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THE LEGAL EFFECT OF REINSTATEMENT OF A DEREGISTERED COMPANY THAT HELD MINING OR PROSPECTING RIGHTS BEFORE DEREGISTRATION

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ABSTRACT

It is common cause that a business may be regulated and affected by many pieces of legislation. Modern corporate law and the mining industry have become closely integrated, and as a result, it has led to a complex regulatory structure, which is mostly regulated within the framework of the Companies Act 71 of 2008 and the Mineral and Petroleum Resources Development Act 28 of 2002. This dissertation explores the conflict that has been created by sections 82(4) and 83(4) of the Companies Act when read with section 56(c) of the MPRDA. It is argued that, in this instance, the Companies Act prevails over the MPRDA. It is further argued that reinstatement in terms of section 82(4) results in the revival of rights that had lapsed upon deregistration in terms of the MPRDA, and that section 83(4), in any event, provides the court with an unlimited discretion to validate any mining or prospecting right that may have lapsed as a result of a company's deregistration.

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1. INTRODUCTION

The interaction between mining and corporate law in South Africa is closely related and ought to be recognised and appreciated, as most mining and prospecting operations are conducted through private and public companies.

A company comes into existence, and is regarded as being a separate entity, when it is registered as such at the Companies and Intellectual Properties Commission ("the commission").[1] The legal existence of a company will accordingly terminate when it is removed from the register of companies by the commission.[2] The company's legal existence, unlike the existence of an individual, is capable of restoration if the company is reinstated as contemplated in terms of the Companies Act 71 of 2008 ("the Act").[3]

There is often a substantial lapse of time between the deregistration of a company and its reinstatement. During this period of time, it frequently occurs that representatives of the deregistered company continue trading and dealing with various creditors and debtors, without being aware that the company has been deregistered.[4]

Recent developments in case law indicate that the reinstatement of a deregistered company in terms of section 82(4) of the Act results in:

- the restoration of the legal existence of the company;
- the revival of rights which that company held before deregistration; and
- the validation of any corporate activities that representatives of the company may have engaged in during the period of its deregistration.[5]

The effect of this position seems to be contradictory to the effect of section 56(c) of the Mineral and Petroleum Resources Development Act ("the MPRDA"),[6] which stipulates that:

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1 s 14(1) of the Companies Act 71 of 2008; Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (2011: RS 11) 66(2) and Williams "Disinterring a Body Corporate: Sections 73(6) and 420 of the Companies Act 1973" 1990 *SALJ* 610 611.

2 Pama "Debt Collecting Against a Deregistered Corporation or Company" 2013:38 *De Rebus* 150, and see s 83 of the Companies Act which regulates the removal of a company from the companies register.

3 s 82(4), read with Delport (n 1) 332(13).

4 Boltar "Company Law (Including Close Corporations)" 1994 *Annual Survey of South African Law* 402 411 and Williams (n 1) 613.

5 *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic* 2015 (4) SA 34 (SCA) par 24 and 29.

> "Any right, permit or permission granted or issued in terms of this Act shall lapse whenever-
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> ...
>
> (c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused."[7]

The MPRDA, unfortunately, goes no further, and there are no provisions in this act which specifically stipulate that reinstatement of the holder will result in the right being revived.

If one considers the position in terms of the MPRDA against the position in the Act, it becomes evident that there is a conflict between the two statutes. The conundrum that arises from this is whether the reinstatement of a company that held a mining or prospecting right before deregistration will revive that right, or if that right is lost forever.[8]

This dissertation effectively discusses two challenging questions, namely:

1. Whether a company that is the holder of a mining and/ or prospecting right indefinitely loses its right upon deregistration, despite that company later being reinstated; and
2. If the court, on application, has any discretion to make an order validating the mining or prospecting right.

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The potential retrospective effect which the reinstatement of a company has on mining or prospecting rights that have lapsed due to that company's deregistration, was not recognised by our courts until the Supreme Court of Appeal delivered its judgment on 30 May 2016 in *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*.[9] This judgment was delivered after this dissertation had been compiled and confirms many of the views expressed herein.

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6 8 of 2002.

7 S 56 of the MPRDA stipulates other instances, which are irrelevant for purposes of this article, when a right granted in terms of that act will lapse. A more detailed discussion regarding the effect of s 56(c) has been included below in par 5.

8 *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) par 7.

9 2016 ZASCA 80 (30 May 2016).

Before 30 May 2016, the judgment from the court *a quo* was the only reported judgment which dealt with this exact topic.[10] Although the high court judgment was well-written and comprehensive, it is argued herein that that judgment was incorrect.

It is also argued herein that the purpose of the MPRDA is not punitive,[11] and that section 56(c) of the MPRDA may have the unintended consequence of a right granted in terms of the MPRDA indefinitely lapsing when a company, as the holder of that right, is deregistered, even if such deregistration is as a result of a company's failure to file its annual returns. Finally, it will also be submitted that even if the approach of the court *a quo* in the *Palala Resources* matter was correct, section 83(4) of the Act now provides the court with an unfettered discretion, and it is accordingly empowered to confirm the validity of a prospecting and/or mining right upon the reinstatement of a company that held such a right before deregistration.

The argument will be supported by discussions regarding, *inter alia*, the interpretation of section 73(6A) of the 1973 Act, as well as the interpretation of section 56(c) of the MPRDA read with sections 82(4) and 83(4) of the Act, and various judgments relating to these sections.

2. THE RESPECTIVE PURPOSES OF THE ACT AND THE MPRDA

Most of the largest mining operations in the Republic are conducted through companies.[12] Due to the nature of most of these companies, they maintain the highest levels of corporate governance and integrity. As a result, it cannot be denied that the application of the Act to mining and prospecting operations is inevitable.

The Act has a number of purposes,[13] and a predominant notion that runs through most of those purposes is the balancing of relationships between all stakeholders and the creation of a culture of better and more transparent corporate governance.[14]

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[10] *Palala Resources* case (n 8) par 7. A comprehensive discussion of this case has been included below in par 3.

[11] See the full discussion on the purposes of the MPRDA in par 2 below.

[12] http://www.projectsiq.co.za/Mining-Companies-in-South-Africa.htm (02-04-2016).

[13] S 7 of the Companies Act lists all of its purposes and these purposes must be considered when giving effect to the interpretation of other provisions within the Act.

[14] Delport (n 1) 48.

Before the MPRDA came into effect on 1 May 2004, the Minerals Act[15] largely regulated the mining industry.[16] The Minerals Act recognised common law principles relating to the ownership of mineral rights, and regulated the issuing of permits, restriction of prospecting and mining operations, and the rehabilitation of land affected by those operations.[17]

When the MPRDA came into effect, holders of rights in terms of the Minerals Act were required to apply, within a specified period of time, to the Department of Minerals and Energy for a conversion of their rights held under the Minerals Act, to rights that would be recognised under the new MPRDA.[18] If the holder of a right under the Minerals Act did not apply for the conversion of its right within the specified period, the right would lapse and accordingly lose its validity.[19]

The private ownership of minerals was also dramatically changed by the MPRDA, which provides that all mineral resources are for the benefit of South Africans, and that the state will be the custodian of all such resources.[20] This was a radical movement from the common law position which provided that the owner of the land is the owner of everything above and beneath the soil, including any mineral resource that was found therein.[21]

The purposes of the MPRDA have been stipulated in section 2 thereof, and regard must be had to those purposes when giving effect to the MPRDA.[22] One of the purposes, which are relevant to this discussion, is to provide the holders of rights with security of tenure in the right that they hold under that act.[23] Another notable purpose is to increase and promote the economic growth and well-being of all South Africans.[24] As will be shown further on herein, the notion of indefinite lapsing of rights, which are incapable of revival upon reinstatement of

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15 50 of 1991.

