CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/18

In the matter between:

AQUILA STEEL (S AFRICA) (PTY) LIMITED	Applicant
and	
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

Neutral citation:	*Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others* [2018] ZACC 5
Coram:	Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgments:	Cameron J (majority): [1] to [121] Theron J (minority): [122] to [136]

Heard on: 23 August 2018

Decided on: 15 February 2019

Summary: Mining — Minerals and Energy — Application for Prospecting Right — Application for Mining Right – Non Compliance with Requirements - Duplicate Grants – Substitution of Mining Right

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ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is granted.
2. The appeal is upheld with costs, including the costs of two counsel.
3. The order of the Supreme Court of Appeal is set aside.
4. In its place there is substituted:

   "The appeal is dismissed with costs, including the costs of two counsel. No order is made on the cross-appeal."

JUDGMENT

CAMERON J (Basson AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J and Petse AJ concurring)

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal,[1] overturning by a majority a judgment of the High Court of

[1] *Pan African Mineral Development Company (Pty) Ltd v Aquila Steel (S Africa) (Pty) Ltd* [2017] ZASCA 165; 2018 (5) SA 124 (SCA) (29 November 2017) (Ponnan JA, with Bosielo and Mathopo JJA and Tsoka AJA concurring; Willis JA dissenting) (Supreme Court of Appeal judgment).

South Africa, Gauteng Division, Pretoria (High Court).[2] The applicant, Aquila Steel (S Africa) (Pty) Limited (Aquila), is a locally incorporated subsidiary of an Australian resources company. Aquila was the applicant before the High Court and the first respondent in the Supreme Court of Appeal. The first to fourth respondents in this Court are the Minister of Mineral Resources and three officials of the Department of Mineral Resources (Department) responsible for implementing the Mineral and Petroleum Resources Development Act[3] (MPRDA). It is their decisions under the statute that Aquila targets in this litigation.

[2] Aquila's corporate antagonists, who resist its relief against the departmental decisions, are the Pan African Mineral Development Company Limited (PAMDC – fifth respondent), a private company owned by the governments of Zambia, Zimbabwe and South Africa; and ZiZa Limited (ZiZa – sixth respondent), a company incorporated in the United Kingdom. ZiZa was originally incorporated in 1893, as the Bechuanaland Railway Company Limited. Cecil John Rhodes was the Prime Minister of the Cape Colony. As part of his colonial design, he made land grants to the company. More than a century later, ZiZa is now owned – as its name suggests – by the governments of Zimbabwe and Zambia. PAMDC was incorporated in South Africa on 26 November 2007 to take over the prospecting activities of ZiZa. (Since their interests match, I refer, except where necessary, to PAMDC and ZiZa together as ZiZa.)

Factual and statutory background

[3] The dispute arises from what counsel for ZiZa rightly called "delinquent" and "unlawful" conduct on the part of the Department. The Department not only botched, but egregiously botched, coincident prospecting and mining rights applications ZiZa and Aquila made to its Northern Cape office between April 2005 and December 2011. This led to overlapping and double grants in which this litigation has its genesis.

[2] *Aquila Steel (South Africa) Limited v Minister of Mineral Resources* 2017 (3) SA 301 (GP) (22 November 2016) (Tuchten J) (High Court judgment).

[3] Act 28 of 2002.

[4] It happened this way. The MPRDA came into force on 1 May 2004. Breaking from the past, the statute established state sovereignty[4] and state custodianship[5] over all the Republic's mineral and petroleum resources "for the benefit of all South Africans"[6] and "to promote equitable access" for historically disadvantaged persons.[7] But the new statute protected those who held rights under the common law or under the now-repealed Minerals Act.[8] They could retain their rights, however, only if they were actively being used. So holders of unused old-order rights were put in a squeeze. They were given a tight deadline. They had just one year – until 30 April 2005 – in which to apply under the MPRDA for new-order prospecting or mining rights. No longer could a mineral rights-holder sterilise rights by sitting on them. The principle was: use it or lose it.

[5] The crucial transitional provisions are packaged up at the back of the statute, in Schedule II. Their import is our concern here. Item 8 is headed "Processing of unused old-order rights". At the time that matters for us,[9] it provided:

> "(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.

[4] Section 2(a) of the MPRDA.

[5] Id section 2(b) and section 3(1).

[6] Id section 3(1).

[7] Id section 2(a)-(d).

[8] Act 50 of 1991.

[9] With effect from 7 June 2013, item 8(1) was amended by adding, right at its end, the words "or for the period for which it was granted, acquired or issued or was deemed to have been granted or issued, whichever period is the shortest". The result is that item 8(1) now reads:

> "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, or for the period for which it was granted, acquired or issued or was deemed to have been granted or issued, whichever period is the shortest."

(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)."[10]

[6] The effect was this. During the one-year grace period, holders of unused old-order rights enjoyed the same rights as before the MPRDA came into force.[11] In addition, they enjoyed exclusivity to apply for new-order title. They had the sole right to apply for prospecting or mining rights over the land over which they held unused old-order rights.[12] As will emerge, a lot turns on "exclusivity" and "sole".

[7] Section 16 of the MPRDA regulates how applications for prospecting rights should be made. This includes holders of unused old-order rights. This is how it read when the statute was enacted, and at all times that matter to the parties before us (it has since been amended):[13]

"(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;

[10] Item 8 of Schedule II of the MPRDA.

[11] Id item 8(1).

[12] Id item 8(2).

[13] The amended section 16 came into effect on 7 June 2013, after the events in issue. It adds subsection (2)(c), which reads:

> "[N]o prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused."

In addition, it deletes from subsection (3) the words "of that fact and return the application to the applicant". Amendments were also made to the environmental and consultation requirements set out in subsection (4).

(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.

(6) The Minister may by notice in the *Gazette* invite applications for prospecting rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted."[14]

[8] Before the MPRDA came into force, ZiZa held large tracts of land in the Northern Cape. Its title included, at common law, old-order mineral rights over those lands. These stemmed from the railway grants Cecil John Rhodes made to ZiZa in the 19th century. In terms of item 8(1) of Schedule II, ZiZa had one year – until 30 April 2005 – to exercise its exclusive right to apply for a new-order prospecting right, thus converting its unused old-order right into an MPRDA right.

[9] Shortly before this cut-off, on 24 March 2005, the Zimbabwean, Zambian and South African governments decided to establish PAMDC as a vehicle for all of ZiZa's

[14] Section 16 of the MPRDA.

mineral rights. The next day, ZiZa resolved to apply for its unused pre-MPRDA mineral rights to be converted under the statute. Eleven days before the 30 April 2005 deadline, on 19 April 2005, it filed its application for a prospecting right under the MPRDA.

[10] ZiZa's application did not comply with section 16 nor with the regulations issued under the MPRDA. Its shortcomings were striking.[15] Among them was that the exact parameters of the land in which ZiZa's rights were held were anything but clear. Despite this, the Department on 17 August 2005 accepted the application. More on this later.

[11] On 18 April 2006, almost a year after the one-year transitional grace period elapsed, Aquila submitted an independent application for a prospecting right over the very same Kuruman land (properties).[16] This application, too, the Department accepted. One of the questions on which the Courts below differed is whether Aquila could apply at all while ZiZa's conversion application was pending. The Department's Regional Manager in Kimberley recorded its acceptance of Aquila's application in a letter dated 2 May 2006. And on 11 October 2006 the Department awarded Aquila a prospecting right. This was notarised on 28 February 2007 and registered on 17 July 2007.[17]

[12] The award of this prospecting right led Aquila to expend almost R157 million on prospecting operations. And its search was not in vain: Aquila found substantial manganese deposits, estimated at over 140 million tonnes, worth many billions of rands. A manganese reserve of 20.2 million tonnes was identified on a portion which

[15] See [22] below.

[16] The full description is portion 114 (a portion of portion 107) of farm no. 703 in the district of Kuruman, Northern Cape Province, plus a further twelve properties. The properties as a whole include portion 114 and cover about 37 000 hectares, all in the Kuruman district.

[17] Section 19(2)(a) of the MPRDA requires the holder of a prospecting right to lodge it for registration at the Mineral and Petroleum Titles Registration Office (at the time, the Mining Titles Office). The provision has been amended since 7 June 2013 in ways that do not affect this judgment.

it now wants to mine. But it cannot. Not so long as it is stuck in the glue of departmental delinquency.

[13] Not long after PAMDC was formally incorporated in South Africa, on 26 November 2007, the Department's Deputy Director-General on 26 February 2008 granted ZiZa a prospecting right that included the disputed land. This was nearly two years after the Department granted Aquila a prospecting right over the same land. In 2009 ZiZa belatedly started providing parts of the crucial information missing from its 2005 application for a prospecting right. This included maps of the land over which it held old-order rights.

[14] ZiZa was deregistered on 9 November 2010. Aquila denies knowing of the overlapping rights, whilst PAMDC says it discovered the existence of Aquila's rights in April 2010.

[15] Aquila continued to prospect and, in December 2010, it applied for a license to mine the manganese deposits. This application for a mining right was accepted later that month. But very soon after, in January 2011, the Department told Aquila that PAMDC held overlapping prospecting rights in the Kuruman land. It claimed that ZiZa's application had not been processed because of an administrative error. The Department explained to Aquila that ZiZa's rights had since been transferred to PAMDC.

[16] Aquila investigated the overlapping rights. In March 2011 Aquila met with PAMDC, who asserted that they held prospecting rights over the land covered by Aquila's right. Aquila requested details to establish the extent of the overlap from both PAMDC and the Department. None were provided. On 17 November 2011 – while ZiZa was deregistered – the Department granted ZiZa's application for a prospecting right – but it did so in favour not of ZiZa but of PAMDC, a totally different entity.

[17] Meanwhile, Aquila continued to fulfil the requirements for the mining right for which it had applied. These were complete by December 2011, the deadline the Department had set. Aquila made an application to renew its prospecting right that month. In February 2012, the Department informed Aquila that this application was accepted.

