MPRDA compliance: is it required?

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Mining Newsletter

In South Africa, only one person can hold a valid prospecting or mining right for a particular mineral on land in terms of the governing Mineral and Petroleum Resources Development Act, No 28 of 2002 (MPRDA).

To ensure that no conflicting rights are granted, an application system akin to queuing is used. The first person to lodge a prospecting right application for a particular mineral is first in the queue, and no prospecting right applications submitted afterwards can be considered or granted until the first application has been rejected (section 16(2)). In addition, a person that is granted a prospecting right over land for a particular mineral has the sole and exclusive right to apply for, and be granted, the relevant mining right (section 19(1)).

Unfortunately, it's possible for the system not to work as intended, and for the Department of Mineral Resources (DMR) to issue overlapping prospecting and mining rights for the same mineral. In these circumstances, an aggrieved person can use the MPRDA's internal appeal process to review the DMR's administrative decision to issue the conflicting right, and have the conflicting right set aside (section 96(1)). After the initial internal appeal, an unsuccessful party may have the option to approach the High Court for relief in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

This is where complex legal arguments often start, with both parties contending to convince the court that their application was the first valid application that was submitted to the DMR, and that the other parties prospecting or mining right is the right that should be set aside as being invalidly granted. The importance of being the first valid application that was submitted to the DMR was demonstrated in the case of *Pan African Mineral Development Company (Pty) Ltd and others v Aquila Steel (S Africa) (Pty) Ltd ((179/2017) [2017] ZASCA 165).*

In this case the Supreme Court of Appeal's decision hinged on whether the first prospecting right application in the queue was fatally defective because it didn't strictly comply with the requirements of the MPRDA, and whether the DMR was entitled to consider the next conflicting application in the queue because of the first applications non-compliance.

It was not disputed that the first application was non-compliant with the MPRDA, but the Supreme Court ultimately found that even though there was non-compliance, the non-compliance did not render the first application fatally defective. Because the first application in

queue was not fatally defective and had not been refused by the DMR, the Supreme Court held that the DMR's decision to grant the second conflicting right was the invalid decision, and that the second conflicting right was the right that should be set aside.

The Original Decision of the High Court

This case was first heard in the Gauteng High Court as *Aquila Steel (South Africa) Limited v the Minister of Mineral Resources and others (72248/15)*. The timeline relating to the two overlapping applications is as follows:

- On 19 April 2005 Ziza Limited (Ziza) submitted a prospecting right application.
- A year later, on 18 April 2006, Aquila Steel (South Africa) Limited (Aquila) submitted prospecting right application. Aquila's application was granted on 11 October 2006.
- On 26 February 2008 Ziza's prospecting right application was granted. There were now two prospecting rights granted over the same land for the same mineral.
- On 14 December 2010 Aquila applied for a mining right. This application was, however, now refused by the DMR because the DMR alleged that of Ziza's prior application was in queue before Aquila's, and that Aquila's right shouldn't have been granted originally.

It was common cause that Ziza's application didn't strictly comply with the requirements of the MPRDA because it didn't include the prescribed coordinated map showing the land that the application extended over.

The wording of the section 16(3) of the MPRDA when the applications were submitted and decided was the following:

"If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of the fact within 14 days of receipt of the application and return the application to the applicant." (own emphasis).

Aquila argued that because Ziza's application was not complete, the application could not be accepted by the regional manager and it would have to have been "returned" to Ziza. It argued that because the act required return of the application, when Aquila submitted its application there would have been no prior pending application for a prospecting right. Aquila's application would have been the only valid application, and consequentially the only valid prospecting right, over the contested area.

Ziza counter argued that the defect in its application didn't mean that its application automatically failed and had to be rejected by the DMR. It argued that a defective application can be amended after submission to remedy defects.

The High Court accepted that the application was defective, and turned its analysis to what the required notifying and "returning the application to the applicant" meant in terms of the then section 16(3) of the MPRDA. Did this mean the application was rejected, or did it mean that the process was merely suspended to allow the applicant to amend its application?

The court considered the objective of the MPRDA to prevent sterilisation of mineral resources. This would be hindered if the return of the application allowed the applicant to amend a defective application. The act didn't specify any timelines that the amendment must be done, meaning that an applicant could delay the entire procedure by not amending the application (or taking years to amend as in the present case), effectively sterilising the minerals by preventing other companies from applying for prospecting rights over the land.

