

Priority Disputes Between Holders of Old Order Mineral Rights and Holders of Prospecting Rights or Mining Rights Under the MPRDA in South Africa: Aquila Has Not Landed

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“Cui bono?”
Cicero

As part of the radical transformation of the mineral regime of South Africa, the African National Congress (“ANC”) government introduced the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) on May 1, 2004. The MPRDA not only vested mineral resources in the custody of the state but also provided for application of new rights on merit by any applicant. The MPRDA also recognized prospecting rights, mining rights, and mineral rights of the previous mineral law dispensation as old order rights (“OORs”) that were subject to transitional provisions. Holders of OORs were afforded the opportunity to convert these rights, or to apply for new prospecting rights or mining rights during different periods of transition. By granting priority to holders of OORs during the periods of transition, it was envisaged that competing applications for prospecting or mining rights under the MPRDA would not be lodged. However, due to poor custodial administration and ulterior motives in post-apartheid South Africa, competing applications were considered and competing rights were granted to land that was subject to transitional rights. This Article shows how priority rules have evolved to deal with competing prospecting and mining rights. The Article examines whether these priority rules can be regarded as fair,

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and the ultimate question is raised as to who benefits by administration of these rules.

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INTRODUCTION

Upon the enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (the “MPRDA”) on May 1, 2004, a new mineral law regime was introduced in South Africa which “fundamentally altered the legal basis upon which rights to minerals are acquired and exercised.”¹ The MPRDA vested all mineral resources in the state, as custodian,² for the benefit of all the people of South Africa.³ The state,

¹ Xstrata South Africa Ltd. v. SFF Ass’n 2012 (5) SA 60 (SCA) ¶ 1; *see* Agri SA v. Minister for Minerals and Energy 2013 (9) ZACC (CC) ¶ 2.

² Minister of Mineral Res. v. Sishen Iron Ore Co. 2014 (45) ZACC (CC) ¶ 63; Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res. 2017 (3) SA 301 (GP) ¶ 6; Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 12.

³ Mineral and Petroleum Resources Development Act 28 of 2002 § 3(1) (2004) (S. Afr.) (amended 2008); *see* Pieter Badenhorst & Hanri Mostert, *Artikel (3)(1) en (2) van die Mineral and Petroleum Resources Development Act 28 of 2002: ‘n Herbeskouing*, 3 J. OF S. AFR. L. 469, 469 (2007) (S. Afr.) (offering differing academic views on the meaning of the MPRDA Section 3(1)); HM van den Berg, *Ownership of Minerals Under the New Legislative Framework for Mineral Resources*, 20 STELLENBOSCH L. REV. 139, 139 (2009)

acting through the Minister of Mineral Resources (the “Minister”), was empowered to grant rights to minerals, including reconnaissance permissions, prospecting rights, retention permits, mining permits, and mining rights.⁴

Prior to the MPRDA, most mineral rights were privately held as independent real rights, and prospecting rights and mining rights were granted to prospectors and miners in private transactions by holders of mineral rights. Only the exercise of these rights was regulated by the state.⁵ The MPRDA abolished the mineral rights, prospecting rights, and mining rights that existed during the previous mineral law dispensation.⁶ It was no longer possible to register the transfer of these rights in the Deeds Office.⁷ Mineral rights, prospecting rights, and mining rights that existed prior to the enactment of the MPRDA were replaced with statutory rights called “old order rights” (“OORs”).⁸ If prospecting operations or mining operations were conducted immediately before enactment of the MPRDA, they were recognised as old order prospecting rights⁹ (“OOPRs”) or old order mining rights¹⁰ (“OOMRs”), respectively.¹¹ If operations were not being conducted before the MPRDA took effect, such OORs were recognised as unused old order rights (“UOORs”).¹² The transitional

(S. Afr.) (offering differing academic views on the meaning of the MPRDA Section 3(1)); see Elmarie van der Schyff, PROPERTY IN MINERALS & PETROLEUM 258-264 (GJ Pienaar ed. 2016) (offering differing academic views on the meaning of the MPRDA Section 3(1)); Pieter Badenhorst & Hanri Mostert, *Artikel (3)(1) en (2) van die Mineral and Petroleum Resources Development Act 28 of 2002: 'n Herbeskouing*, 3 J. OF S. AFR. L. 469, 469 (2007) (S. Afr.); HM van den Berg, *Ownership of Minerals Under the New Legislative Framework for Mineral Resources*, 20 STELLENBOSCH L. REV. 139, 139 (2009) (S. Afr.) for a discussion of different academic views on the meaning of the MPRDA Section 3(1)).

⁴ Mineral and Petroleum Resources Development Act 28 of 2002 § 3(2)(a). Rights to petroleum under the MPRDA fall outside the scope of this Article.

⁵ See Pieter Badenhorst & Hanri Mostert, *Mineral and Petroleum Law of South Africa I-1* (JUTA and Co. Ltd., Revision Serv. 6, 2010).

⁶ Minister of Mineral Res. v. Sishen Iron Ore Co. (45) ZACC (CC) ¶¶ 10, 11, 23, 63.

⁷ Mineral and Petroleum Resources Development Act 28 of 2002 § 110; S. Era Res. Ltd. v. Farndell 2009 (150) ZASCA (SCA) ¶¶ 4, 8 (S. Afr.); see Pieter Badenhorst & Hanri Mostert, *A Bridge too Ghostly to Contemplate? Minerals and Petroleum Legislation and the Deeds Registries Act 47 of 1937*, 2004 DE REBUS 24 (S. Afr.).

⁸ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd., (165) ZASCA (SCA) ¶ 12.

⁹ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, tbl. 1 (S. Afr.) (listing “old order prospecting rights”).

¹⁰ *Id.* at tbl. 2 (listing “old order mining rights”).

¹¹ *Id.* § 1 (defining “old order prospecting rights” and “old order mining rights”).