[18] Unable to get information on the nature of ZiZa's or PAMDC's right, Aquila in 2013 issued requests under the Promotion of Access to Information Act[18] (PAIA). PAMDC gave Aquila information about an overlapping right but it was still not clear to Aquila whether this covered the disputed portion of land over which both entities were seeking rights.

[19] On 29 October 2013, Aquila appealed to the Minister against the grant of a prospecting right to PAMDC.[19] PAMDC cross-appealed, asking for the decisions to accept and grant Aquila's prospecting right to be set aside. On 14 October 2014, ZiZa was restored to the companies' register of England and Wales (re-registered). By 23 February 2015, the Minister had still not given a decision. This prompted Aquila to seek a High Court order requiring the Minister to decide the appeal and

[18] Act 2 of 2000.

[19] In terms of section 96 of the MPRDA, which reads:

> "(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to-
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> (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
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> (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.
>
> (2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.
>
> (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.
>
> (4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section."

counter-appeal. This litigation was settled when the Minister agreed to make a decision by 2 June 2015.

[20] That deal was kept – or almost kept, one month late. The Minister finally communicated his decision on 2 July 2015. He determined that ZiZa had lodged its prospecting right during the period in which it enjoyed an exclusive Schedule II right. Its prospecting right was therefore lawfully granted – and Aquila's had been wrongly accepted. He also declined Aquila's application for a mining right because ZiZa had a prospecting right over the same land.

[21] PAMDC made a new application for a prospecting right over the same properties on 20 July 2015. At the time of the High Court judgment, it had not received notification of acceptance of that application. For now, all is in limbo.

Litigation history

High Court

[22] The litigation commenced with a review Aquila instituted under the Promotion of Administrative Justice Act[20] (PAJA), seeking to set aside the Department's decision of 17 November 2011 to grant PAMDC a prospecting right. It alleged bias because of the South African government's significant interest in PAMDC but later abandoned this complaint. Its more lethal complaint, in which it persisted, was that the Department's decision to accept ZiZa's prospecting right application was irregular because ZiZa's application did not comply with the MPRDA and its regulations.[21] This was because the application did not describe ZiZa's old-order rights; nor, sufficiently, the area over which ZiZa sought a prospecting right; the contested land did not appear in any of the maps submitted; the prospecting work program lacked meaningful detail; ZiZa had not shown financial or technical ability; and it did not provide certificates of existing mineral rights.

[20] 3 of 2002.

[21] Regulations 2 and 5 to 9 deal with prospecting rights applications.

[23] Aquila also challenged the grant of the prospecting right as flawed and irregular. This was because of irregularities in the description of the minerals to which the grant applies; the vague description of the area the right covers; the grant did not stipulate the duration; and the application failed to evince capacity to use the prospecting right. Aquila also relied on its own grant of a prospecting right some 18 months before the grant to ZiZa, and complained about the fact that the grant, though to ZiZa, was executed in favour of PAMDC. Aquila also challenged the regularity of the appeal decisions on the basis that the Minister's reasons were deficient and show that he failed to properly apply his mind to the appeal.

[24] ZiZa's primary submissions were that Aquila's prospecting right lapsed in October 2011, five years after it was granted; and that Aquila could not challenge the Regional Manager's acceptance of ZiZa's application for a prospecting right. ZiZa contended that, in the internal statutory appeal to the Minister, Aquila did not challenge the acceptance decision and should not be able to bypass the internal remedies by reviewing that decision.[22] The review application, it said, was thus moot. ZiZa insisted that section 16 did not provide for the Regional Manager to reject an application. The fact that it had lodged an application for a prospecting right, however incomplete, nevertheless secured its place at the front of the queue.

[25] It contended that, upon its re-registration as a corporation, it was deemed to have continued in existence as if it had not been deregistered. This included restoration of its exclusive prospecting right.

[26] The High Court upheld Aquila's review. It drew a distinction between the *acceptance* of an application and the *grant* of a right under the MPRDA. It noted that an application had to be made in the manner prescribed under section 16 and the

[22] ZiZa did not persist with the contention, rejected in the High Court, that Aquila had failed to exhaust its internal remedies as section 7(2) of PAJA requires.

Regulations for it to be acceptable. If an application did not comply with those provisions the Regional Manager was enjoined to return the application. Here, the High Court held that "the [RM] was left with no discretion".[23]

[27] The High Court held that the return of an application by the Regional Manager amounted to a rejection. An incomplete application could not secure a place in the queue because "it would result in the potential sterilisation of the right to prospect for the minerals on the land in question. An indolent applicant could delay the potential exploitation of the mineral for years".[24]

[28] The High Court found that ZiZa never transferred its rights to PAMDC; in fact there was no basis on which those rights could have been granted to PAMDC because the rights granted to ZiZa had lapsed. Exclusivity under item 8 of Schedule II ran only until 30 April 2005: after that, others are able to join the queue. Exclusivity was thus limited to one year, and ZiZa's exclusive rights expired on 30 April 2005. From that date, ZiZa was just another applicant. Regarding deregistration, the High Court held that ZiZa's prospecting right lapsed under section 56(c) of the MPRDA.[25] However, a declaratory order that ZiZa's rights had lapsed on deregistration was unnecessary in view of the Court's other conclusions.

[29] Though the Court did not sustain Aquila's complaint of bias, it did note "a high degree of institutional incompetence".[26] It found, therefore, that the most equitable remedy would be to substitute its decision for the Minister's. The Court thus set aside

[23] High Court judgment above n 2 at para 16.

[24] Id at para 19.

[25] Section 56 provides:

> "Any right, permit, permission or license granted or issued in terms of this Act shall lapse, whenever—
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> . . .
>
> (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".

[26] High Court judgment above n 2 at para 111.

the Department's acceptance of ZiZa's application for a prospecting right, the decision to grant the right to ZiZa and to execute the right in favour of PAMDC. It also set aside and substituted the Minister's decisions on ZiZa's and Aquila's internal appeals and granted Aquila a mineral right, on terms the Minister was to determine within three months.

Supreme Court of Appeal

[30] With the High Court's leave, ZiZa and the Department appealed, while Aquila conditionally cross-appealed the decision on ZiZa's deregistration.[27] ZiZa prevailed. The Supreme Court of Appeal overturned the High Court's finding that ZiZa's prospecting right application was irregular in not reflecting the properties with sufficient specificity. The Court noted that ZiZa's application included hand-drawn plans that identified the co-ordinates of the properties, the registered descriptions of the farms, the co-ordinates of the total area and a description of the old-order rights and permits in respect of which application was being made, including the farm name, division, certificate number, date of grant, area size and grid reference. This, the Court held, constituted sufficient compliance with the statute's requirements. Furthermore, the Department had captured ZiZa's application on its system as early as November 2006. This meant, the Court held, that the Department was aware of the overlap. The Department was thus not unaware of the properties to which ZiZa's application related.

[31] Finally, the Supreme Court of Appeal took note that the Department allows applicants to supplement their applications.[28] Moreover, item 8(3) of Schedule II of

[27] Aquila notes that ZiZa / PAMDC did not appeal to the Supreme Court of Appeal against the orders of the High Court setting aside the decisions accepting ZiZa's application for prospecting and granting it rights. ZiZa insisted that it has never conceded that the decision to accept and grant its prospecting right application was invalid. It contended that it has merely refrained from dealing with their substance in any detail because an order setting them aside is irrelevant to the outcome of this case. That is also why it did not appeal the orders reviewing and setting aside the acceptance and grant decisions.

[28] This Court's exposition of the facts in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC) (*Dengetenge*) at paras 13 and 20 recorded, without ruling on the permissibility or implications of the fact, that deficiencies in the

the MPRDA stipulates that an old-order right terminates only after the application for a prospecting or mining right has been dealt with and is granted or refused. ZiZa's application should have been returned by the Regional Manager. The Court dismissed Aquila's contention that ZiZa's application for a prospecting right should have been returned within 14 days by the Regional Manager for want of compliance with the statute. It did so on the basis that Aquila had failed to direct a ground of review at this conduct. Instead, Aquila challenged the Regional Manager's acceptance of ZiZa's application, which occurred only later and was distinct from the failure to return the application within 14 days.

[32] In their cross-appeal to the Minister, ZiZa and PAMDC challenged the acceptance and grant of Aquila's application for a prospecting right. The High Court had set aside the Minister's decision to uphold the cross-appeal and substituted its own decision for that of the Minister. The Supreme Court of Appeal reversed the substance of that decision.

[33] The Supreme Court of Appeal also overturned the High Court's approach to the transitional provision, item 8 of Schedule II, which capped the exclusivity period for old-order rights-holders' applications at one year. The "express language" of item 8(3), the Court concluded, prolongs the continued validity of the unused old-order right until the prospecting application is either granted or refused. Item 8 affords security of tenure to holders of unused old-order rights until those rights have been converted or rejected under the MPRDA.[29]

[34] The Supreme Court of Appeal in addition rejected the remedy the High Court granted Aquila, which was to substitute the Minister's decision to reject Aquila's appeal with a decision to grant Aquila's mining right application, albeit on terms to be

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application at issue there had been permitted to be rectified. ZiZa's argument sought to draw strength from the fact that *Dengetenge* noted this fact "without censure".

[29] Supreme Court of Appeal judgment above n 1 at para 26.

decided by the Minister later. The Supreme Court of Appeal, finally, rejected Aquila's cross-appeal on the effect of ZiZa's deregistration.

In this Court

Leave to appeal

[35] Aquila now seeks leave to appeal against the Supreme Court of Appeal decision, which it asserts is replete with misdirections of fact and law. The Department and ZiZa oppose. The parties' contesting claims entail the interpretation of the transitional and other provisions of the MPRDA. These almost inevitably implicate constitutional issues.[30] In addition, the nature of the exclusivity and priority Schedule II of the MPRDA accords an unused old-order right, and the impact of a combined reading of Schedule II with the statute itself, are opaque. They need explication. The questions that arise involve arguable points of law of wide general public importance. There are also prospects of success. Leave to appeal must follow.