16 There were other statutes at that time that also contributed to the mining regulatory framework, such as the Expropriation of Mineral Rights (Township) Act 96 of 1969, the Mine Health and Safety Act 29 of 1996 and the Diamonds Act 56 of 1986.

17 s 5-16 of the Minerals Act.

18 sch 2 item 7 of the MPRDA and Badenhorst "Exodus of 'Mineral Rights' from South African Mineral Law" 2004 *Journal of Energy and Natural Resources Law* 218 232.

19 sch 2 item 7(8) of the MPRDA and Badenhorst (n 18) 233.

20 See the preamble, s 2(a) and (b) and s 3 to the MPRDA, as well as Badenhorst (n 18) 223.

21 Badenhorst (n 18) 220.

22 Dale *Commentary on the Mineral and Petroleum Resources Development Act* (2005) 107.

23 s 2(g) of the MPRDA and Dale (n 22) 119.

24 See s 2(e) and 2(f) of the MPRDA and Dale (n 22) 118-120.

the company that held those rights, is somewhat self-destructive to the above mentioned purposes.

That being said, providing security of tenure should be weighed against the need to prevent the sterilisation of mineral rights,[25] which often occurred under the previous dispensation. In terms of the Minerals Act, it was possible for a person holding a mineral right to retain that right for a number of years without actually making use of the right and mining the land.[26] Holders of such rights would retain the rights until such time as they felt the need to exercise the right to mine or sell their land. This resulted in an untenable situation where a marginal group of people controlled the use of mineral resources.[27] The MPRDA created a framework intended to avoid this situation, and the holder of a right in terms of the MPRDA is obligated to begin operations within a prescribed period of time, failing which, the Minister of Minerals and Energy has the authority to cancel or suspend the right.[28] Practitioners in the industry have accordingly coined the phrase "use it or lose it" in relation to rights granted in terms of the MPRDA.[29]

If a deregistered company that held a right in terms of the MPRDA is able to simply revive that right upon reinstatement of its existence, it could result in representatives of the company concerned purposely allowing it to be placed into deregistration, and reinstating it at a time when it would be more convenient to continue and/or commence operations. This would certainly defeat the prevention of the sterilization of mineral rights. A further issue that would arise in such an instance is determining whether the deregistration of a company that held a right in terms of the MPRDA, would result in the duration of the right being held in abeyance until the company was reinstated.[30]

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[25] *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources* (3081/12) [2014] (ZAGPPHC) 11 (30 January 2014) par 63.

[26] Sch 2 of the MPRDA recognises unused older order rights as "any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect."

[27] This gave rise in the need to create a framework for equitable access to mineral resources. See Dale (n 22) 3.

[28] s 19(2)(b) and s 25(2)(b) read with s 47 of the MPRDA.

[29] http://www.bowman.co.za/News-Blog/Blog/New-order-mining-rights-four-years-into-a-new-mining-regime-by-Claire-Tucker-and-Twaambo-Muleza (24-03-2016).

[30] A similar argument was raised in the *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2015 (3) All SA 408 (SCA) par 20. The court found that the intention of the MPRDA was not to sterilise mineral rights in favour of one particular applicant, and that the right will lapse in the circumstances contemplated in terms of s 56 of the MPRDA.

The purpose of the Act must also be noted. In summary, the purpose is to create and regulate a balanced relationship between all stakeholders in a company such as the shareholders, creditors and directors, while endorsing a culture of better corporate governance. The purposes of the MPRDA, on the other hand, are to create and promote economic well-being and sustainability, provide security of tenure to right holders, and to prevent the sterilisation of mineral resources.

Keeping these purposes in mind, it is also important to consider the interaction between the 1973 Act (which was the predecessor to the Act) and the MPRDA.

3. THE 1973 ACT AND THE *PALALA RESOURCES* CASE

In the *Palala Resources* matter, the high court had to determine whether reinstatement of a company in terms of section 73 of the erstwhile Companies Act ("the 1973 Act"),[31] resulted in the revival of a prospecting right that had lapsed upon the deregistration of the holder of that right in terms of section 56(c) of the MPRDA.[32] The question before the court is undoubtedly comparable to the conundrum that this dissertation seeks to address. However, the court in the *Palala Resources* matter had to determine the position in terms of the 1973 Act,[33] which included the deeming provision of section 73(6A). This provision provided 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."[34]

The high court in the *Palala Resources* matter held that:

- the deeming provision only revived the legal personality of the holder, and did not resurrect the rights that the holder possessed before deregistration;[35]

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31 61 of 1973.

32 *Palala Resources* case (n 8) par 7.

33 The position regulating the reinstatement of companies was dealt with in s 76(3) of the 1973 Act.

34 See the *Palala Resources* case (n 8) par 5.

35 *Palala Resources* case (n 8) para 49.

- the prospecting right in question had lapsed immediately on the deregistration of the holder, and the deeming provision could not find application, as it only applied to rights that still existed when the company was reinstated;[36] and
- section 56(c) of the MPRDA was clear, and the court did not need to read anything more into the provision, other than what was specifically stated.[37]

Although, on the face of it, the judgment seems logical, the high court in this matter clearly refused to recognise the conflict between the MPRDA and the 1973 Act. It is submitted that this was the incorrect approach and that certain provisions of the 1973 Act should have influenced the interpretation of section 56(c) of the MPRDA in the *Palala Resources* matter.

Before the Act came into effect,[38] the 1973 Act and the Close Corporations Act[39] governed the regulation of juristic entities. These statutes were in existence long before the MPRDA came into effect.

Of particular relevance to this discussion, is the fact that before the MPRDA became effective, the 1973 Act contained a provision which allowed any interested party to approach the court on application for an order restoring the legal existence of that company.[40] The effect of such an order was that the company was deemed to have never been deregistered.[41] Section 73(6)(b) also provided the court with a discretion to make a restoration order, with directions, that would place the company and affected parties in a position as near as possible to the position all parties were in before the deregistration of the company concerned.[42] The only limitation on the discretion of the court, was that the order would have to seem just in the circumstances.[43]

That being said, the provision which authorised the registrar to reinstate a deregistered company which had been deregistered as a result of its failure to file annual returns,[44] was

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36 *Palala Resources* case (n 8) para 70.
37 *Palala Resources* case (n 8) para 56.
38 The Act commenced on 1 May 2011.
39 69 of 1984.
40 s 73(6)(a) of the 1973 Companies Act.
41 See *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) 476.
42 Blackman *Commentary on the Companies Act 61 of 1973* (2008: RS 5) 4-180.
43 Blackman (n 42) 4-181.
44 s 73(6A) of the 1973 Companies Act.

introduced almost three years after the MPRDA came into effect.[45] Annual returns are filed with the commission as an indication that the company is still active. If annual returns have not been filed with the commission for two successive years, the commission may require the company to submit such returns, failing which, the commission may proceed to deregister it.[46] The effect of reinstatement under section 73(6A) of the 1973 Act mirrored the effect of reinstatement made by an order of court, as it also resulted in the company being deemed to have never been deregistered.

