

Mining & Minerals

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SOUTH AFRICA

Mining on the same land for the same mineral: The overlapping rights conundrum

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ALERT**

Mining on the same land for the same mineral: The overlapping rights conundrum

It has become the new norm for applications to be submitted for prospecting/mining rights over land where a right to mine has already been granted over the same land and for the same mineral.

In the recent case of *Eyethu Coal (Pty) Ltd v Minister of Mineral Resources and Energy and Others* (25781/2020) [2024] ZAGPPHC 1051, the Pretoria High Court considered a review which resulted from an overlapping rights dispute.

The matter addressed a number of issues, including the appeal process under section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) read with Regulation 74 of the Regulations promulgated under the MPRDA (Regulations), issues relating to prospecting rights, and the amending of a mining right.

In summary, Messenger Trading CC (Messenger Trading) had been awarded a prospecting right over a portion of land in September 2016 and, upon being granted the right, it applied for execution of the right. However, the regional manager refused the application on the basis that Eyethu Coal (Pty) Ltd (Eyethu Coal) had a pre-existing mining right over the same land and for the same mineral that was granted to it in 2013. Almost 11 months later, Messenger Trading launched an appeal against the regional manager's decision in terms of section 96 of the MPRDA to the Director-General of the Department of Mineral Resources

(DMR). The basis of the appeal was that Eyethu Coal, in its application for its granted mining right, had only applied to be granted a mining right in respect of a portion of the land. It was the DMR that had incorrectly given it a mining right over the whole land. Messenger Trading's appeal succeeded and the regional manager's decision was overturned. In addition, the Director-General overturned a decision taken by a previous Acting Director-General to award Eyethu Coal a mining right over the whole of the land and it was replaced with a decision only granting Eyethu Coal a mining right over a portion of the land. Eyethu Coal then took this new decision from the Director-General on appeal to the Minister of Mineral Resources (Minister), and the Minister dismissed the appeal. This led to the matter being taken on review.

Preliminary point: The grant, duration and renewal of Messenger Trading's prospecting right

A preliminary point was raised by Eyethu Coal that Messenger Trading lacked *locus standi* in the matter due to the fact that its prospecting right had lapsed and could not be renewed. Messenger Trading's prospecting right, which had been renewed in 2020 after its 2016 right had lapsed, had expired and could not be renewed further. This was because section 18(4) of the MPRDA holds that a prospecting right is only capable of being renewed once, and for a period not exceeding three years.

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The court agreed with Eyethu Coal on this point and held that the fact that the right had not yet been executed and therefore could not be considered to be effective in terms of section 17(5) did not mean that the prospecting right was incapable of expiring. The court found that what was important was the effluxion of time and that, in this case, the non-renewable three years had lapsed and this meant that Messenger Trading did lack the necessary *locus standi*.

Procedural defects in the section 96 appeal

Eyethu Coal then proceeded to claim that there were procedural defects in Messenger Trading's internal appeal to the Director-General. One of the defects raised by Eyethu Coal was that Messenger Trading did not lodge its appeal within 30 days of learning of the decision, as required by the MPRDA, but lodged it 11 months later, without justifying its late submission or asking for condonation, as per Regulation 74(4). The other procedural defect raised by Eyethu Coal was that Messenger Trading had failed to pay the R500 appeal fee required by Regulation 74.

In relation to the late lodging of the appeal, the court found that where an appeal is filed outside of the 30-day period, there must be a justification set out for the delay in the form of a request for condonation. The purpose of the condonation, according to the court, is to allow the decision-maker to assess whether there are factors that weigh in favour of such condonation being granted. The

court, relying on *Aurecon South Africa (Pty) Ltd v Cape Town City* [2016] (2) SA 199 (SCA), set out that the relevant factors to be considered are:

"The nature of the relief sought, the extent and costs of the delay; its effect on the administration of justice; the reasonableness of the explanation of the delay; the importance of the issues raised; and the prospects of success on review."

It was found that the absence of an express request for condonation meant that these factors could not be considered, and any consideration of the appeal would lead to an error of law being committed.