Issues

[36] The issues are these:

(a) Was the grant of a prospecting right to ZiZa on 26 February 2008 valid?

(b) When Aquila applied for a prospecting right on 18 April 2006, was it entitled to do so?

(c) Should the Minister have upheld Aquila's appeal against the refusal to grant it a right to mine?

(d) Does the doctrine in *Kirland* / *Oudekraal* impede relief for Aquila?

[30] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 42; *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 37:

> "There can be no doubt that this case raises constitutional issues of importance. It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources. Furthermore, this legislation regulates the mining industry which is a vital component of this country's economy, not only in terms of its contribution to the national GDP, but also in respect of creating jobs for thousands of people who otherwise would be unemployed. These facts, coupled with the good prospects of success, warrant the granting of leave."

(e) If not, to what remedy is Aquila entitled?

Assessment

[37] The Minister's reason for rejecting Aquila's internal appeal against the grant of a prospecting right to ZiZa was that Aquila's own prospecting right application had been unlawfully accepted, processed and granted.[31] This, the Minister said, was because Aquila's application was lodged and processed during the period that afforded exclusivity to ZiZa.

[38] The soundness of the Minister's reasoning depends on (a) whether Aquila's application for a prospecting right and the grant of that right to it rendered the later grant of a prospecting right to ZiZa unlawful; and if so, (b) whether the Department lawfully accepted Aquila's application on 2 May 2006.[32]

Was the ZiZa prospecting right lawfully granted?

[39] The foundation of the Minister's reasoning – that if Aquila's prospecting right was unlawfully accepted and granted then ZiZa's prospecting right was lawfully granted – needs only to be stated to be rejected. Just because Aquila may have applied for a prospecting right prematurely,[33] or just because the Minister should not have granted Aquila the right it sought before considering ZiZa's application, does not mean that the Minister lawfully granted ZiZa a prospecting right. Whether ZiZa's prospecting right was lawfully granted depends on whether the Minister and it complied with the requirements of the MPRDA. Whether the Minister did so when granting Aquila its prospecting right is an independent question: either could have been lawfully granted or both could have been unlawfully granted.

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[31] The Department accepted Aquila's prospecting right application on 2 May 2006 and granted Aquila a prospecting right on 11 October 2006.

[32] Section 16(2)(b) of the MPRDA precludes acceptance of an application for a prospecting right if any other person "holds a prospecting right" for "the same mineral and land". As noted above n 9, with effect from 7 June 2013 subparagraph (c) was added, barring acceptance of a prospecting right application also in the event that a "prior application . . . has been accepted . . . which remains to be granted or refused".

[33] See below [57] to [67].

[40] The question is then: Did ZiZa's application for a prospecting right comply with section 16 and regulations 2, 5 and 7? If not, then that is the end of this question. The decision granting ZiZa's prospecting right must be set aside. Then Aquila would be entitled to apply for a mining right, as ZiZa would not have a valid prospecting right. This is because the statute precludes the award of a mining right if any other person holds a prospecting right.[34] At the same time, whether Aquila's prospecting right was lawfully granted would be irrelevant; the MPRDA does not require an aspirant mining right holder to hold a valid prospecting right.

[41] The Supreme Court of Appeal held that ZiZa's prospecting right application complied "sufficiently". In this, it referred to the maps ZiZa provided at lodging. These, the Supreme Court of Appeal ruled, "sufficiently described" the properties to enable the Department to accept ZiZa's application, identify the properties to which it related and log them onto its system.[35] This led the Supreme Court of Appeal to observe that "as early as November 2006" the Department was aware of the overlap between the ZiZa and Aquila applications.[36]

[42] Both the Supreme Court of Appeal's legal conclusion about the sufficiency of ZiZa's maps and its factual finding about when the overlap dawned on the Department seem mistaken. The two errors are linked. The documentary evidence shows with fair steadiness that the Department became aware of the overlap only in late 2009. This was after ZiZa at long last supplied sketch plans properly coordinated in

[34] Section 22(2)(b) of the MPRDA requires the Regional Manager of the Department to accept an application for a mining right provided that "no other person holds a prospecting right . . . for the same mineral and land".

[35] Supreme Court of Appeal judgment above n 1 at para 21.

[36] Id at para 21. This factual conclusion by the Supreme Court of Appeal appears to derive from a hand-written note on an undated internal audit memorandum of the Department's Northern Cape office, on which is inscribed "overlaps with ZiZa Limited". This appears to have been attached, with matching cross-references, to a memo dated 23 November 2006. ZiZa relied on this for its submission, which the Supreme Court of Appeal accepted, that the overlap was discovered early. But the audit memo is undated, and everything else in the record points away from inferring that it was made contemporaneously with the memo. On the contrary, the documentary evidence the Department itself proffers shows repeatedly that the overlap was discovered only some three years later.

accordance with the statute's requirements. That was only in 2009 – nearly *four years* after ZiZa lodged its application in April 2005. And the evidence indicates that the Department's belated realisation of the overlap was attributable precisely to the poor quality of ZiZa's maps.

[43] Had the deficiencies of the ZiZa application been solely its maps, this alone would suggest that they were fatal: for, considering the formalities the application demanded with their purpose in mind, as we must,[37] we have to determine what was demanded of an old-order rights-holder and why. Regulation 2(2) required ZiZa to lodge "a plan of the land to which the application relates, in accordance with generally accepted standards", including the coordinates and spheroid of the land.[38] The very object of this requirement was to eliminate overlaps and to eliminate them from the outset.

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[37] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 30 states:

> "Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between 'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provisions will lead to a different result."

[38] Regulation 2(2) provides:

> "An application contemplated in subregulation (1) must be accompanied by a plan of the land to which the application relates, in accordance with generally accepted standards, signed and dated by the applicant and must contain–
>
> (a) the co-ordinates and shperoid (Clarke 1880/Cape Datum, WGS84/WGS84, WGS94/Hartebeesthoek94) of the land to which the application relates;
>
> (b) the north point;
>
> (c) the scale to which the plan has been drawn;
>
> (d) the location and where applicable, the name and number of the land to which the application relates;
>
> (e) the extent of the land to which the application relates;
>
> (f) the boundaries of the land to which the application relates;
>
> (g) surface structures and registered servitudes where applicable; and
>
> (h) the topography of the land to which the application relates."

[44] The ZiZa application came nowhere near fulfilling the requirements. The quality of its maps was lamentable to the point of being amateurish. In this they thwarted the purpose of the requirements, which was to avoid overlaps. The consequences were severely detrimental for everyone – for the Department, for Aquila and for PAMDC itself.

[45] But the Department allowed ZiZa to supplement its maps from time to time. Aquila disputed the permissibility of this, but I shall accept in ZiZa's favour, without deciding so, that supplementation was in order. This leaves further deficiencies in ZiZa's application, which the Supreme Court of Appeal did not consider at all. These endured beyond lodgement and acceptance. And they remained substantial.

[46] So substantial that, on 11 September 2006 – some 16 months after the application was lodged, and four months after the Department accepted it – the Regional Manager wrote to ZiZa. He told ZiZa flatly: "your application does not comply with section 17(1)(a) and (b)".[39] He specified the two defects: (1) "[t]he entire prospecting work program presentation is unacceptable" and (2) "[f]inancial access must be proved".

[39] The Regional Manager's letter refers to section 19(1)(a) and (b), a clear slip of the pen for section 17(1)(a) and (b). Section 17(1) provides:

> "Subject to subsection (4), the Minister must grant a prospecting right if–
>
> (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
>
> (b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;
>
> (c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;
>
> (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996); and
>
> (e) the applicant is not in contravention of any relevant provision of this Act."

[47] The Department's recorded objections didn't stop there. The deficiencies were expounded a second time, in a memorandum dated 14 January 2008. This was from Mr Tshwaro Petso, the Department's Chief Mine Economist, Kimberley, to the Regional Manager of the Department's Northern Cape office. By now, 16 months later, the Department at least considered ZiZa's sketch plan and supporting information as conforming to regulation 2(2).

[48] But further deficiencies remained. Regulation 7(1)(h) and (i) were not complied with. [40] This was "because time frames were not assigned to the various

[40] Regulation 7 provides:

"(1) The prospecting work programme must contain–

(a) the full particulars of the applicant;

(b) the plan contemplated in regulation 2 (2), showing the land to which the application relates;

(c) the registered description of the land to which the application relates specifying the farm name and subdivision;

(d) the mineral or minerals to be prospected for;

(e) a geological description of the land substantiated by a geological map;

(f) a description of how the mineral resource and mineral distribution of the prospecting area will be determined through

(i) the prospecting work to be performed;

(ii) a geochemical survey to be carried out; and

(iii) a geophysical survey to be undertaken;

(g) a description of the prospecting method or methods to be implemented that may include–

(i) any excavations, trenching, pitting and drilling to be carried out;

(ii) any bulk sampling and testing to be carried out; and

(iii) any other prospecting methods to be applied;

(h) all planned prospecting activities must be conducted in phases and within specific timeframes;

(i) technical data detailing the prospecting method or methods to be implemented and the time required for each phase of the proposed prospecting operation;

(j) details with documentary proof of–

(i) the applicant's technical ability or access thereto to conduct the proposed prospecting operation; and

(ii) a budget and documentary proof of the applicant's financial ability or access thereto, which may include but is not limited to the following:

activities proposed in the works programme". In addition, the economist pointed out that ZiZa had not demonstrated technical ability to carry out the operations it proposed in the works program. This meant regulation 7(j)(i) had not been complied with. The capacity to finance the expenditure associated with the proposed operations had also not been demonstrated. The departmental economist concluded flat-out that "[t]his application does not comply with the requirements of section 17(1)(a)".

