IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

22/11/16.

CASE NO: 72248/15

In the matter between:

AQUILA STEEL (SOUTH AFRICA) LIMITED Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

21/11/16
DATE

SIGNATURE

MINISTER OF MINERAL RESOURCES First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES Second Respondent

DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION DEPARTMENT OF MINERAL RESOURCES Third Respondent

REGIONAL MANAGER: NORTHERN CAPE REGION DEPARTMENT OF MINERAL RESOURCES Fourth Respondent

PAN AFRICAN MINERAL DEVELOPMENT COMPANY (PTY) LIMITED Fifth Respondent

ZIZA LIMITED Sixth Respondent

JUDGMENT

Tuchten J:

1 The applicant (Aquila) applies to review certain decisions of the first to fourth respondents (the government respondents) and for certain declaratory relief. Although the government respondents did not give notice of intention to oppose, they submitted an explanatory memorandum and appeared at the hearing to oppose the relief sought by the applicant. Where it is not necessary to distinguish between the different actors within the Department of Mineral Resources, I shall simply refer to the Department as the DMR. The relief sought is also opposed by the fifth and sixth respondents, whom I shall call collectively PAMDC and Ziza. Aquila, the government respondents and PAMDC and Ziza were respectively represented at the hearing before me by counsel.

2 The review is brought under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) but I need not identify the precise provisions of PAJA under which the applicant seeks review relief because it was implicit in the oral arguments that if the issues identified and argued by the respondents are decided against them, review relief must issue.

3 The facts are straightforward and in the main not in dispute but despite that I at least found the issues arising from those facts difficult to resolve. Counsel for Aquila put up a chronology of the main facts

relevant to the case which I think all concerned found most helpful during the argument. I shall therefore attach a copy of the applicant's chronology as an appendix to this judgment. Counsel for the respondents accepted the accuracy of the chronology although they submitted that there were one or two matters that should have been included in the chronology.

4 Aquila is a subsidiary of an Australian resources company. In 2006, Aquila was granted a prospecting right over a piece of land in the Northern Cape (portion 114)[1] and a further twelve properties (all collectively the relevant properties). In the exercise of that right, it spent R156 million on prospecting activities and found a significant manganese reserve. Aquila now wishes to mine that reserve.

5 Ziza had its genesis in land grants made by the government of the Cape Colony to Cecil John Rhodes in the late 19th century. Ziza was incorporated in the United Kingdom on 24 May 1893 under the name The Bechuanaland Railway Company Limited,[2] and is now owned by the governments of Zimbabwe and Zambia. No doubt its present

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1 The full description is portion 114 (a portion of portion 107) of farm no. 703 in the district of Kuruman, Northern Cape Province.

2 The area in question fell into what was then called British Bechuanaland and later incorporated into the Cape Province of the Union of South Africa. British Bechuanaland should not be confused with Bechuanaland Protectorate, the modern Botswana.

name is made up of the first two letters of those countries. Part of Ziza's patrimony apparently involved mineral rights over land. The land itself had long before been alienated.

6 The Mineral and Petroleum Resources Development Act, 24 of 2008 (the MPRDA), was promulgated in 2002 and came into force on 1 May 2004. It represented a fundamental shift in the regulation of mineral rights in South Africa. It vested privately-owned mineral rights in the State (as custodian of these rights) and enforced the "use it or lose it" principle. It abolished the entitlement of a right-holder to sterilise the mineral rights in question unless and until it was ready to mine.[3]

7 It will immediately be seen that the MPRDA represented in its sphere as ringing a break with the past as did the Constitution. Its preamble declares that the nation's mineral (and petroleum) resources belong to the nation with the State as their custodian; affirms the need to protect the environment, ensure sociologically sustainable development of these resources and promote economic and social development; recognises the need to promote development and community upliftment, to eradicate discriminatory practices in the industry and redress past racial discrimination. The preamble

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3 *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 CC paras 1-3 and *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 1 SA 306 SCA paras 16 & 20

proceeds to reaffirm the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations and to emphasise the need to create an internationally competitive administration and regulatory regime. The effect of the MPRDA was to remove the ability of the owners of minerals to prevent the exploitation of their minerals simply by reference to their ownership. Under the previous statutory regime, exploitation only be achieved with the owner's consent. Under the MPRDA regime, owners of minerals could no longer sterilise their exploitation by simply relying on their ownership.

8 Recognising that some consideration had to be given to the position of mineral owners under the earlier regime, the MPRDA in Schedule II enacted a regime of transitional arrangements. For the purpose of Sch II, Ziza was the holder of what the measure calls an unused old order right. Item 8 of Sch II provides for preferential treatment for holders of old order rights, of which an unused old order right is one, provided they exercise certain rights conferred upon them by the measure within a specified period. It was common cause that this period expired on 30 April 2005.

9 Three fundamental principles enacted through the MPRDA are relevant to this dispute. Firstly, subject to the transition provisions, the common law owner of such minerals cannot sterilise their exploitation by reference only to their ownership.

10 Secondly in relation to the applications for prospecting and mining rights for which the MPRDA provides, there is a queuing system. Broadly, the applicant first in the queue, a status which it achieves by submitting its application to the regional manager (RM) of the DMR for the area into which the land in question falls, has the right to have its application adjudicated first. Should the application of the applicant first in the queue be granted, the other applications cannot be considered in relation to the same land and the same mineral. Should a second application be granted despite the existence of a pending application of the applicant first in the queue, then the grant of the second application will be unlawful and susceptible to being set aside.

11 Thirdly, the queuing system is subject to certain exclusive rights conferred by Sch II on the holders of old order rights. The content of this exclusivity is at the heart of this dispute.

12 For a proper appreciation of the issues raised in the review, it is important to emphasise the distinction drawn in the MPRDA between the *acceptance* of an application for one of the rights which can be conferred under the MPRDA and the *grant* of that right. In the case of a prospecting right, an application containing certain prescribed information must be submitted to the RM of the DMR for the area in which the land over which the right is sought falls.

13 In this regard, s 16 of the MPRDA as it read at the time provided:

> (1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application-
> (a) at the office of the Regional Manager in whose region the land is situated;
> (b) in the prescribed manner; and
> (c) together with the prescribed non-refundable application fee.
> (2) The Regional Manager must accept an application for a prospecting right if-
> (a) the requirements contemplated in subsection (1) are met; and
> (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.
> (3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to submit an environmental management plan; and

(b) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice.

(5) Upon receipt of the information referred to in subsection (4) (a) and (b), the Regional Manager must forward the application to the Minister for consideration.

14 The "prescribed manner" for the purposes of s 16(1)(b) includes the obligation prescribed in reg 5(1) of the Mineral and Petroleum Resources Development Regulations[4] (the Regulations) to submit the plan contemplated in reg 2(2) to which the application relates. Reg 2(2) requires that the application must be accompanied by a plan of the land to which the application relates, in accordance with generally accepted standards, containing the coordinates and one of three named "spheroids".[5]

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4 Published in Gazette no. 26275 on 23 April 2004

5 I was told by counsel that a spheroid is a fixed point determined by a process understood by the surveying profession.

15 Under s 16(2), the RM to whom such an application is submitted had to scrutinise it for compliance with the requirements in s 16(1)(b) read with the Regulations. He had also to determine whether any other person held one of the rights administered under the MPRDA including a prospecting right in relation to the land and the mineral in question.

16 If the application did not pass muster ("comply with the requirements of this section"), the RM was left with no discretion. Within 14 days of receipt of the application, he had to notify the applicant in writing of that fact and return the application to the applicant. If the application did indeed pass muster, the RM had equally no discretion. He had to *accept* the application and call for certain information. Once that information was furnished, the RM was then required to forward the application to the Minister for consideration. Section 17 describes the powers of the Minister to grant or refuse an application for a prospecting right.

