Mining & Minerals

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SOUTH AFRICA

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Revisiting an old gem in the circularity era: Reprocessing of tailings under the *Ataqua* judgment

According to PwC's SA Mine 2024 report (Report), which was released on 1 October 2024, "*The South African mining sector has experienced a hive of merger and acquisition (M&A) activity in the past year.*" The Report notes a total deal value of $10 billion across 32 deals in the 12-month period ending 30 June 2024.

Movements in the market are, however, not necessarily always linked to primary extraction and processing of minerals, but rather in finding value through sustainable solutions. In this regard, the Report notes that "*South African mining companies [are] exploring circularity primarily through mineral reclamation from their mine tailings.*"

Given the long history of South Africa's mining industry, it is a frequent occurrence to come across scenarios where the value of an old mine lies not in the mine itself, but rather in the salvage or recovery value of the assets that were established as part of the original mining operation. This is particularly evident in the case of historic tailings dumps, where advancements in technology have resulted in the possibility of recovering minerals from these dumps that were not originally capable of being extracted as part of the historical mining process.

As many of these dumps were established and processed under an evolving legal regime, the nature, regulation and ownership thereof are not always straightforward, and there are several legal factors that need to be considered insofar as they form part of any potential deal acquisition or disposal. This is especially so in respect of any tailings dumps that were established, in full or in part, prior to the commencement of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) on 1 May 2004.

Whether the tailings dumps are movable or immovable

This is an important consideration in the ownership and transferability of tailings dumps, with the dictum of the *High Court in De Beers Consolidated Mines (Pty) Ltd v Ataqua Mining (Pty) Ltd* (unreported, case no: 3215/06 Orange Free State Provincial Division) (Ataqua) being authoritative in this instance.

In considering whether tailings dumps are movable or immovable, the court held that one should apply the modern approach to the common law principle of accession by looking primarily at the intention of the person who established the dump. This is done on a case-by-case basis through the assessment of certain factors that are indicative of such intention, including *inter alia* the nature of the dump and manner of annexation.

The *Ataqua* case was recently relied upon in *Mpilo and Zen Holdings (Pty) Ltd v Centurion Mining Company (Pty) Ltd and Another* (2815/2023) [2023] ZAMPMBHC 43 (26 July 2023), where the High Court found that, contrary to the arguments advanced by the respondent, the relevant tailings dumps in dispute constituted immovable property. Importantly, it emphasised that the *Ataqua* decision does not imply that all tailings dumps established prior to the commencement of the MPRDA are by implication deemed as movables; rather, it is a factual assessment that needs to be carried out with due regard to the facts of a specific matter.

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Timing of establishment

This is relevant to determine the legal regime that is applicable to the tailings in question. In the *Ataqua* case, the High Court held that:

- A mineral can occur in a residue stockpile or residue deposit, as defined in the MPRDA at the time.
- Tailings dumps established prior to 1 May 2004 when the MPRDA commenced, cannot constitute residue stockpiles or residue deposits as they are not considered minerals as defined under the MPRDA. This is specifically because, having been severed from the land, the stockpiled material does not occur naturally and was not formed by or subject to a geological process.

Following on from the above and in terms of *Ataqua*, the MPRDA does not apply to any tailings dumps established prior to 1 May 2004 and any processing of such dumps does not require a mining right or permit under the MPRDA.

The MPRDA was, however, amended subsequent to the *Ataqua* case, which resulted in the MPRDA also applying to tailing dumps created under old order rights on or after the commencement date of the amendments, being 7 June 2013. This did introduce the additional consideration of having to discern if most or all of the relevant dump was created before or after this date so as to affirm its legal nature and classification.

Evolving legislative regime

From an environmental perspective, it is also important to note that the applicable legal framework is currently evolving. Historically, residue stockpiles and residue deposits were authorised as part of the Environmental Management Programme approved under the MPRDA. This was later moved to the National Environmental Management: Waste Act 59 of 2008 (NEMWA), requiring that a waste management licence be obtained for reclamation of residue stockpiles and residue deposits.

However, the regulation of residue stockpiles and residue deposits as "*waste*" is considered impractical for various reasons and there has long been an effort to transition this away from NEMWA and bring it within the scope of the National Environmental Management Act 107 of 1998 (NEMA). The proposed amendments to the NEMA Environmental Impact Assessment Regulations Listing

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Notices (Listing Notices) seem to acknowledge the principles established under the *Ataqua* case, as they distinguish between the following listed activities:

- Any activity, including the operation thereof, undertaken for purposes of the reclamation of a residue stockpile or residue deposit, which activity requires a mining right in terms of the MPRDA, as well as activities contained in Listing Notices 1 and 3.
- The reclamation, or the expansion and operation, of a residue stockpile or residue deposit established prior to the commencement of the MPRDA.
- Expansion of prospecting, mining, exploration or production operations, which includes the expansion of a residue stockpile or residue deposit, or the reclamation thereof.
- Any activity requiring a prospecting right, mining permit or exploration right in terms of the MPRDA, or the reclamation of a residue stockpile or residue deposit, which triggers an activity listed in any of the listing notices, required to exercise the right.

The drafting of the amendments could be improved for the sake of clarity, specifically in relation to the wording of the listed activities. That being said, it is noteworthy that the proposed amendments do seem to be aimed at clarifying longstanding regulatory uncertainties in relation to residue stockpiles and residue deposits, including that (i) in addition to an environmental authorisation (EA), authorisation is required in terms of the MPRDA for reclamation of residue stockpiles and residue deposits; and (ii) reclamation or expansion of historical pre-MPRDA residue stockpiles and residue deposits requires an EA, but does not constitute mining.

For more on this, refer to our previous alert here.

Conclusion

Due to the complexities of the matter, the *Ataqua* judgment and subsequent legislative developments have not always been consistently applied in practice, with the reclamation of old order stockpiles often deemed to constitute mining without any thorough investigation being undertaken. This often leads to uncertainty over regulatory competence, and if applications for environmental permits need to be submitted to the Department of Mineral Resources and Energy, or the provincial offices of the Department of Forestry, Fisheries and the Environment.

As dealmaking in the mining sector continues to recover and improve, it is of primary importance to ensure that a thorough legal investigation is undertaken at the outset to ascertain the legal nature and associated rights pertaining to tailings dumps, especially insofar as they comprise part of long-standing mining operations.

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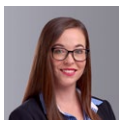

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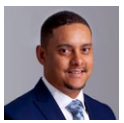

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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