapse when a holder-company is "provisionally" deregistered for failing to submit annual returns, leaving the possibility that, upon meeting certain requirements, the company can be restored to the register. Instead of merely lying dormant, upon the "provisional" deregistration, the prospecting rights revert to the State in its capacity as custodian of the country's mineral resources. In fulfilling its custodial duties, the State acts as a safe-keeper of the right for the deregistered company. This protects not only the deregistered company but also *bona fide* third parties from using resources to obtain rights that can unexpectedly, be taken away. If permanent loss of the right (and granting it to another entity) is necessary to advance the MPRDA's objectives, the government may invoke its powers under section 47 of the MPRDA to cancel the right.

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