¹² *Id.* sched. II, § 1 (defining “unused old order rights”); See *id.* sched. II, tbl. 3 (listing old order rights).

arrangements of the MPRDA¹³ provided for: (1) the continuation of OOPRs¹⁴ or OOMRs¹⁵ during different periods of transition and the option to convert these rights during transition into prospecting or mining rights, respectively;¹⁶ and (2) the continuation of UOORs for a period of one year¹⁷ and an exclusive right to apply for a prospecting or mining right during the transition.¹⁸ The first instance involved a conversion application, whilst the second instance involved a new application for a prospecting or a mining right under the MPRDA. In the first instance, it was the objective of the transitional arrangements to ensure that security of tenure¹⁹ was protected,²⁰ but this was not expressly stated for the second instance. Thus, the transitional arrangements accorded preference to holders of OORs to apply for rights under the MPRDA.²¹ By granting preference, it was *not* envisaged that inconsistent applications for prospecting or mining rights would be considered, nor that rights would be granted to lands subject to transitional rights during the transitional period. Recognition of OORs was intended to prevent inconsistent applications for prospecting rights or mining rights, and also to prevent the disruption of existing prospecting or mining operations until they could be regulated by the MPRDA.²²

¹³ Pieter Badenhorst & Hanri Mostert, *Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property Clause: An Analysis in Two Parts (Part 1)*, 14 STELLENBOSCH L. REV. 377, 378 (2003) (S. Afr.); Pieter Badenhorst & Hanri Mostert, *Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property Clause: An Analysis in Two Parts (Part 2)*, 14 STELLENBOSCH L. REV. 22 (2003) (S. Afr.); see Pieter Badenhorst, *Transitional Arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a Narrow Bridge?*, 23 OBITER 250 (2002) (S. Afr.) (for a discussion of the transitional arrangements); see generally Badenhorst & Mostert, *supra* note 5, at ch. 25 (discussing transitional arrangements).

¹⁴ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 6(1).

¹⁵ *Id.* sched. II, § 7(1).

¹⁶ *Id.* sched. II, §§ 6(2), 7(2).

¹⁷ *Id.* sched. II, § 8(1).

¹⁸ *Id.* sched. II, § 8(2).

¹⁹ Pieter Badenhorst & Hanri Mostert, *Security of Mineral Tenure in South Africa: Carrot or Stick?*, 32 J. OF ENERGY AND NAT. RES. L. 5, 12–13 (2004) (defining the meaning of security of mineral tenure).

²⁰ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 2(a).

²¹ See *id.* § 2(b).

²² *Id.* § 2(a); *Holcim SA Ltd. v. Prudent Investors Ltd.* 2011 (1) SA 364 (SCA) ¶ 26 (S. Afr.).

This Article will show that, due to poor administration, prospecting rights and mining rights were, at times, granted by the custodian to land that was still subject to applications or rights under the transitional arrangements. Applications for new rights were also received when applications for prospecting permits or mining authorizations under the repealed Minerals Act 50 of 1991 (“Minerals Act”) were still pending at the commencement of the MPRDA. This state of affairs has created priority of rights disputes, which arise when there is a conflict between two or more rights and there is a need to determine which one should receive priority.²³ Priority disputes may also arise between more than one applicant for, and grantees of, prospecting or mining rights over the same or different minerals in land. The MPRDA’s main provisions largely deal with this problem by securing prior applications or prior rights.²⁴ These provisions fall beyond the scope of this article, except to the extent that they are relevant in discussions of case law. In a priority dispute, it is the court’s task to determine which prospecting or mining rights exist to the land and which of these rights should receive priority for purposes of the exercise of these rights.

This Article will show that the preference accorded to holders of OORs, in effect, evolved into priority rules to deal with situations where inconsistent rights were granted by the custodian of mineral resources. By way of background, some basic aspects of the application, acquisition, and termination of prospecting and mining rights will be discussed. The Article will subsequently focus on the determination of priority between: (1) pending old order applications and prospecting or mining rights under the MPRDA; (2) OOPRs or OOMRs and prospecting or mining rights under the MPRDA; and (3) UOORs and prospecting or mining rights under the MPRDA. This Article argues that granting priority to one right in favor of another can be justified by either of two priority principles. First, a right that is created first in time receives priority over a subsequently created right. Second, the holder of an inconsistent right who has knowledge of a prior right cannot benefit from such knowledge. The first principle is based upon the age-old Roman maxim of *prior in tempore, potior in jure*²⁵ which

²³ See SAMANTHA HEPBURN, AUSTRALIAN PROPERTY LAW: CASES, MATERIALS AND ANALYSIS, at 556–63 (Chatswood: Lexis Nexis, 4th ed. 2018).

²⁴ For instance, it is provided that the regional manager may not accept a later application for a prospecting right or mining right if another person already holds rights in the land (§§ 16(2)(b), 22(2)(b) and 27(3)(b)) of the MPRDA, or an application for such rights has been made but not yet granted (§§ 16(2)(c), 22(2)(c) and 27(3)(c)). It is also provided that the underlying right in an application for renewal of such right remains valid until the application for renewal is granted or refused (§§ 18(5) and 24(5)).

²⁵ Translation: “First in time, superior in right.” *Prior in tempore, potior in jure*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

is applied to two conflicting real rights.²⁶ The second principle is based upon an analogy with the doctrine of notice.²⁷ Under South African law,²⁸ the doctrine of notice forces the acquirer of a real right to give effect to an earlier inconsistent personal right of which he had notice.²⁹ This Article argues that application of the priority rules that have evolved during the transition from the old order to the new mineral regime are effective, beneficial, and fair in theory but not always in practice due to slow and improper processing of some applications by the Minister acting as the custodian of mineral resources.

I. PROSPECTING RIGHTS AND MINING RIGHTS UNDER THE MPRDA

A prospecting right is defined³⁰ as a statutory right granted by the State that entitles its holder (the “pro prospector”) against the owner of the relevant land³¹ to enter the land for purposes of prospecting,³² to conduct prospecting operations on the land,³³ and to remove and dispose of minerals³⁴ found during prospecting for testing, identification, and analysis.³⁵ A prospecting right also entitles a prospector to apply for ancillary rights, such as: (1) permission to remove and dispose of minerals³⁶ that were found during prospecting,³⁷ (2) a retention permit to

²⁶ CORNELIUS G. VAN DER MERWE, *SAKEREG* 64 (Durban: Butterworths, 1989); *Wahloo Sand BK v. Tr., Hambly Parker Trust* 2002 (2) SA 776 (SCA) at 748I, 788E, 791H (the maxim was also applied to competing personal rights).

²⁷ For a discussion of the South African doctrine of notice, *See* CORNELIUS G. VAN DER MERWE, *Things*, in 27 *LAW OF SOUTH AFRICA* 214–16 (Durban: Lexis Nexis, 2014).

