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# MINING & MINERALS ALERT

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**PAIA red tape removed: Copies of mining right applications now accessible by interested and affected parties upon request to a Regional Manager**

On 11 September 2020, the High Court, Pretoria (court) handed down a judgment clarifying the rights that interested and affected parties (I&APs) as contemplated in the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) have to request and be provided with copies of mining right applications in terms of sections 10(1) and 22(4) of the MPRDA.

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## PAIA red tape removed: Copies of mining right applications now accessible by interested and affected parties upon request to a Regional Manager

The Applicants in this matter were the Umgungundlovu Community Council represented by Duduzile Baleni and 89 other community members.

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The court held that subject to the right of an applicant and/or the Department of Mineral Resources and Energy (DMRE) to redact financially sensitive aspects of a mining right application, I&APs are entitled to be furnished with a copy of an application for a mining right as contemplated by section 22 of the MPRDA upon requesting same from the Regional Manager of the DMRE.

The Applicants in this matter were the Umgungundlovu Community Council represented by Duduzile Baleni and 89 other community members (Community). The Community were recognised I&APs in relation to an application for a mining right submitted by the Fifth Respondent, Transworld Energy and Mineral Resources (SA) Pty Ltd (TEM) during the course of 2015, to mine for titanium on land upon which the Community resides and works (Mining Right Application).

The Community attempted to obtain a copy of the Mining Right Application directly from TEM. TEM initially refused to provide a copy thereof and advised the Community to submit a formal request

to the DMRE in accordance with the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA). The Community elected to approach the court for a determination of whether, *inter alia*, I&APs have the right to be furnished with copies of mining right applications upon requesting same from the DMRE pursuant to sections 10 and 22(4) of the MPRDA (Court Application).

It is worth noting that following the submission of the Court Application, TEM provided the Community with a copy of the Mining Right Application which had been redacted in regard to commercial and financially sensitive information. However, TEM opposed the application on the basis that the process to be followed in this regard is provided for in PAIA, and not the provisions of the MPRDA.

The Community argued that, based on the proper interpretation of sections 10 and 22(4) of the MPRDA, in order to give I&APs the opportunity to have meaningful and timeous consultations with mining right applicants, I&APs should have the right to be automatically furnished with a copy of a mining right application upon requesting same from the Regional Manager of the DMRE. As the purpose of such consultations is to provide sufficient details to the landowners or occupiers to enable them to make informed decisions, the Community submitted that the request process in terms of PAIA was not satisfactory to enable I&APs to exercise their rights to consultation. This

## PAIA red tape removed: Copies of mining right applications now accessible by interested and affected parties upon request to a Regional Manager...continued

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is due to a number of factors, including specific timelines for the exercise of the communities' rights which are truncated (notably the 30 day period within which objections to mining right applications must be lodged), as well as the assertion that there is a lack of capacity at the DMRE to timeously deal with the number of PAIA applications.

Furthermore, the court was provided with evidence from the Centre for Applied Legal Studies (CALS) regarding the low success rate of attaining information and documentation from the DMRE through PAIA processes. In this regard the CALS submitted, *inter alia*, that "there was no timeous responses to the request and many other reasons, such as lack of staff capacity, their lack of understanding and inconsistency in applying the time periods and many other issues."

In coming to its conclusion, the court highlighted the importance of meaningful public participation and consultation throughout the processes contemplated in the MPRDA. The court agreed with the interpretation of sections 10 and 22(4) of the MPRDA presented by the Community, stating "the case for the applicants is that the relevant sections (10 and 22(4)), properly interpreted, mean that they are entitled to a copy on request from the Regional Manager and they do not have to go through the PAIA process, which

*is very long. I have already agreed with their understanding of these sections. The whole consultation process is intended to advance the objects of the MPRDA. The applicants, as occupiers have a direct interest because they have rights which they are legally entitled to enforce".*

The judgment is a victory for I&APs, as it furthers their rights to obtain information in a more efficient and timeous manner. The implications of this judgment should be noted by mining right applicants. It will be interesting to see how the DMRE deals with future requests from I&APs for copies of mining right applications, and how the right of an applicant and/or the DMRE to redact financially sensitive aspects of a mining right application will be achieved from a practical perspective. For now, we would advise that mining right applicants take a proactive approach when submitting mining right applications. Following the submission of an application on the SAMRAD system, applicants should also submit an additional version thereof which has been redacted in relation to information that the applicant deems is financially and commercially sensitive, and clearly marked as a redacted version, so as to prevent a scenario where the DMRE makes this determination on the applicant's behalf or worse, fails to redact the application at all before handing a copy to I&APs.

*Ben Cripps and Allan Reid*

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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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