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If you conclude a commercial transaction with someone who holds a right issued by the Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), you must ensure that the required regulatory approvals for the implementation of the transaction have been granted.

A formal application must be submitted to obtain consent. Unfortunately, in some circumstances, the legislation does not provide any maximum time limits for considering the application and, in some cases, there might be considerable delays.

What can be done if there is a significant delay in the approval process after the application for ministerial consent has been submitted?

The right to just administrative action

Any action taken by an organ of state must be lawful, reasonable, and procedurally fair, otherwise the court can be approached to "review" the action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The right to approach a court directly is, however, curtailed if the applicable legislation contains an internal appeal procedure. Exceptions to this rule do exist, however, and if there are "exceptional circumstances" a person is entitled to approach the court directly without first exhausting the internal appeal procedure.

To phrase these requirements differently, a court can be approached to review an administrative action if:

- an internal appeal was submitted but it was unsuccessful; or
- the particular law has no internal appeal procedure that is applicable; or
- the particular law has an internal appeal procedure but there are exceptional circumstances that are applicable and the court exempts the applicant from having to follow the internal appeal procedure.

An internal appeal when the minister fails to take a decision?

Does the MPRDA's internal appeal process apply where the minister fails to take a decision?

An "administrative action" is defined in PAJA to include the failure to take a decision but the MPRDA's appeal procedure applies to "administrative decisions". This term is not defined. The wording and context supports a conclusion that "administrative decision" can only relate to decisions that have actually been taken, and doesn't apply to a failure to take a decision:

- The MPRDA requires that any "decision taken" must be done within a reasonable time, must be in writing, and accompanied by written reasons. Where the minister has failed to consider an application there will be no "decision", it is not capable of being reduced to writing, and it will not be possible to give any reasons.
- An internal appeal must be lodged within 30 days of becoming aware of the administrative decision. If there is an indeterminable amount of time to consider the application, from when must this period be calculated?
- The internal appeal procedure is worded to apply to an administrative decision that "was taken", implying that there must have been some form of act, not just a failure to take a decision.
- The internal appeal procedure does not automatically suspend the decision against which there is an appeal. Where there has been no decision at all, this provision can't be applied.
- A person must be provided with written reasons. Where no decision has been taken at all it is not possible for the department to comply with this regulation.

The term "administrative decision" in terms of the MPRDA has a narrower definition than "administrative action" under PAJA. This term should not be interpreted to include situations where there has been a failure to take a decision but only to include situations where a prejudicial decision has been taken.

The alternative: Reliance on exceptional circumstances

Even if this argument is rejected, an internal appeal process can be bypassed if there are exceptional circumstances. Effectively, PAJA empowers the court to make a decision on behalf of the minister when a decision is not taken in a reasonable time. This power is exercised by the courts when:

- the end result is a forgone conclusion;
- any further delay will cause unjustifiable prejudice;
- the original decision maker has exhibited bias or incompetence; or
- the court is as well qualified as the original authority to make the decision.

For many applications the MPRDA doesn't allow the minister to use any discretion when considering the application because the power is not a discretionary power; the minister must grant consent if the requirements for transfer are complied with. If the requirements are met, the result is a forgone conclusion; the minister must grant the application.

For these categories of applications it can be argued that:

- the court is as qualified as the minister to make the decision; and
- that the end result of the application is a foregone conclusion.

In addition to meeting these two requirements for substitution of a decision by the court, a person may also be able to advance reasons to show the court that further delay will cause unjustifiable prejudice.

A person would be entitled to approach a court for direct relief and to ask the court to substitute its decision with the minister's decision under the correct circumstances.

Summary

So what should be done if an application has been submitted and the department has failed to consider it?

If time is not of the essence, a court application can be brought, asking for an order to force the department to perform its duty. The matter would then be referred back to the department for consideration within a court specified time line.

If time is of the essence, a person can approach a court for direct relief and ask the court to grant the application, effectively substituting its decision for the minister's decision. In order to be successful it must be argued that:

- the MPRDA's internal appeal process does not apply to situations where the minister fails to take a decision, alternatively, that there are exceptional circumstances that would allow the court to exempt the non-compliance with the internal appeal procedure; and
- the end result is a forgone conclusion; or
- when any further delay will cause unjustifiable prejudice; or
- when the original decision maker has exhibited bias or incompetence; or
- where the court is as well qualified as the original authority to make the decision.

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