IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

REPORTABLE
CASE NO: 3130/12

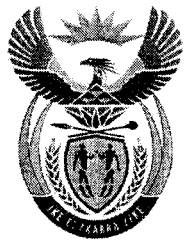
In the matter between:

BRIGHT BAY PROPERTY SERVICE (PTY) LTD Applicant

and

THE MORAVIAN CHURCH IN SOUTH AFRICA Respondent

Coram	:	**Henney, J**
Judgment by	:	**Henney, J**
For the Applicant	:	**Adv D Van Reenen**
Instructed by	:	Norton Rose South Africa (incorporated as Deneys Reitz Inc) 10th Floor, Norton Rose House 8 Riebeeck Street, Cape Town Tel: (021) 405 1200 Fax: (021) 418 6900 Ref: Ms A Spies/BBP3
For the Respondent	:	**Adv D Van Der Merwe**
Instructed by	:	Von Lieres Cooper Barlow Hangone 6th Floor 71 Loop Street Cape Town (Ref: SH/L3578)
Date(s) of Hearing	:	**5 JUNE 2012**
Judgment delivered on	:	**31 OCTOBER 2012**



Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

(Reportable)

CASE NO: 3130/12

In the matter between:

BRIGHT BAY PROPERTY SERVICE (PTY) LTD **Applicant**

And

THE MORAVIAN CHURCH IN SOUTH AFRICA **Respondent**

JUDGMENT DELIVERED ON 31 OCTOBER 2012

HENNEY, J:

Introduction

[1] The Applicant is Bright Bay Property Service (Pty) Ltd, a company duly incorporated in terms of the company laws of South Africa with its registered address at 2 Argon Road, Hermanus, and with its principal place of business at 89 Bergzicht Street, Hermanus Business Park.

[2] The Respondent is the Moravian Church in South Africa, an association with perpetual succession established in terms of its constitution with its head office and principal place of business at 63 Albert Road, Lansdowne. The Applicant was deregistered on 16 July 2010 and reinstated as a company on 16 February 2012.

[3] Relief Sought

The Applicant in essence seeks an order to compel the Respondent to comply with the terms of the agreement entered into between the parties on 19 September 2006, and in particular Clause 6, which provides that the Respondent undertakes to take all steps, procedures and processes necessary in order for the Applicant to obtain the necessary permits, licences, permissions and approvals from the appropriate authority in order to mine on the property owned by the Respondent.

[4] Grounds of Opposition

The Respondent opposes the application on the grounds that upon deregistration the mining permit (Permit No. MP09/2007), issued to the Applicant by the Department of Mineral Resources, dated 24 August 2007, as subsequently extended ("the first mining permit"), lapsed and became of no further force or effect.

[5] It further contends that when the Applicant applied for a new mining permit and when it was granted on or about 29 August 2011, the Applicant had been deregistered. It was claimed that as such, the application was unlawful and the mining permit granted by the Department invalid. As a result therefore, the resolutive condition in Clause 11 of the Agreement entered into between the parties on 19 September 2006 was duly fulfilled whereupon such agreement was destroyed *ex tunc*. Accordingly, the Applicant has no further rights whatsoever in terms of such agreement and cannot rely thereon for the relief sought.

[6] The facts underpinning this matter

The Respondent is the owner of a farm, Karwyders Kraal No 584 ("the property") situated in the Hermanus Municipal area. On 19 September 2006, the Applicant entered into an agreement ("the agreement") with the Respondent represented by its President, at that time Rev. Angelene Swart. In terms of this agreement, the Applicant was granted the right to prospect and trade for minerals on the property.

[7] These rights would be exercised for a period of five (5) years from the effective date (defined as the date on which the licence, consent or permit to trade is obtained). On 24 August 2007, the Applicant was issued a permit by the Department of Minerals and Energy in terms of Section 27 of the Mineral

and Petroleum Resources Development Act, 28 of 2002. Thereafter the Applicant commenced mining at the property. 24 August 2007 was therefore determined as the effective date of the agreement and, accordingly, the first five year period would expire on 23 August 2012.