17 One of the issues of interpretation raised during argument before me was the consequence in relation to an application for a prospecting right of notification that the application did not pass muster and return of the application to the unsuccessful applicant. This is important because of the queuing system. The question at this level is whether

an applicant whose application did not pass muster and was returned to that applicant retained its place in the queue. There is apparently no authority directly on point.

18 The argument advanced against Aquila was that s 16 does not provide for the rejection of an application by a RM. On counsel's argument, the return of the application to the applicant would enable such an applicant to supplement or correct its application at its leisure, thereby preventing other aspirants in the queue from having their applications considered.[6]

19 I cannot accept this submission. If correct, it would result in the potential sterilisation of the right to prospect for the mineral and on the land in question. An indolent applicant could delay for years the potential exploitation of the mineral. So the interpretation contended for would not advance the purposes of the MPRDA.[7]

20 The language of s 16 is against the interpretation contended for. The interpretation would require that an application be treated as pending even though the DMR, having returned the application, had no record of it other than, no doubt, entries reflecting the dates on which the

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6 See in this regard s 9 of the MPRDA.

7 See s 4 of the MPRDA.

application was received and returned. In such a case, it would be very difficult, to say the least, for the DMR to determine whether a subsequent application related to the same land and mineral as that which had been returned to the applicant.

21 I therefore conclude that the return of an application by a RM under s 16 was equivalent to the rejection of such an application. It was of course open to such an unsuccessful applicant to amend or amplify its application and resubmit it. But then the application would be treated as a new application and given a place in the queue as such, rather than as a pending application enjoying first place in the queue.

22 This conclusion is regrettably not dispositive of the issue because Ziza was the holder of an unused old order right. As such, Ziza enjoyed certain preferent rights under item 8. The issue before me relates both to the content and to the duration of this preferent right. I shall deal with this question below.

23 Ziza's common law mineral rights in question had never previously been exploited. Ziza's rights were therefore unused old order rights.[8] When the predecessor to the MPRDA, the Minerals Act, 50 of 1991, was repealed by the enactment and coming into operation of the MPRDA, Ziza could only exploit its rights under the MPRDA. In order to gain any right to exploit its unused old order rights, Ziza therefore had to apply for prospecting or mining rights under Item 8. If Ziza did nothing in this regard, its common law rights would cease to exist. This gave rise to certain steps on its part in the period February to April 2005.

24 A cabinet memorandum signed by the Director-General of Mineral Resources (the DG) on 21 February 2005 and by the Deputy Minister on 4 March 2005 recorded that "extensive discussions" had been going on between the Minister and the relevant authorities in Zambia and Zimbabwe. These governments agreed with the government of South Africa to "co-operate in exploring and possible exploitation of the resources". It was envisaged that a new company would be formed and co-owned by the three governments, in order to "take over

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8 An unused old order right is defined in item 1 of Sch II to the MPRDA to mean any right, entitlement, permit or licence listed in Table 3 to the Schedule in respect of which no prospecting or mining was being conducted immediately before the MPRDA took effect. Category 1 of Table 3 relates to a mineral right under the common law for which no prospecting permit or mining authorisation was issued in terms of the Minerals Act, 50 of 1991.

the prospecting and possible mining activities of Ziza in South Africa". The company was in due course incorporated and is the fifth respondent (PAMDC.)

25 The three governments entered into a memorandum of understanding on 24 March 2005. The memorandum records the parties' "intention to enter into agreement to facilitate process of co-operation to facilitate the establishment of the Pan African Mineral Development Company and to establish a Council of Ministers for cooperation". All the mineral rights owned by Ziza would be transferred to the yet to be established PAMDC and Ziza would exist only for the purpose of winding up its operations.

26 PAMDC was incorporated on 26 November 2007. The three governments entered into a shareholders' agreement to regulate their joint venture in October 2008. But no mineral rights were ever transferred from Ziza to PAMDC. So when the MPRDA came into operation, any old order mining rights still in existence in relation to the relevant properties could not have vested in PAMDC.

27 Ziza resolved on 25 March 2005, amongst other things, to submit appropriate applications to secure prospecting licenses and conversion of its old order mineral rights to new order mineral rights

in compliance with the 30 April 2005 deadline set by the MPRDA. During April 2005, Ziza filed a number of applications in respect of different agglomerations of land making up its total 1,7 million hectares of unused old order rights. These appear to have been filed with the Northern Cape Province Regional Office of the DMR at Kimberley as well as with the North West Province Regional Office. The specific application with which the present review is concerned is an application for a prospecting right which was filed on 19 April 2005 in Kimberley, and apparently related to some 500 000 hectares of land (collectively the Ziza properties).

28 Ziza's application for a prospecting right was affected by certain irregularities, set out in detail in the applicant's founding affidavits. One of these defects was that in relation to the land or area over which the right was sought, there were no "coordinated maps". In addition, the Ziza application did not show the required financial resources or technical ability on the part of Ziza.

29 The RM of the DMR's Northern Cape Region was obliged to notify Ziza within 14 days of receipt of its application that it did not comply with the requirements of section 16 of the MPRDA and to return the application to Ziza.[9] This did not take place. Instead, after a delay of

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[9] Section 16(3) of the MPRDA, as it read before 7 June 2013.

four months, the RM purported to accept Ziza's application for a prospecting right on 17 August 2005. The explanation for the failure to return the application to Ziza appears from an explanatory memorandum dated 2 December 2013 submitted by an official within the DMR to its chief director: legal services:

> It is hereby acknowledged that the ZIZA's application was not initially complete, however due to extensively large area covered by the application, it took a significant time to follow all the necessary administrative processes completely capture their application on the internal system, hence the application could not be rejected within the 14 days prescribed in terms of the Act. *[T]he only decision which could be taken after 14 days is to accept such an application, whether defective or not and thereafter apply the provisions of ... PAJA.*[10]

30 It is not in dispute that this decision (the acceptance decision) was irrational and resulted in a sequence of events which led to the present dispute. The applicant attacked the acceptance decision in the present review. The only defence to the attack on the acceptance decision is that raised by counsel for the government respondents, that the applicant had not exhausted its internal remedies in relation to the acceptance decision.

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[10] Own emphasis

31 After acceptance, the Ziza application remained pending for a considerable period before it was finally granted on 26 February 2008. Under s 19(2) of the MPRDA, the holder of a prospecting right must lodge it for registration at the Mining Titles Office. Registration of the right was under the MPRDA as it then read was of no relevance to the relationship between the holder of the right and the DMR but affected the position of the holder in relation to third parties.

32 The prospecting right granted to Ziza was registered in the name of PAMDC. But PAMDC had never applied for a prospecting right. It is not in dispute that the registration of the right in the name of PAMDC was irregular and should never have been effected. The applicant asks that the registration be set aside. The only defence raised to this prayer is that the registration is of no consequence and ought therefore to be ignored.

33 The failure by Ziza to lodge various documents required by the DMR, timeously or at all, continued right up to the time the application was granted. Various sections of the DMR reported negatively on the Ziza application and recommended that it be rejected. In a minute of a meeting between officials of the DMR and PAMDC held on 8 September 2010, it was explained by the DMR that at the time the rights had been granted to Ziza, there were no "coordinated map

plans". This phrase refers to maps of the land over which rights are applied for with coordinates sufficient to enable the DMA to load the identity of the land in question onto its system. The application form prescribed by regulation requires these maps with coordinates to be submitted, for the obvious reason that without them it is very difficult to identify the land in question.

34 It is not clear from the record why the DDG as the delegate of the Minister was persuaded to grant the Ziza prospecting right notwithstanding recommendations to the contrary. None of the respondents has offered any justification for the acceptance of the Ziza application or its grant. But it is clear that Ziza never attempted to exploit the prospecting right and that the prospecting right was never executed in the name of Ziza.

