Mining & Minerals

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SOUTH AFRICA

The overlapping rights saga continues: Clarifying the first in time, first in right principle and whether a prospecting right is a prerequisite to an application for a mining right

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The overlapping rights saga continues: Clarifying the first in time, first in right principle and whether a prospecting right is a prerequisite to an application for a mining right

One of the cornerstones of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) is to ensure the sustainable development of South Africa's mineral resources and to promote economic growth, employment and the advancement of the social and economic welfare of all South Africans.

The High Court recently took these objectives into consideration in the matter of *Northern Coal v Minister of Mineral Resources and Energy and Others* [2024] ZAGPPHC 750 (24 July 2024), when interpreting section 102 of the MPRDA.

The dispute arose following an internal appeal process in terms of section 96 of the MPRDA, which was lodged by Jaments Proprietary Limited (Jaments). Jaments had applied for a prospecting right over "*Farm Roetz*" in Mpumalanga, but its application was rejected by the regional manager of Department of Mineral Resources and Energy (DMRE), due to there being a pre-existing section 102 consent application lodged by Northern Coal Proprietary Limited (Northern Coal).

Section 102(1) of the MPRDA

Section 102(1) of the MPRDA provides that:

> *"A reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right, production right, prospecting work programme, exploration work programme, production work programme, mining work programme environmental management programme or an environmental authorisation issued in terms of the National Environmental Management Act [107 of] 1998, as the case may be, may not be amended or varied (including by extension of the area covered by it or by the additional of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister of DMRE."*

Essentially, section 102 provides for a variation of a mining right with the written consent of the Minister of Mineral Resources and Energy (Minister), including a variation of a mining right "*by extension of the area covered by it*". In this instance, Northern Coal had been mining coal on the neighbouring farm to Farm Roetz, Farm Jagtlust, since 2009. Northern Coal had purchased Farm Roetz in 2020 and had requested an extension of its mining area onto Farm Roetz, in terms of section 102, in order to continue its mining operations and avoid large-scale retrenchments as the mining area under its existing mining right had reached the end of the life of the mine. Northern Coal had previously had a prospecting right over Farm Roetz but this prospecting right had lapsed and Jaments lodged its application for the prospecting rights upon the lapse of Northern Coal's prospecting right.

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Jaments was of the view that a prerequisite to the granting of a section 102 consent application by the DMRE, was that the applicant should hold a valid prospecting right over the area to be extended in terms of section 102, before it could apply to include the "*extended area*" in its mining right. Jaments further argued that Northern Coal had sought to consolidate its mining right with a prospecting right it had previously held over Farm Roetz, but that due to the expiration of the prospecting right, Northern Coal's section 102 consent application should have been dismissed by the DMRE.

Although the section 102 consent was granted after the rejection of Jaments' application, on 24 May 2024, following the section 96 appeal process, the Minister acceded to Jaments' application under section 96 and suspended the consent for section 102 (suspension decision). The effect of the suspension decision was that Northern Coal could no longer lawfully mine on Farm Roetz and so Northern Coal approached the High Court on an urgent basis.

High Court's finding

The court held that section 102 of the MPRDA does not require that the holder of a right also holds a right over the extended area it seeks to include in its mining area. In coming to its decision, the court adopted a substance over form approach and clarified that section 102 applies to a variation of the area over which a mining right applies and that there is no requirement in either section 22 (relating to applications for mining rights) or section 102, to hold a prospecting right over the property that it intends to mine. This principle was confirmed in *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* [2022], in which the Supreme Court of Appeal confirmed that a prospecting right is not a prerequisite for a mining right.

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First in time principle

The court went on to clarify the first in time principle. Section 6 of the MPRDA gives effect to the principle and provides that:

> *"Subject to the Promotion of Administrative Justice Act 3 of 2000, any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness."*

The court in this regard considered section 102, read with the definition of "*mining area*" in section 1 of the MPRDA, in substance, to be an application for a mining right in respect of the same mineral and land which remained to be granted or refused as contemplated in section 16(2)(c) of the MPRDA. In this regard, the regional manager could not have accepted any subsequent applications for prospecting or other rights for coal as there was a pre-existing application over Farm Roetz. Consequently, given that Northen Coal had applied for section 102 consent in 2020 without a response from the DMRE, the principle of first in the right, first in time applied and Jaments' prospecting right application in 2021 ought not to have been validly received by the DMRE.

The court held that the Minister had failed to apply his mind to the provisions of section 102 of the MPRDA and erred in law. It further found that the suspension decision failed to take into consideration the real and imminent irreparable damages that Northern Coal's operations, employees and local community would suffer. Over and above an economic loss of approximately R14 million per month being suffered, Northern Coal could have potentially retrenched a number of employees due to the discontinuation of mining activity and there could have been severe environmental consequences which would impact the surrounding communities.

By conducting such a balancing act, the court has illustrated that the scale should always lean towards certainty and the public interest in the finality of administrative decision-making. Furthermore, the sizable economic loss that would be the consequence of discontinuing Northern Coal's operations would have been contrary to the purpose and objectives of the MPRDA in ensuring the sustainable development of South Africa's mineral resources and the promotion of economic growth, employment and the advancement of the social and economic welfare of all South Africans.

Vivien Chaplin and Sandile Shongwe

OUR TEAM

For more information about our Mining & Minerals sector and services in South Africa and Kenya, please contact:

Vivien Chaplin
Sector Head: Mining & Minerals
Director: Corporate & Commercial
T +27 (0)11 562 1556
E vivien.chaplin@cdhlegal.com

Ian Hayes
Practice Head & Director:
Corporate & Commercial
T +27 (0)11 562 1593
E ian.hayes@cdhlegal.com

Emil Brincker
Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

Claudette Dutilleux
Director:
Dispute Resolution
T +27 (0)11 562 1896
E claudette.dutilleux@cdhlegal.com

Jackwell Feris
Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Willem Jacobs
Director:
Corporate & Commercial
T +27 (0)11 562 1555
E willem.jacobs@cdhlegal.com

Rachel Kelly
Director:
Corporate & Commercial
T +27 (0)11 562 1165
E rachel.kelly@cdhlegal.com

Fiona Leppan
Director: Employment Law
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Burton Meyer
Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Jaco Meyer
Director:
Corporate & Commercial
T +27 (0)11 562 1749
E jaco.meyer@cdhlegal.com

Rishaban Moodley
Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Aadil Patel
Practice Head & Director:
Employment Law
Sector Head:
Government & State-Owned Entities
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Allan Reid
Executive Consultant:
Corporate & Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com

Clarice Wambua
Consultant | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com

Deon Wilken
Director:
Banking, Finance & Projects
T +27 (0)11 562 1096
E deon.wilken@cdhlegal.com

Alistair Young
Director:
Environmental Law
T +27 (0)11 562 1258
E alistair.young@cdhlegal.com

Anton Ackermann
Associate:
Corporate & Commercial
T +27 (0)11 562 1895
E anton.ackermann@cdhlegal.com

Sandile Shongwe
Associate:
Corporate & Commercial
T +27 (0)11 562 1242
E sandile.shongwe@cdhlegal.com

Alecia Pienaar
Counsel:
Environmental Law
M +27 (0)82 863 6279
E alecia.pienaar@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com