[8] The Applicant in terms of the agreement would be further entitled to mine for a further five years if it gave the Respondent three months written notice of its intention to do so prior to the expiry of the initial period of five years. This notice was given on 31 January 2011. In terms of the agreement, the Applicant would pay certain amounts per cubic metre of minerals mined and removed and Respondent would have certain rights of inspection in relation to documents.

[9] The Respondent was obliged in terms of Clause 6 of the agreement to assist and support the Applicant with all steps, procedures and processes required for obtaining the necessary rights, permits, licences, consents/permissions, approvals, exemptions or certificates, where applicable from any government authority or interested parties, and to sign all documentation where applicable to obtain the necessary rights, permits, licences, approval, exemption or certificates. The Applicant in particular relies on certain clauses in the agreement concluded between it and the Respondent.

[10] The Applicant mined on the property until it was interdicted from doing so by the Respondent on 10 August 2011. The Applicant alleges that during this time both parties complied with their obligations in terms of the agreement. On 27 July 2010 the Respondent received correspondence from the Overstrand municipality in which it was stated that the property was zoned for agricultural use in terms of the Zoning Scheme Regulations promulgated in terms of section 8 of the Western Cape Land Use Planning Ordinance 15 of 1985 ("LUPO"). Having obtained advice to such effect, it was the Respondent's belief that this meant that no mining activities were permitted on the property. However, nothing was done to prevent the Applicant from continuing with any mining activities on the property.

[11] During April 2011 a town planner in the employment of the Respondent came into possession of a fax from the local authority addressed to the Department of Mineral Resources. In this correspondence the Respondent was advised that an application in terms of the LUPO would have to be submitted for mining activities to take place on the farm. It was as a result of this correspondence that the Respondent formed a view that the Applicant's mining activities were unlawful and should stop.

[12] The facts in this case are common cause as set out in the papers. It is clear that as from April 2011, the Respondent did not want the Applicant to continue with mining on its property.

[13] The Respondent contends that the Applicant was mining unlawfully. It is further common cause that the property had to be rezoned in terms of Section 8 of the LUPO. In order for this to be done the Applicant in terms of Clause 6 of the Agreement needed the assistance and support of the Respondent to enable it to obtain approval to have the property rezoned.

[14] As from 11 October 2011 after the Applicant had sought alternative legal advice, it started formally to rely on this provision. It in particular requested the Respondent to provide it with a Special Power of Attorney to allow the Applicant to make a departure from the zoning conditions in order for it to proceed with its mining activities. This constituted a demand in terms of Clause 9 of the agreement.

[15] On 3 November 2011, the Applicant's attorney stated that should the Respondent not comply with the demand of 14 October 2011, proceedings would be instituted to compel the Respondent to do so. Once again no response was received.

It is further common cause that the Applicant was deregistered on 16 July 2010. Raynard of the Applicant only became aware of it during January 2011. The Applicant despite applying for its re-instatement in January 2011 was only reinstated on 16 February 2012. It is also common cause that the Applicant was issued with a new permit on 28 August 2011 whilst it was deregistered.

The Respondent's failure to assist and co-operate as required in terms of Clause 6 of the agreement led to the Applicant instituting those proceedings. The Respondent was of the view that it was not obliged to comply with this provision of the agreement as the agreement was no longer valid.

[16] Issues to be Determined

The sole issue to be determined in order to decide whether the relief sought can be granted is what was the effect of the deregistration on the acts purportedly performed by the Applicant between its deregistration and its re-registration. The Respondent's defence is the following. It argues that due to the deregistration, the permit that was granted to the Applicant to mine on the property had lapsed in terms of Section 56 of Mineral and Petroleum Resources Development Act, 28 of 2002[1]. As a result of this lapsing of the permit, Clause 11 of the agreement was immediately fulfilled whereupon such agreement was destroyed *ex tunc*. Clause 11[2] is a resolutive condition which states:

> *"Indien die opnemer nie in staat is om die nodige regte, permitte, lisensies, toestemmings, goedkeurings vrystellings of sertifikate te bekom soos vereis word deur wetgewing nie word die opnemer onthef van enige verpligtings en aanspreeklikheid in terme van hierdie ooreenkoms".*

---

[1] Section *56(c) "Any right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever –*
(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."