35 It was not suggested that Ziza ever acquired the required financial resources or technical ability. Indeed Ziza never contemplated prospecting or mining. It was instead going to transfer its rights to PAMDC. But in fact it never did so.

36 On 18 April 2006 Aquila submitted an application (the Aquila application) for a prospecting right to the DMR. This was almost a year after the Ziza application was submitted but before the grant of the

prospecting right to PAMDC. It is not suggested that the Aquila application was defective. The Aquila application was accepted on 2 May 2006, within the statutory period of 14 days.

37 Whether the Ziza application in fact overlapped with the Aquila properties ought to depend on a comparison between the properties identified in the respective applications for prospecting permits. Counsel for Aquila submit in their heads of argument that because of the defective way in which the Ziza application was compiled, there is uncertainty about the extent of what Ziza applied for, what it was granted in February 2008 and whether what it was granted overlapped with the Aquila properties and that there was no way in which the RM could have determined, as at 18 April 2006, and comparing the two applications with each other, that there was an overlap. Consequently, it is submitted, even if Ziza intended to apply for a right that overlaps with that of Aquila, that intention was never carried into effect because its application did not evidence that intention. This submission was not pressed in argument and I shall assume for present purposes against Aquila that the overlap exists and treat the case as one of double grants.

38 On 28 February 2007, the DMR executed a prospecting right in favour of Aquila. It was registered in the Mineral and Petroleum Titles Registration Office on 17 July 2007. The Aquila prospecting right covers the relevant properties. These properties include portion 114 and cover about 37 000 hectares in the Kuruman district in the Northern Cape Province. On the strength of its prospecting right, Aquila performed extensive prospecting and drilling operations between 28 February 2007 and 13 December 2010 on the relevant properties.

39 Through its prospecting activities, Aquila identified a large manganese resource, estimated to amount to over 140 million tonnes, worth many billions of rands, on the Aquila properties. A manganese reserve of 20,2 million tonnes was identified on portion 114. Since December 2010, Aquila has been ready and able to mine the manganese reserve on portion 114. It submitted an application for a mining right to the DMR on 14 December 2010. The DMR accepted the Aquila mining right application in a letter dated 22 December 2010.

40 On 9 November 2010 Ziza was dissolved and deregistered. Counsel for the applicant submit that the effect of the dissolution and deregistration was that any rights in relation to pending mineral right

applications which Ziza had held thereby lapsed and ceased to exist in terms of s 56(c) of the MPRDA. This provision reads:

> Any right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever-
> (a) ...
> (b) ...
> (c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused.

41 In its letter accepting Aquila's mining right application sent on 22 December 2010, the DMR assured Aquila that it would consider Aquila's mining right application by 31 December 2011. But the DMR did not consider Aquila's application for a mining right until July 2015, and then only after Aquila had compelled it to do so by bringing a mandamus application. The mandamus application occurred against the following background.

42 During the course of 2009, PAMDC or Ziza furnished to the DMR further information, including the maps and coordinates which ought to have formed part of Ziza's 2005 application. When these maps and coordinates were processed, the DMR apparently discovered that Aquila already held a prospecting right over some of the properties

identified on them. According to PAMDC, the DMR informed them around April 2010 that there had been a double grant. There were extensive negotiations and discussions between PAMDC and the DMR in relation to the issue during 2010 from which Aquila was excluded.

43 On 14 December 2010, Aquila applied for a mining right for manganese and other minerals on Portion 114. The application for the Aquila mining right was accepted on 22 December 2010. After or during a prolonged process of negotiation with the DMR, Aquila was informed orally that its application for a mining right would not be granted. Aquila tried through its attorneys without success to get written confirmation that its application for a mining right had been rejected. The final attempt to get this confirmation was made in a letter dated 22 October 2013.

44 Aquila was first informed of the double grant on 28 January 2011, in the course of a meeting with the DMR on the processing of its mining right application. The DMR cited the double grant as a reason not to consider the mining right application. Throughout the period from that date to October 2013, Aquila tried to gather information on the alleged double grant and achieved limited success by October 2013. Such

success as Aquila did achieve was only through the use of requests in terms of the Promotion of Access to Information Act, 2 of 2000.

45 Unbeknown to Aquila, and unexplained on the documents compiled as part of the record, moves were afoot during 2011 to execute a prospecting right in favour of PAMDC (not Ziza). Dr Thibedi Ramontja had been a director and the chairman of PAMDC since October 2008. According to the DMR, he resigned from PAMDC before he was appointed as the DG of the DMR on 12 October 2011. Although the DMR promised Aquila a copy of his resignation letter, it was never produced.

46 In any event, Dr Ramontja had been in office as DG for a month when a prospecting right was executed in favour of PAMDC on 19 November 2011. The prospecting right states that it covers "various farms" in the "magisterial/administrative districts of Kuruman and Vryburg" measuring 576 873 hectares.

47 There was no basis on which such a prospecting right could have been granted to PAMDC. A prospecting right had been granted to Ziza and had not been transferred to PAMDC. The prospecting right granted to Ziza had lapsed. And at the time the DMR purported to

grant PAMDC a prospecting right, Aquila already held a prospecting right over the relevant properties.

48 PAMDC appeared to accept that these defects were insurmountable. PAMDC submitted a fresh application for a prospecting right over the relevant properties on 20 July 2015. PAMDC states that it has not received any notification of an acceptance of the application and the record does not reveal such an acceptance. To date, PAMDC has made no attempt to engage in prospecting on portion 114 or any of the other relevant properties.

49 After what Aquila describes as a frustrating process of engagement with the DMR and PAMDC, culminating in two PAIA requests, Aquila eventually received documents in August and October 2013 including the grant letter of February 2008 to Ziza and the executed prospecting right in favour of PAMDC. On the strength of these documents, it launched an internal appeal against the decisions evidenced in the documents it received in August and October 2013 (the Aquila appeal).

50 The exact nature of the internal appeal launched by Aquila was the subject of close scrutiny in argument. The Aquila appeal was launched by a notice of appeal in a letter dated 29 October 2013. The

subject of the appeal was set out in paragraph 1.2 of the notice and was squarely directed against the grant of the prospecting right to Ziza (the Ziza prospecting right grant decision).

51 Paragraph 1.3 then proceeds to set out the grounds of appeal. The remainder of the notice sets out further grounds of appeal, factual allegations and argument. Paragraph 1,3,2, read with paragraphs 2.4, 3.22, 4.3.4.2, 6.1.2, 6.4 and 6.6.2 however make it plain that while there was no formal appeal against the acceptance decision itself, one of the grounds upon which the Ziza prospecting right *grant* decision was attacked was that the Ziza prospecting right *acceptance* decision was irregular.

52 This procedural matter is of some importance in the present review because as I shall show later, the Ziza prospecting right acceptance decision is the subject of Aquila's first prayer for relief. This is important for Aquila because it contends that success in its attack on the Ziza prospecting right acceptance decision will affect Aquila's place in the queue for prospecting rights over Portion 114. It is important for the government respondents because they contend that because there was no appeal to the Minister against the Ziza prospecting right acceptance decision, Aquila has not exhausted its internal remedies in that regard and this court should not entertain the

review against the Ziza prospecting right acceptance decision because of the provisions of s 7 of PAJA. The government respondents further submit that the review has been brought out of time. Section 7 of PAJA reads:

> (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
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> (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
>
> (2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any

> internal remedy if the court or tribunal deems it in the interest of justice.

53 In response to this challenge, Aquila in the first place submits that in substance, the issues raised by its notice of internal appeal included an attack on the Ziza prospecting right acceptance decision. In the second place, to the extent necessary, Aquila asks for exemption under s 7(2)(c) of PAJA and, if it has been found that its review of the Ziza prospecting right acceptance decision has been brought out of time, an extension of time under s 9(1)(b) of PAJA.