[49] There is little point in going on and on about these further deficiencies. It is enough to say that the prospecting work program, too, bordered on the amateurish, for it envisaged entirely a "desk study", with no prospecting methods or prospecting data set out and without any provision for financing. This was because the "seed capital" the governments involved in ZiZa promised, on the prospect of which the conversion application relied, never materialised. So ZiZa never had funding to carry out prospecting, let alone mining.

[50] Unlike the maps, these defects were never remedied. Not to this day. No one contended otherwise. So glaring were they that they lead to an overwhelming conclusion. The Department's acceptance of ZiZa's prospecting right application on

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(aa) loan agreements entered into for the proposed prospecting operation;

(bb) resolution by a company to provide for the finances required for the proposed prospecting operation; and

(cc) any other mechanism or scheme providing for the necessary finances for the proposed prospecting operation;

(k) a cost estimate of the expenditure to be incurred for each phase of the proposed prospecting operation where the expenditure must be broken down into–

(i) direct prospecting costs;

(ii) labour costs;

(iii) costs pertaining to the rehabilitation and management of environmental impacts; and

(iv) any other direct cost; and

(m) an undertaking, signed by the applicant, to adhere to the proposals as set out in the prospecting work programme.

(2) The prospecting work programme referred to in subregulation (1) shall form part of the prospecting right when such right is granted."

17 August 2005, and its award of that right to ZiZa on 26 February 2008, were both flawed. The shabby state of ZiZa's application meant that in terms of section 16(3) the Regional Manager of the Department ought to have returned it to ZiZa: but he did not do so.

[51] It is true that the Regional Manager did not have the power to grant or refuse ZiZa's application, since only the Minister enjoys that power under section 17(1). Yet the statute imposes on the Regional Manager an obligation to return an application that is not lodged "in the prescribed manner".[41] The statute defines "prescribed" as "prescribed by regulation".[42] Both regulation 2 and regulation 5 explicitly "prescribe" how an application for a prospecting right under section 16 must be made, and what it must contain. This suggests that the Regional Manager has an evaluative function when accepting an application. He or she much check that the application has been lodged "in the prescribed manner", in terms of each applicable regulation.[43] It also means that an application that fails to comply with either regulation "must" be returned.

[52] Failure by the Regional Manager to return an application non-compliant with the regulations constitutes failure to carry out an expressly specified statutory duty ("must . . . return"). It follows in my view that the malperformance in issue may constitute administrative action reviewable under PAJA; but, since Aquila's notice of motion did not target the non-return specifically, targeting the grant of a prospecting

[41] Section 16(1)(b), read with section 16(2)(a) of the MPRDA.

[42] Id section 1.

[43] If so, this renders debatable the suggestion by the Supreme Court of Appeal in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* [2015] ZASCA 82; 2016 (1) SA 306 (SCA) at para 8 that section 16 entails a purely "mechanical and bureaucratic procedure for the application", and that the Regional Manager's office, though playing a central role in the process, "fulfils a very limited, clearly circumscribed role", but it is not necessary finally to determine this question.

right instead, it is unnecessary to decide this issue and whether Aquila is entitled to a separate order under PAJA setting the non-return aside.[44]

[53] The conclusion that ZiZa's application was grossly defective when it was accepted, when it should instead have been returned, means that it was also defective when the Minister considered it in terms of section 17(1) of the MPRDA. That leads to the conclusion that the Minister's grant to ZiZa of a prospecting right was unlawful and should be set aside. It follows that the High Court's order setting aside the grant of a prospecting right to ZiZa and substituting for it a refusal of that right was correctly granted. [45] This means that there was no other prospecting rights-holder blocking Aquila's path to a mining right.

[54] This means that it is not necessary to consider contested features that were much in issue before the High Court and the Supreme Court of Appeal. Aquila initially presented its case in the form of a "domino" argument – if it succeeded in demonstrating the invalidity of one block in the Department's management of its and ZiZa's applications, the later blocks would all of necessity come tumbling down.

[55] On this approach, if Aquila could show that ZiZa's application was a nullity, at lodgement, in April 2005, or fatally defective when accepted, in August 2005, the later grant of the prospecting right would for that reason alone tumble; and this, in turn, would taint all the Department's subsequent actions. But Aquila accepted in oral argument that the domino approach was not indispensable to its case, and on the approach and the conclusions in this judgment seeing whether the dominoes tumble is not necessary.

[44] In *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga* [2002] ZASCA 117; 2003 (1) SA 373 (SCA) at paras 7, 20 and 28, the Supreme Court of Appeal held that no act performed or decision taken before a decision to publish a land claim is reviewable under PAJA.

[45] High Court judgement above n 2 at para 118.4 (*ad* Aquila's prayer 2).

[56] While the validity of ZiZa's prospecting right is crucial, because it formed the basis on which the Minister refused Aquila a mining right, the validity of Aquila's prospecting right is indeterminative, since holding a prospecting right is not a precondition to obtaining a mining right. However, had ZiZa held a valid prospecting right, that would have barred the award of a mining right to Aquila.

Exclusivity and duration

[57] It is further unnecessary to decide an issue that occupied much of the High Court and Supreme Court of Appeal's respective judgments. Could Aquila have applied for a prospecting right before ZiZa's application to convert its old-order right had been fully processed?

[58] It is unnecessary to decide the question because what matters is whether ZiZa had a lawfully granted prospecting right. Above I concluded that ZiZa's prospecting right was wrongly awarded because of its woefully deficient application. Whether Aquila's application was properly lodged is irrelevant to that finding.

[59] As already pointed out,[46] the Minister refused to set aside ZiZa's prospecting right because (he said) Aquila's prospecting right was unlawfully granted. The answer to that reasoning is that, just because Aquila's was unlawful does not mean ZiZa's was not unlawful too. What matters is that ZiZa's was unlawful, and so Aquila can now seek to mine.

[60] Nonetheless, because the issue was fully argued in both of the courts below and before this Court, and because there may still be unprocessed old-order rights applications, it is desirable to deal with it. This affects old-order right holders whose applications are still pending. Answering it also entails clarifying the currently opaque relationship between the processing of old-order rights and applications made by aspirant right holders.

[46] See [39].

[61] So: is it right that Aquila could not apply for a prospecting right at all on 11 October 2006? The Minister's reasoning was that the exclusivity period that item 8(1) confers, namely "one year" from 1 May 2004, does not end after one year. It endures beyond 30 April 2005. It lasts until a prospecting right application by an unused old-order rights-holder, like ZiZa, has been granted or refused in terms of item 8(3) – regardless of how long that might take. Until then, no other application for a prospecting right may be lodged, considered, accepted or granted.

[62] On this approach Aquila's prospecting right application was comprehensively disabled. The mere lodging of an application for a prospecting right by the holder of an unused old-order right before the expiry of the one-year period precludes other applicants from standing in line to apply at all, even after the grace period expires. Since Aquila's application was submitted after ZiZa's application had been lodged, it could not lawfully join the queue at all, let alone be granted. The reasoning is that, in terms of item 8(2), the holder of an unused old-order right enjoys the sole exclusive right to apply for a prospecting right for as long as it takes the Department to finalise its application under item 8(3) – and no other applicant can join the queue by lodging an application or having it accepted.

[63] The High Court rejected this construction,[47] but the Supreme Court of Appeal embraced it.[48] The High Court considered that the exclusivity afforded to holders of unused old-order rights to queue for rights under the MPRDA expired after one year.[49] Thereafter, ZiZa was just the same as any other applicant. It could lawfully join the queue for MPRDA rights, alongside any other applicants.[50] The High Court said interpreting item 8 exclusivity as running only until 30 April 2005, after which other

[47] High Court judgment above n 2 at paras 73-83.

[48] Supreme Court of Appeal judgment above n 1 at paras 12-7.

[49] High Court judgment above n 2 at para 83.

[50] Id.

aspirant right holders could join the queue, far better fulfilled the objects of the MPRDA.

[64] The High Court rejected ZiZa's contention that this does not give effect to item 8(3)'s specification that the unused old-order right "remains valid" until the application is granted and dealt with in terms of the MPRDA or is refused.[51] This, it said, was to confuse the continued validity of the unused old-order right with its place in the MPRDA's queuing system. If this were not so, the holder of an unused old-order right could submit a manifestly inadequate application, and take no action at all, "ever", after its defective application was returned to it under section 16(3). The old-order right would remain valid indefinitely, disabling other applications, simply because the application had been neither granted nor refused.[52] This the High Court said was "absurd".[53]

[65] The Supreme Court of Appeal reversed this. It reasoned that, for as long as a conversion application in terms of item 8 remains pending, item 8(3) specifies that the unused old-order right "remains valid" until the application for a new MPRDA right is either granted or refused. The order in which the statute requires applications received on subsequent days to be processed, namely "in order of receipt",[54] necessarily entails

[51] High Court judgment above n 2 at para 78.

[52] Id at para 75.

[53] Id at para 80.

[54] Section 9(1)(b) of the MPRDA. Section 9 provides:

> "(1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on–
>
> (a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);
>
> (b) different dates must be dealt with in order of receipt.
>
> (2) When the Minister considers applications received on the same date he or she must give preference to applications from historically disadvantaged persons."

that any later application cannot be dealt with at all until the old-order conversion application has been finally determined.[55]

[66] The Supreme Court of Appeal considered that the later insertion of section 16(2)(c)[56] supported its interpretation[57]. The amendment expressly prohibits acceptance of a prospecting right application for the entire time after a prior application has been accepted and while it remains to be granted or refused.[58] The insertion, the Supreme Court of Appeal said, merely "clarified" that this was indeed the position, even before the amendment.[59] The Supreme Court of Appeal considered that both the unused old-order right plus the exclusivity that right confers "remain extant" until the conversion application is either granted and dealt with under the MPRDA or is refused.[60] Where the application is made but neither granted nor refused, both the unused old-order right and its exclusivity period endure.[61]

[67] In my view, the Supreme Court of Appeal's reasoning in overturning the conclusion of the High Court cannot be supported. Its approach cross-stitched onto each other two separate features of the protections item 8 affords the holder of an unused old-order right – exclusivity and duration. The exclusivity in item 8(1) is expressly stated to last for one year, and one year only. To protract this indefinitely,

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[55] Supreme Court of Appeal judgment above n 1 at para 13.