[2] Clause 11

[17] The Applicant, in answer to these defences stated that the application for deregistration had been made in early 2011 in terms of Section 73(6A) of the Companies Act 61 of 1973 (previous Act) and claimed that although the company was only reinstated on 16 February 2012 after the new Companies Act 71 of 2008 had come into operation the provisions of Section 73(6A) of the old Act would still be applicable. Section 73(6A) reads as follows:

> *"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 73, 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."*

[18] Mr Van Reenen who appeared for the Applicant argued that in the light of this it would mean that the "*company shall be deemed to have continued in existence as if it had not been deregistered*". He therefore argued that having regard to this deeming provision, the deregistration would be of no consequence to the Applicant and the agreement was at all relevant times valid. The whole relief that the Applicant therefore seeks is dependent upon the submissions of Mr Van Reenen being correct. It would therefore firstly be convenient to deal with these submissions because the defences as raised by

the Respondent would be dependent on the outcome of these submissions.

[19] I have various difficulties with this submission for the reasons I will deal with hereunder. The law relating to deregistration and the restoration of a company has changed with the coming into effect of the new Act.

[20] Section 82(3) (and 82(4)) of the new Act deals with deregistration and simply provides:

> *"(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) the company has transferred its registration to a foreign jurisdiction in terms of subsection (5), or -*
> *(i) has failed to file an annual return in terms of section 33 for two or more years in succession;*
> *(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";*

[21] The new Act does not have a similar deeming provision as previously contained in Section 73(6)(a) and Section 73(6A), that upon restoration by the Registrar or an order of court "*the company shall be deemed to have continued in existence as if it had not been deregistered*".

[22] This court in *Peninsula Eye Clinic v Newlands Surgical Clinic 2012 (4) SA 484 (WCC)* had occasion to deal with an application for the re-instatement

of a company after it had been deregistered due to its failure to file its annual returns.

Binns-Ward J on page *487 at para 5* said the following:

> *"Those provisions, which also expressly allowed that upon the restoration of a company's registration it would be treated, at least to the extent required, as if it had remained in existence during the period of its deregistration, were repealed in terms of s 224 of the currently applicable Companies Act 71 of 2008, which came into operation with effect from 1 May 2011. Broadly equivalent, but by no means identical, provisions to those of s 73(6) and 73(6A) of the 1973 Act are to be found in s 82(4) of the currently applicable statute. However, the currently applicable provisions do not contain anything, at least expressly, equivalent to the retrospectivity provisions that obtained in terms of s 73(6)(a) and(b) and s 73 (6A) of the 1973 Act. Furthermore, under the 2008 Companies Act, the reinstatement of the registration' of companies deregistered in terms of s 82(3) of the Act falls exclusively within the province of the Companies and Intellectual Property Commission ('the Commission'). There is no provision in the 2008 Act for the restoration of the registration of a company by order, on application to a court".*

[23] The New Companies Act under the provisions of Section 224 repealed the previous Companies Act. The legislature must have been aware of the retrospectivity provisions of the previous Act when it repealed such act and replaced it with the new Act. The previous Act under Section 73(6)(a) and 73(6A) had provisions which expressly stated that upon restoration of a company registration, it would be treated to the extent required, as if it had remained in existence during the period of deregistration.

[24] If Parliament wanted to retain these provisions it would have expressly stated so, by either enacting similar or identical provisions or by stating its intentions to do so under Schedule 5 of the Act[3]. As such, it is my view that in terms of the new Act it was the intention of the legislature not to retain the retrospective provision in terms of the previous Act.

[25] As pointed out by *Binns-Ward J*[4] this poses great difficulties for companies similar to that of the Applicant who were either deregistered under the previous Act and not been registered up till now or had been deregistered in terms of Section 82(3) of the new Act read with regulation 40(2) of the Regulations as published by the Minister under GNR 351 in GG 34299 dated 26 April 2011.