54 By letter dated 31 January 2014, PAMDC gave notice of its intention to oppose the Aquila appeal and further cross-appealed. The cross-appeal (the PAMDC cross-appeal) was directed in terms against both the decision of 2 May 2006 to accept Aquila's application for a prospecting right and the decision of 11 October 2006 to grant a prospecting right to Aquila.

55 Although Dr Ramontja was the appropriate delegated appeal authority, the DMR conceded in November 2013 that he was conflicted and the parties agreed that the Minister would decide the appeal.

56 PAMDC eventually delivered its final submission in the internal appeals on 27 October 2014. PAMDC had apparently delayed its answer for months in order to resurrect Ziza from its deregistration in 2010 in England with effect from 14 October 2014.

57 The internal appeal process took more than twenty months to be concluded. At the outset, the DMR had promised Aquila that the appeal would be decided by 13 January 2014. Eventually, and only after being compelled to do so by Aquila's mandamus application, the Minister decided the Aquila appeal and the PAMDC cross-appeal as well as Aquila's mining right application on 2 July 2015. Why the administrative adjudication process took so long, when reg 74(9) of the Regulations provide that the decision must be made within 30 days after the completed appeal papers are placed before the functionary considering the appeal, is not explained. The Minister had, when he decided the appeal, the advice of his own most senior legal adviser as well as that of senior counsel. The Minister was advised to uphold the Aquila appeal and dismiss the PAMDC cross-appeal.

58 But the Minister rejected the Aquila Appeal, granted the PAMDC cross-appeal, and refused Aquila's mining right application. The Minister gave reasons for the three decisions embodied within his ruling. I reproduce those reasons below in full:

> The prospecting right application of Ziza Limited was lodged and accepted during a period which afforded it exclusivity in terms of the transitional provisions of the MPRDA. The gra[n]ting of a prospecting right in its favour was therefore lawful.
>
> As a consequence, the prospecting right application of Aquila Steel was unlawfully accepted, processed and granted during the aforesaid period which afforded exclusivity to the application of Ziza,
>
> Accordingly, I am also not in a position to grant the mining right application in favour of Aquila Steel, because of the existence of a prospecting right in favour of Ziza.

59 It seems however that there is still a measure of confusion in the minds of the functionaries in the DMR dealing with this fraught, as it has become, situation. The applicant applied for a renewal of its prospecting permit on 20 July 2015. One would have thought that once the Minister had pronounced that the earlier prospecting right in favour of Ziza had been lawfully accepted and granted, this would have led to the refusal of the application for renewal. Not so; the Aquila renewal application was granted on 20 July 2015 and is now the subject of a pending internal appeal.

60 The Minister's adverse decisions on the internal appeals and the mining right application led to the institution of the present application to court on 7 September 2015.

61 The issues raised by the respondents have given rise to technical issues (an expression which I do not use pejoratively) and the applicant has perforce attacked these in a series of intricate prayers for relief, contained in a second amended notice of motion as amended again by an unopposed application from the bar during the course of argument which was later embodied in a written amendment. I set out below the substantive relief in which at this stage of the proceedings the applicant persists:

1 Reviewing and setting aside the decision of the fourth respondent to accept the sixth respondent's application for a prospecting right with reference number NC 30/5/1/1/2/179PR, which decision was taken on or about 17 August 2005;

1A To the extent necessary, exempting the applicant in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") from the obligation to exhaust its internal remedies in respect of the order sought in paragraph 1 above;

1B To the extent necessary, extending the 180-day time period for institution of judicial review proceedings contemplated in section 7(1) of PAJA so as to terminate one day after the institution of this application in respect of the order sought in paragraph 1 above;

2 Reviewing and setting aside the decision of the third respondent to grant a prospecting right with reference number NC 30/5/1/1/2/179PR to the sixth respondent, which decision was communicated by means of a letter dated 26 February 2008 and substituting this decision with the following: the sixth respondent's application for a

prospecting right with reference number NC 30/5/1/1/2/179PR is refused;

3 Reviewing and setting aside the decision of the third respondent taken on or about 17 November 2011 to execute a prospecting right with reference number NC 30/5/1/1/2/179PR in favour of the fifth respondent;

4 Reviewing and setting aside the execution of a prospecting right with reference number NC 30/5/1/1/2/179PR by the fourth respondent in favour of the fifth respondent on or about 19 November 2011, and the registration of such right in the Mineral and Petroleum Titles Registration Office;

5 Reviewing and setting aside the following decisions of the first respondent, which decisions were communicated by means of a letter dated 2 July 2015:

5.1 the decision to dismiss the appeal by the applicant under section 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the Aquila Appeal");

5.2 the decision to uphold the cross-appeal by the fifth respondent under section 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the PAMDC Cross-Appeal");

5.3 the decision to reject the applicant's application for a mining right (with reference number NC 30/5/1/2/2/295MR) in respect of iron ore, pyroxenite, copper ore, zinc ore, manganese ore, ferrous and base metals on portion 114 ("the Aquila Mining Right Application");

...

7 Substituting the first respondent's decision in respect of the Aquila Appeal with the following: the Aquila Appeal is upheld, the grant of a prospecting right with reference number NC 30/5/1/1/2/179PR to the sixth respondent is set aside and the sixth respondent's application for a prospecting right with reference number NC 30/5/1/1/2/179PR is refused;

8 Substituting the first respondent's decision in respect of the PAMDC Cross-Appeal with the following: the PAMDC Cross-Appeal is dismissed;

9 Substituting the first respondent's decision in respect of the Aquila Mining Right Application with the following: the Aquila Mining Right Application is granted subject to conditions to be determined by the first respondent within thirty calendar days of the date of this court order;

Alternatively to paragraph 10 above: remitting the Aquila Mining Right Application to the first respondent and ordering the first respondent to make a decision in respect of the Aquila Mining Right Application within sixty calendar days of the date of this court order;

...

10A Declaring that the prospecting right granted to the sixth respondent with reference number NC 30/5/1/1/2/179PR lapsed with effect from 9 November 2010;

11 Ordering the second respondent to remove from the records of the Mineral and Petroleum Titles Registration Office the prospecting right with reference number NC 30/5/1/1/2/179PR and any reference to the registration of the prospecting right with reference number NC 30/5/1/1/2/179PR;

62 The first issue, raised only by PAMDC and Ziza in counsel's heads of argument, is whether any of the relief is moot. During argument before the court. Counsel confined their mootness argument to the prayer for the setting aside of the notarial deed of prospecting grant in favour of PAMDC. I do not agree that any of the relief sought is moot. Firstly, substantial parts of the relief in question are opposed by the

government respondents. Secondly, the path to the key relief sought by the applicant, the orders directed at compelling the Minister to grant the applicant a mining right, is obstructed by components of the relief said to be moot. Because decisions of this kind generally remain valid despite their defects unless upset by an order of court, it is in the interests of justice that the position in relation to such decisions be clarified by court order rather than left to confuse the relationship between the parties in the future. Thirdly, and generally, this is a procedurally complex situation. These complexities have caused considerable confusion in the administration of the government respondents. The case was argued before me over the better part of three days and even with the guidance of three sets of counsel, I found that the administrative intricacies made it exceptionally difficult to appreciate the big picture. Fourthly, such is the complexity of the picture that as the argument went on, counsel raised new legal issues not initially advanced. In one such case, raised after reply by counsel for Aquila, I declined to allow argument on the new legal issue. The more that situation is clarified by appropriate orders of court, the better.

63 This is not the type of case in which an applicant has sought to circumvent the internal appeal procedure. On the contrary, the present litigants extensively presented and argued their cases before the

Minister. The regularity of the Ziza prospecting right acceptance decision was one of the issues in the appeal, not because that decision was specifically the subject of the appeal but because the Ziza prospecting right grant decision, of which the acceptance decision was a component, was the subject of the appeal. One of Aquila's main grounds and arguments in the appeal was that because the Ziza prospecting right acceptance decision was irregular, it followed that the Ziza prospecting right grant decision was irregular.