²⁸ As to the difference between the doctrine of notice in English law and South African law, *See* Pieter Badenhorst, *The South African Doctrine of Notice: A Comparative Law Perspective*, PROP. L. REV. 119 (2015).

²⁹ Pieter Badenhorst, Juanita Pienaar, & Hanri Mostert, SILBERBERG AND SCHOEMAN’S *THE LAW OF PROPERTY* 84 (Durban: Lexis Nexis, 2006).

³⁰ Pieter Badenhorst, *The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?*, 134 S. AFR. L. J. 361, 367 (2017).

³¹ Including third parties. *Id.*

³² Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 5(3)(a).

³³ *Id.* § 5(3)(b). Activities incidental to prospecting operations may also be carried out. *Id.* § 5(3)(d). And water from the land may be used for prospecting purposes. *Id.* § 5(3).

³⁴ Other than diamonds. *Id.* § 19(1)(c).

³⁵ *Id.* §§ 15(3)(c), 19(1)(c), 20(1).

³⁶ This would be bulk samples of minerals, including diamonds. *Id.* § 19(1)(c).

³⁷ *Id.* § 20(2).

defer applying for a mining right during unfavorable market conditions;³⁸ (3) the renewal of a prospecting right to continue with uncompleted prospecting operations;³⁹ or (4) a mining right to minerals.⁴⁰ A mining right is defined⁴¹ as a statutory right granted by the state that entitles its holder (the “miner”), against the owner of the relevant land, to enter the land for purposes of mining,⁴² to conduct prospecting and mining operations for minerals,⁴³ and to remove and dispose of minerals found during mining.⁴⁴ A miner is entitled to apply for renewal of the mining right to continue with mining operations.⁴⁵

There is a prescribed manner⁴⁶ to apply for both prospecting and mining rights at the office of the regional manager of the Department of Mineral Resources (the “Department”) in the area the land is situated.⁴⁷ If the formal requirements for lodgement of an application are fulfilled,⁴⁸ the application is accepted.⁴⁹ If an application does not meet the formal requirements, the regional manager must notify the applicant about the refusal of the application within fourteen days of receipt.⁵⁰ Prospecting rights are granted⁵¹ by the Deputy Director-General: Mineral Regulation (the “Deputy Director-General”), as delegate of the Minister,⁵² upon

³⁸ *Id.* §§ 31(1), 32(2).

³⁹ *Id.* § 19(1)(a).

⁴⁰ *Id.* § 19(1)(b); PIETER BADENHORST & HANRI MOSTERT, *MIN. & PETROLEUM L. 13-24* (Juta 2010).

⁴¹ BADENHORST & MOSTERT, *supra* note 40.

⁴² Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 5(3)(a)

⁴³ *Id.* § 5(3)(b). Activities incidental to mining operations may also be carried out. *Id.* § 5(3)(d). And water from the land may be used for mining purposes. *Id.* § 5(3).

⁴⁴ *See id.* § 5(3)(c). Diamonds found during mining may also be removed. *See id.* § 5(3)(cA).

⁴⁵ *Id.* § 25(1).

⁴⁶ *Id.* § 16(1)(b); § 22(1)(b).

⁴⁷ Pieter Badenhorst, *Lapsed Prospecting Rights: The Custodian Giveth and the Custodian Taketh Away?* Palala Resources (Pty) Ltd. v. Minister of Mineral Resources and Energy, 133 S. Afr. L. J. 37, 38 (2016); *See* Badenhorst, *supra* note 30, at 364–65.

⁴⁸ Mineral and Petroleum Resources Development Act 28 of 2002 §§ 16(2), 22(2).

⁴⁹ It is important to distinguish between the acceptance of an application for a right that can be conferred and the grant of such a right. *See* Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res. 2017 (3) SA 301 (GP) ¶ 6.

⁵⁰ Mineral and Petroleum Resources Development Act 28 of 2002 § 16(3), § 22(3).

⁵¹ *See supra* note 49.

⁵² *See* Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 17(1).

compliance with the statutory requirements for the grant of such rights.⁵³ The Minister grants mining rights upon compliance with the statutory requirements.⁵⁴ An application for renewal of a prospecting or mining right must be granted by the regional manager⁵⁵ if the requirements⁵⁶ for the granting of the right have been met.⁵⁷ The Minister then renews a mining right if the requirements⁵⁸ have been met.⁵⁹ The above-mentioned acts of the Minister or officials of the Department are administrative decisions.⁶⁰ Prospecting or mining rights⁶¹ are registered according to the Mining Titles Registration Act 16 of 1967⁶² (“MTRA”) and must be timely lodged for registration at the Mineral and Petroleum Titles Registration Office (the “MPTRO”).⁶³ Upon registration, these rights are classified as “limited real rights” that are binding on third parties.⁶⁴

A prospecting right can be granted for a period of up to five years⁶⁵ and can be renewed once, for a period not exceeding three years.⁶⁶ A mining right can be granted for up to thirty years⁶⁷ and is renewable for further periods that may not exceed thirty years each.⁶⁸ A prospecting right or a mining right is terminated upon expiration of the period for which it was granted,⁶⁹ after cancellation by the Minister upon specified grounds,⁷⁰

⁵³ *Id.*

⁵⁴ *Id.* § 23(1).

⁵⁵ *See id.* § 18(1).

⁵⁶ *Id.* § 18(1)–(3).

⁵⁷ *Id.* § 18(3).

⁵⁸ *Id.* § 24(1)–(3).

⁵⁹ *Id.* § 24(3).

⁶⁰ *Minister of Mineral Resources v. Mawetse Mining Corporation* 2015 (1) SA 306 (SCA) at 24, 26, 27 (S. Afr.). As to the applicable principles of administrative justice, see *Mineral and Petroleum Resources Development Act 28 of 2002* sched. II, § 6.

⁶¹ The MPRDA refers to rights rather than agreements or deeds in the context of notarial execution and registration of agreements or deeds.

⁶² *Mining Titles Registration Act 16 of 1967* § 5(1).

⁶³ *Mineral and Petroleum Resources Development Act 28 of 2002* sched. II, §§ 19(2)(a), 25(2)(a).

