MINING & MINERALS

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MINISTER OF MINERAL RESOURCES NOT EMPOWERED TO WAIVE THE LEGAL REQUIREMENT TO EXHAUST INTERNAL APPEAL FOR ANY ADVERSE ADMINISTRATIVE DECISION(S) – THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT

The Minister of Mineral Resources or his delegated officials are not empowered to waive the legal requirement to exhaust internal appeal for any adverse administrative decision(s) – the Mineral and Petroleum Resources Development Act, No 28 of 2002 (as amended).

The Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) as amended by the Mineral and Petroleum Resources Development Amendment Act, No 49 of 2008 (Amendment Act) is the principal legislation in South Africa which, *inter alia*, regulates the granting or refusal of prospecting rights, mining rights, exploration rights and production rights to applicants by the state as the custodian of all mineral and petroleum resources of South Africa through the Minister of Mineral Resources (Minister).

The legislature in terms of s96 of the MPRDA introduced a compulsory internal appeal process which an aggrieved party must follow. The internal appeal process must first be complied with before approaching a court for relief as s96(3) of the MPRDA makes it clear that no person is entitled to apply to a court for the review of an administrative decision taken in terms of the MPRDA until that person has exhausted their internal remedies. However in exceptional circumstances if a court deems it in the interest of justice an aggrieved persons would be entitled in terms of s7(2)(c) of Promotion of Administrative Justice Act, No 3 of 2000 to directly approach a court for relief without exhausting the internal remedies.

The Constitutional Court in the case of *Dengetenge Holdings (Proprietary) Limited v Southern Sphere Mining & Development Co Limited and Others* 2014 (5) SA 138 (CC) recently confirmed "The promulgation of PAJA made it compulsory for aggrieved parties to exhaust internal remedies before approaching a court for review unless they were exempted from this duty by a competent court. The corollary was that the (peremptory) remedy-exhaustion requirement in s96 of the MPRDA could not be waived by administrative functionaries. They were bound to consider the aggrieved party's internal appeals."

Any party who approached a court for the judicial review of a decision by the Minister without first exhausting the internal remedies does so at their own peril. The biggest concern most aggrieved parties have with internal appeals to an administrator is that the internal appeal does not automatically suspend the administrative decision of the Minister or their delegated official. However, the new s96(2)(b) of the Amendment Act, which came into effect on 7 June 2013, also introduced additional protection to aggrieved persons by suspending any competing applications in terms of the MPRDA in respect of the same/similar rights pending the finalisation of an internal appeal.

Further in respect of internal appeals (including judicial review) there are time-periods within which such process must be initiated. The failure to initiate the process within the prescribed time-periods could result in a court refusing to review and set aside the adverse decision even though such decision was irregular. It is important to obtain legal advice on whether a proper case could be pleaded to demonstrate to a court or an appeal forum that a right or legitimate expectation was materially and adversely affected by the decision of the Minister or her delegated official, which decision must be reviewed, set aside and substituted with the correct decision.

Should you require further information relating to the aforesaid, please contact Jackwell Feris on (T) 011 562 1825 or jackwell.feris@dlacdh.com.

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