

South African mineral rights may expire sooner than their holders may anticipate

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South African rights to prospect and mine are granted for a fixed duration in terms of the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA). Prospecting rights are granted for a maximum period of five years, renewable for a further single period not exceeding three years, and mining rights are granted for a maximum period of 30 years, renewable for further 30 year periods.

In the recent decision of the Supreme Court of Appeal of South Africa in the case of the *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* ((20069/14) [2015] ZASCA 82), handed down in on 28 May 2015, the court was asked to determine the date from which the duration of a right should be calculated. The court held that the duration of rights should not be calculated from the date that the right was notarially executed or with reference to the termination dates that are contained in the right itself. It was held that the duration of the right should be calculated from the date that an applicant was informed that the right would be granted.

To understand the reasoning of the court, and why the decision will lead to uncertainty in practice, the procedure followed by the Department of Mineral Resources (DMR) when a company applies for a right in terms of the MPRDA should be outlined:

- An applicant for a mining right or prospecting right must make payment of a non-refundable application fee and lodge its application in the prescribed manner at the offices of the regional manager in whose region the land is situated.
- The regional manager must accept the application for consideration if the formal requirements for its lodging have been complied with and if no other person holds or has submitted an application for a prospecting right or mining right over the land for the same mineral.
- After the acceptance of the application the regional manager must make it known that an application has been received, must call on interested parties to submit comments on the application, and must notify the applicant that it must submit the required environmental reports.
- If the requirements for the grant of the right have been complied with, the applicant will be notified that the right has been granted, will be advised of any conditions attached to the grant of the right, and will be requested to make itself available at the regional offices to notarially execute the right.

- The practice of the DMR is to calculate the duration of a right from the date of its execution, and record the expiry date calculated using this method as a clause in the in the right.

The facts of the Mawetse case are the following:

- In November 2006 Dilokong Chrome Mine (Pty) Limited (Dilokong) applied for a prospecting right.
- In December 2006 the regional manager issued a letter of acceptance, and requested Dilokong to give effect to the empowerment provisions of the MPRDA and submit supporting documents to evidence its compliance.
- In July 2007 the deputy director general of the DMR wrote to Dilokong to confirm that the right had been granted for a period of four years.
- During November 2007, on the date on which the prospecting right was to be executed, Dilokong was informed that the right would not be executed by the DMR because Dilokong had failed to comply with the empowerment criteria.
- The environmental management plan submitted by Dilokong was never approved and the prospecting right was never executed.
- In September 2009 Mawetse applied for rights in respect of the same mineral and land as Dilokong's application. Mawetse's application was, however, rejected on the basis that Dilokong had been granted rights over the area.

The decision to reject Mawetse's application was taken on review. One of Mawetse's contentions was that the right granted to Dilokong had lapsed because a period exceeding the duration for which the right was approved had passed, during which the right had not started running because it had not yet been executed and had not become effective.

The court stated that a right is granted for a limited period and expires through the effluxion of time. To determine if a right has expired, it is necessary to determine the date that the right was granted. The court held that there are three distinct legal processes that must be distinguished from each other, namely the granting, the execution and the coming into effect of the right.

The court rejected the argument advanced by Dilokong that the commencement of the right period approval had not started running because the right had not been executed and had not become effective, stating that this argument was untenable because it would mean that the area was effectively sterilised in favour of Dilokong. The court held that the period of Dilokong's prospecting right must be calculated from the date on which it was informed that its application was successful and that the right had been granted.

The court thus held that Dilokong's prospecting right, which had been granted during July 2007, had lapsed due to its expiry, notwithstanding that the right had not been executed and that the right had not become effective.

The decision in the case of *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* has two important implications for mineral rights granted in terms of the MPRDA:

- Firstly, the departmental practice of executing renewals and calculating the duration of the right from the date of the rights execution is not sanctioned by the provisions of the MPRDA.
- Secondly, a right, including the exclusive right to apply for a renewal thereof or the exclusive right to apply for a mining right in the case of a holder of a prospecting right, will lapse on the expiry of the period that is calculated from the date on which the decision to grant the right was communicated to the applicant, not calculated from the date of execution of the right.

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