64 Up to the time the Minister finally gave his decision on the appeal, Aquila had no access to the record which had served before the DMR when the decisions presently under attack were made. It was compelled to make its case on the strength of such documents as it was able to accumulate. The record which served before the DMR and the Minister when they made their decisions which are under attack before me has for the most part been produced. It runs to over 2 000 pages. This record was essential to enable Aquila to build and present its case. But there is evidence that shows that other documents relevant to the decisions in question are for whatever reason unavailable.

65 In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*[11] paras 36-38, the court pointed to the purposes of the requirement that internal remedies be exhausted before a court is approached on review. Among these purposes are the needs to preserve the autonomy of the administrative process, to restrict the risk of the court's trespassing on the terrain allocated to the executive and to allow such bodies to use their own skills and experience in areas where administrators may have greater knowledge and expertise than that of the courts. This will be particularly so where specialised knowledge of a technical or practical nature is required.

66 The extent of the failure to exhaust the internal remedy suggested by counsel for the government respondents is not that the issue was not before the Minister: it is merely that the Minister was not asked specifically to deal with the issue on the basis that the Ziza prospecting right acceptance decision was a decision separate from the Ziza prospecting right grant decision.

67 I do not think that the result would have been any different if the Minister had been asked specifically to consider the Ziza prospecting right acceptance decision. In reaching the conclusion that the Ziza

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11 2010 4 SA 327 CC

prospecting right grant decision had been lawfully made, the Minister had to consider whether the Ziza prospecting right acceptance decision had been lawfully made. In coming to the conclusion that the grant decision had been lawfully made, the Minister must have concluded that the acceptance decision had been lawfully made.

68 One can test the proposition by asking what the position would be if the Minister were now asked, in the light of the reasons given, to consider the Ziza prospecting right acceptance decision as a separate appeal. The response of the Minister must inevitably be that the issue had been determined in the appeal. It is difficult to think how, in a further appeal to the Minister, Aquila could resist the contention that it is issue estopped from challenging the propriety of the Ziza prospecting right acceptance decision in the light of the decision on appeal. A further challenge before the Minister of the acceptance decision would be a mere empty formality.

69 For these reasons, I think that Aquila complied in substance if not in form with its duty to exhaust internal remedies. But if it did not, I conclude on much the same grounds that it ought to be afforded the relief it seeks under both ss 7(2)(c) and 9(1) of PAJA. Exceptional circumstances are required for the exercise of the power of the court

under s 7(2)(c) while the extension of time under s 9(1) requires merely that the extension be required in the interests of justice.

70 In my view, both these tests have been met. The case is of great commercial importance to the parties. Aquila has in good faith spent R156 million to put itself into a position to exploit the opportunity which arose from the prospecting activities it carried out in good faith. I think an aphorism expressed in relation to the law of prescription is appropriate on these facts: the requirement to exhaust internal remedies was designed to penalise inaction, not legal ineptitude.[12] The omission from paragraph 1.2 of the notice of appeal was far from demonstrating ineptitude on the part of Aquila or its lawyers and it cannot be suggested that there was any inaction on their part. Indeed, the record demonstrates that a most difficult and complex case was pursued diligently. There can be no prejudice to the Minister or any of the government respondents if the review of the Ziza prospecting right acceptance decision is allowed to proceed. To hold otherwise would be to place the full ventilation of Aquila's case at risk for no more than a technical quibble, devoid of substance. And finally, the determination of the disputes raised in the first instance through what counsel for the government respondents described as administrative errors has been inordinately delayed by the administrative processes

12 *Mazibuko v Singer* 1979 3 SA 258 W 266A

of the DMR and the Minister. Sending the matter back to the Minister under these circumstances would not advance the administration of justice.

71 If substantively, the review in relation to the Ziza prospecting right acceptance decision was not the subject of the appeal, then the present review was brought outside the period of 180 days contemplated by s 9(1)(b) of PAJA, although all the other review relief was brought in time. It is manifestly in the interests of justice to extend the time period to allow what Aquila regards as an important component of its case to be ventilated.

72 For these reasons, I intend to make orders in terms of prayers 1A and 1B of the amended notice of motion.

73 I mentioned above that Ziza's unused older rights were afforded special protection under Sch II. The objects of Sch II are to ensure the protection of security of tenure in relation to ongoing operations which are the subject of the MPRDA, to give the holder of an old order right[13] an opportunity to comply with the MPRDA and to promote equitable access to the resources administered under the MPRDA. Counsel for

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13 And one other existing right not relevant to the present enquiry

PAMDC and Ziza submitted that Sch II must prevail in the event of a conflict with the body of the MPRDA. I shall accept that this is so.

74 Item 8 provided at the relevant time as follows:

> (1) Any unused old order right in force immediately before this Act took effect continues in force subject to the terms and conditions under which it was granted, acquired or issued or was deemed to have been granted or issued for a period not exceeding one year from the date on which this Act took effect.
>
> (2) The holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of this Act within the period referred to in subitem (1).
>
> (3) An unused old order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused.
>
> (4) Subject to subitems (2) and (3), an unused old order right ceases to exist upon the expiry of the period contemplated in subitem (1).

75 Item 8(2) confers in terms upon the unused old order right holder the exclusive right to apply for a prospecting or a mining right within the one year period provided for in item 8(1). Counsel for PAMDC and Ziza submitted that the language of item 8(3) should be given its full

literal effect. What it meant in the present case, submitted counsel, was that regardless of the defects in any such application and whether or not the right conferred was set aside on review or appeal, the exclusivity conferred by item 8(2) remained in existence until the application had been granted and dealt with in terms of the MPRDA or refused.

76 If this were correct, thus counsel, then the Aquila application for a prospecting right which was submitted during the period after Ziza's application for a prospecting right had been "lodged", the term used in item 8(3), could not have lawfully been placed in the queue at all, let alone granted. This, it was submitted, was because the *lodging* of an application for a prospecting right by an unused old order right holder before the expiry of the one year period of exclusivity on 30 April 2005 precluded other aspirant prospectors from joining the queue at all, *even after the expiry of the one year period and effectively until the unused old order right holder's application had been granted or refused.*

77 I do not agree. The interpretation for which counsel contends would potentially frustrate both the objects of the MPRDA and those of Sch II. The purpose articulated in item 2 of Sch II is to give the holder of an old order right an opportunity to *comply* with the MPRDA. For

that purpose such a right holder was expressly given exclusivity for a period of a year. No person other than an old order right holder is given by the MPRDA any exclusivity which prevents other aspirant right holders from even joining the queue. Only an old order right holder is placed in the privileged position that no other person might, during the year of exclusivity even join the queue for consideration whether rights should be conferred on it. If item 8 were to be interpreted as counsel submits, equitable access to the resource in question might be delayed almost indefinitely.

78 In my view, the objects of the MPRDA would far better be achieved if item 8 were interpreted to mean that the exclusivity ran only until 30 April 2005. Thereafter other aspirant right holders might join the queue. Counsel submitted that the contrary interpretation would not give effect to the notion in item 8(3) that the unused old order right would *remain valid* until the application was granted and dealt with in terms of the MPRDA or refused.

79 I do not think that the continued *validity* of the unused old order right relates to its place in the queuing system which originates from the provisions of the MPRDA. The common law mineral right enjoyed by Ziza entitled it to search for, mine and dispose of minerals on its land

for its own account.[14] The common law right did not regulate how the right was to be exercised outside the statutory regime in place regulating that topic. The regime under which that common law right might be exercised passed from that under the Minerals Act, 1991 to that provided for under the MPRDA. The exclusivity was conferred for no more than to enable the old order right holder to *apply*[15] for a prospecting or mining right *in terms of the MPRDA*.