[56] Mineral and Petroleum Resources Development Amendment Act 49 of 2008 with effect from 7 June 2013 (MPRD Amendment Act).

[57] Supreme Court of Appeal judgment above n 1at para 14.

[58] Id.

[59] Id.

[60] Id at para 15.

[61] Id at para 26:

> "[H]owever, the high court did not explain why the clear language of item 8(3) was not to be given its ordinary meaning and effect. The express language of that provision is to perpetuate the continued validity of the unused old order right until the prospecting application is either granted or refused. What is more, in its approach to this enquiry, the High Court appears to have imported a queuing into the exclusivity contemplated by item 8. But, those two cannot co-exist. Item 8 is designed to afford security of tenure to holders of unused old order rights until those rights have been converted or rejected in terms of the MPRDA."

on the basis that the application for conversion of the old-order right is pending, wrongly chains exclusivity and duration into lockstep together.

[68] The two are distinct, and item 8 treats them so. Holders of unused old-order rights are accorded the privilege of exclusivity. This confers the sole entitlement to apply for a new-order right over the property to which the unused old-order right relates. But they also get protected duration: item 8(3) specifies that the unused old-order right "remains valid" until the conversion application is disposed of. To conflate these two protections, or to tag the entailments of one onto the other, seems to me to misread the statute and to destabilise the protective balance it creates.

[69] Item 8(2) tells us what exclusivity means. It says it means the exclusive right to apply, within one year, for a prospecting or other right "in terms of this Act". That is all. It is a time-defined power, namely to *apply*, coupled with an immunity from competing intrusions. Aquila points out that the application item 8 envisages is for a new-order MPRDA right. This is plainly correct. For the statute defines "prospecting right" as "the right to prospect granted in terms of section 17(1)."[62] It is not a prospecting right preserved from the common law or resuscitated from the pre-existing statutory regime or defined within item 8. It is a new MPRDA right. The holder of an unused old-order right applies for a right that is considered and conferred afresh, under the new statute.

[70] This matters because it colours the nature of the application process after the grace year has expired. It is an ordinary MPRDA application, though with a priority entitlement to being considered.

[71] Item 8 does not purport to deal with the right to apply for a prospecting right at all. The grant or refusal of the application is governed entirely by the main provisions of the statute. The old-order applicant must, in other words, fulfil all the requirements

[62] Section 1 of the MPRDA.

the MPRDA specifies for the conferral of a prospecting, mining or other right. These include the requirements set out in sections 16 to 21.

[72] So the exclusivity item 8 confers is the privilege to apply under these MPRDA provisions for a new-order right. And until that application is disposed of, either way, the old-order right "remains valid" under item 8(3). What item 8 emphatically does not say is that the right to *apply exclusively* is preserved for so long as the old-order right remains valid. To import this into the provisions is to misperceive the delicacy of an intricate statutory scheme.[63] The later amendment of section 16 by the insertion of subparagraph (2)(c)[64] does not support the Supreme Court of Appeal's opposite conclusion. It is at best neutral. It seems equally likely that the addition was inserted because the statute needed to be changed for the very reason that the existing wording meant something different.[65]

[73] And it is this inquiry that authority impels upon us. This Court, in *NEHAWU*,[66] recognised that "it is permissible to refer to a subsequent statute if it throws light on the meaning of a provision in an earlier statute".[67] The Court invoked the decision of the Appellate Division in *Patel*.[68] There, Schreiner JA warned that courts should be cautious in inferring that a later statute "declared" a prior statute's meaning, "since it is usual for later legislation to amend rather than to declare the meaning of earlier

[63] This Court in *Sishen* above n 29 2014 (2) SA 603 (CC) at para 86 emphasised the intricacy of the disparate objects item 2 of Schedule II expressly sets out. These are: to ensure security of tenure in relation to ongoing prospecting, mining or production; to promote equitable access to mining and petroleum resources; and to give the holder of an old-order right the opportunity to comply with the new statutory requirements. The Court said the statute was, "for plain reasons, intent on not bringing to a halt ongoing mining activity as it extended its new legislative regulation and attempted to render the mining industry equitable, accessible to all and a more meaningful contributor to our economy."

[64] MPRD Amendment Act.

[65] Supreme Court of Appeal judgment above n 1 at paras 14 and para 45.

[66] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at para 66.

[67] Id at para 66, applied in *S.O.S Support Public Broadcasting Coalition v South African Broadcasting Corporation (SOC) Limited* [2018] ZACC 37; (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC) at para 41.

[68] *Patel v Minister of the Interior* 1955 (2) SA 485 (A).

statutes".[69] The test, which this Court adopted, was that it must be "clearly shown" in the later statute what the earlier meant.

[74] The amendment does not match this test. The later insertion of subparagraph (c) in section 16(2) does not afford a "clear" indication that, pre-insertion, the provision already meant that the Regional Manager may not "accept" an application for a prospecting right if there is a prior competing application for a prospecting right that has been accepted and that remains to be granted or refused.

[75] While section 16 sets out how applications for prospecting rights are processed, section 9, which is headed "[o]rder of processing of applications",[70] determines the order in which this must be done. What item 8 does is to hold off, for the duration of the one-year grace period, the ordering that section 9 would otherwise prescribe. As appears below, the ordering section 9 ordains takes effect after the one-year grace period. Until then, the main practical effect of exclusivity is this. During the grace year the holder of an old-order right may bring as many applications as it chooses to fix any defects in earlier applications. No one else may during this time apply for the same right over the same property.

[76] But, at the end of the grace year, the continued validity of the old-order right, pending conversion, does not bar others from standing in line to apply for MPRDA rights over the same land.[71] Section 9 bars their applications from being processed only until that of the old-order rights-holder has been processed. However, where applications by holders of the unused old-order right are not disposed of within the exclusivity year, other applicants become entitled to apply in terms of section 16, though their applications may be processed only in the order ordained by section 9.

[69] Id at 493A–D.

[70] The provisions of section 9 are set out in [65].

[71] High Court judgment above n 2 at paras 77-8.

[77] Section 9 requires that, if received on the same day, competing applications from historically disadvantaged persons[72] must enjoy preference; but, if received on different days, competing applications must be dealt with in the order in which they are received.

[78] Section 9 read together with item 8(3) of Schedule II entails that an application competing with one by the holder of the old-order right falls into the queue behind it. In other words, the one-year exclusivity period does not bar other applications after its elapse, but it does confer priority of consideration and processing, simply because the old-order rights-holder's application was in first. This means that the old-order rights-holder obtains priority (though not exclusivity) for the disposal of its application, until the MPRDA right it seeks is granted and dealt in terms of the MPRDA or is refused.[73] Until that happens, no competing application for an MPRDA right may be processed. Yet once the grace period ends, the MPRDA's requirements apply equally to all applications, no matter where they are in the queue.

[79] Once the grace period ends, the MPRDA's requirements apply equally to all applications, no matter where they are in the queue. If those requirements are not met, the Regional Manager must notify the applicant of this. If he fails to do this, but the requirements remain unmet, the applicant runs the risk of the application being set aside on review and losing its place in the queue. After 30 April 2005, this includes holders of unused old-order rights. If there are as yet no other applicants, the holder of the unused old-order right may attempt to correct the defect while staying in the

[72] Section 1 of the MPRDA defines "historically disadvantaged persons" as:

> "(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
>
> (b) any association, a majority of whose members are persons contemplated in paragraph (a);
>
> (c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes."

[73] Item 8(3) Schedule II of the MPRDA.

front of the queue. If there are other applicants behind it and they successfully challenge the defective application, they will step to the front.

[80] Both the High Court and the Supreme Court of Appeal were alert to the need to interpret the MPRDA and item 8's exclusivity, priority and duration provisions purposively, in light of the statute's transformational objectives.[74] The Supreme Court of Appeal rightly noted that the transitional provisions were crafted to secure a constitutionally compliant balance between the existing entitlements of old-order rights-holders and the transformational objectives of the MPRDA.[75]

[81] This the legislature achieved. It did so by affording holders of unused old-order rights (a) exclusivity during the grace period; (b) priority determination and processing of an application lodged within that period; and (c) sustained validity until disposal of the application. But it was no logical or functional part of this bargain to accord holders of unused old-order rights indefinite exclusivity pending conversion.

[82] Does disjoining exclusivity from priority and duration, and confining it to one year for old-order rights-holders, while affording them their section 9 ordinal priority, undermine the transitional purposes of the MPRDA? The answer is No. Old-order rights-holders are given the sole entitlement to lodge applications within one year. During this time, all new applications are barred. If their applications are not finalised within that year, they still enjoy the advantage that their applications are considered first, before any new applications under section 17.

[83] It is important to place in context the exclusivity period and the priority the statute affords unused old-order rights applications. Broadly, the statute's transitional provisions balance the rights held by previously privileged holders of mineral rights (which excluded most South Africans because they were black) with the rights of new,

[74] High Court judgment above n 2 at paras 77-9; Supreme Court of Appeal judgment above n 1 at paras 14-5.

[75] Id Supreme Court of Appeal judgment at para 14. See also *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at paras 63-6.

previously disadvantaged, entrants to the mining and resources sector. Both logically and practically the privileges of exclusivity and priority inhibit new entrants. They do this to protect old-order rights-holders. But they do not endure indefinitely.

[84] To summarise. When ZiZa lodged its application for a prospecting right on 19 April 2005, it was exercising its right to apply, within the grace year, for a prospecting right in terms of section 16. That excluded other applicants until the grace year expired. Others could join the queue after 30 April 2005. Their applications were valid. But they did so behind ZiZa. ZiZa's application preserved its priority under section 9, and its old-order right remained valid until its application was granted and dealt with under the MPRDA or refused.