⁶⁴ *Id.* § 2(4); *Mining Titles Registration Act 16 of 1967* § 5(1); Badenhorst, *supra* note 30, at 363.

⁶⁵ *Mineral and Petroleum Resources Development Act 28 of 2002* sched. II, § 17(6).

⁶⁶ *Id.* § 18(4).

⁶⁷ *Id.* § 23(6).

⁶⁸ *Id.* § 24(4).

⁶⁹ *Id.* § 56(a).

⁷⁰ *Id.* § 56(e); *see id.* § 47(1).

or upon the occurrence of certain legal events,⁷¹ including: (1) death of the miner or prospector, in the absence of a successor in title;⁷² (2) deregistration of a company which held the right, in the absence of ministerial consent⁷³ to transfer the right to a successor in title;⁷⁴ (3) liquidation or sequestration of the prospector or miner;⁷⁵ or (4) abandonment of the right by the prospector or miner.⁷⁶ Upon termination of prospecting or mining rights, these rights revert “to the custodianship of the state, which assumes the power to reallocate the rights in terms of the MPRDA.”⁷⁷

II. PRIORITY DETERMINATION IN THE CASE OF PENDING AND COMPETING APPLICATIONS

Under the transitional arrangement applications for prospecting permits, mining authorisations, or consents to prospect or mine that were lodged, but not finalized, under the repealed Minerals Act, could be converted to applications that were deemed to be lodged for prospecting rights, mining permits, or mining rights under the MPRDA.⁷⁸ Under this scheme, when a third party’s application for prospecting or mining rights is contested, priority is accorded to a pending old order application.

In *Meepo v. Kotze*,⁷⁹ an application for a prospecting right under the MPRDA was contested because the farm at issue was subject to a previous pending application. Kotze, the owner of the farm, applied for a prospecting permit under the Minerals Act to prospect for diamonds, prior to the enactment of the MPRDA. The regional manager did not inform

⁷¹ Badenhorst, *supra* note 47, at 39; Badenhorst, *supra* note 30, at 365-66.

⁷² Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 56(b).

⁷³ *Id.* § 11(1) (the consent of the Minister (or Director-General (item 1 of the *Ministerial delegation*)) is required for the alienation or transfer of prospecting rights or mining rights).

⁷⁴ *Id.* § 56(c); Palala Resources Ltd. v. Minister of Mineral Resources and Energy 2014 (6) SA 403 (GP) ¶ 47 (S. Afr.).

⁷⁵ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 56(d).

⁷⁶ *Id.* § 56(f).

⁷⁷ Palala Resources Ltd. v. Minister of Mineral Resources and Energy 2014 (6) SA 403 (GP) ¶ 65.

⁷⁸ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 3(1).

⁷⁹ *Meepo v. Kotze* 2008 (1) SA 104 (NC) ¶ 1 (S. Afr.); *See generally* P.J. Badenhorst & Hanri Mostert, *Duelling Prospecting Rights: A Non-Custodial Second?*, S. AFR. L. J., no. 4, at 819.

Kotze of the Department's failure to process the application.⁸⁰ At the commencement of the MPRDA, Meepo applied for a prospecting right to prospect for diamonds on the farm.⁸¹ The Deputy Director-General granted power of attorney to the regional manager to grant a prospecting right.⁸² The regional manager, not the Deputy Director-General, as is required under the MPRDA, granted a prospecting right to Meepo.⁸³

The court found that the application for the prospecting permit under the Minerals Act should have first been processed as a pending application under the MPRDA.⁸⁴ The court recognized that Kotze's application for a prospecting permit was still pending when Meepo submitted its application for a prospecting right under the MPRDA.⁸⁵ The court ordered the regional manager and the Deputy Director-General to process and deal accordingly with Kotze's application.⁸⁶ This way, the application for a prospecting permit would be regarded as an ordinary application for a prospecting right.⁸⁷ The court also found that the power of the Minister to grant a prospecting right was delegated to the Deputy Director-General who, in turn, could not further delegate it to the regional manager.⁸⁸ The court thought it irregular and *ultra vires* of the power of the regional manager to process Meepo's application under the MPRDA and disregard Kotze's pending application.⁸⁹ The court held that Meepo's prospecting right was null and void because it was granted by the regional manager who was not authorized to grant a prospecting right.⁹⁰

The *Meepo* decision demonstrates how the transitional process from the mineral law regime under the Minerals Act to the MPRDA functioned in practice:

Pre-existing positions are protected, even where (as in this case) no proprietary element has been established yet. In doing so, the court endorses a process that conforms to the dictates of administrative justice and the rule of law. This also illustrates

⁸⁰ Meepo v. Kotze 2008 (1) SA 104 (NC) ¶¶ 4, 52 (S. Afr.).

⁸¹ *Id.* ¶ 5.

⁸² *Id.* ¶ 45.

⁸³ *See id.* ¶ 6 (describing that two attempts to grant a prospecting right were made and the second prospecting right was registered and formed the subject of the court application).

⁸⁴ *Id.* ¶ 54.

⁸⁵ *Id.* ¶ 60.

⁸⁶ *Id.* ¶ 63.

⁸⁷ Badenhorst & Mostert, *supra* note 79, at 826.

⁸⁸ Meepo v. Kotze 2008 (1) SA 104 (NC) ¶ 60.

⁸⁹ *Id.* ¶ 60.

⁹⁰ *Id.* ¶ 47.

the importance of the transitional period, in which the transitional arrangements functioned as a buffer against loss (beyond what has been envisaged) of positions that might have been held under the previous mineral law dispensation.⁹¹

Ultimately, the outcome was equitable; the holder of an OOR, whose application was pending under the Minerals Act, was accorded priority. Kotze's rights preceded those of Meepo in time, while Meepo probably had notice of Kotze's pending application. In other words, Meepo had to give effect to Kotze's earlier personal rights of which he had notice. The continuation of prospecting operations and possible mining operations would have been beneficial to the people of South Africa if it were included within the framework of the MPRDA.