80 An old order right holder which exercised the right exclusively to apply in terms of the MPRDA was then obliged to comply with and be subject to the MPRDA in relation to prospecting or mining rights. If this were not so, absurd results would follow. For example, an unused old order right holder could submit a manifestly inadequate application. Upon its return to the right holder under s 16(3), the old order right holder might take no action at all, ever. On the interpretation proposed by counsel for PAMDC and Ziza, the old order right would remain valid forever because the application had been lodged but neither granted nor refused.

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14 *Agri SA, supra*, para 7

15 Items 2(b) and 8(3) of Sch II

81 The contrary interpretation, on the other hand, would preserve the exclusivity until 30 April 2006 and then permit the objects of the MPRDA to be achieved.

82 Counsel could not in my view refer me to any authority on this point. I was referred to the judgments in *Rustenburg Platinum Mines Ltd v Regional Manager, North-West Region and Others*[16] delivered on 2 May 2012 and *Yakani Resources v Nel and Others*[17] delivered on 24 February 2014. But they do not, in my view, decide the point. Nor does, in my view, Dale[18] deal with the point. I must thus decide the issue without the guidance afforded by other decisions.

83 In my view, for the reasons I have given, the interpretation restricting the exclusivity afforded to Ziza as the holder of an unused old order right to queue for rights under the MPRDA expired on 30 April 2005. From that date, Ziza had to be treated like any other applicant and other applicants might lawfully join the queue for rights under the MPRDA.

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16 Case no. 26396/2006 in this court

17 Case no. 25017/2012 in the South Gauteng High Court.

18 Dale *et al, South African Mineral and Petroleum Law*

84 The effect of this conclusion is that if the Ziza prospecting right acceptance decision and the Ziza mining right acceptance decision are set aside, then the position is as if the Ziza application for a prospecting right had never been made. No substantive grounds were advanced by the respondents in defence of these decisions. It follows that the relief sought in relation to these decisions, prayers 1 and 2, must be granted.

85 It similarly follows that the decision to register a prospecting right in favour of PAMDC must be set aside. The relief sought in this regard, prayers 3 and 4, must be granted.

86 There is a further ground upon which Aquila attacks the contention that Ziza's queuing exclusivity had a bearing on the validity of the Aquila prospecting right acceptance decision. This attack arises from the facts of Ziza's deregistration on 9 November 2010 and its subsequent restoration to the companies register of England and Wales on 14 October 2014.

87 This point arises because during the almost four year period of Ziza's deregistration, Aquila applied for the grant of a mining right on 14 December 2010 and its application for the grant of a mining right was accepted on 22 December 2010.

88 There can be no doubt that *at the time* Aquila applied for the grant of the mining right and its grant application was accepted, any prospecting right which Ziza might have previously held had lapsed. This is because the MPRDA specifically legislates for a lapse of any such right upon the deregistration of the right holder in s 56. Section 56 provides:

> Any right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever-
>
> (a) it expires;
>
> (b) the holder thereof is deceased and there are no successors in title;
>
> (c) a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused;
>
> (d) save for cases referred to in section 11 (3), the holder is liquidated or sequestrated;
>
> (e) it is cancelled in terms of section 47; or
>
> (f) it is abandoned.

89 No consent was sought under s 11. So upon the deregistration of Ziza on 9 November 2010, the Ziza prospecting right lapsed pursuant to s 56(c). While Ziza was deregistered, Aquila was, entirely lawfully if my conclusion in relation to Ziza's old order right exclusivity is correct,

granted a prospecting right for the same minerals and over the same land as had been the subject of the Ziza prospecting right.

90 One might then have thought that Ziza's restoration to the company register could have had no effect on the legality of the right which Aquila had obtained during the period in which Ziza was deregistered. How could subsequent events turn something that was legal into something that was illegal? Because, submitted counsel for PAMDC and Ziza, of the consequences of *Palala Resources (Pty) Ltd v Minister of Mineral Resources and others.*[19]

91 Palala was granted a prospecting right, to endure until 19 May 2011. On 16 July 2010 Palala's company registration was cancelled for failure timeously to file its company returns. Its registration was restored on 13 September 2010. In the interim Hectocorp lodged an application for the same rights previously held by Palala. Hectocorp's application was rejected by the DMR on the ground that the rights sought by Hectocorp had already been issued to Palala. In October 2010, Palala applied for the renewal of its prospecting right. In response to Palala's application for the renewal of its projecting right, the DMR told Palala that its right had lapsed due to Palala's deregistration. Against this decision, Palala lodged an administrative

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19 [2016] 3 All SA 441 SCA

appeal which was upheld. But a further appeal to the Minister by Hectocorp was successful. Palala sought the review and setting aside of the Minister's decision. The review failed in the High Court. But on appeal to the SCA, the review was upheld.

92 The decision of the SCA turned on a resolution of the tension between s 56(c) of the MPRDA and s 73(6A) of the old Companies Act, 61 of 1973. Section 73(6A) read:

> Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding fee in respect thereof.

93 The SCA in *Palala* referred with approval to and followed an earlier decision in that court, *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd.*[20] *Newlands Surgical Clinic* dealt with the position under s 82(4) of the new Companies Act, 71 of 2008, which reads:

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20 2015 4 SA 34 SCA

> If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission to reinstate the registration of the company.

94 The court in *Palala*, following *Newlands Surgical Clinic*, held[21] that restoration to the register both revested the company with its property and validated its corporate activities during the period of its deregistration.

95 The court in *Palala* did not overlook the manifest injustice that the logic of its reasoning could cause to third parties. But that had to be viewed, thus the court, against the clear language of the legislative scheme, the potential for prejudice to third parties if the contrary position were to prevail and the proposition that it was not "strictly correct"[22] to compare the deregistration of a company with the death of a natural person because deregistered companies sometimes continue to carry on business as if deregistration had never occurred and while third parties are unaware of the deregistration.

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21 Para 7

22 Para 9

96 The court in *Palala* went on[23] to hold:

> There is nothing in the scheme of the MPRDA which buttresses the conclusion that s 73(6A) does not retrospectively revive rights which had lapsed in terms of s 56(c). The court a quo reasoned that a retrospective revival of rights would undermine the purpose and objectives of the MPRDA, since `the Department would be compelled in every case where a company is deregistered to treat its MPRDA rights as frozen'. I disagree. As stated, third parties are at risk in their dealings with a deregistered company, even where they have no knowledge of such deregistration. Restoration of registration operates retrospectively and *ex post facto* validates all the company's corporate activities (including its mineral prospecting rights), even to the detriment of third parties. The legislature is presumed to know the law and when it enacted s 56(c) of the MPRDA it must have been aware that companies and close corporations that had been deregistered could be restored to the register with automatic retrospective effect. Yet it did not qualify its reference to `whenever a company or close corporation is deregistered' as a trigger for the lapsing of mineral rights, by saying that the right would not be restored if the company or close corporation was restored to the register. Had it wished to ensure the finality of the lapsing of a mineral right on deregistration, it could easily have done so. The legislature could have excluded mineral rights from the rights restored to a company or close corporation on being restored to the register.

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23 Para 11

97 But, the court proceeded to say:[24]

> On the facts of this case a relatively short period had elapsed between Palala's deregistration and its restoration (16 July 2010 to 13 September 2010). The inference is irresistible that the deregistration was as a result of an administrative oversight. No sound reason exists why in such circumstances Palala should lose a potentially valuable mineral prospecting right, even though its other assets and other rights are revested upon restoration. In the circumstances and for the reasons set out above, the court *a quo* erred in its finding that Palala's restoration had not retrospectively restored its mineral prospecting right.