[26] The same issue regarding the retrospective validation of acts performed by or against a company between deregistration and its re-instatement, was considered in *Fintech (Pty) Ltd v Awake Solutions and Others ZASGH* (8 October 2012) where *Van Oosten J* held at *[14]*

> "*The position of a deregistered company is unique: although it is regarded as having come to an end, it, unlike human beings, is amenable to resurrection. The principles of the condictio indebiti accordingly do not apply as there has not been enrichment. The applicant, in my view, should moreover not benefit solely from a procedural fiction, having resulted from deregistration. Once the deregistration came to the knowledge of Walker immediate steps were taken to effect Awake's re-*

---

[3] Item 9 of Schedule 5 for example retains the provisions of the previous Act in respect of the winding up and liquidation of a company.

[4] See para 24 Peninsula Eye Clinic (supra)

instatement and all statutory requirements were complied with. The re-instatement of the registration was successful. I can see no reason why the court should not be able to exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the 2008 Act, on application or otherwise, to validate anything done by or against the effected company, between deregistration and its re-instatement and to make such order it considers appropriate".

[27] Whilst I understand the difficulties as pointed out by *Binns-Ward J* as well as *Van Oosten J* regarding the absence in the 2008 Act of a similar procedure to that appearing in the old Act relating to re-instatement of a deregistered company by a court. I am however in respectful disagreement with the view expressed by *Van Oosten J.* The view that the court may exercise its inherent jurisdiction "*on application or otherwise to validate anything done by or against [an] effected company, between deregistration and its re-instatement and to make such order it considers appropriate*", is incorrect.

[28] I say this for the following reasons: A court cannot exercise its inherent jurisdiction to grant relief, where no provision is made for such relief in terms of the law. In this case the legislature in the Companies Act 71 of 2008 expressly stated its intention not to retain the retrospectivity provisions to make provision for a situation that a company that had been deregistered, shall upon restoration be deemed to have continued in existence as if had not been deregistered. A High Court cannot in the exercise of its inherent powers negate the unambiguous expression of the legislature.

[29] This had been clearly stated in *Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505* (CC) at *[52].*

> *"I doubt that the inherent jurisdiction of the Court under S 173 is such that it empowers a Judge of the High Court to make orders which negate the unambiguous expression of the legislative will. Moreover, the power that a Court has to use its inherent power is a special and extraordinary power which should be exercised sparingly and only in clear cases".*

See also *Du Plessis NO v Voorsitter Van die Drankraad Raad en Andere 1995 (2) SA 486 (O) at 491 – 493.* See also *Herbstein & Van Winsen (5ed) at 52.*

[30] Secondly, although the Court, in terms of S 73 6(a) and the Registrar, in terms of S73 (6A) had the power to re-instate a deregistered company, it never had the power on application to validate anything done by or against an effected company between deregistration and its reinstatement. By operation of law the effect of the order of restoration is that the company is to be regarded as never having been deregistered.

[31] The re-instatement of the Applicant, however, which occurred on 16 February 2012, had been done in accordance with Section 82(4) of the new Act. I agree with the interpretation of *Binns-Ward J* in the *Peninsula Eye Clinic* case, (at 488 para 6) where he notes that in the light of the definition of "*company*" as a "*juristic person that, immediately before the effective date was deregistered in terms of the Companies Act, 1973 and has subsequently been*

re-registered in terms of this Act", one must read into section 82(4) after the words, "*as contemplated in subsection (3)*", the words, "*or a company that has been deregistered in terms of section 73(5) read with section 73(3) of the Companies Act, 1973*".

[32] Nowhere in the new Companies Act is it provided that where an application for re-registration or reinstatement had been made in terms of the previous Act, and had not been concluded before the effective date on which the new Act came into operation, that the provisions relating to deregistration, reinstatement and more particularly the consequences thereof in terms of the previous Act would be applicable.

[33] Item 3(1) of Schedule 5 of the transitional arrangements to the Act, under the heading Pending matters, merely provides that any matter pending before the Registrar under the previous Act, amended by this Act, before the effective date and not fully addressed at that time must be concluded by the Registrar in terms of such Act, despite its repeal or amendment.

