A double whammy for the Department of Mineral Resources

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Without Prejudice

On 4 November 2016, the Labour Court handed down its judgment (unreported case number J2459/16) in the matter between AngloGold Ashanti Limited, the Acting Chief Inspector, the relevant Principal Inspector, and the Inspector that issued an instruction in terms of section 54 of the Mine Health and Safety Act 29 of 1996 (MHSA) (the *AngloGold Ashanti judgment*), in favour of AngloGold Ashanti.

In its judgment, the Labour Court was particularly critical of the manner in which the relevant representatives of the Department of Mineral Resources (DMR), through its Mine Health and Safety Inspectorate, applied and administered the MHSA and, in particular, the manner in which the so-called "stop notices" were issued under section 54.

Following hot on the heels of the *AngloGold Ashanti judgment*, the High Court of South Africa (Gauteng Division) issued its judgment (case number 72248/15) in the matter between Aquila Steel (South Africa) Limited, the Minister of Mineral Resources, the Director General (DMR), Deputy Director General (Mineral Regulation Department), Regional Manager: Northern Cape Region (DMR), Pan African Mineral Development Company Proprietary Limited and Ziza Limited (the *Aquila* judgment).

The circumstances giving rise to the review application brought by Aquila Steel (South Africa) Limited are all too familiar: lengthy delays in relation to applications for prospecting and mining rights, double-granting of rights, lengthy delays in relation to internal appeals in terms of s96 of the Mineral and Petroleum Resources Development Act (28 of 2002) (MPRDA) and misinterpretation of the Act's provisions.

The court in the *Aquila* judgment addressed a number of legal issues which have been of concern to the mining industry in relation to the nature and scope of exclusivity granted to holders of unused old order rights under the transitional arrangements of the MPRDA:

- the status of an application for a right, which is not compliant with the provisions of the MPRDA;
- the effect of a de-registration and subsequent re-registration of a company; and
- the requirements to exhaust internal remedies before bringing an application to review

decisions under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

In summary, Ziza Limited (Ziza) was the holder of unused old order rights. In this capacity, Ziza was provided with an opportunity, under Schedule 2 of the MPRDA, to apply for a new order prospecting right within a one-year period. This expired on 30 April 2005. Ziza submitted various applications, including in April 2005, prior to the expiry of the one year period, an application for a prospecting right in respect of manganese in the Northern Cape. The application did not comply with the provisions of section 16 of the MPRDA (as they then were).

Aquila, a subsidiary of an Australian resources company, submitted an application for a prospecting right on 18 April 2006, almost a year after the Ziza application was submitted but before the granting of a prospecting right, in the name of Pan African Mineral Development Company Proprietary Limited (PAMDC).

The application submitted by Ziza did not comply with the provisions of s16 of the MPRDA. Despite this the Regional Manager (of the DMR) did not return the application to the company to advise it that the application did not comply. Instead, after a delay of four months, on 17 August 2005, the Regional Manager purported to accept the Ziza Application. After acceptance, the Ziza Application remained pending for a lengthy period before it was finally granted on 26 February 2008. The prospecting right granted to Ziza was registered in the name of PAMDC, despite PAMDC not being the applicant for a prospecting right and in the absence of any application to transfer the prospecting right from Ziza to PAMDEC in terms of section 11 of the MPRDA.

Ziza did not, once the prospecting right was granted, attempt to exercise its rights under the Ziza Prospecting Right, and carried out no prospecting activities. In addition, Ziza did not demonstrate that it had the necessary financial resources or the technical ability to carry out the prospecting or mining.

On 28 February 2007, the DMR executed a prospecting right in favour of Aquila. On 17 July 2007 it was registered by Aquila in the Mineral and Petroleum Titles Registration Office. It was common cause that there was an overlap between the properties, which formed the subject of the Ziza Prospecting Right and the Aquila Prospecting Right.

During its prospecting operations, Aquila identified a large manganese resource. It

submitted an application for a mining right to the DMR on 14 December 2010. The DMR accepted the Aquila mining right application in a letter dated 22 December 2010.

In the interim, there had been further activity in relation to Ziza – on 9 November 2010 Ziza was dissolved and deregistered. In terms of section 56(c) of the MPRDA, the Ziza Prospecting Right automatically lapsed on de-registration. Despite the correspondence from the DMR to Aquila on 22 December 2010 that it would consider Aquila's mining right application by 31 December 2011, the DMR did not do so until July 2015, and then only after Aquila had compelled it to do so by bringing a *mandamus* application. Prior to this there had been various engagements between Aquila, the DMR, and PAMDC, which did not lead to a resolution of the matter. This included communication from the DMR to Aquila that due to the double-granting of the prospecting right, the DMR could not consider the mining right application submitted by Aquila. In addition, the internal appeal submitted by Aquila was not being processed.