[85] Here, the critical practical issue is: how long did the transitional exclusivity protecting ZiZa's application last? On the approach by the Supreme Court of Appeal, it endured throughout the period when ZiZa's and Aquila's applications for prospecting were lodged and accepted and granted. This would entail that no competing application may even be lodged until an application by an old-order rights-holder has been granted and dealt with in terms of the MPRDA or refused. Instead, as this judgment holds, ZiZa's exclusivity expired on 30 April 2005. This means that Aquila's application for a prospecting right was capable of being lodged, at the time it was, over a year after the grace period expired, though its place in the queue was behind that of ZiZa. However, since the Minister's grant of a prospecting right to ZiZa is set aside only now, it must follow that the grant of a prospecting right to Aquila, on 11 October 2006, was invalid, since ZiZa's competing application, albeit, as we now know, defective, was first in the queue – and had at that stage not yet been processed as section 9 requires.[76]

[76] ZiZa applied for a prospecting right on 19 April 2005; the Department accepted its application on 17 August 2005; and a prospecting right was awarded to ZiZa on 26 February 2008. Aquila applied on 18 April 2006 and its application was accepted on 2 May 2006. Despite the fact that ZiZa's prospecting right application had not yet been processed, the Department awarded Aquila a prospecting right on 11 October 2006.

[86] The majority of the Supreme Court of Appeal held that Aquila in its notice of motion should have attacked the failure by the Regional Manager to *return* ZiZa's defective application within 14 days, as section 16(3) requires, rather than the Regional Manager's decision, under section 16(4) to *accept* the application.[77] Aquila justly complained that this was unduly formalistic. Aquila's attack on the decision to accept ZiZa's application fully encompassed all the defects in the application that should undoubtedly have led to its being returned. It set out those defects – which were glaring – and neither ZiZa nor the Department made an effort to dispute them or their significance.

[87] To demand that Aquila target the non-return of ZiZa's application, rather than its acceptance, when the two were erroneous for identical reasons, seems to toy with both the logic and the substance of what matters here. It is lack of compliance with the requirements of section 16 that kiboshes an application, not whether the Regional Manager returns it as the provision demands.[78] Whether, as the High Court held,[79] the return of a non-compliant application under section 16(3) entails its rejection, or, as the Supreme Court of Appeal held,[80] it does not, the real issue remains whether the statute gave the Regional Manager authority to accept the application at all, and, ensuingly, gave the Minister the power to grant the right sought. Here, clearly not.

[88] As noted,[81] only the Minister has the power to grant or refuse an applicant a prospecting right.[82] But the statute gives the Minister that power only once the Regional Manager accepts the application. Aquila's decision to target the erroneous

[77] Supreme Court of Appeal judgment above n 1 at para 25.

[78] In dissent, Willis JA in the Supreme Court of Appeal noted that the Regional Manager's return of a defective application in terms of section 16(3) "is the funeral rite of the application, not its deathblow".

[79] High Court judgment above n 2 at para 21.

[80] Supreme Court of Appeal judgment above n 1 at para 24. Aquila insisted that the return by the Regional Manager of a defective application amounts to its rejection. This seems wrong. The Supreme Court of Appeal pointed out at para 24 that only the Minister, and not the Regional Manager, has power under section 17(1) and (2) to grant or refuse an application for a prospecting right.

[81] See [51].

[82] Section 17(1) of the MPRDA.

acceptance of ZiZa's application therefore put the crucial precondition to the Minister's eventual grant or refusal of the prospecting right in the crosshairs. And, since the MPRDA itself determines the conditions under which the Minister may grant or refuse a new-order right, it cannot assist the old-order applicant that item 8(3) provides that the old-order right "remains valid" until grant or refusal of the new-order right. Differently put, the continued existence of the old-order right until grant or refusal of the new-order right does not exempt the old-order rights-holder from compliance with the requirements of the MPRDA. Nor does it permit the Regional Manager to accept applications that do not comply with the statute.

[89] On this basis, on the legal regime item 8 creates,[83] after the grace period of exclusivity expired on 30 April 2005, ZiZa remained at the front of the queue for consideration of its application for a prospecting right. Aquila was waiting right behind it. After 30 April 2005, nothing barred Aquila from applying for a prospecting right over the same properties, and nothing barred the Department from accepting Aquila's application, as it did on 2 May 2006, subject only to prior processing of ZiZa's.

[90] But, since ZiZa's application had not yet been processed, and even though Aquila's application was in no way defective, it must follow that the award of a prospecting right to Aquila, too, was premature at the time it occurred.

Do Oudekraal / Kirland bar relief for Aquila?

[91] The award of a prospecting right to ZiZa was thus invalid. As a matter of fact, however, ZiZa (like Aquila) was awarded that right. The statute provides that an application for a mining right may not be accepted if any other person holds a prospecting right for the same mineral and land.[84] What is the effect of the factual

[83] See [5] to [8] and [61] to [72].

[84] Section 22(2)(b) of the MPRDA provides that the Regional Manager "must" accept an application for a mining right if "no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land".

grant of the prospecting right to ZiZa? Does the fact that Ziza should never have been granted that right mean that, judged now, the Minister was lawfully empowered, in December 2010, to consider and grant a mining right to Aquila? ZiZa protested strongly No. While not seeking to defend the validity of its own application for a prospecting right, ZiZa stoutly argued that Aquila could not be granted either a prospecting or mining right at all for so long as, within the Department's processes, ZiZa's application was regarded as valid.

[92] ZiZa's argument was this. Whatever its defects, ZiZa's application for a prospecting right, and the grant to it, were both extant when Aquila submitted its mining right application in December 2010. The prospecting right ZiZa was awarded on 26 February 2008 – rightly or wrongly – endured (subject to the effect of ZiZa's deregistration between 9 November 2010 and 14 October 2014) for five years, until 25 February 2013. Aquila applied for a mining right on 14 December 2010. Its application was accepted on 22 December 2010. All this was while the Department thought it had, and acted as though it had, granted a prospecting right to ZiZa. The further administrative acts of granting a prospecting right to Aquila, and accepting its mining right application, were precluded by the simple fact that, at the time, the Department had – validly or invalidly – granted ZiZa a prospecting right. Since the MPRDA prohibits acceptance of a mining right if any other person holds a prospecting right,[85] Aquila's application was precluded by the fact that ZiZa held a prospecting right, even if invalid. Aquila cannot, ZiZa said, "reverse engineer the course of events" to render the Department's decisions retrospectively invalid.

[93] For these propositions, ZiZa invoked the decision of this Court in *Kirland*.[86] That showed, ZiZa said, that an organ of state cannot simply ignore its own decision as a non-decision or a nullity. Once taken, that decision is valid and binding until set

[85] Section 22(2)(b) of the MPRDA.

[86] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

aside on review. Hence ZiZa's prospecting right, so long as it was in existence, barred Aquila from acquiring a mining right.

[94] This is not right. *Kirland*, and *Oudekraal*,[87] which it confirmed, do not make invalid administrative action legally valid. Nor do they invest them retrospectively with power to thwart rightful and lawful processes from prevailing at the time they took place. *Kirland* and *Oudekraal* are concerned with constraining misuse of the bureaucracy's power. They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful. As explained in *Merafong*,[88] the import of these decisions was that government cannot simply ignore its own seemingly binding decisions on the basis that they are invalid. The validity or invalidity of a decision has to be tested in appropriate proceedings. And the sole power to pronounce that decision defective, and therefore invalid, lies with the courts. The lodestar principle is that the courts' role in determining legality is pre-eminent and exclusive. Government officials may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them. And, unless set aside, a decision erroneously taken may well continue to have lawful consequences.[89]

[95] But what the *Kirland* / *Oudekraal* doctrine does not do is to fossilise constitutionally invalid administrative action as indefinitely effective. For rule of law reasons and for good administration, the principle puts a provisional halt to determining invalidity, without bringing the process to an irreversible end. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.[90] Most important, the principle does not entail that, unless public authorities in fact

[87] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[88] *Merafong City Local Municipality v Anglo Gold Ashanti Limited* [2016] ZACC 35 2017 (2); 2017 (2) SA 211 (CC); BCLR 182 (CC) (*Merafong*).

[89] Id at paras 41-2.

[90] Id at para 43.

bring court proceedings to challenge an administrative decision, they are inevitably obliged to treat it as valid.[91]

[96] The key point of the doctrine is that since "[c]onsequential acts which follow on constitutionally invalid conduct are commonplace",[92] bureaucratic self-help is prohibited. This is because legal remedies are the province of the courts, and the courts alone. Since even an invalid administrative act may have lawful consequences, no official is entitled to pronounce a decision a nullity without going to court. It is the court that must consider whether to undo the invalid act, and its consequences, before pronouncing the act invalid. And in our constitutional dispensation, the key provision in determining a remedy is the just and equitable power section 172(1)(b) of the Constitution affords.[93]

[97] Properly seen, *Kirland* and *Oudekraal* in their practical effect are about remedy. They assert the power of the courts to constrain bureaucratic self-help. The fact that administrative action exists, albeit invalid, may on fitting facts be the basis for withholding a remedy of invalidity. But where a court – as this judgment does – pronounces that past administrative action is invalid, the principle does not mean that

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[91] Id at para 44:

> "*Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances."

[92] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*) at para 31.

[93] Section 172(1)(b) provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

a proper remedy cannot be granted. This emerges from *Oudekraal*, where the Supreme Court of Appeal explained that—

> "a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid."[94]

[98] So, practically speaking, *Kirland* / *Oudekraal* have no application here. The principle does not breathe life into the Department's invalid decisions to accept and grant ZiZa's defective prospecting right application. And it cannot thwart the valid award of a mining right to Aquila. The legally null award of the prospecting right to ZiZa does not enjoy a zombie afterlife to thwart the legal conclusion that a mining right could validly be granted to Aquila.