[34] The mere fact that the Registrar, with respect to any matter pending under the previous Act before the effective date of the new Act and not fully addressed at such time, in terms of item 3(1) of Schedule 5 is empowered to conclude such a matter in terms of the old Act, in this case the application for re-registration, does not mean that if such re-registration had been concluded

after the new Act came into operation the retrospectivity provisions of the previous Act would be applicable. It merely empowers the Registrar to conclude with all matters that were pending in terms of the previous Act.

[35] If it was the intention of the Legislature that the old Act would apply in such circumstances then Section 82 would have made provision for such an eventuality. Instead the definition of company under Section 1 of the new Act clearly states that a company is defined as a deregistered company under the previous Act which has subsequently been re-registered in terms of this Act. If it was re-registered in terms of "this" (2008) Section 82(4) would be applicable. As a consequence of this, any action taken by the Applicant during the period of deregistration would be of no legal force or effect due to the fact that the Applicant lacked corporate personality.

[36] The position of such an entity had been clearly set out in *Miller and Others v NAFCOC Investment Holding Co Ltd and Others 2010(6) 390 SCA* in which it was held at *395 d – e* that ... "*Deregistration, on the other hand, puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist at death.*"

And further at para [12] at F ... "*The notices requiring the attendance of the individual applicants and their attorney before the commissioner were authorised by the commissioner whilst Serveco was deregistered. They were therefore void for that reason.*"

(own emphasis)

[37] The further argument was that even if the first mining permit had lapsed a new mining permit was applied for and granted to the Applicant. This action of the company is deemed to be valid due to the re-registration of the Applicant in terms of S 73(6A) of the Act. This permit it seems was applied for and issued whilst the company was still deregistered on 28 August 2011. The new permit that was therefore issued whilst the Applicant was deregistered was issued to a non-existing entity and therefore void.

[38] Apart from what I have said earlier, that the re-registration did not take place in terms of Section 73(6A) of the 1973 Act, but in terms of Section 82(4) read with Section 82(3) and S 1(c) of the new Act, I have further difficulties with this submission. If the company was deregistered on 16 July 2010, then the permit had lapsed on that day in terms of Section 56(c) of the Mineral and Petroleum Resources Development Act. Raynard says he only became aware of the deregistration in January 2011. How this happened is difficult to comprehend because in terms of Section 73(7) of the previous Act a notice of deregistration would have been addressed to the postal address and the registered office of the Applicant.

[39] In any case, if Raynard's version is to be accepted, it follows then at that stage (January 2011) Raynard had to know that the first mining permit that

was issued in 2009 had lapsed. On this ground alone, the Applicant could not demand specific performance in terms of the agreement, because it could not lawfully mine on the property, due to the fact that it had a lapsed permit.

[40] The agreement in any event during at the time when the demand was made was not in operation, because no effect could be given to the agreement because due to the fact that the permit had lapsed. There was therefore no agreement in existence that was breached by the Respondent.

[41] The Applicant relies on Clause 9 of the agreement which deals with the consequences of any breach of the terms of the agreement. Clause 9 reads:

> *"Kontrakbreuk*
>
> *Ingeval enigeen van die partye versuim om enige van die terme of voorwaardes van hierdie ooreenkoms na te kom, dan is die verontregte party geregtig om aan die party aldus in verstek skriftelik kennis te gee, in welke kennisgewing die term of voorwaarde wat die party in verstek versuim het om na te kom beskryf moet word en waarin geëis word dat sodanige term of voorwaarde nagekom word binne 14 (veertien) dae vanaf die datum waarop sodanige kennisgewing aan die party in verstek oorhandig is of deur hom geag ontvang te gewees het soos voormeld, na gelang van die geval. Ingeval die party in verstek versuim om aan sodanige eis te voldoen binne die vermelde tydperk, is die verontregte party geregtig, sonder inkorting van enige ander regte waarop hy regtens geregtig mag wees om spesifieke nakoming te eis alternatiewelik hierdie ooreenkoms te kanselleer en in elke geval sodanige skadevergoeding as wat hy gely het van die ander party verhaal".*