Certain contentions in the *Palala Resources* matter should be considered when determining whether the 1973 Act had any influence on the interpretation of the MPRDA.

The applicant in this matter alleged that the 1973 Act was the dominant act and that section 56(c) of the MPRDA must be interpreted as being subject to that act, and accordingly subject to the deeming provision of section 73(6A).[47] In considering this argument, the court applied different interpretative presumptions to determine whether the 1973 Act had any influence on the interpretation of the MPRDA, and in particular, if section 73(6A) of the 1973 Act had any impact on the interpretation of section 56(c) of the MPRDA.[48]

The high court considered the doctrine *lex posterior priori derogate*[49] against the presumption that a statutory provision is not intended to alter existing law more than is necessary, and the presumption that general legislation does not revoke prior existing specific legislation,[50] and held that the applicant's contention that the 1973 Act was dominant, was incorrect.[51]

The doctrine *lex posterior priori derogate* contemplates that later legislation will prevail over earlier legislation if there is a conflict between the two statutes. This doctrine only finds application when both of the statutes concerned are of a general nature.[52] The result of this

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45 See the Corporate Laws Amendment Act 24 of 2006.

46 Delport (n 1) 155.

47 *Palala Resources* case (n 8) par 37.

48 *Palala Resources* case (n 8) par 52.

49 The presumption is that a newer statute will prevail over an older one. In this regard see Devenish "The Application of the Generalia Specialibus Non Derogant Maxim in the Interpretation of Statutes" 2005 *SALJ* 72 73.

50 *Palala Resources* case (n 8) par 53.

51 *Palala Resources* case (n 8) par 38.

52 Devenish (n 49) 74.

maxim is that there is an implied repeal of existing legislation.[53] If the previous piece of legislation is, however, specific, and not general, then this maxim will not apply.[54] The presumption that general legislation does not revoke prior existing legislation then finds application. This presumption is, however, rebuttable if there is a clear intention in the later general piece of legislation.[55]

The court relied heavily on the presumption that general legislation, like the 1973 Act, does not revoke prior existing specific legislation, such as the MPRDA. Although section 73(6A) of the 1973 Act came into effect after the MPRDA, the 1973 Act had itself been in existence for several years before the enactment of the MPRDA. The fact that the court confined itself to only considering the dates on which section 73(6A) of the 1973 Act and section 56(c) of the MPRDA came into effect, may have been ill-conceived in the circumstances, especially considering that section 73(6A) was inserted to provide the registrar with far-reaching powers,[56] and the general purpose of the section was to place a company back into being as though it had never been deregistered.[57] The effect of reinstatement by the registrar was the same as having the court issue a declaratory order in terms of section 73(6)(a), as the company would be deemed, on either occasion, to have continued in existence as though it was never deregistered.[58] It seems that the court overlooked that it was possible for section 56(c) of the MPRDA and section 73(6A) to apply in a manner which did not result in any conflict between the two pieces of legislation, as the first mentioned provision dealt with what occurred upon deregistration, whereas the latter provision dealt with what occurs after reinstatement of a company.[59] Needless to say, it is difficult to fully understand why the court placed so much weight on section 73(6A) coming into effect after the MPRDA, and the manner in which the above mentioned presumption was applied by the court is evidently questionable.

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53 Devenish (n 49) 74.
54 Devenish (n 49) 74.
55 Devenish (n 49) 73.
56 Delport (ed) *Henochsberg on the Companies Act 61 of 1973* (2011: RS 5) 144(3).
57 Delport (n 56) 144(1).
58 Pama (n 2) 152 and Delport (n 1) 332(14).
59 *Palala Resources* matter (n 9) par 10.

The MPRDA, in any event, only recognised one instance in which it would prevail, and that was in the event that the common law conflicted with provisions in the MPRDA.[60] Further, section 2 of the 1973 Act provided that it would apply to every company incorporated within the Republic of South Africa.[61] This would have included companies that conducted any form of operation under the MPRDA. In addition thereto, section 3 of the 1973 Act specified an all-inclusive list of instances when that act would not apply.

In light thereof it was never contemplated in the 1973 Act or MPRDA that one of those statutes would find application to the exclusion of the other.

The purpose of the 1973 Act was to regulate and govern relationships within companies. That act did not differentiate between companies which conducted different forms of businesses.[62] In practise, the 1973 Act (and now the Act) would be the first piece of legislation considered when registering a company for the purpose of conducting a prospecting or mining operation. In light thereof, it is submitted that the 1973 Act may in fact have been the "predominant" act that applied to all companies, including companies that conducted prospecting and mining operations.

In the *Palala Resources* case the high court seemed to have overlooked the fact that the 1973 Act had been in operation for a number of years before the MPRDA had come into effect,[63] and that section 73(6A) was introduced into section 73 as a supplementary provision in order to provide the registrar of companies with the capacity to reinstate companies if they had been deregistered as a result of their failure to file annual returns.

If the high court's reliance on the presumption that general legislation does not revoke prior existing specific legislation was correct, then the applicant (or rather an interested party of the applicant) could have approached the court in terms of section 73(6)(a) and (b) (which had been in existence before the MPRDA) for an order to reinstate it and confirm the validity of the prospecting right. This approach may have circumvented the problems experienced by the

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60 s 4(2) of the MPRDA.

61 Delport (n 56) 15.

62 The only restriction on the application of the 1973 Act was contained in s 3 thereof, and related to, *inter alia*, companies that were governed by the law regulating friendly societies, pension funds, trade unions, insurance companies and building societies.

63 The 1973 Act became effective on 1 January 1974, more than 30 years before that commencement of the MPRDA.

applicant with section 73(6A), as the applicant could have approached the court for an order of reinstatement and the validation of its prospecting right, without the presumption relied on by the court finding any application.

The court also relied on the doctrine that a statutory provision is not aimed at altering existing law more than is necessary.[64] It is submitted, however, that the court's application of this doctrine was somewhat misplaced. The corporate law position at the time when the MPRDA came into existence was such that the reinstatement of a deregistered company resulted in that company being re-vested with all of its rights and obligations.[65] The MPRDA provided that all mining and/or prospecting rights lapsed upon the deregistration of the holder of such a right. It did not contain any provision as to what would occur in the event that the holder of such a right was reinstated. The result of this is that, strictly speaking, there is no provision in the MPRDA which alters the notion in the 1973 Act that rights previously held by a deregistered company, re-vest to that company upon reinstatement.