98 Counsel for Aquila submitted that the situation in *Palala* should be distinguished from the present case because *at the date of Ziza's restoration to the register*, the Ziza prospecting right had lapsed due to the expiry of the time for which it had been granted while the right in *Palala* was still current. Counsel for the respondents submitted that the legal consequence of a restoration was that the exclusivity that Ziza's prospecting right would have conferred on Ziza, had the deregistration not taken place, must also be restored.

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24 Para 12

99 I think the answer to this conundrum lies in the identification of the content of the concept of *revesting of the company's property.*[25] To illustrate my reasoning, take this example: a company is on the date of its deregistration the owner of a sack of potatoes and a tin of paint. During the period before the company is restored to the register, the potatoes are consumed and the paint is used to coat a third party's property, movable or immovable. The legislative deeming provision, which counsel for the respondents told me required the law to treat as true that which is untrue, cannot in my judgment require the law to treat the potatoes or the paint, which have ceased to exist except at the atomic level, as revesting in the company upon its restoration to the company register.

100 So too, in my view, in the case of a prospecting right which has lapsed by effluxion of time. A prospecting right when granted gives rise in the hands of the grantee to a complex of rights. None of those rights can survive the expiry of the period for which the prospecting right was granted. The passage of time has put the rights previously enjoyed by the company as far beyond the reach of the company as did the consumption of the company's potatoes or the use of its paint. Moreover, as I have said, the atoms of consumed potatoes or paint which has been used at least continue to exist. A prospecting right, as

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25 *Newlands Surgical Clinic* para 29

an incorporeal, does not. Finally on this topic, s 56(a) of the MPRDA gives effect, I think, in terms to the principle which I have tried to articulate: when a prospecting right expires, it lapses.

101 I therefore conclude that the restoration of Ziza to the company register did not have the effect of revesting it with the Ziza prospecting right. The restoration therefore had no legal effect on the Aquila prospecting right.

102 The decisions of the Minister form the subject of prayer 5. Prayer 5.1 deals with the decision to grant a prospecting right to Ziza. I have found that this grant was unlawful. It follows that the Minister was wrong in coming to this decision. The relief sought in prayer 5.1 must be granted.

103 So too must the relief in prayer 5.2 be granted. That prayer is directed at the decision to set aside Aquila's prospecting right and the acceptance decision which preceded it. As I have found that the prior existence of the unlawfully accepted and granted Ziza prospecting right application affords no impediment to the legality of the decisions regarding the Aquila prospecting right, the Minister's decision in this regard cannot stand.

104 Prayers 7 and 8 are merely consequential to the conclusion that the appeal in relation to the Ziza and Aquila prospecting rights ought to have gone the other way. That relief will be granted.

105 Prayer 11 raises a question of substance. The Minister found that the existence of the Ziza prospecting right precluded the grant of the Aquila mining right. This was the only ground upon which the Minister found that the Aquila's application for a mining right should not be granted. The issue at this level is whether I should merely set aside the decision on appeal and remit the matter to the Minister to decide the question afresh or whether I should, as Aquila asks, substitute the decision of the court for that of the Minister to the extent that I direct that the Minister grant Aquila the mining right for which it applied and direct the Minister to determine, within a specified time, appropriate conditions to which the mining right should be subject.

106 This question raises the important principle of separation of powers. The decision to confer or withhold mining rights has in the first instance been vested in the executive, not the courts. A court should be slow indeed to use its powers to make a decision of this nature. This question is regulated by s 8(1)(c)(ii)(aa) of PAJA. The court can only exercise its power to substitute its decision for that of the administrator when exceptional circumstances are present and it

would be fair (just and equitable) to do so. If these factors are not established, the court must defer to the constitutionally mandated functionary and allow that administrator to try to make a correct decision with such guidance as the judgment of the court might provide. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,[26] the Constitutional Court set out[27] certain factors which in this enquiry inevitably should carry greater weight. These are firstly whether the court is in as good a position as the administrator to make the decision; and secondly whether the decision of the administrator is a foregone conclusion. Thereafter the court should consider other relevant factors, including delay, bias or the incompetence of the administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. The exceptional circumstances enquiry requires an examination of each matter on a case by case basis which accounts for all relevant facts and circumstances.

107 Aquila dealt extensively in its affidavits with its case for substitution. It pointed out in its first founding affidavit that the sole ground for the Minister's decision was that the Ziza prospecting right application was

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27 Para 47

validly granted. It pointed to the inordinate delays that had obstructed its attempts to ventilate its case administratively and begin the process of mining which alone would enable Aquila to begin trying to recoup its R156 million investment. It pointed out that it had to go to court to compel the Minister to decide the appeal. It dealt with complications which will arise, if further delays are experienced, in relation to the allocation of rail capacity to take off the ore it mines. It dealt with complications in relation to its negotiations to buy the surface rights of the ground which have already been caused by the delay and the increased costs in that regard which the delay has occasioned. The delay has had a negative impact on Aquila's application to the water authorities in the Northern Cape for the allocation of water for the purpose of mining. Its application for an allocation of water in this arid region has already been returned with the remark that Aquila should first resolve its issues with the DMR. If other parties are in the interim granted water licenses, this may seriously prejudice Aquila.

108 A further factor upon which Aquila relied in argument before me was the existence of institutional bias against Aquila. I think however that counsel for the respondents are correct on this issue: some of the decisions made in the DMR went in favour of Aquila. This alone, in my view, puts paid to Aquila's submission. If the DMR and the Minister

were institutionally biassed against Aquila, I would expect them to display consistent bias.

109 But neither of the respondents has put up any factual material to contradict the factual foundation of Aquila's case for substitution as I have summarised it above. In particular, the neither the Minister nor PAMDC and Ziza presented any factual material to cast any doubt on the case made at that level by Aquila.

110 Neither PAMDC nor Ziza has ever conducted any prospecting activities on the ground over which they ostensibly obtained rights. PAMDC has not made the slightest move to create the substantial infrastructure and incur the substantial costs which even prospecting, let alone mining, have been shown to require. Their purpose in this litigation has been to obstruct the exercise by Aquila of the rights which it has acquired and seeks to acquire, no doubt in the hope that its capacity to obstruct will drive Aquila commercially to cut PAMDC or one or more of those associated with PAMDC into its operation or to pay PAMDC a sum of money to stop obstructing the process.

111 While I have found that institutional bias has not been established, in my view Aquila has established a high degree of institutional incompetence on the part of the government respondents and a lack

of energy in resolving the issues which arose from that very incompetence. The DMR delayed its decision whether to accept Ziza's application and then concluded entirely irrationally that its delays had exempted Ziza from complying with the MPRDA. The Minister too was content to let the appeal process drag on for years while PAMDC positioned itself to take advantage of the restoration of Ziza to the company register, something they did only in an attempt to strengthen their position against Aquila. And then when the Minister made his decision, he did so without any attempt to provide proper reasons for his conclusions even though the parties provided full argument and the Minister had called for and was given carefully drawn opinions by his own internal legal advisor and by counsel who was briefed to furnish an opinion. The Minister did not do justice to the case he was called upon to decide. I say this not because the Minister was wrong but because he made no attempt to give proper reasons for the conclusions to which he had come.

112 The absence of any suggestion from the respondents in the papers in these proceedings that there is any issue of substance which might be raised to deny Aquila the grant of the mining right it seeks leads me to conclude that this court is in as good a position as the Minister to make the decision. Had the Minister, or any other respondent, advanced facts which suggested that during any negotiations between

the Minister around appropriate conditions might result in the refusal of the mining right, I might well have come to a different conclusion. But no attempt at all has been made in that regard. From this it follows too that the grant of the mining right to Aquila is, or ought to be, a foregone conclusion.

113 I have pointed to the tardiness of the government respondents. Delaying the grant of Aquila's mining right any longer than is necessary will not advance the declared aim in the preamble to the MPRDA to build an internationally competitive administration and regulatory regime.