[42] The Applicant's first demand for specific performance was dated 14 October 2011. Thereafter on 3 November 2011 a further letter was sent to the Respondent stating that if the Respondent did not comply with the demand dated 14 October 2011 it would institute legal proceedings. When the Respondent did not comply these proceedings were instituted. However, the Applicant at these stages was a non-existent entity that lacked the necessary corporate personality and could not have demanded specific performance and compliance with Clause 6 of the agreement and it could also have not authorised Raynard or any other person to make such a demand.

[43] The deregistration took place prior to demand and more than a year before the Applicant instituted these proceedings. The Applicant was advised by its counsel in January 2012, before instituting these proceedings, that it was still not reinstated. Once again I find this difficult to understand. It was only after it was reinstated on 16 February 2012, that it instituted these proceedings. See in this regard *Barclays National Bank Ltd v Traub, Barclays National Bank Ltd v Kalk 1981 (4) SA 291 WLD*, where it was held that where the deregistration of the company had taken place almost a year after *litis contestatio* it would have no bearing on that case.

The situation in that case, however, was different to the present case to the extent that the company who was deregistered raised the fact of such deregistration as a defence to escape its obligations towards a creditor and

the company was deregistered after the proceedings were instituted. In this particular case, the demand for performance was made by a non-existing entity, after deregistration and the proceedings were also instituted long after deregistration.

[44] The further contention of the Applicant that the Department of Mineral Resources regards the permit issued as valid despite the provisions of Section 56 is not convincing. The Department acts merely as a functionary to implement the Act. The provisions of the Act are clear notwithstanding the Department's attitude. The jurisdictional fact is that before a permit can be issued a company has to be registered.

[45] If the retrospectivity provisions do not apply, it would have as a result that all actions and legal activities and their consequences that took at the time of the deregistration cannot be retrospectively validated.

[46] Even if the argument is accepted that the retrospectivity provisions relating to the actions and conduct of the company in terms of Section 73(6A) of the 1973 are applicable, on re-registration, a lapsed permit in terms of the Mineral and Petroleum Resources Development Act cannot be validated. If regard is to be had to the provisions of Section 56(c) of the Mineral and Petroleum Resources Development Act, such a permit would have no legal force and effect and would be void. The Applicant could not have acquired

any right in terms thereof because it lacked the necessary corporate personality.

[47] As it stands therefore in the absence of a new application and or new permit having been granted to the Applicant, after re-registration, the Applicant is currently not the holder of a valid mining permit and cannot demand specific performance in terms of Clause 9.

Conclusion

[48] The Applicant was not entitled in law whilst it was deregistered to demand specific performance as it did not possess necessary corporate personality and could not have instituted these proceedings. There could further be no breach of the Agreement during this period of deregistration by the Respondent, because of the fact that the Applicant was a non-existent entity devoid of any corporate personality.

[49] Due to the fact that the Applicant was deregistered, it did not possess the necessary corporate personality to demand specific performance in terms of Clause 6 of the agreement during the period it is alleged that the Respondent was in breach. A further consequence of deregistration is that the first permit had lapsed on 16 July 2010. There is therefore no need for me to decide on the issue as raised by the Respondent that the resolutive condition

in Clause 11 was duly fulfilled whereupon his agreement was destroyed *ex tunc*.

[50] The Applicant as a non-existent entity could not apply for a new permit and the subsequent issue of the new permit in 29 August 2011 during the period of deregistration was invalid. As a result of this, the agreement was and still is no longer in operation. The Applicant was therefore not entitled to mine during this period and could also not claim specific performance.

In the result therefore the Applicant has not established it has a clear right to entitle it to interdictory relief.

[51] Condonation

The Applicant withdrew its opposition to the application for the late filing of the Respondent's opposing papers. The application for condonation is therefore granted in respect of this.

The following order is therefore made:

Order

That the relief in terms of the Notice of Motion is refused with costs.

HENNEY, J
Judge of the High Court