The high court in the *Palala Resources* matter, however, effectively took the approach that the MPRDA and the 1973 Act had no bearing on each other, as the MPRDA regulated prospecting and mining rights,[66] and was the only piece of legislation that was relevant in determining the outcome of the application.[67] This approach is, however, in complete contradiction to the principle laid down in the Constitutional Court judgment of *Maccsand v The City of Cape Town*,[68] in which it was held that in certain instances more than one act will be applicable, and in those instances, the application and compliance with one piece of legislation will not exempt the application of the other relevant statute.[69]

Perhaps the high court purposely steered away from finding that there may have been a conflict between the 1973 Act and the MPRDA, in order to avoid dealing with the question of how the two pieces of legislation could be reconciled or which one would prevail in the event that the conflict was irreconcilable.

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64 *Palala Resources* case (n 8) par 53.

65 See the *Ex parte Sengol Investments* case (n 41). This was also in line with the position in Australia; see Kollmorgen "Deregistered Corporate Plaintiffs" 1995 *Corporate and Business Law Journal* 65 78.

66 *Palala Resources* case (n 8) para 45, 46 and 68.

67 *Palala Resources* case (n 8) para 70.

68 2012 (4) SA 181 (CC).

69 *Maccsand* case (n 68) par 44 and 55.

In light thereof, it is submitted that the 1973 Act should have influenced the interpretation of section 56(c) of the MPRDA in the high court *Palala Resources* matter.

The 1973 Act was, however, repealed by the Act which came into effect on 1 May 2011,[70] and the question that follows is whether the Act should now have any influence on the interpretation of section 56(c) of the MPRDA.

4. THE INFLUENCE OF THE ACT READ WITH THE *NEWLANDS SURGICAL CLINIC* SCA JUDGMENT

The MPRDA does not exclude the application of other legislation,[71] and it has been recognised by the highest court in the Republic that the MPRDA may need to be concurrently applied with other relevant legislation in instances when that legislation is also relevant.[72]

Section 5(4) of the Act also provides guidance in considering if sections 82(4) and 83(4)[73] of the Act should be taken into account when determining if a right granted in terms of the MPRDA is capable of revival upon reinstatement, as it sets out the manner in which the Act must be applied in relation to other statutes. In particular, it stipulates that certain statutes will

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[70] See the preamble to the Act.

[71] s 4 of the MPRDA.

[72] *Maccsand* case (n 68) par 44 and 55.

[73] The relevant provisions of s 82 and 83, for purposes of this dissertation, are as follows: "82. Dissolution of companies and removal from the register (1) The Master must file a certificate of winding up of a company in the prescribed form when the affairs of the company have been completely wound up. (2) Upon receiving a certificate in terms of subsection (1), the Commission must – (a) record the dissolution of the company in the prescribed manner; and (b) remove the company's name from the companies register. (3) In addition to the duty to deregister a company contemplated in subsection (2)(b), the Commission may otherwise remove a company from the companies register only if – (a)… (b) the Commission – (i) has determined in the prescribed manner that the company appears to have been inactive for at least seven years, and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or (ii) has received a request in the prescribed manner and form and has determined that the company – (aa) has ceased to carry on business; and (bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated. (4) If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company. (5)… (6)… 83. Effect of removal of company from register (1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company's registration has been transferred to a foreign jurisdiction, as contemplated in section 82(5). (2) The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register. (3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register. (4) At any time after a company has been dissolved – (a) the liquidator of the company, or any other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and (b) If the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved."

prevail in the event that there are any conflicting provisions between those statutes and the Act.[74] The MPRDA is not specified as being one of those prevailing statutes.

Section 5(4)(b)(ii) makes it clear that the Act must prevail in instances when there is a conflict between it and any other national legislation, such as the MPRDA, which cannot be interpreted in a manner so that both pieces of legislation find application without the one contradicting the other.[75]

In light thereof, it cannot be denied that section 82(4) and 83(4) of the Act must be considered when determining if a prospecting or mining right has been resurrected on the reinstatement of its holder.

In terms of section 82(4) of the Act, a company that is deregistered may be reinstated by the commission upon application made to it by an interested party.[76] The commission has, in terms of a practice note, stipulated what information should be included in such an application.[77] One aspect which the application for reinstatement has to address is what assets and liabilities the deregistered entity held at the time of its deregistration. A prospecting or mining right would ordinarily be considered to be an asset, yet confusion may have been created by the high court judgment in the *Palala Resources* matter.

Contrary to the position in the 1973 Act,[78] the Act does not specifically state that the reinstatement of a company by the commission will result in the company being deemed to have never been deregistered, or that all rights and obligations held by the company before its deregistration will automatically revert to the company upon reinstatement.[79] That being said, it was submitted, even before the judgment in the *Newlands Surgical Clinic* matter, that the legal position upon reinstatement in terms of the Act would be the same as that under the 1973 Act, namely that all rights and obligations would be restored to the company and it would continue as though it was never deregistered.[80]

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74 s 5(4)(i)(aa) to (ii) of the Act.

75 Delport (n 1) 36.

76 Section 82(4) of the Act and Jooste "Companies and Close Corporations" 2015:3 *Juta's Quarterly Review of South African Law* 11.

77 Reg 40(7) of the Act read with Practice Note 6 of 2012 issued by the commission on 23 October 2012. See also Delport (n 1) 332(13).

78 See s 73(6)(a) and s 73(6A) of the 1973 Act.

79 Delport (n 1) 332(14).

80 Cassim *Contemporary Company Law* (2012) 923.

Nevertheless, section 83(4)(a) of the Act seems to provide the court with a wide discretion to make any order that it deems just and equitable at any stage after a company has been dissolved.[81] If reinstatement by the commission does not result in complete retrospectivity, it has to be determined whether the court may use its discretion, under section 83(4)(a), to provide retrospectivity to actions that occurred whilst a company was deregistered.[82]

Since the enactment of these provisions, there has been much uncertainty about the effect of sections 82(4) and 83(4).[83] A number of applicants have approached the courts for all forms of relief, including orders declaring that upon reinstatement of a deregistered company in terms of section 82(4), the company is re-vested with all of its rights and obligations and that the company is deemed to have remained in existence despite its deregistration.[84]

In *Peninsula Eye Clinic (Pty) Ltd vs Newlands Surgical Clinic (Pty) Ltd*[85] the high court had to decide if the reinstatement of a company in terms of section 82(4) of the Act operated retrospectively, and if so, whether corporate activities undertaken on behalf of the company during its deregistration were validated upon reinstatement.

The high court decided that the reinstatement of a company only provided retrospective effect to the corporate existence of that entity. Full retrospectivity, however, did not occur upon the reinstatement of such a company, as it did not validate activities undertaken on behalf of the company during the company's period of deregistration. The court also found that, even though reinstatement did not provide full retrospectivity, the court could exercise its discretion under section 83(4) of the Act, and make an order that it deemed appropriate in the circumstances.[86]

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81 Jooste (n 76) and Delport (n 1) 332(28A).

82 *Newlands Surgical Clinic* case (n 5) par 1.

83 Van der Linde "An Overview of Recent Company Law Cases: a Mixed Bag of Clarity, further Confusion and Continuing Uncertainty" 2015 *Annual Banking Law Update* 1.