[99] The facts in *Corruption Watch* show this.[95] There, the invalidity of a preceding legal act (the irregular removal as National Director of Public Prosecutions of Mr Nxasana) was held to vitiate a subsequent legal act (the appointment to that post of Mr Abrahams).[96] This was even though, at the time, Mr Nxasana's removal had yet to be declared invalid, and thus existed as a fact.

[100] If ZiZa's argument were correct, the fact that, at the time of Mr Abrahams' appointment, Mr Nxasana's resignation, albeit invalid, existed as a fact, would mean

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[94] *Oudekraal* above n 87 at para 36.

[95] *Corruption Watch* above n 92 at para 31.

[96] Id at para 35:

> "Now that the manner in which Mr Nxasana vacated office has been declared constitutionally invalid, it follows that the appointment of Advocate Abrahams is constitutionally invalid."

that there was a "vacant" post to which Mr Abrahams could validly be appointed. That cannot be. This Court did the opposite. It retrospectively declared both the irregular removal and the appointment consequent on it invalid. The Abrahams appointment was invalid even though the Nxasana removal had yet to be declared invalid.

[101] This Court in *Corruption Watch* emphasised that "where a consequential act could be valid only as a result of the factual existence – not legal validity – of the earlier act, the consequential act would be valid only for so long as the earlier act had not been set aside".[97] That is an abstract way of saying that if act B depends solely on the factual existence of act A, then act B is valid only for so long as act A is not set aside. This, again, is explained in *Oudekraal*:

> "Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts."[98]

[102] The corollary here is the logical converse. Where a consequential act would be *invalid* only as a result of the factual existence – not legal validity – of an earlier act, the consequential act would be *invalid* only for as long as the earlier act is not set aside. In practical terms, where the grant to Aquila of a mining right would be precluded only for as long as ZiZa's prospecting right existed, once ZiZa's right is set aside as invalid, as it is by this judgment, the grant of a mining right to Aquila is judged capable and valid. In different words, now that the acceptance and grant of the

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[97] Id at para 32.

[98] *Oudekraal* above n 94 at para 31. See further Forsyth "'The Metaphysic of Nullity': Invalidity, Conceptual Reasoning and the Rule of Law" in Forsyth and Hare (eds) *Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford 1998) at 159 cited with approval in *Oudekraal* above n 94 at para 29:

> "The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act."

Thus, where a consequent act relies on the substantive validity of the initial act for its legality, the factual existence of an initial unlawful act will sustain the validity of the consequent act only for long as the initial act is not set aside. This is distinct from consequent acts that merely require for their validity the factual existence - as opposed to the substantive validity - of an initial act.

ZiZa prospecting right application have been set aside, as this judgment does, nothing stands in the way of recognising Aquila's application for a mining right on 14 December 2010, and the Department's acceptance of that application on 22 December 2010, as valid.

Remedy

[103] It follows that the Minister should have considered Aquila's internal appeal, and ZiZa's counter-appeal, on the footing that ZiZa's prospecting right was invalid. [99] The Minister did not do so. His determination of the appeal, which Aquila's notice of motion squarely targeted, was thus flawed and irregular and must be set aside.

[104] The question is: what now? The Minister's decision was dated 2 July 2015. Some four and a half years before, on 14 December 2010, Aquila applied for a mining right, which application the Department accepted on 22 December 2010. As already observed, given that ZiZa's prospecting right was invalid, there was no impediment to the Minister's granting Aquila the right to mine the properties in issue.

[105] The Minister dealt with Aquila's application to mine in his disposal of the section 96 appeal. He recorded his decision as follows:

> "After careful consideration of the appeals . . . I . . . have decided to dismiss the appeal by Aquila Steel…The reasons for my decision are as follows:
>
> - The prospecting right application by ZiZa Limited was lodged and accepted during a period which afforded it exclusivity in terms of the transitional provisions of the MPRDA. The granting 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.

[99] In terms of section 96 of the MPRDA.

> 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."[100]

[106] Aquila's application for a mining right was included in the review record before us. No criticism that it was in any respect deficient under the MPRDA was levelled against it. In these circumstances, the High Court substituted the Minister's decision with an order granting Aquila's application for a mining right, subject to conditions to be determined by the Minister within three months.[101] In doing so, it determined that exceptional circumstances existed that justified a substitution order under section 8(1)(c)(ii)(aa) of PAJA.[102]

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[100] The Minister concluded by strongly urging the parties "to engage their best efforts to reach a settlement of the dispute between them". That did not happen, and this litigation is the consequence.

[101] High Court judgment above n 2 at para 118.10.

[102] Section 8 of PAJA reads:

> "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
>
> (a) directing the administrator—
>
> (i) to give reasons; or
>
> (ii) to act in the manner the court or tribunal requires;
>
> (b) prohibiting the administrator from acting in a particular manner;
>
> (c) setting aside the administrative action and—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases—
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation;
>
> (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
>
> (e) granting a temporary interdict or other temporary relief; or
>
> (f) as to costs.
>
> (2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—
>
> (a) directing the taking of the decision;
>
> (b) declaring the rights of the parties in relation to the taking of the decision;

[107] The Supreme Court of Appeal majority held that the High Court ought not to have granted substitution.[103] Even if it were to be accepted that the ZiZa application was invalid, the Supreme Court of Appeal held, the High Court's order was "misconceived".[104] This was because of its bifurcated nature: the imposition of conditions could not be separated from the grant of the mining right. And, since the Court could not itself impose the conditions, the mining right should not have been awarded, particularly since the application, having been lodged in 2010, was outdated.[105]

[108] Should the Supreme Court of Appeal have intervened? Here, it is critical to bear in mind that PAJA empowered the High Court itself to weigh the factors set out in section 8 and to determine, for itself, what remedy to afford Aquila. This is because the statute entrusted to the High Court a discretion in the true sense. This meant it was for that Court to weigh the courses available to it, and from those to choose which one it found appropriate to order.[106]

[109] As this Court found in *Trencon*, it was for the High Court to exercise "an election of which option it will apply" between permissible options.[107] The fact that an appellate court might have "preferred to have followed a different course" does not empower it to interfere.[108]

(c) directing any of the parties to do, or to refrain from doing, any actor thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs."

[103] Supreme Court of Appeal judgment above n 1 at para 26.

[104] Id at para 29.

[105] Id.

[106] *Trencon Construction (Pty) Limited v Industrial Development Corporation of SA Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 84.

[107] Id at paras 84-6.

[108] Id at para 84.

[110] The High Court weighed the options before it with conspicuous care. It noted that the issue trenched upon the separation of powers, and that the award of a mining right is in the first instance vested in the executive, not the courts.[109] It set out the provisions of PAJA, and the implications of this Court's judgment in *Trencon* that regulated its exercise of the power. It noted that the sole ground for the Minister's refusal of a mining right to Aquila was the (erroneous) consideration that ZiZa had a prospecting right.

[111] The High Court noted the inordinate delays in the Department's management of the applications, and the injustice that further delays would inflict. Though the Court discounted institutional bias as a factor justifying substitution,[110] it found that Aquila had established "a high degree of institutional incompetence on the part of the government respondents"[111] and a lack of energy in resolving the very issues their incompetence caused. As *Trencon* found, that an administrator has been incompetent will contribute to a finding that a substitution order is just and equitable.[112] A finding of gross incompetence may make it unfair to require a party to resubmit itself to the administrator.[113]

[112] The High Court noted that neither the Department nor ZiZa had suggested any issue of substance standing in the way of the grant of the mining right to Aquila. From this, that Court concluded that it was in as good a position as the Minister to make the decision.[114]

[113] Did the considerations the High Court set out establish that substitution was a permissible option, a course available to it? In my view, they plainly did.

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[109] High Court judgment above n 2 at para 106.

[110] Id at para 108.

[111] Id at para 111.

[112] *Trencon* above n 106 at para 47.

[113] Id at para at 53.

[114] High Court judgment above n 2 at para 112.

[114] To deal with the bifurcation point the Supreme Court of Appeal raised. Aquila contended, and it is evident from the record before us showing how the two impugned prospecting rights in issue here were granted, that the rights under the MPRDA may well be granted on the basis that conditions are to be imposed later.[115] It was also pointed out that the conditions in issue are relatively standard and are typically imposed regardless of who the particular applicant is. Neither ZiZa nor the departmental respondents made any serious attempt to put these two facts in issue.

[115] What is more, the sole reason the Minister gave for not granting Aquila the mining right it sought was the existence of ZiZa's prospecting right. ZiZa protested that this gave no indication that the Minister had actually considered Aquila's application. It urged that the Minister's statement meant that he thought he was precluded from considering Aquila's application by ZiZa's prospecting right.

[116] But this is to misread what the Minister said. The Minister did not say "I am also not in a position to consider the mining right application in favour of Aquila". What the Minister said was "I am also not in a position *to grant* the mining right application in favour of Aquila Steel *because of the existence of the prospecting right in favour of ZiZa*". This must rightly be inferred to mean that it was the grant or not of the right that was in issue before the Minister, and that its grant was precluded by the sole reason he proffered, which was his erroneous belief that ZiZa had a prospecting right.[116]

[117] This construction is supported by everything in the record before us. Nothing in it indicates anything to preclude the grant of a mining right to Aquila. It has fulfilled the requirements of the MPRDA and its Regulations. It has demonstrated the

[115] In the case of the ZiZa prospecting right and the Aquila prospecting right here, the grant decision was communicated to the applicant with determination of conditions to follow.

[116] In selecting the "Recommendation . . . not approved" box on recommendation in favour of Aquila by the Department's Chief Director, Mr Alberts, the Minister wrote against "comments / amendments", "The Minister cannot condone an unlawful act. Parties are advised to negotiate a settlement".

capacities and competencies required.[117] And, in expending nearly R157 million in prospecting the properties, and in pursuing its entitlement to mine what it has found with nothing other than single-minded determination in the departmental and court processes, it has demonstrated its determination.