III. PRIORITY DISPUTES BETWEEN OOPRS OR OOMRS AND PROSPECTING OR MINING RIGHTS UNDER THE MPRDA

The priority accorded by the transitional arrangements are briefly as follows: An existing OOPR had a conversion period, meaning it remained valid for two years after the passage of the MPRDA,⁹² subject to its terms and conditions.⁹³ The holder of the right had to apply for a conversion to a new right⁹⁴ during this time.⁹⁵ If the requirements for conversion⁹⁶ were met, the Minister had to convert the OOPR into a prospecting right.⁹⁷ Within ninety days of notice of conversion,⁹⁸ the holder had to register it

⁹¹ Badenhorst & Mostert, *supra* note 5, at 25-11.

⁹² De Beers Consolidated Mines Ltd. v. Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy 2008 (OPD) unreported case no. 1590/2007 at 42-44 (S. Afr.) (holding that a holder of an old order prospecting right had a period of two years to have it converted, regardless of when the underlying right in the pre-existing prospecting permit would have expired).

⁹³ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 6(1).

⁹⁴ Norgold Investments (Pty) Ltd. v. Minister of Minerals and Energy of the Republic of South Africa 2011 (SCA) ¶ 44 (S. Afr.). Lodgement had to take place at the office of the regional manager in whose region the land was situated. *Id.* ¶ 39. A lodgement at the office of an incorrect regional manager is not fatal as long as the application reached the Deputy Director-General, as ultimate decision maker. *Id.*

⁹⁵ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 2.

⁹⁶ *Id.* § 6(3).

⁹⁷ *Id.* § 6(4). The terms and conditions of the OOPR remained applicable to the prospecting right, unless contrary to the constitution. *Id.* § 6(4).

⁹⁸ *Id.* § 6(5). If the OOPR was subject to a mortgage the converted right had to be registered subject to such mortgage. *Id.* § 6(6).

with the MPTR0, and deregister the OOPR with the Deeds Office.⁹⁹ The OOPR ceased to exist upon failure to lodge a timely application for its conversion,¹⁰⁰ or upon its conversion and the registration of the prospecting right.¹⁰¹ Registration, as a second element of termination, is not always considered or mentioned by the courts.

An existing OOMR had a conversion period, meaning it remained valid for five years after the passage of the MPRDA or the period for which it was granted if the period was shorter than five years (“conversion period”), subject to its terms and conditions.¹⁰² A holder of an OOMR had to lodge an application for conversion within the conversion period.¹⁰³ If the requirements for conversion¹⁰⁴ were met, the Minister had to convert it into a mining right.¹⁰⁵ Within ninety days of notice of conversion,¹⁰⁶ it had to be registered with the MPTR0 and the OOMR had to be deregistered with the Deeds Office.¹⁰⁷ The OOMR ceased to exist upon failure to lodge a timely application for conversion¹⁰⁸ or upon conversion of the OOMR and registration of the mining right.¹⁰⁹

The *Sishen Iron Ore* trilogy of decisions¹¹⁰—the most costly litigation in South African legal history—dealt with problems associated with the conversion of an OOMR held jointly by two holders, and indirectly with the priority accorded to the holders of the right. The facts were briefly as follows: Sishen Iron Ore Company Pty. Ltd. (“Sishen”), the holder of an undivided share (78.6%) of an OOMR to iron, timely applied for the conversion of its right. Arcelor Mittal SA (“AMSA”), the other holder of the undivided share (21.4%) of the OOMR, however, failed to apply for conversion of its right. Upon expiration of the five-year

⁹⁹ *Id.* § 6(5).

¹⁰⁰ *Id.* § 6(8).

¹⁰¹ *Id.* § 6(7).

¹⁰² *Id.* § 7(1).

¹⁰³ *Id.* § 7(2). Lodgement had to take place at the office of the regional manager in whose region the land was situated. *Id.* § 7(2).

¹⁰⁴ *Id.* § 7(3).

¹⁰⁵ *See id.* § 7(4).

¹⁰⁶ *Id.* § 7(5). If the OOMR was subject to a mortgage, the converted right had to be registered subject to such mortgage. *Id.* § 7(6).

¹⁰⁷ *Id.* § 7(5).

¹⁰⁸ *Id.* § 7(8).

¹⁰⁹ *Id.* § 7(7).

¹¹⁰ *Sishen Iron Ore Co. v. Minister of Mineral Res. of the Republic of South Afr.*, unreported case no 28980/2010 of 3 February 2010; *Minister of Mineral Res. of the Republic of S. Afr. v. Sishen Iron Ore Co.* 2013 (SCA) ¶¶ 1–2 (S. Afr.); *see* *Minister of Mineral Res. v. Sishen Iron Ore Co.* 2014 (45) ZACC (CC) ¶¶ 1–2.

transitional period, Sishen applied for conversion of the outstanding 21.4% share of the OOMR. The Department, however, granted a prospecting right for the 21.4% share in the unconverted OOMR to a politically well-connected third party, Imperial Crown Trading (Proprietary) Limited (“ICT”). At issue was the percentages of shareholding in the converted mining and whether a mining right could have been granted for the 21.4% undivided share in the unconverted OOR.

In *Sishen Iron Ore Company (Pty.) Ltd. v. Minister of Mineral Resources*,¹¹¹ the first case in the trilogy, the court of first instance found that Sishen had timely lodged a “full 100% old order mining right” for conversion¹¹² and decided that the Minister granted the “sole and exclusive full mining right” to Sishen.¹¹³ Therefore, prospecting rights or mining rights could not have been granted to anyone else, including ICT.¹¹⁴ The South African Supreme Court of Appeal in *Minister of Mineral Resources v. Sishen Iron Ore Company (Pty.) Ltd.*¹¹⁵—the second case in the trilogy—also held that, upon the grant of the conversion of Sishen’s OOMR, Sishen became the holder of the sole and exclusive mining right.¹¹⁶ Because AMSA failed to timely convert its share in the OOMR, it ceased to exist on April 30, 2009,¹¹⁷ and Sishen became the sole holder of the mining right.¹¹⁸ In other words, Sishen acquired the remaining share in the OOMR by ministerial grant and/or expiration of AMSA’s share in the OOMR by operation of law. The correctness of the two *Sishen* decisions has been questioned,¹¹⁹ especially because prior to the expiration of AMSA’s undivided share in the OOMR on April 30, 2009, it would have been irregular and *ultra vires* for the Minister to have

¹¹¹ *Sishen Iron Ore Co. v. Minister of Mineral Res. of the Republic of South Africa*, unreported case no 28980/2010 of 3 February 2010.

¹¹² *Id.* ¶ 96.