84 *Peninsula Eye Clinic (Pty) Ltd vs Newlands Surgical Clinic (Pty) Ltd* 2014 (1) SA 381 (WCC); *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC); and *Missouri Trading CC and Another v Absa Bank Ltd and Others* (2014) ZAKZDHC 6 (20 March 2014). Also see Delport (n 1) 332(20).

85 See *Peninsula Eye Clinic* (n 84) para 50, 55 and 56.

86 *Newlands Surgical Clinic* case (n 5) par 1.

In this particular instance, the court decided that it was just and equitable to order that arbitration proceedings, which had occurred whilst Newlands was deregistered, were valid, and that the order made by the arbitrator was, as a result, also valid and enforceable.[87]

The importance of the judgment in the *Peninsula Eye Clinic* matter, is that it was recognised that additional relief could be sought from the court, by any interested party, under section 83(4) of the Act even after the deregistered company had been reinstated.[88]

Newlands appealed the decision of the high court to the Supreme Court of Appeal.[89] In its judgment, the Supreme Court of Appeal acknowledged that once a company is deregistered, its existence comes to an end. Any action performed by representatives on behalf of the deregistered company would lack validity.[90] Accordingly, if there was no retrospectivity upon reinstatement, it would mean that everything done on behalf of the company during its period of deregistration would be a nullity.[91]

The legislative history and the interpretation relating to the previous statutory provisions that regulated the reinstatement of companies was also considered by the Supreme Court of Appeal.[92] The result of this analysis by the court was that in all instances, "automatic retrospective reinstatement" occurred upon the reinstatement of a company or close corporation.[93]

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The court then turned to sections 82 and 83 of the Act. It recognised that there have been conflicting decisions of the various high courts regarding these sections since the commencement of the Act. It also recognised that the *Bright Bay Property Services* case[94] seemed to be the only matter in which the court decided that there would be no retrospectivity upon reinstatement of a deregistered entity in terms of section 82(4) of the Act.[95] It is

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87 *Peninsula Eye Clinic* case (n 84).

88 Locke & Esser "Corporate Law (Including Stock Exchanges)" 2014 *Annual Survey of South African Law* 38 41.

89 *Newlands Surgical Clinic* case (n 5) par 7 and 8.

90 *Newlands Surgical Clinic* case (n 5) par 15.

91 *Newlands Surgical Clinic* case (n 5) par 15.

92 In this regard the court considered the judgments in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*, *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA). See *Newlands Surgical Clinic* case (n 5) par 18.

93 *Newlands Surgical Clinic* case (n 5) par 18.

94 2013 (3) SA 78 (WCC).

95 *Newlands Surgical Clinic* case (n 5) par 22.

submitted that the actual reason why the court in the *Bright Bay Property Services* case could not order automatic retrospective reinstatement was the fact that the matter concerned rights, which had been granted under the MPRDA, to an entity that was deregistered at the time of the grant. This is distinguishable to the facts in the *Palala Resources* case, as the applicant in the *Bright Bay Property Services* case was not in existence at the time of the grant and it was impossible for a right in terms of the MPRDA to vest in a non-existent entity. It is interesting to note that, until 30 May 2016, the *Bright Bay Property Services* case was the only other reported judgment (besides the *Palala Resources* case) which related to rights granted under the MPRDA and the deregistration of the holder of such rights.

In deciding whether reinstatement in terms of section 82(4) has retrospective effect, the Supreme Court of Appeal made the following remark:

> "But most significant of all, I think, is the consideration underscored by the court a quo (para 44) namely that reinstatement would hardly serve any practical purpose if it did not at least have the effect of retrospectively revesting the company with title to its property ... Its formerly secured creditors would remain unsecured ..."[96]

The Supreme Court of Appeal determined that there would be no reason to recognise that reinstatement resulted in only the revival of rights to the deregistered company.[97] As a result it was decided that complete and automatic retrospectivity occurs upon the reinstatement of a company in terms of section 82(4).[98] This meant that upon reinstatement the company would be restored - all rights and obligations which it previously held would revert to the company and all corporate actions undertaken by the company during its period of deregistration would be validated.[99]

Before the commencement of the Act, it was well established in South African law that reinstatement of a deregistered company resulted in the retrospective validation of all actions performed on behalf of that company during its period of deregistration.[100] It was, however, recognised that there may be drastic consequences experienced by third parties when the automatic validation of all actions carried out on behalf of a company during its deregistration

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[96] *Newlands Surgical Clinic* case (n 5) par 24.
[97] *Newlands Surgical Clinic* case (n 5) par 29.
[98] *Newlands Surgical Clinic* case (n 5) par 29.
[99] *Newlands Surgical Clinic* case (n 5) par 29.
[100] See *Ex parte Sengol Investments* case (n 41); *Newlands Surgical Clinic* case (n 5) par 18 and Luiz "Company Law" 2007 *Annual Survey of South African Law* 149 185.

occurs.[101] That being said, the court took cognisance of the fact that there could be just as much of an effect on parties if actions carried out on behalf of, or against, a deregistered company were not automatically validated upon reinstatement.[102]

The Supreme Court of Appeal endorsed the decision of the court *a quo* in so far as the interpretation and application of section 83(4) of the Act was concerned. According to the court, section 83(4) provided third parties with the option of approaching a court for any order that would be just and equitable if that third party was prejudiced by the reinstatement (and accompanying retrospective effect) of a deregistered company.[103]

Keeping this in mind, it may be concluded that on a proper application of section 5(4) of the Act and the principles in the *Maccsand* and *Newlands Surgical Clinic* matters, it is possible for a prospecting or mining right to be revived in terms of section 82(4) and 83(4) of the Act.

5. RECONSIDERING THE *PALALA RESOURCES* MATTER

If one considers that the Supreme Court of Appeal has made a clear decision that reinstatement of a deregistered company in terms of the Act restores rights and obligations to that company which existed prior to deregistration, then it would almost be obvious that a prospecting or mining right held before deregistration would also be restored.

That being said, the specific wording of section 56(c) of the MPRDA cannot be disregarded.[104] This section provides for only one specific instance in which a right will not lapse upon the deregistration of the right holder, namely, if an application in terms of section 11 of the MPRDA has been made to the Minister of Minerals and Energy. Such an application is made to the Minister of Minerals and Energy for consent to cede, transfer, alienate, let, sublet or otherwise dispose of a mining or prospecting right.[105] A holder of a right will lose the right, on a plain interpretation of only section 56(c), if it has not made an application to the Minister of Minerals and Energy in terms of section 11 of the MPRDA before its deregistration.[106] This was relied on by the high court in the *Palala Resources* case.[107] It was

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[101] Luiz (n 100) 186 and 187.
[102] *Newlands Surgical Clinic* case (n 5) par 26 and 27 and Delport (n 1) 332 (20).
[103] *Newlands Surgical Clinic* case (n 5) par 30.
[104] The full section has been cited above in par 1.
[105] s 11(1) of the MPRDA.
[106] Dale (n 22) 525.

said that any further exceptions to the rule that the right lapses upon deregistration would have been expressly stated if that was the intention of the legislature.[108]

On a strict interpretation of only section 56(c) of the MPRDA, it would appear that the high court judgment in the *Palala Resources* matter may in fact be correct. In support thereof, is the argument that reinstatement can only revive rights that are still effective at the time of deregistration, and that, as a result of the specific wording in section 56(c), a prospecting or mining right would be invalidated immediately upon deregistration. It would therefore no longer be a valid right which was capable of revival upon reinstatement.[109]

There is, however, a need to have continuity in a company. There seems to be no substantive argument in corporate law to support the view that a company must permanently lose all of its rights (real or incorporeal) and obligations if it is placed into deregistration as a result of its failure to file annual returns.

