

MINING & MINERALS ALERT

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Mining rights are usually held by juristic persons, that is, companies. Despite the various shareholding arrangements that may be concluded, the entitlement to a mining right belongs to the holder, which is the company in whose favour the mining right has been granted and not the shareholders.



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Mining rights are usually held by juristic persons, that is, companies. Despite the various shareholding arrangements that may be concluded, the entitlement to a mining right belongs to the holder, which is the company in whose favour the mining right has been granted and not the shareholders.

In the case of *Limpopo Economic Development Agency v Klopper NO and Others* (982/2020) [2022] ZASCA 73 (25 May 2022) the entitlement to a mining right was the subject of contention. The Limpopo Economic Development Agency (LEDA) sought to assert that it held a 40% share in a mining right held by Dilokong Chrome Mine (Pty) Ltd (DCM) based on a clause in the mining right.

LEDA held 40% of the shares in ASA Metals (Pty) Ltd (ASA) and the remaining 60% was held by Eastern Asia Metal Investment Co Ltd. ASA, in turn, was the sole shareholder in DCM. DCM was the holder of a converted mining right for chrome. As part of a business rescue process DCM's mining right was sold to Cheetah Chrome South Africa (Pty) Ltd (Cheetah). LEDA contended that it had a share in the mining right pursuant to clause 17 thereof and sought to, among other things, interdict the sale to Cheetah. Clause 17 of the mining right read:

"In the furthering of the objects of this Act, the Holder is bound by the provisions of an

agreement or arrangement dated 11 December 2006 entered into between the Holder/empowering partner and it is being recorded that the parties shall within 3 (three) months of executing the right, conclude a new agreement wherein Limpopo Economic Development Agency will hold 40% of stake in the right without an obligation to dilute. The above is subject to the transfer of Limpopo Economic Development 40% stake at a later stage to SOMCO upon due notice by the Minister (the empowerment partner) which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad-Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right."

The matter was initially determined by the High Court in Johannesburg which dismissed LEDA's contention. LEDA turned to the Supreme Court of Appeal. Both courts determined that the matter turned on the proper interpretation of clause 17 of the mining right. The High Court determined that clause 17 was incorrect and poorly drafted in light of the context and purpose of the arrangements by the parties, which was actually to amend the shareholding in ASM such that the 40% that LEDA held in ASM would be transferred to an empowerment partner as directed by the Minister of Mineral Resources and Energy. The majority judgment of the Supreme Court of Appeal agreed with the interpretation and determination by the High Court and found that LEDA's assertion of a stake in the mining right itself was untenable and that the Minister of Mineral Resources and Energy had no lawful authority to arbitrarily grant a "stake" in the mining right to anyone other than the person who applied for it, i.e., DCM. Any

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interpretation to the contrary would arbitrarily deprive DCM of its property, which would be neither sensible nor business-like.

The minority judgment of the Supreme Court of Appeal would have upheld the appeal, thus granting LEDA the relief it had claimed. The basis of this decision was that although clause 17 of the mining right was not a model of good draftmanship, there was no doubt as to what the Minister of Mineral Resources and Energy sought to achieve when he imposed the condition embodied in this clause which, on its proper construction, in line with all the tenets of interpretation, was to make the appellant the holder of a 40% interest in the mining right. It held that the interpretation favoured by the High Court and endorsed by the majority had the effect that Cheetah, being a Chinese company with no empowerment credentials, would

acquire the mining right free from the strictures of section 2(d) and (f) of the Mineral and Petroleum Resources Development Act 28 of 2002 which set out to promote the participation of historically disadvantaged persons in the mining sector.

It is clear from the Supreme Court of Appeal's judgment that a mining right belongs to the entity to which the right has been granted and not the shareholders, despite any shareholding arrangements which may be in place. Furthermore, the judgment is a stern reminder for parties to employ careful scrutiny when executing a mining right to ensure that all the provisions of the mining right accord with their stated intention, failing which one man's mishap may become another man's golden ticket (or in this case, chrome-plated ticket).

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