¹¹³ *Id.* ¶ 98.

¹¹⁴ *See id.* ¶ 100.

¹¹⁵ *Minister of Mineral Res. of the Republic of S. Afr. v. Sishen Iron Ore Co.* 2013 (SCA) ¶¶ 1–2 (S. Afr.).

¹¹⁶ *Id.* ¶¶ 50, 56.

¹¹⁷ *Id.* ¶¶ 52–53.

¹¹⁸ *Id.* ¶¶ 54, 56.

¹¹⁹ *See* Pieter Badenhorst & Nicolaas Johannes Jacobus Olivier, *Conversion of “Old Order Mining Right”: Sleeping at the MPRDA’s Wheel of (Mis)Fortune?* *Sishen Iron Ore Company v. Minister of Mineral Resources* Unreported Case No. 28980/10 (GNP), 76 J. OF CONTEMP. ROMAN-DUTCH L. 269, 278–81 (2013); Pieter Badenhorst & Nicolaas Johannes Jacobus Olivier, *Conversion of Jointly-Held Old Order Mining Rights: An All and Nothing Ruling?* *Minister of Mineral Resources of the RSA v. Sishen Iron Ore* (394/12) [2013] ZASCA 50 (28 March 2013), 77 J. OF CONTEMP. ROMAN-DUTCH L. 145, 150–51, 154 (2014).

considered and granted a mining right to Sishen for the 21.4% undivided share of the OOMR which was still held by AMSA. Upon expiration of AMSA's share in the OOMR, the transitional arrangements did not provide for automatic acquisition by the other co-holder of the mining right. Co-holding of mineral rights in the previous dispensation was not uncommon¹²⁰ but was not dealt with at all by the transitional arrangements. The common law principles of co-ownership ought to have been applied.¹²¹ It should also be remembered that, in terms of the transitional arrangements, an OOMR is terminated, not upon the granting of a mining right only, but upon registration of the new mining right in the MPTRO, which was not taken into account by the South African Supreme Court of Appeal in *Sishen*.

On appeal to the highest South African court, the Constitutional Court, in *Minister of Mineral Resources v. Sishen Iron Ore Co (Pty.) Ltd.*,¹²² it was decided that: (1) Sishen only converted its OOMR, which comprised its 78.6% share of the mineral right;¹²³ (2) AMSA's OOMR, which comprised its 21.4% share of the mineral right, ceased to exist on April 30, 2009, upon its failure to apply for conversion¹²⁴ and it "reverted"¹²⁵ to the state because the state is the custodian of mineral resources;¹²⁶ (3) the Minister was not empowered to grant AMSA's share of the OOMR to ICT, a third party;¹²⁷ and (4) Sishen was entitled to formally apply again for, and be granted upon compliance with the requirements of the MPRDA, the residual 21.4% share of AMSA's unconverted OOMR.¹²⁸ In effect, priority was given to Sishen, as holder of a share in an OOMR, and not as holder of a new mining right with such

¹²⁰ See, e.g., *Erasmus v. Afrikaner Proprietary Mines Ltd.* 1976 (1) SA 950 (W).

¹²¹ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 4; Badenhorst & Olivier, *Conversion of 'Old Order Mining Rights': Sleeping at the MPRDA's Wheel of (Mis)fortune?* – *Sishen Iron Ore Co. (Pty) Ltd. v. Minister of Mineral Resources* Unreported Case no. 28980/10 (GNP), 76 J. OF CONTEMP. ROMAN-DUTCH L. 269, 275–77 (2013).

¹²² *Minister of Mineral Res. v. Sishen Iron Ore Co.* 2014 (45) ZACC (CC) ¶ 63; Pieter Badenhorst, *Expropriation of 'Old Order' Mineral Rights in South Africa: The Constitutional Court Has Its Say (Twice)*, 4 PROP. L. REV. 53 (2014); see Pieter Badenhorst & Nicolaas Johannes Jacobus Olivier, *Conversion of Jointly-Held Old Order Mining Rights: You Can't Always Get What You Want* - *Minister of Mineral Resources v. Sishen Iron Ore Co. (Pty) Ltd.* [2013] ZACC 45, 78 J. OF CONTEMP. ROMAN-DUTCH L. 498 (2015).

¹²³ *Minister of Mineral Res. v. Sishen Iron Ore Co.* 2014 (45) ZACC (CC) ¶¶ 31, 32.

¹²⁴ *Id.* ¶¶ 31, 33, 42.

¹²⁵ See Badenhorst & Olivier, *supra* note 122.

¹²⁶ *Minister of Mineral Res. v. Sishen Iron Ore Co.* 2014 (45) ZACC (CC) ¶ 50.

¹²⁷ See *id.* ¶¶ 37, 38, 53.

¹²⁸ *Id.* ¶ 58.

share, to apply for the remaining undivided share of the unconverted OOMR after its expiration over a third party holding a prospecting right that was granted after expiration of the conversion period. The Constitutional Court also did not consider the relevance of registration of the converted rights for purposes of the termination of OOMRs.

Priority was granted to Sishen, which was operating one of the largest opencast iron ore mines in the world, rather than to an opportunistic third party that did not intend to prospect or mine at all¹²⁹ but merely wanted to be compensated handsomely for an inconsistent prospecting right that it had no right to under the MPRDA.¹³⁰ The rights of Sishen preceded those of ICT in time. ICT had insider knowledge of Sishen's application for conversion of the OOMR and AMSA's failure to apply for conversion at the Department and it applied for a prospecting right for the 21.4% share of AMSA's mining right immediately when it was terminated. This knowledge further justifies the bestowing of priority on the majority interest holder of the OOMR. The continuation of mining operations at the Sishen mine is obviously beneficial within the framework of the MPRDA for the people of South Africa.

IV. PRIORITY DISPUTES BETWEEN UOORS AND PROSPECTING RIGHTS OR MINING RIGHTS UNDER THE MPRDA

The priority accorded to UOORs by the transitional arrangements were as follows: An UOOR remained valid, subject to the terms and conditions under which it was granted or acquired.¹³¹ Upon commencement of the MPRDA, an UOOR remained valid for a transitional period of one year or for the period for which it was granted,

¹²⁹ See Pieter Badenhorst & Nicolaas Johannes Jacobus Olivier, *Conversion of Jointly-Held Old Order Mining Rights: An All and Nothing Ruling?* – Minister of Mineral Resources of the RSA v. Sishen Iron Ore (394/12) [2013] ZASCA 50 28 March 2013, 77 J. OF CONTEMP. ROMAN-DUTCH L. 145, 153–54 (2014).