Even though the MPRDA deals specifically with the regulation of mineral resources, it must be remembered that the Act does not assert the MPRDA as being a statute which prevails over it in the event that there is a conflict between these two pieces of legislation. This is noteworthy, as the Act came about after the MPRDA, and would have recognised it as being an industry specific piece of legislation, which should take preference in the event of any conflict arising between them, if that was the intention.[110]

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Furthermore, according to the MPRDA, a prospecting or mining right is a limited real right.[111] This is not a new concept, as a mineral right has been recognised as being a real right, similar in nature to a servitude, for many years.[112] The commencement of the MPRDA introduced the idea that rights to prospect and mine are "conditional" real rights, subject to the fulfilment of certain conditions imposed in terms of the MPRDA and by the Minister of Minerals and Energy.[113]

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[107] *Palala Resources* case (n 8) par 44.
[108] *Palala Resources* case (n 8) par 45.
[109] *Palala Resources* case (n 8) par 49.
[110] s 5(4) of the Act.
[111] S 5(1) of the MPRDA provides that a right is a limited real right once it has been registered in the Mining Titles Registration Office.
[112] Badenhorst (n 18) 220.
[113] Badenhorst (n 18) 218.

An entity that holds a limited real right in the form of a mining right[114] can therefore, be likened to an entity that holds immovable property, as both types of rights are registered in governmental offices that were established to act as registries. If an entity that owns immovable property is deregistered, that immovable property becomes *bona vacantia*.[115] If that company is reinstated, the immovable property is deemed to re-vest to the entity concerned.[116] Before the enactment of the MPRDA, a right to mine or prospect would have also become *bona vacantia* upon the deregistration of the holder of that right. However, after the enactment of the MPRDA, it is uncertain if a right granted in terms thereof is also considered as being *bona vacantia* upon deregistration of the holder.[117] To add further uncertainty, it is noted that the right is not automatically endorsed at the Mining Titles Registration Office as "lapsed" when the holder of that right is deregistered.[118] Needless to say, this has resulted in deregistered entities unlawfully continuing operations under lapsed rights.[119] There is evidently a need to secure a prospecting or mining right in instances when deregistration has occurred as an oversight.

It has been indicated above[120] that the decision in the *Palala Resources* case was questionable, even in terms of the legislation in place at that time. The decision becomes even more questionable in view of the provisions of the Act as interpreted in *Newlands Surgical Clinic* case.

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It must not be forgotten that there is also an obligation to interpret the provisions of the MPRDA in a manner that is consistent with its purposes.[121] The indefinite lapsing of a right in terms of section 56(c) of the MPRDA cannot be an intended consequence of that act, as it is intended to create economic well-being and security of tenure. It is not intended to create

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[114] Once the mining or prospecting right has been registered in the Mineral Titles Registration Office, it is regarded as being a limited real right, which is enforceable against the world at large.

[115] See Williams (n 1) 612 and Dale (n 22) s 25.

[116] Williams (n 1) 617 and Delport (n 1) 332 (20).

[117] Dale (n 22) 526.

[118] This is despite it being an obligation on the director general in terms of s 5(1)(d) of the Mining Titles Registration Act 16 of 1967 to do so. In practice, however, the Department of Mineral Resources is not advised of the deregistration of the holder.

[119] See the *Bright Bay Property Services* case (n 94) for a practical example, in which the applicant received a permit from the Department of Mineral Resources whilst being deregistered.

[120] See para 3 above in this regard.

[121] s 4(1) of the MPRDA.

irretrievable consequences in instances where, for example, a holder has been deregistered through no culpability of its directors.

Considering what has been stated above, there is a clear conflict between the effect of sections 82(4) and 83(4) of the Act with section 56(c) of the MPRDA. On a correct interpretation of section 5(4) of the Act, as stated above, the Act would prevail over the MPRDA, and section 82(4) and 83(4) of the Act would ultimately carry the day and assist in the assertion that a mining or prospecting right may be validated upon the reinstatement of the company that held the right.

Moreover, there would be many adverse repercussions for mining or prospecting right holders if the high court judgment in the *Palala Resources* matter had to continue to be followed.

The most detrimental effect would be that the prospecting or mining right would be considered invalid. Any operation conducted under the impression that the right is still valid, or without the knowledge that the holder of the right has been placed into deregistration, would be in contravention of the MPRDA, and possibly guilty of an offence which may result in a fine, imprisonment, or both.[122] To add insult to injury, it is not a duty of the Department of Minerals and Energy to monitor the deregistration and reinstatement of holders of rights.[123] In terms of section 19 and section 24 of the MPRDA an application for the renewal of a right must be made while the right is still in existence. If the company was deregistered at any stage, it would, according to the high court judgment in the *Palala Resources* matter, indefinitely lose that right. The Department of Mineral Resources and Energy would, however, be unaware of the deregistration, and accept and grant a renewal of the lapsed right.

Secondly, it would mean that upon reinstatement, the company which held the right before deregistration would have to reapply to the Minister of Minerals and Energy for a new right over the same portion of land as the right which had lapsed. Besides the submission of an application for a prospecting or mining right being a time-consuming and costly exercise, it must be noted that in terms of the MPRDA, anyone is entitled to submit an application for such a right.[124] The previous holder is not afforded any preference thereto. The result of this is that, even though a company may have invested a large sum of money into its operations, it is

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[122] See s 98 and 99 of the MPRDA.
[123] *Bright Bay Property Service* case (n 94) par 44.
[124] s 16 and s 22 of the MPRDA.

not guaranteed that it will be re-awarded with the right that it lost upon deregistration. A third party who applies for such a right may be granted that right instead. This position is in complete contradiction to the purpose of having security of tenure in rights regulated under the MPRDA.

Thirdly, the obligations which arose from the right, such as the obligation to rehabilitate the land affected by the right,[125] and the duty to repay any funding that was provided by a third party to the holder to commence operations under such a right, will remain in existence despite the lapsing of the right.[126] The company would then be required to honour its obligations without having the benefit of any right and without being able to generate any cash flow from an operation which would have been conducted under the right had the holder not been deregistered. In addition to the above, if a holder of a right granted in terms of the MPRDA is deregistered and, as a result, the right indefinitely lapses, that holder would certainly need to retrench most, if not all of its work force, as it would not be entitled to carry out any form of operation without such a right. These consequences are counterproductive to creating economic well-being as intended by both the MPRDA and the Act.