[118] In my view, the High Court had ample reason to conclude that a substitution order was competent. It rightly emphasised the inordinate delays to which Aquila has been unjustly subjected.[118] Its order substituting the decision of the Minister was imperatively just and equitable and should be reinstated.

[119] This conclusion makes it unnecessary to consider the effect of ZiZa's deregistration, and whether the approach of the Supreme Court of Appeal to this question was correct.[119] It is also unnecessary to consider whether the Department's execution of ZiZa's prospecting right in favour of PAMDC, an entirely different entity, was lawful.

[120] I would accordingly allow the appeal and reinstate the order of the High Court.

[121] The following order is made:

1. Leave to appeal is granted.
2. The appeal is allowed with costs, including the costs of two counsel.
3. The order of the Supreme Court of Appeal is set aside .

[117] Aquila was not disputed on the papers to have satisfied the requirements for a mining right. Its mining right application was annexed to its founding papers. Aquila tendered delivery of all the annexures. The respondents, including the Minister, never challenged the sufficiency of Aquila's application in any way.

[118] *Trencon* above n 106 at paras 47and 51-3.

[119] Shortly before the hearing, on 20 August 2018, counsel were advised by the Registrar's office that they would be invited to make submissions on whether the decisions of the Supreme Court of Appeal in *Newlands Surgical Clinic v Peninsula Eye Clinic* [2015] ZASCA 25; 2015 (4) SA 34 (SCA) (*Newlands*) and *Palala Resources v Minister of Mineral Resources and Energy* [2016] ZASCA 80; 2016 (6) SA 121 (SCA) (*Palala*) are compatible with the decisions of this Court in *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) and *The Citizen 1978 v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) (*McBride*); and, if not, the extent to which, if at all, this may affect the application. It is unnecessary, for now, to determine whether *Newlands* and *Palala* sufficiently recognise the distinction between retrospectivity and retroactivity and whether they can stand in the light of *Du Toit* and *McBride*.

4. In its place there is substituted:

"The appeal is dismissed with costs, including the costs of two counsel. No order is made on the cross-appeal".

THERON J

Introduction

[122] I have read the erudite judgment by my brother, Cameron J (first judgment) but am unable to agree with its outcome. I am in agreement with the first judgment's approach to priority and its finding that the award of a prospecting right to ZiZa should be set aside. However, I disagree on whether substitution is appropriate.

Substitution or remittal?

[123] For the reasons advanced by Cameron J, there is nothing that prevents the consideration of Aquila's application for a mining right. However, this is where the first judgment and I part ways.

[124] It is necessary to consider whether we ought to remit the matter to the Minister or substitute in terms of section 8(1)(c)(ii) of PAJA.[120] The threshold for substitution

[120] Section 8(1)(c)(ii) reads, in relevant part, as follows:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
>
> . . .
>
> (c) setting aside the administrative action and—
>
> . . .
>
> (ii) in exceptional cases—
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation."

is high. At the outset, it requires that the case be an exceptional one. It is clear from the astounding history and complexity of this matter that it is an unusual one, markedly out of the ordinary. The Department ought ordinarily to deal with applications expeditiously. On this basis, the initial threshold is met.

[125] Would it be just and equitable for the Minister's decision on whether to grant Aquila's mining right application to be substituted with a decision of this Court? The factors to be considered in determining whether to make a substitution order were outlined in *Trencon*:

> "To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."[121]

[126] The two factors which carry the greatest weight are whether the Court is in as good a position as the administrator to make the decision and whether the decision of an administrator is a foregone conclusion.[122] Section 23(1) of the MPRDA requires the Minister to grant an application for a mining right if the following requirements are met:

> "(a) the mineral can be mined optimally in accordance with the mining work programme;

[121] *Trencon* above n 106 at para 47.

[122] Id.

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;

(e) the applicant has provided for the prescribed social and labour plan;

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);

(g) the applicant is not in contravention of any provision of this Act; and

(h) the granting of such right will further the objects referred to in section 2 (d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."

[127] Many of these requirements are technical in nature and require specific knowledge and expertise. It would be difficult, for example, for this Court to assess whether, on the basis of the mining work programme, the mineral can be mined optimally. The first judgment makes much of the fact that the applicant has alleged that it meets these requirements and it has never been contended otherwise by the Minister.[123] In the view I take of the matter, given the nature of the decision the Minister took in finding that he was not in a position to grant Aquila's application, it would appear that the substance of Aquila's application was never considered. Indeed, the reason underlying the Minister's decision is indicative of the fact that the Minister considered himself precluded from making a decision on the application. This Court does not have any basis, beyond the applicant's say-so, to conclude that it has met the requirements of section 23(1) nor do we have the technical expertise to make this assessment. The High Court attempted to cure this difficulty by providing that the Minister could impose conditions on the mining right.[124] However, this does not accommodate the consideration of more qualitative factors such as the requirement in sub-section 23(1)(h).

[123] See first judgment [112].

[124] High Court judgment above n 2 at para 114.

[128] There is an additional basis upon which the High Court erred. The approach that the High Court adopted in respect of the imposition of conditions was incorrect.

[129] The first judgment correctly finds that, under *Trencon*, an appellate court cannot lightly interfere with the decision of a lower court to grant substitution.[125] The Supreme Court of Appeal interfered with the High Court's decision to substitute the Minister's decision. In *Trencon*, this Court confirmed the settled rule that an exercise of true discretion can be interfered with if that discretion was materially influenced by a misdirection as to the applicable law.[126] I agree with the Supreme Court of Appeal that the High Court had misdirected itself as to the legal principles regarding the granting of a mining right and the imposition of conditions thereof.[127] That Court's interference with the High Court's decision to substitute was justified. I cannot agree with the first judgment that the reasoning of the Supreme Court of Appeal was incorrect on this score.

[130] Section 23(1) of the MPRDA obliges the Minister to grant a mining right if certain jurisdictional facts are satisfied. Section 23(6) then provides:

> "A mining right is subject to this Act, any relevant law, the terms and conditions *stated in the right* and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years." (Emphasis added.)

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[125] See first judgment [109].

[126] *Trencon* above n 106 at para 88.

[127] Supreme Court of Appeal judgment above n 1 at para 29 reads:

> "The power to impose conditions is inextricably linked to the exercise of the statutory power itself. It thus seems to me that the grant of the right and the imposition of conditions cannot be separated from one another. Granting the right without considering whether to impose conditions or what conditions need to be imposed constitutes, to my mind, an invalid exercise of the power. Since the High Court could not itself purport to exercise the power to impose conditions, as it no doubt appreciated, its order was misconceived. On that basis alone the order is susceptible to attack. Further, the Aquila application was submitted approximately seven years ago. The information that it contains must necessarily be outdated. The grant of the mining right application was accordingly not a foregone conclusion. The High Court could thus hardly have been in as good a position as the Minister to determine the application."

[131] Section 23(6) thus empowers the Minister to impose conditions on the mining rights that he grants. It contemplates that these conditions are not attached to the right but rather are an intrinsic part of that right by delineating the ambit and scope of that right. The first judgment relies on the fact that the imposition of conditions after a right has been granted is a regular occurrence.[128] I fail to see how this changes the plain and purposive meaning of section 23(6). The fact that the Minister has a certain approach to the imposition of conditions – which may not necessarily be correct – does not change the principle that a mining right cannot be granted in complete isolation from the imposition of conditions. In this way, conduct cannot override the wording of a statute and the manner in which a provision ought to be interpreted.

[132] The High Court did not have due regard to the proper interpretation of the statute when considering whether to substitute. The High Court held that the jurisdictional facts in section 23(1) were satisfied – as a foregone conclusion – because the respondents did not controvert Aquila's assertions that those conditions were satisfied.[129] The High Court proceeded to substitute the Minister's decision not to grant the mining right with one to grant the right and directed the Minister to impose conditions on the right within three months.[130] It could not do this.

[133] The power to impose conditions is, as the Supreme Court of Appeal held, "inextricably linked" to the power to grant a mining right and these conditions, as discussed, are part of the content of a specific right.[131] As a result, it is not possible or lawful to grant a mining right and delay the imposition of conditions to a later date by a different decision maker. This is why section 23(6) envisages "the terms and conditions *stated in the right*". Conditions may also be linked to the reasons for why

[128] See first judgment [107].

[129] High Court judgment above n 2 at para 112.

[130] Id at para 118.10.

[131] Supreme Court of Appeal judgment above n 1 at para 29.

the right was granted in the first place, and might be crucial to ensuring that the jurisdictional facts listed in section 23(1) are satisfied.

[134] The High Court – and this Court – quite clearly are not in a position to impose the conditions envisaged in section 23(6), as each respectively lacks the requisite expertise, knowledge and information. The High Court's decision to grant the mining right was materially influenced by its erroneous understanding that the imposition of conditions can occur separately to the grant of the right. The High Court therefore erred in finding it could substitute the Minister's decision and grant a mining right and its decision to substitute should, in any event, have been set aside as it was by the Supreme Court of Appeal.

[135] In addition, the most striking deficiency this Court is faced with cannot be cured through the imposition of conditions. This is the glaring acknowledgement by Aquila that it does not know whether its applications overlap with Ziza's. This entire case has proceeded through the courts on the assumption that they do overlap but it may very well not be so. The Department and the Minister are the ones best placed to solve this conundrum.

[136] It is for these reasons that I find that this Court is not in as good a position as the Minister to make the decision. I also cannot find that the outcome of the application is a foregone conclusion. The additional factors to be considered are whether the delay, bias or incompetence renders a substitution order just and equitable. The delays in this matter have been significant and the incompetence of the Department and its functionaries has been beyond the pale. This however is not sufficient to offset the weightier factors that militate against substitution.[132] In order to ameliorate the delay suffered by Aquila, I would fashion an order which ensures that, following remittal to the Minister, Aquila's mining right application is processed expeditiously and without undue delay.

[132] *Trencon* above n 106 at para 47.

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