114 Regard being had to these considerations, Aquila has in my judgment established its case for substitution. Aquila submitted in its first founding affidavit that a period of 60 calendar days would be long enough to enable the Minister to formulate an appropriate set of conditions. There was no answer to this contention. I propose to err on the side of caution and afford the Minister three months for this purpose.

115 In prayer 10A, Aquila seeks a declaratory order that the Ziza prospecting right lapsed with effect from 9 November 2010, the date of Ziza's deregistration. I have found that the Ziza prospecting right,

and the application which gave rise to it, fall to be set aside. That means they must be treated as for present purposes never having been made. It is a consequence of my conclusions on the revesting argument that if I am wrong in holding that the Ziza prospecting right, and the application which gave rise to it, should be set aside, then an order under prayer 10A would be appropriate. But as I have found that these decisions should be set aside, it would be confusing if not contradictory to make an order on prayer 10A. I therefore decline to make any order on that prayer.

116 Prayer 11 seeks to correct the incorrect impression arising from the registration of the prospecting right in favour of PAMDC from the records of the Mineral and Petroleum Titles Registration Office. This registration was not suggested to be appropriate. PAMDC did not hold any such prospecting right. I have said that I do not think that this issue is moot.

117 Finally, as to costs: Aquila asked for a punitive costs order. But the respondents have raised arguable issues before me. I do not think such a costs order is warranted. There can be no dispute that costs of two counsel are justified.

118 I make the following order:

1 (prayer 1) Reviewing and setting aside the decision of the fourth respondent to accept the sixth respondent's application for a prospecting right with reference number NC 30/5/1/1/2/179PR, which decision was taken on or about 17 August 2005;

2 (prayer 1A) To the extent necessary, exempting the applicant in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") from the obligation to exhaust its internal remedies in respect of the order sought in paragraph 1 above;

3 (prayer 1B) To the extent necessary, extending the 180-day time period for institution of judicial review proceedings contemplated in section 7(1) of PAJA so as to terminate one day after the institution of this application in respect of the order sought in paragraph 1 above;

4 (prayer 2) Reviewing and setting aside the decision of the third respondent to grant a prospecting right with reference number NC 30/5/1/1/2/179PR to the

sixth respondent, which decision was communicated by means of a letter dated 26 February 2008 and substituting this decision with the following: the sixth respondent's application for a prospecting right with reference number NC 30/5/1/1/2/179PR is refused;

5 (prayer 3) Reviewing and setting aside the decision of the third respondent taken on or about 17 November 2011 to execute a prospecting right with reference number NC 30/5/1/1/2/179PR in favour of the fifth respondent;

6 (prayer 4) Reviewing and setting aside the execution of a prospecting right with reference number NC 30/5/1/1/2/179PR by the fourth respondent in favour of the fifth respondent on or about 19 November 2011, and the registration of such right in the Mineral and Petroleum Titles Registration Office;

7 (prayer 5) Reviewing and setting aside the following decisions of the first respondent, which decisions were communicated by means of a letter dated 2 July 2015:

7.1 (prayer 5.1) the decision to dismiss the appeal by the applicant under section 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the Aquila Appeal");

7.2 (prayer 5.2) the decision to uphold the cross-appeal by the fifth respondent under section 96(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the PAMDC Cross-Appeal");

7.3 (prayer 5.3) the decision to reject the applicant's application for a mining right (with reference number NC 30/5/1/2/2/295MR) in respect of iron ore, pyroxenite, copper ore, zinc ore, manganese ore, ferrous and base metals on portion 114 ("the Aquila Mining Right Application");

8 (prayer 7) Substituting the first respondent's decision in respect of the Aquila Appeal with the following: The Aquila Appeal is upheld, the grant of a prospecting right with reference number NC 30/5/1/1/2/179PR to the sixth respondent is set aside and the sixth respondent's application for a prospecting right with reference number NC 30/5/1/1/2/179PR is refused;

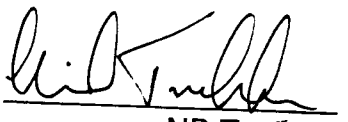
9 (prayer 8) Substituting the first respondent's decision in respect of the PAMDC Cross-Appeal with the following: The PAMDC Cross-Appeal is dismissed;

10 (prayer 9) Substituting the first respondent's decision in respect of the Aquila Mining Right Application with the following: The Aquila Mining Right Application is granted subject to conditions to be determined by the first respondent within three months of the date on which this court order is made;

11 (prayer 10A) No order is made on this prayer;

12 (prayer 11) Directing the second respondent to remove from the records of the Mineral and Petroleum Titles Registration Office the prospecting right with reference number NC 30/5/1/1/2/179PR and any reference to the registration of the prospecting right with reference number NC 30/5/1/1/2/179PR.

13 Directing the respondents to pay the applicant's costs in this application including the costs arising from the employment by the applicant of both senior and junior counsel. The respondents' liability for costs will be joint and several.



NB Tuchten
Judge of the High Court
21 November 2016

AquilaDMR_PAMDC

For the applicant:
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APPENDIX

UA. 21/11/16.

Date	Where in pleadings or Rule 53 record (pagination top right)	Where in core bundle (pagination bottom right)	Event
19 April 2005	Annexure MH13 pages 190-294	1-105	ZIZA applies for a prospecting right
30 April 2005			Expiry of one-year period of exclusivity in items 8(1) and (2) of Schedule II to the MPRDA
17 August 2005	Supplementary Rule 53 record pages 1 to 3	106-108	Acceptance of ZIZA's application for a prospecting right
18 April 2006	Founding affidavit para 37 page 31 (the application does not form part of the papers)	Not included in core bundle	Aquila applies for a prospecting right
2 May 2006	Annexure MH14 page 295	109	Acceptance of Aquila's application for a prospecting right
11 October 2006	Annexure MH5 page 137-138	110-111	Grant of prospecting right to Aquila
28 February 2007	Annexure MH6 page 139-167	112-140	Prospecting right executed in favour of Aquila
26 November 2007	Annexure MH18 page 345	141	PAMDC is incorporated
26 February 2008	Annexure MH3 page 121-122	142-143	Grant of prospecting right to ZIZA
9 November 2010	Annexure MH25 page 419-428	144-159	ZIZA is deregistered
14 December 2010	Annexure MH7 page 168-171	160-163	Aquila applies for a mining right

Date	Where in pleadings or Rule 53 record (pagination top right)	Where in core bundle (pagination bottom right)	Event
22 December 2010	Annexure MH26 page 429-430	164-165	Acceptance of Aquila's application for a mining right
17 November 2011	Rule 53 record page 146-153	166-173	DDG makes decision to execute a prospecting right in favour of PAMDC
19 November 2011	Annexure MH4 page 123-136	174-187	Prospecting right executed in favour of PAMDC
December 2011	Founding affidavit para 68 page 48 (the renewal application does not form part of the papers)	Not included in core bundle	Aquila submits an application to renew its prospecting right
28 February 2012	Annexure MH35 page 489	188	Acceptance of Aquila's application for renewal of prospecting right
25 February 2013	ZIZA / PAMDC heads of argument para 6.2.2	Not included in core bundle	The ZIZA prospecting right expires, according to ZIZA / PAMDC
14 October 2014	Founding affidavit para 95.7.2	Not included in core bundle	ZIZA is restored to the register of the UK Companies House
2 July 2015	Annexure MH8 page 172-173	189-190	Minister dismisses the Aquila appeal, upholds the PAMDC cross-appeal and refuses to grant the Aquila mining right

Date	Where in pleadings or Rule 53 record (pagination top right)	Where in core bundle (pagination bottom right)	Event
20 July 2015	Rule 53 record pages 1251 to 1292	191-192	PAMDC applies for a new prospecting right
31 July 2015	Annexure MH36 page 491-492	193-194	Renewal of Aquila's prospecting right