Due to the nature and extent of the exclusivity granted to holders of unused old order rights in terms of Schedule 2 to the MPRDA, the court held that the exclusivity meant that the holder was required to submit an application which was compliant with the provisions of the MPRDA within the period of one year. If a compliant application was submitted, the application would be first in the queue to be considered, and be granted or refused, in terms of the provisions of the MPRDA. Conversely, if an application was lodged, which did not comply with the provisions of the MPRDA, the return of the application to the applicant by a Regional Manager under the provisions of section 16 (which apply to applications for a prospection right), was equivalent to a rejection of such an application.

Related aspects addressed by the court included that a Regional Manager had no discretion in relation to a non-compliant application and was obliged to notify the applicant in writing of the fact that the application did not comply, and return the application to the applicant, within 14 days of receipt of a non-compliant application. It appears that the court also concluded that in circumstances where the Regional Manager did not notify the applicant in writing, as required in terms of section 16, this did not affect the court's conclusion that the submission of a non-compliant application was equivalent to a rejection of such an application. Where a non-compliant application was submitted, the applicant did not retain its position in the queue and the application could not be treated as a pending application for so long as the applicant took to meet the compliance requirements.

The period of exclusivity is limited to one year, in this case until 30 April 2005, whereafter the applicant (Ziza) would be treated the same as any other applicant, and other applicants could submit applications for consideration.

With regard to the effect of a de-registration of a company, and its subsequent re-registration, the court held that, in terms of section 56(c) of the MPRDA, in the event that Ziza held a prospecting right, the prospecting right lapsed, and that, on re-registration, the prospecting right would have been restored to Ziza, but for the fact that the prospecting right had, in addition, lapsed by effluxion of time. Where the relevant right, in this case, the prospecting right, has not lapsed for any other reason, only a lapsing under section 56(c) would see the restoration of the right on re-registration of the company.

In relation to exhausting internal remedies before bringing an application to review, the court held that, while Aquila did not specifically appeal against the Regional Manager's decision to accept the application for the prospecting right by Ziza, the internal appeal in terms of section 96 of the MPRDA by Aquila addressed granting the prospecting right to Ziza and, by implication, addressed the acceptance of the application, was substantially compliant with the provisions of PAJA. The court granted condonation in relation to the time periods, to the extent required.

An important aspect addressed by the court was whether the court could substitute its decision for that of the Minister and grant Aquila a mining right. On the facts before it, the court concluded that it could exercise its power to substitute its decision for that of the Minister as contemplated in section 8(1)(c)(ii)(aa) of PAJA because it was fair (just and equitable) to do so. The court granted Aquila its mining right and provided the Minister with a three month period to set the conditions of the mining right.

Material findings of the court included:

- The coming into force and effect of the MPRDA abolished the entitlement of a right holder to sterilise the mineral right in question;
- The preamble of the MPRDA specifically reaffirms the state's commitment to guaranteeing security of tenure in respect of prospecting and mining operations and emphasises the need to create an internationally competitive administration and regulatory regime;
- The queuing system contemplated in the MPRDA means that, if a compliant application is submitted, that applicant has the right to have their application adjudicated first. Should the

application of the applicant first in the queue be granted, the other applications cannot be considered in relation to the same land and the same mineral. Should a second application be granted despite the existence of a pending application of the applicant first in the queue, then the grant of the second application will be unlawful and susceptible to being set aside;

- The queuing system was subject to certain exclusive rights granted under the transitional arrangements (Schedule 2) to the holders of old order rights;
- The registration of the right in the name of PAMDC was "irregular and should never have been effected";
- There was no basis on which a prospecting right could have been granted to PAMDC. The prospecting right had been granted to Ziza, and had not been transferred to PAMDC (as required under section 11 of the MPRDA). In addition, the prospecting right granted to Ziza had lapsed, and at the time that the DMR purported to grant PAMDC a prospecting right, Aquila already held a prospecting right over the relevant properties.

It is hoped that, as with the *AngloGold Ashanti judgment,* the *Aquila* judgment will promote careful consideration and a level of caution when addressing applications for rights under the provisions of the MPRDA.

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