¹³⁰ The *modus operandi* of the department in granting the prospecting right to ICT was described as follows by Acting Judge of Appeal Southwood in Minister of Mineral Resources v. Sishen Iron Ore Co 2013 (4) SA 461 (SCA): “The irrationality of granting a prospecting right to search for iron ore on properties on which one of the biggest iron ore mines in the world is situated is manifest. The only plausible inference is that this was done to give ICT a preferential right to apply for a mining right in that area.” Minister of Mineral Resources v. Sishen Iron Ore Co 2013 (4) SA 461 (SCA) ¶ 8.

¹³¹ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 8(1). Lodgement had to take place at the office of the regional manager in whose region the land was situated. *Id.* § 6(2).

if less than one year.¹³² Within the transitional period, the holder of the UOOR had the exclusive right to apply for a prospecting right or a mining right under the MPRDA.¹³³ If such an application was lodged within the transitional period, the UOOR remained valid until a prospecting or mining right was “granted and dealt with in terms of the Act or [was] refused.”¹³⁴ An UOOR was terminated upon expiration of the transitional period, or on the grant or refusal of an application for a prospecting or mining right under the MPRDA.¹³⁵ It should be noted that in this instance, registration of a new prospecting or mining right was not required for the termination of the UOOR.

In *Pan African Mineral Development Company (Pty.) Ltd. v. Aquila Steel (South Africa) (Pty.) Ltd.*,¹³⁶ a priority dispute arose between the holder of UOORs and the holder of a prospecting right that was granted by the Department to the same minerals and land. The Supreme Court of Appeal¹³⁷ resolved the dispute by applying the priority rules in accordance with the transitional arrangements. The majority decision was delivered by Judge of Appeal Ponnann (Judges of Appeal Bosielo and Mathopo and Acting Judge of Appeal Tsoka concurring) and a dissenting judgement was given by Judge of Appeal Willis. The next Part sets out the facts and issues of the *Pan African* decision. Then, it discusses the decision and reasoning of the majority and minority of the court. Finally, it will analyze whether the decision was correct.

A. Facts

As part of Cecil John Rhodes’ dream to build a railway line from Cape Town to Cairo, the government of the Cape Colony granted vast tracks of land, including mineral rights, along the envisaged route in the Northern Cape to the Bechuanaland Railway Company Limited, which was incorporated in the United Kingdom.¹³⁸ After two name changes, the

¹³² *Id.* § 8(1).

¹³³ *Id.* § 8(2).

¹³⁴ *Id.* § 8(3).

¹³⁵ *See id.* § 8(2)–(4).

¹³⁶ Minister of Mineral Res. v. Sishen Iron Ore Co. 2014 (45) ZACC (CC) ¶ 63

¹³⁷ For a discussion of decision of the court *a quo* in *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP), see Heleen van Niekerk, *How Not to Queue: Judicial Scrutiny of the MPRDA’s Queuing System, an Analysis of Aquila Steel (South Africa) Limited v. Minister of Mineral Resources (72248/15) [2016] ZAGPPHC 1071 and Legislative Changes to the Queuing System*, 38(2) OBITER 417 (2017).

¹³⁸ *See Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 1; In the minority judgement it is stated that the grants were made to Cecil

railway company, now called ZIZA Limited (“ZIZA”) initially operated as a railway company and was co-owned by the governments of Zimbabwe and Zambia.¹³⁹ According to the terms of a memorandum of understanding—signed on March 24, 2005, between the governments of South Africa, Zambia, and Zimbabwe—a new South African company called the Pan African Mineral Development Company (Pty.) Ltd. (“PAMDC”), was to be established and co-owned by the parties to the memorandum of understanding as a special purpose vehicle to collaborate and transfer ZIZA’s mineral rights to PAMDC and take over the possible prospecting and mining activities of ZIZA.¹⁴⁰ PAMDC was incorporated on November 26, 2007 and the governments of South Africa, Zambia, and Zimbabwe concluded a shareholders’ agreement for PAMDC.¹⁴¹ ZIZA was removed from the U.K. companies’ register on November 9, 2010, but its registration was restored on October 14, 2014.¹⁴²

On April 19, 2005, ZIZA, as holder of UOORs, submitted an application for a prospecting right for its Kuruman properties in the Northern Cape.¹⁴³ The “application recorded that ZIZA was in the process of ceding its rights to PAMDC.”¹⁴⁴ On August 17, 2005 the regional manager accepted ZIZA’s application for a prospecting right¹⁴⁵ and the Deputy Director-General granted a prospecting right to ZIZA for five years on February 26, 2008.¹⁴⁶ However, on November 19, 2011, a prospecting right was executed by the Department of Mineral Resources, not in the name of ZIZA, but in the name of PAMDC.¹⁴⁷

On May 2, 2006, the Regional Manager accepted an application for a prospecting right for certain overlapping properties from Aquila Steel (S. Afr.) (Pty.) Ltd. (“Aquila”),¹⁴⁸ a subsidiary of an Australian natural resources company. The Deputy Director-General granted a prospecting right to Aquila on October 11, 2006.¹⁴⁹ An internal departmental

John Rhodes. *Id.* ¶ 43; *see also*, *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) ¶ 5.

¹³⁹ *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) ¶¶ 1, 43.

¹⁴⁰ *Id.* ¶ 4.

¹⁴¹ *Id.* ¶ 5.

¹⁴² *Id.* ¶¶ 5, 9.

¹⁴³ *Id.* ¶¶ 3, 16.

¹⁴⁴ *Id.* ¶ 3.

¹⁴⁵ *Id.* ¶¶ 3, 16.

¹⁴⁶ *Id.* ¶¶ 5, 16, 31.

¹⁴⁷ *Id.* ¶ 5.

¹⁴⁸ *Id.* ¶ 4.