The court also considered the practicalities of "returning the application". This means the DMR has no record of the application other than the day that it was received and returned. Crucially the DMR wouldn't have records of the minerals or land that the application related to.

The court concluded that a "return" of a non-compliant application to allow an applicant to remedy defects amounts to a rejection of the application.

The high court held that:

- Ziza's prospecting right application was fatally defective because it failed to strictly comply with the requirements of the MPRDA – Ziza had failed to include the prescribed coordinated map showing the land that the application extended over;
- The DMR was required to "return" a non-compliant application in terms of section 16(3) of the MPRDA;
- The "return" of Ziza's application would mean that the application had been rejected;
- If Ziza subsequently amended its application, then the amended application would have to be treated as a new application; and
- It was therefore not competent for the DMR to accept and grant Ziza's application for a prospecting right.

The court accordingly set aside both the DMR's decision to accept Ziza's prospecting application and the decision to grant Ziza a prospecting right.

The Reversal of the High Court's Decision on Appeal

Ziza appealed the decision to the Supreme Court of Appeal, which reversed the High Court's decision and found in Ziza's favour.

The Supreme Court first considered a question overlooked by the High Court – was Ziza's application fatally defective because it didn't strictly comply with the requirements of the MPRDA by not including the prescribed coordinated map? (See the courts full discussion in paragraph 19 to 22.)

Statutory requirements, such as the requirements that a prospecting application must comply with, are generally either:

- Mandatory (peremptory) requirements, which needs exact compliance and where purported compliance that falls short of the requirements is a nullity; or
- Directory requirements, which although desirable to comply with will have no legal

consequences if not complied with (footnote 22).

The requirements of the MPRDA in relation to applications for prospecting rights are framed as mandatory requirements that require strict compliance. The applicable section states that *"[a]ny person who wishes to apply to the Minister for a prospecting right ⋯ must lodge the application ⋯ in the prescribed manner"* (section 16(1)(b)). Aquila argued that because Ziza didn't comply with the mandatory requirements set out in the regulations, its application was a nullity.

The Supreme Court, however, recognised that a third category of statutory requirements had been developed that lay between mandatory and directory requirements. These are statutory requirements that are framed as mandatory requirements but that only require substantial compliance in order to be legally effective.

The Supreme Court endorsed its previously held view that not every deviation from the literal prescription of an act should be fatal. The question that should be asked is "whether, in spite of the defects, the objective of the statutory provision had been achieved" (paragraph 20).

The Supreme Court held that even though Ziza's application did not strictly comply with the requirements of the MPRDA by including the prescribed coordinated map showing the land that the application extended over, Ziza had substantially complied and had given the DMR sufficient information in order for the DMR to identify the relevant properties and log them onto the application system. The additional information included in Ziza's application included:

- Hand drawn plans that identified the co-ordinates;
- The registered descriptions of the farms;
- The co-ordinates of the total area; and
- The description of the old order rights in respect of which the application was made, which included the farm details, area size and grid reference.

The Supreme Court held that Ziza had substantially complied with the requirements of the MPRDA and that it could not be suggested that the DMR was unaware of the properties that formed part of Ziza's application.

On the question of whether a return of the application, as required by the MPRDA at the time, constituted a refusal by the DMR, the Supreme Court held that there is an important distinction between the "return" and the "refusal" of an application – a return is exercised by the regional manager of the DMR and gives the applicant with an opportunity to supplement its application, while a refusal is exercised by the Minister, not the regional manager.

Conclusion

The Aquila judgement doesn't eliminate the need for applicants to comply with the requirements of the MPRDA in order to ensure that the DMR can't reject their application.

The judgement does, however, clarify that the statutory requirements in the MPRDA should not be viewed as mandatory (peremptory) requirements that need to be strictly complied with in

order to ensure that an application is valid.

This may ensure that an application for a prospecting right will not fail merely if a single statutory requirement was not met, or if a single document was omitted from the application.

The important consideration is if there was sufficient compliance with the requirements in order for the objectives of the MPRDA to be achieved. An application may still be rejected by the DMR, or a prospecting right or mining right may still be set aside, if it can be shown that the level of compliance was insufficient.

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