Creditors may require that a mortgage bond be registered over a prospecting or mining right as security for debts that are associated with the funding of such operations.[127] The indefinite lapsing of the right would inadvertently result in the indefinite loss of that security, as a mortgage bond will, as a result of the loss of the right, also lapse.[128] This is surely an unintended outcome and could have consequences which are far more invasive than those associated with a right that revives upon reinstatement of the holder. A mortgage bond registered over a mining right would ultimately be subject to the holder of the right remaining in existence. This could have the effect that a number of over-indebted mining companies opportunistically allow themselves to be placed into deregistration.

That being said, the high court decision was appealed to the Supreme Court of Appeal, where the issue was reconsidered in light of the recent developments relating to the reinstatement of companies.

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[125] s 24, 24A, 24P and 24R of the National Environmental Management Act 107 of 1998.
[126] Delport (n 1) 332(11) and Pama (n 2) 150.
[127] See s 11(3) of the MPRDA and s 31 of the Mining Titles Registration Act.
[128] Dale (n 22) 527.

The Supreme Court of Appeal criticised the approach taken by the high court. It expressed the view that section 56(c) of the MPRDA and section 73(6A) of the 1973 Act could harmoniously exist as the former provision dealt with what occurs on deregistration, whereas the latter provision dealt with what occurs upon reinstatement of the company. The Supreme Court of Appeal accordingly found that upon reinstatement of a company in terms of section 73(6A) of the 1973 Act, complete restoration of the company's assets occurred, including the restoration of rights granted under the MPRDA.[129] The court went even further, and stated that at the time of drafting the MPRDA, the legislature was aware that upon reinstatement of a company, full retrospectivity occurred. As a result, the court stated, the legislature would have specified that a right granted in terms of the MPRDA would not be capable of revival upon restoration of the company, if that is what it intended.[130]

6. POTENTIAL DIRECTORS' LIABILITY

As a general rule, a director of a company is not personally liable for the debts of that company just because he or she holds the office of directorship.[131] Be that as it may, the deregistration of a company does not affect any liability of a director that may have resulted from an action that may have occurred before the deregistration.[132] In other words, if a director acted in a manner which attracted personal liability before deregistration of the company in respect of which he was appointed, he will not be absolved from such liability upon deregistration.[133] This seems to be different to the position which arises when a company is dissolved, as it is submitted that the liability of directors ceases upon dissolution.[134] The position relating to personal liability of directors that arises *after* deregistration is, however, a different issue. Before the commencement of the Act, section 26(5) of the Close Corporations Act provided that members of a close corporation would be jointly and severally liable for any

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[129] *Palala Resources* case (n 9) par 10.
[130] *Palala Resources* case (n 9) par 11.
[131] Havenga "Members' Personal Liability for Debts of a Close Corporation after Deregistration" 2002 *SA Merc LJ* 134 134.
[132] s 83(2) of the Act.
[133] Delport (n 1) 332(23).
[134] Cassim (n 80) 923.

outstanding debts of the close corporation.[135] There was, however, no such provision in the 1973 Act,[136] and there is currently no similar provision in the Act.

The MPRDA and the Act need to be considered when determining whether a director of a company, which held a mining or prospecting right, may be liable for inadvertently allowing the company to be placed into deregistration and as a result thereof allowing the right to lapse.[137]

In terms of the MPRDA there is nothing which expressly stipulates that a director of a company in such instances would be held liable to the company, or any third party, on reinstatement. In fact, as previously stated, the MPRDA provides no guidance on what occurs after a right has lapsed owing to the deregistration of the holder.

Liability under the MPRDA could, however, potentially come about if operations unlawfully continue after a right has lapsed. In terms of the MPRDA any person who contravenes the MPRDA may be liable to a fine or imprisonment, or both. Sections 98 and 99 of the MPRDA regulate this position. In terms of these sections, "any person" may be held liable under the MPRDA for contravention of that act. Assuming that a company is the holder of a right, or operating under a right which may be invalid, the company would then be held liable in terms of section 99 of the MPRDA. This does not mean that the director of the company would be held personally liable under the MPRDA. That being said, if a director used the company in a manner which contravened the MPRDA and which could be considered as an unconscionable abuse of that entity, then section 20(9) of the Act may be used to support a claim of civil liability against the director.[138]

Directors of mining and prospecting companies should, however, also be weary of contravening the Act. Section 77(2)(b)[139] and section 218(2)[140] of the Act, may be used in

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[135] Havenga (n 131) 134.

[136] See Cassim and Larkin "Company Law (Including Close Corporations)" 2004 *Annual Survey of South African Law* 487 525 and see Havenga (n 131) 135.

[137] This is based on the principal in the Constitutional Court judgment in the *Maccsand* matter, which stipulates that the MPRDA may apply in addition to other legislation.

[138] Delport (n 1) 99.

[139] S 77(2)(b) stipulates that "A director of a company may be held liable - in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of - (i) a duty contemplated in section 76(3)(c) (ii) any provision of this Act not otherwise mentioned in this section; or (iii) any provision of the company's Memorandum of Incorporation.

such instances, to establish the liability of a director when a company has been deregistered as a result of its failure to file annual returns and has consequentially lost its rights due to that deregistration.

In terms of section 33 of the Act, every company, irrespective of the form, is obligated to file annual returns.[141] Section 33 goes further and requires that a director (or employee) be nominated as the person responsible for compliance with that section.[142]

Section 33 must be read with section 77(2)(b) of the Act which provides that a director may be liable to the company if he fails to act with the degree of care, skill and diligence that is expected of a person carrying out the same functions as those carried out by that particular director and having the general knowledge, skill and experience of that director. Section 77(2)(b) creates a remedy for the company against its director and is not available for third parties that may be adversely affected by the deregistration.

It is submitted that it can be expected of a director to have knowledge of the duty of the company to file an annual return. It is further submitted that in the event that a company is deregistered as a result of the failure to file an annual return, the company may pursue a claim in terms of section 77(2)(b) against the director.

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The test to establish liability in terms of section 77(2)(b) for failure to file annual returns would stand on three legs, namely:

- Whether all the elements of a delict can be established against the director concerned;
- Whether it would be expected of a person carrying out the same functions as the director concerned to file the return or to ensure that it be filed; and
- Whether it could be expected of that particular director (taking into account his skill, knowledge and experience) to have filed the return or to ensure that it be filed.[143]

Section 218(2) of the Act, is the provision that could have the most far-reaching consequences for directors of companies that have, as a result of deregistration, lost their rights in terms of

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[140] S 218(2) provides that any person may hold another liable for any loss or damage suffered as a result of the the contravention of any provision of the Act.

[141] s 33(1) of the Act.

[142] s 33(3) of the Act.