In relation to the failure to pay the appeal fee, it was found that this appeal fee is prescribed by both section 96 and Regulation 74 and that it has to accompany a written notice of appeal in order for the submission of an appeal to be complete. The court found that because Regulation 74(4) includes that *"the appeal must"* be accompanied by the appeal fee, it means that this requirement is peremptory, with the effect that there is no room to allow for any condonation for any non-compliance. This is due to the administrative law principle that an administrator, such as the Director-General, or the Minister in this instance,



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lacks the authority to use their discretion to condone any non-compliance with a peremptory requirement. As a result, the court found that the Director-General had acted *ultra vires* in considering such appeal.

The Director-General's decision to overturn the mining right

After looking at the procedural defects, the court then proceeded to consider the merits of the matter. The court looked at the decision taken by the Director-General to overturn an earlier decision granting Eyethu Coal a mining right over the entire area of the land. In considering this, the court referred to the Ouderkraal/Kirland principle set out in *Aquilla Steel (SA) v Minister of Mineral Resources and Others* [2019] (3) SA 621 (CC). This relates to the principle of a decision-maker not ignoring its previously binding decision on the basis of invalidity, without such invalidity being addressed in the appropriate forum. This in essence meant that the Director-General was not in a position to alter the granting of Eyethu Coal's mining right without a court first making a declaration in respect of the mining right.

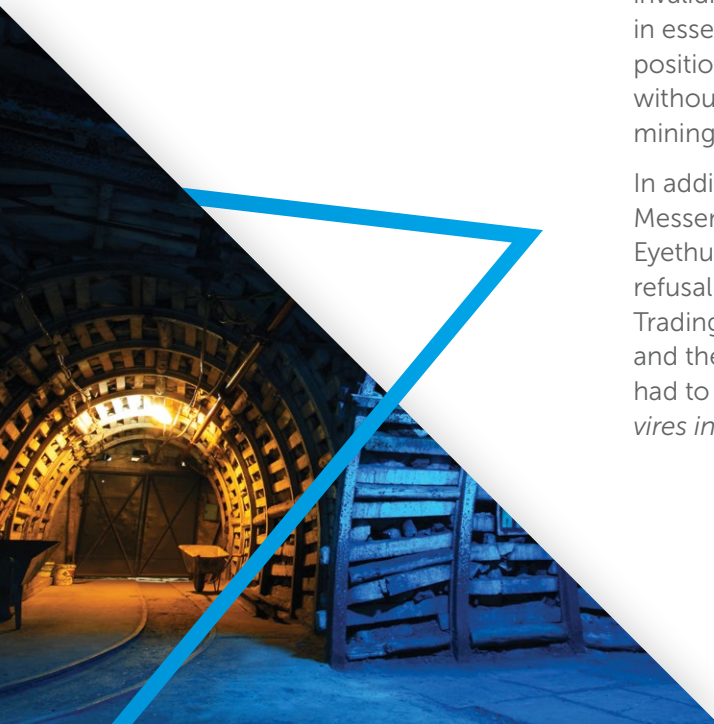
In addition, the court held that the appeal made by Messenger Trading was not aimed at directly attacking the Eyethu Coal mining right but was meant to challenge the refusal by the regional manager to execute Messenger's Trading's prospecting right. As such, the Director-General, and thereafter the Minister, had gone beyond what they had to consider and acted "*irregularly, improperly and ultra vires in violation of the Promotion of Administrative Justice*

Act 2 of 2000". In addition, it violated the audi alteram partem principle in that Eyethu Coal had not been afforded the chance to make any valid representation before its mining right was amended.

Key takeaways

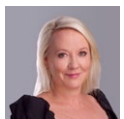
- A prospecting right is valid for the duration granted by the DMR and becomes effective on the date that it is granted, regardless of whether the right is executed or not. In addition, a prospecting right may only be renewed once.
- If it was not previously appealed in terms of section 96 of the MPRDA, the Director-General and the Minister lack the authority to amend a mining right without following the appropriate legal channels, even if the issue was caused by their own mistake.
- In terms of section 96 of the MPRDA read with Regulation 74 of the Regulations, an appeal that is not lodged within 30 days of an administrative decision must be accompanied by a condonation application. This condonation application must address the factors set out in *Aurecon* so as to allow the appeal authority to properly consider the condonation.
- The prescribed fee must accompany such an appeal within the time period set out in the Regulations as the failure to do this renders the appeal fatally defective.

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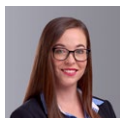
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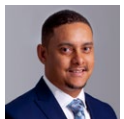
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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