

# Dispute Resolution and Mining & Minerals

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## Overlaps and oversight: Navigating mineral rights in South Africa

As the global economy begins to embrace the transition to green metals, ensuring certainty of mineral right tenure is crucial for the sustainability of these aspirations. The granting of ostensibly exclusive rights to multiple parties poses a significant challenge to role players in South Africa's ever-fluctuating mining landscape.

While the granting of overlapping rights is not a new phenomenon, its recently increased frequency and disruptive impact warrants a re-evaluation of the basic principles governing the granting of such rights and the remedies available to affected parties.

South Africa's mineral law regime is governed by the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The State, as the designated custodian of mineral and petroleum resources, may grant, issue, refuse, control, administer and manage any permissions, rights and permits in respect of prospecting and mining operations. As clarified by the Constitutional Court in *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources and Others* [2019] (4) BCLR 429 (CC), the granting of prospecting and mining rights remains binding until set aside.

The granting of prospecting and mining permits or rights where another party has pre-existing and conflicting rights presents a substantive and procedural challenge to holders attempting to undertake unimpeded prospecting or mining activities in realisation of those rights. This is especially so given the obligations imposed on right holders by the MPRDA and other statutes such as the Mine Health and Safety Act 29 of 1996 and the National Environmental Management Act 107 of 1998, with right-holders being obliged to, amongst other things, demonstrate the optimisation of prospecting or mining, rehabilitate land affected by such mining and prospecting activities, and ensure compliance with health and safety standards. The granting of overlapping rights, particularly in circumstances where rights holders have not been consulted beforehand, thus creates immense practical difficulties where statutory obligations also overlap, and parties are both unable to abide by duties imposed on them and may be held responsible for the non-compliance of others.

Considering the uncertainty created by such overlaps, some parties have elected to conduct operations jointly by agreement (by, for example, setting aside minerals to which they are not entitled after extraction) to mitigate practical and legal complications. Such arrangements

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are, however, discretionary, with no certainty being provided in the MPRDA for the practical consequences of the mining of mixed minerals on the same land. Some guidance is found in the case of *Minister of Mineral Resources and Others v Sishen Iron Ore Co. (Pty) Limited and Another* [2014] (2) BCLR 212 (CC), where the court referred to the untenability of allowing a newcomer to acquire a right in respect of land where there is an existing right holder. This does not mitigate the practical consequences faced by holders.

The increasing frequency of overlapping mineral rights in South Africa's evolving mining landscape necessitates a thorough re-evaluation of the principles governing the consequences of these overlaps. Despite some clarity being provided in the MPRDA, practical challenges persist,

especially concerning conflicting statutory obligations and the absence of definitive and practical guidance on joint operations. This has resulted in administrative backlogs at the Department of Mineral Resources and Energy (DMRE) regarding objections and appeals against accepted and granted overlapping mineral rights. These complications are compounded by different approaches towards overlapping rights being adopted by each regional DMRE. In this respect it is pertinent that the DMRE offer a consistent and firm view regarding its position pertaining to overlapping rights. Addressing these complexities is paramount to fostering a more efficient and harmonised mining sector that upholds both environmental sustainability and legal certainty.

**Denise Durand and Jonathan Sive**

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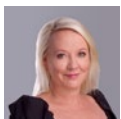
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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

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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