[143] See s 76(3)(c) of the Act.

the MPRDA. This provision stipulates the following: "Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

It is recognised that a third party may invoke this section to hold a director liable for any loss which that third party had suffered as a result of the director contravening the Act.[144] Wrongfulness or fault is not required to invoke this section.[145] Keeping this in mind, if a director inadvertently fails to file a company's annual returns as envisioned in section 33 of the Act, and the company as a result becomes deregistered, which in turn results in the lapse of a right that it held in terms of the MPRDA, all third parties who suffered a loss as a result of the lapsed right could potentially rely on this section to hold the directors liable. This could result in the directors having to defend matters instituted by contractors, employees and funders of the company, even though they never intended to cause any damage. In light of this, it is difficult to condone that the proper intention of the MPRDA was to have a right indefinitely lapse on the deregistration of the holder thereof.

That being said, personal liability for directors who inadvertently allowed a company to fall into deregistration whilst having a right under the MPRDA appears to be a reality and could be invoked even when there has been no fault on the part of the director.

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7. THE COURT'S DISCRETION IN TERMS OF SECTION 83(4)

The Supreme Court of Appeal only addressed whether reinstatement of a company in terms of section 73(6A) of the 1973 Act resulted in the revival of rights that had been granted and lapsed in terms of the MPRDA. The court did not address what the position is under the Act, but based on what has been stated above, an assumption may be made that reinstatement under section 82(4) of the Act would also result in the revival of rights that had lapsed upon deregistration of the holder of those rights in terms of the MPRDA. Even if this assumption is incorrect, the most important question to be answered is whether the court has the discretion to validate a mining or prospecting right upon application once the holder of that right has been reinstated. If the answer is affirmative, any possibility of having a right lapse indefinitely upon deregistration may be remedied without having to amend section 56(c) of the MPRDA.

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[144] Delport (n 1) 639 and 640.
[145] Delport (n 1) 639.

Section 83(4) of the Act provides that an application may be brought to court at any stage after a company has been dissolved, to declare the dissolution as void, or to seek any other order that is just and equitable in the circumstances.

In *Absa Bank Ltd v Companies and Intellectual Properties Commission*[146] the court found that the deregistration of a company also resulted in its dissolution.[147] It is noteworthy that the power granted to the court in terms of section 83(4) is not limited to the review of a decision by the commission to remove a company from the register.[148]

The *Peninsula Eye Clinic* matter confirmed that section 83(4)(a) of the Act provides the court with a seemingly unlimited discretion, upon application by any party with an interest in the company, to grant any order that it deems to be just and equitable. An application in terms of this section of the Act may even be used when a company has been reinstated by the commission.[149]

It has accordingly been recognised that this section has two purposes. Firstly, it can be used to void the dissolution of a company and secondly, it can be used by any interested party to obtain any form of ancillary relief that may be justified in the circumstances.[150]

If the approach of the high court in the *Palala Resources* matter is followed, a right granted under the MPRDA cannot fall to the state if the holder thereof is deregistered because the right indefinitely lapses and no longer exists. However, during such deregistration, a third party may be granted a right by the Minister of Minerals and Energy, which seemingly competes with the right that had been held by the company that became deregistered. There is nothing in the Act or the MPRDA which prevents the previous holder of the right from approaching the court for relief in terms of section 83(4) of the Act. That previous holder could accordingly request a declaratory order from the court, validating the lapsed right, and declaring the right of the third party to be invalid.

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[146] 2013 (4) SA 194 (WCC).
[147] Van der Linde (n 81) 3.
[148] Van der Linde (n 81) 4.
[149] Delport (n 1) 332(28A).
[150] Van der Linde (n 81) 5.

In further support of this submission it must be noted that Delport still recognises that an application may be brought to court to have immovable property that became *bona vacantia* upon deregistration of a company declared by the court as property of that reinstated entity.[151] In such instances the application would need to be served on the relevant state representative, as well as the relevant deeds office and the commission.[152]

Based on this approach, an application in terms of section 83(4)(a) could be brought to court to have the right that existed under the MPRDA, which is also a real right, declared a valid right of the reinstated holder, provided that the Minister of Minerals and Energy, the Mining Titles Registration Office, the commission and any other party that may be affected by such an order, receives notice thereof.

An application of such a nature would also allow any interested third party and the Minister of Minerals and Energy to provide reasons to the court as to why the lapsed right should not be declared as valid. Of course, the outcome of such an application would need to be assessed on a case-by-case basis.

Further, assuming for the moment, that the approach of the Supreme Court of Appeal in the *Palala Resources* matter is correct, reinstatement of a company under section 82(4) will in any event result in a right held by that company in terms of the MPRDA being automatically validated. In such an instance, an interested third party, which was affected by the validation of that right, could also approach the court in terms of section 83(4) of the Act for relief.

Although the views in this dissertation have been confirmed by the Supreme Court of Appeal, there is the foreseeable risk that there will now be a number of applications brought to court by third parties in terms of section 83(4) requesting relief, as those parties may be holding rights in terms of the MPRDA which conflict with rights that were previously held by companies that fell into deregistration and have subsequently been reinstated.

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[151] Delport (n 1) 332(24).
[152] Delport (n 1) 332(24).

7. CONCLUSION

The MPRDA cannot be considered in isolation and it has been shown above that the MPRDA finds simultaneous application with the Act. As a result, recent corporate law developments relating to the effect of reinstatement of deregistered companies should be taken into account when considering:

- if a right under the MPRDA lapses indefinitely upon the deregistration of the holder of the right;
- if it is possible that the right may be automatically validated upon reinstatement of the holder; or
- if the court has the capacity to validate the lapsed right upon reinstatement of the holder.

Section 82(3) read with regulation 40 of the Act create a framework in which a company can be reinstated after it has been deregistered. The effect of this reinstatement, ordinarily, is that all corporate activities engaged in during the company's deregistration will be automatically and retrospectively validated. In addition thereto, all rights and assets held by the company before deregistration would be deemed to re-vest to the company. Section 83(4) of the Act also provides an additional remedy to any interested party who wishes to approach the court for any order that may be just and equitable in the circumstances. There is no restriction on the court's discretion in this regard, and this would be the most appropriate section to rely on if a third party was aggrieved by the automatic retrospective validation which arises from the reinstatement of a company.

In light of the recent Supreme Court of Appeal judgment in *Palala Resources,* it seems that the approach to be followed is such that the lapsed right would revive upon the reinstatement of the holder.

The Supreme Court of Appeal has confirmed that the judgment from the court *a quo* in the *Palala Resources* matter is questionable as it fails to take cognisance of the corporate law position, which endorses full retrospectivity and re-vestment of all rights upon reinstatement of a company that was deregistered.

Even if the approach of the Supreme Court of Appeal is not followed when the provisions of the Act are applied, a company which held a mining or prospecting right before

deregistration, could approach the court in terms of section 83(4) of the Act for an order declaring the right to be valid, provided that, in the circumstances, such an order is just and equitable. It is submitted that a legislative amendment to section 56(c) of the MPRDA may be necessary to encapsulate the decision of the Supreme Court of Appeal, and reiterate that the right lapses upon the deregistration of the holder of that right, but revives upon the reinstatement of the holder.

What remains to be seen, however, is the effect of this new judgment, as it is anticipated that several third parties will be adversely affected by the revival of rights that were once considered to have indefinitely lapsed. As a result, there may be many more applications brought to court by such third parties in terms of section 83(4) of the Act requesting relief that is just and equitable in the circumstances.

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