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MINING & MINERALS ALERT

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One right two many - A tale of two rights: The double granting of mineral rights decided upon

Mining in South Africa is no mean feat and oftentimes requires a feat of engineering. However, before there can be boots and excavators on (or under) the ground, a right is required in order to extract the precious metals and minerals that make millions. The Department of Mineral Resources (DMR) is responsible for the granting of mining rights and prospecting rights to extract minerals, however in the case of *Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* (CCT08/18) [2019] ZACC 5; 2019 (4) BCLR 429 (CC); 2019 (3) SA 621 (CC) (15 February 2019) the DMR granted two prospecting rights on the same land to two different entities. The saga unfolds...

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Aquila Steel (S Africa) (Pty) Ltd (Aquila) applied for a prospecting right over properties in the Northern Cape on 18 April 2006, which application was accepted on 2 May 2006. Unbeknown to Aquila, ZiZa Limited (ZiZa), the owner of the properties over which Aquila had applied, had also applied for a prospecting right over the same properties, but much earlier on 19 April 2005. The application by ZiZa was accepted on 17 August 2005. Section 16(2)(b) of the Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA) provides that an application for a prospecting right must be accepted if "no other person holds a prospecting right, mining right, mining permit or retention permit for the same land and mineral". With unwelcome generosity and despite the aforementioned provision in the MPRDA, the DMR not

only accepted Aquila's application, it granted Aquila a prospecting right on 11 October 2006 (which was notarised on 28 February 2007 and registered on 17 July 2007) and on 26 February 2008 ZiZa was also granted a prospecting right.

In applying for a prospecting right, ZiZa had exercised its election to convert an unused old-order right to a new-order prospecting right governed by the MPRDA and thus enjoyed limited exclusivity of one year from the commencement of the MPRDA to apply for the new-order title. However, as this tale goes, not all was well. ZiZa's application was defective. Having expended almost R157 million on prospecting operations and identified a manganese reserve of 20.2 million tonnes, Aquila subsequently applied for a mining right to mine the substantial manganese deposits it had found, but was informed that Pan African Mineral Development Company (Pty) Ltd (PAMDC), a company incorporated to take over the prospecting activities of ZiZa, held overlapping prospecting rights on the same properties over which the mining right was sought.

After much strife and turmoil Aquila approached the High Court seeking to set aside the DMR's decision to grant ZiZa's prospecting right, among other reasons, on the basis that ZiZa's prospecting right was flawed and irregular as there were irregularities in the description of the minerals and a vague description of the area the right covered. It contended that an application had to be made in the manner prescribed by the MPRDA and its regulations, failing which the application

One right two many - A tale of two rights: The double granting of mineral rights decided upon...*continued*

The Constitutional Court held that ZiZa's application "came nowhere near fulfilling the requirements" and that as a result ZiZa had thwarted the purpose of the requirements, which is to avoid overlaps.

had to be returned as per the provisions of the MPRDA. The High Court set aside the DMR's acceptance of ZiZa's application for a prospecting right and the decision to grant the right to ZiZa and held that an incomplete application could not secure a place in the queue of applicants as it would result in the sterilisation of the right to prospect for the minerals on the land in question. ZiZa appealed the High Court's decision and the Supreme Court of Appeal overturned the High Court's decision finding that ZiZa had indeed provided the description of the minerals and a description of the area the right covered which constituted sufficient compliance with the MPRDA's requirements. The Supreme Court of Appeal reversed the High Court's decision and dismissed Aquila's contention that ZiZa's defective application had to be returned for want of compliance on the basis that Aquila should have directed a ground of review on the failure to return the application instead of challenging the acceptance.

The Constitutional Court held that ZiZa's application "came nowhere near fulfilling the requirements" and that as a result ZiZa had thwarted the purpose of the requirements, which is to avoid overlaps.

The Court found that the acceptance and grant of ZiZa's prospecting right were both flawed and set aside the Supreme Court of Appeal decision. The Constitutional Court held that since ZiZa had applied for a new-order prospecting right it enjoyed a grace period of exclusivity until 30 April 2005 and thus remained at the front of the queue for consideration of its application for a prospecting right. The Court determined that nothing barred Aquila from applying, however Aquila's application was subject to prior processing of ZiZa's. It further determined that since ZiZa's application had not been processed and even though Aquila's application was not defective, the grant of a prospecting right to Aquila was premature at the time it occurred, thus Aquila did not have a prospecting right. As a result of this Aquila could apply for a mining right unhindered by any prospecting right over the properties, albeit that it too did not have a prospecting right as the acceptance and/or grant of a mining right is independent of previous possession of a prospecting right.

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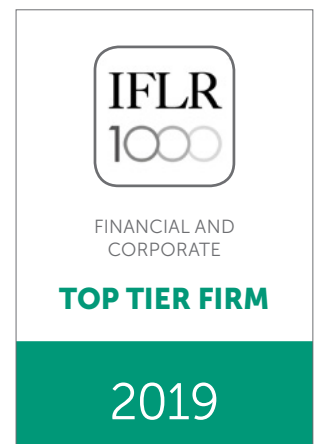
In furthering the government's fourth industrial revolution drive, the DMR could well make life easier by providing the notices of accepted rights on their website.

In light of the foregoing tumult, in order to keep boots and excavators on (or under) the ground it is imperative that holders of mineral rights are aware of threats to their treasured rights. One way to keep alert is to regularly survey the notices of accepted mineral rights in terms of s10(1) of the MPRDA which, in terms of Regulation 3(3) of the MPRDA Regulations, must be placed on a notice board at the office of the Regional Manager. In addition, notices of accepted rights must be made known by way of publication in the applicable Provincial Gazette; notice in the Magistrate's Court in the magisterial district applicable to the land in question; or advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated. The DMR seldom makes use of the additional

publication methods, thus frequent trips to the various regional offices to check the notice boards are, at this point, the gold standard by which threats to mineral rights may be surveyed.

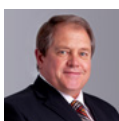
In furthering the government's fourth industrial revolution drive, the DMR could well make life easier by providing the notices of accepted rights on their website. Until such a time, holders of mineral rights should keep their treasured rights protected by adhering to the aforementioned gold standard (part of our mining and minerals team's service offering) which will ensure that objections and/or appeals against acceptances of overlapping mineral rights are filed timeously, failing which one man's treasure may become another man's (or woman's) treasure too.

David Pule and Mmatiki Aphiri



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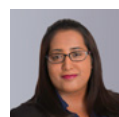
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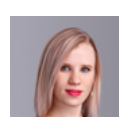
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