¹⁴⁹ *Id.* ¶¶ 4, 17.

memorandum on November 23, 2006, noted the conflict of interest between ZIZA's and Aquila's applications.¹⁵⁰ Aquila's prospecting right was nevertheless notarially executed on February 28, 2007,¹⁵¹ and registered in the MPTRD on July 17, 2007.¹⁵² Aquila had spent R156 million (USD 11.6 million)¹⁵³ on prospecting activities and identified 140 million tons of manganese resource, worth billions of rands which it intended to mine.¹⁵⁴ On December 22, 2010, the regional manager accepted Aquila's application for a mining right over one of the Kuruman properties in the face of ZIZA's prospecting right.¹⁵⁵ Aquila applied on December 15, 2011, to renew its prospecting right, which was granted on July 31, 2015.¹⁵⁶

PAMDC and ZIZA argued that Aquila could not lawfully have applied for and been granted a prospecting right while ZIZA's application to dispose of its UOOR was still pending.¹⁵⁷

B. Decision

Judge of Appeal Ponnann, for the majority, set out the legal principles applicable to ZIZA's prospecting right that was granted over the Kuruman properties: A holder of an UOOR was afforded an exclusive right, for one year, to lodge an application for a new prospecting right (or mining right) under the MPRDA.¹⁵⁸ An application for a prospecting right must comply with the requirements of the MPRDA and it could take some time to be processed and finalized.¹⁵⁹ The application had to be dealt with, and its validity determined, before any other application for a prospecting or mining right could be considered and finalized.¹⁶⁰ The UOOR and its exclusivity remain in existence until an application for a prospecting or mining right has been granted or refused by the Minister or his delegate.¹⁶¹

¹⁵⁰ *Id.* ¶ 4.

¹⁵¹ *Id.* ¶ 4, 17.

¹⁵² *Id.* ¶ 4.

¹⁵³ As of July 24, 2018.

¹⁵⁴ *Id.* ¶ 44 (Willis, JA, dissenting). *Aquila Steel (SA) Pty. Ltd. v. Minister of Mineral Resources*, *supra* note 2, at 19.

¹⁵⁵ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 5, 18.

¹⁵⁶ *Id.* ¶ 18.

¹⁵⁷ *See id.* ¶ 46 (Willis, JA, dissenting).

¹⁵⁸ *Id.* ¶ 12.

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* ¶ 17.

¹⁶¹ *Id.* ¶¶ 15, 26.

If an application is not granted or refused, the UOOR and its exclusivity period endure.¹⁶² Security of tenure is afforded to the holder of the UOOR as it remains valid until the application is granted or rejected under the MPRDA.¹⁶³ The refusal of an application for a prospecting right is an exercise of ministerial power. Refusal of an application does not amount to the return of an application by the regional manager for non-compliance with the prescribed formalities.¹⁶⁴

The return of an application to an applicant by the regional manager was, however, painted differently in the dissenting opinion of Judge of Appeal Willis:¹⁶⁵

The return of the application by the [regional manager] is merely a public manifestation of its being dead. It is not an act of execution in itself. It is not a rejection of the application. It is not a usurpation of the function of the Minister to decide whether to grant or refuse an application. It is a facilitation. It avoids wasting the resources of time and intellectual expertise of the Minister having to try to apply his mind to something which is incapable of being considered.

A prospecting right over the Kuruman properties was also granted to Aquila, executed and registered in the MPTRD.¹⁶⁶ That meant that two entities held prospecting rights to the same minerals and land.¹⁶⁷ The court perceived the grant of competing prospecting rights to be at odds with the scheme of the MPRDA.¹⁶⁸ In other words, a priority of rights dispute arose.

The majority set out the following principles to determine which prospecting right should receive preference or priority in the case of two competing prospecting rights for the same properties: A holder of an UOOR who has applied for a prospecting right during the period of exclusivity enjoys preference under the MPRDA because it is structured to permit the grant of only one prospecting right, or mining right, for the

¹⁶² *Id.* ¶ 15.

¹⁶³ *See id.* ¶ 26. Ponnar JA incorrectly refers to conversion. Item 8 of Schedule II does not provide for conversion of an unused old order right but rather the *de novo* application for a prospecting right or mining right.

¹⁶⁴ *Id.* ¶¶ 22, 24. The court *a quo* in *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res. 2017 (3) SA 301 (GP)* ¶ 21, however, held that “the return of an application by a RM under s 16 [of the MPRDA] was equivalent to the rejection of such an application.”

¹⁶⁵ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA)* ¶ 49.

¹⁶⁶ *See id.* ¶¶ 4, 17.

¹⁶⁷ *Id.* ¶ 17.

¹⁶⁸ *Id.*

same mineral over the same land.¹⁶⁹ As long as an application for a new prospecting right, or mining right, is pending, an applicant continued to hold an UOOR over the properties.¹⁷⁰ A pending old order application would preclude any later application until the old order application had been finally determined.¹⁷¹ The regional manager is thus “precluded from accepting or doing anything with a later application until an existing application has been decided,”¹⁷² and the Minister or his delegate may not grant another prospecting or mining right during the period of exclusivity, which is guaranteed by the MPRDA.¹⁷³

The court reasoned that the preclusion of the regional manager is “clarified” by the amendment of Section 16(2)(c) of the MPRDA which now expressly prohibits the regional manager from accepting a later prospecting right application in the face of an earlier application for a prospecting right that has yet to be determined.¹⁷⁴ The court further decided that if the application for a prospecting right by the holder of an UOOR was successful, the prospector would also procure an exclusive right to renew the prospecting right and to apply for a mining right for the mineral and prospecting area.¹⁷⁵ The majority justified the preference or priority to the holder of the UOOR over a newcomer applicant for a prospecting right as follows:

This preference was underpinned by a constitutional objective, namely, to ensure that the deprivation of property brought about by the enactment of the MPRDA was fair. In the result, existing rights were “left intact and capable of full enjoyment by those who wished to and were able to exploit [them]”. An old order right holder’s ability to preserve its existing right through the conversion process was central to the constitutionality of the

¹⁶⁹ *Id.* ¶ 13. Ponnar, JA, referred incorrectly to a conversion application.

¹⁷⁰ *Id.*

¹⁷¹ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 13.

¹⁷² *Id.* ¶ 14.

¹⁷³ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 8(2); Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 15.

¹⁷⁴ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 14. It should, however, be noted that the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, which amended Section 16(2)(c) of the MPRDA, only went into effect on June 7, 2013. The acceptance of Aquila’s application for a prospecting right by the regional manager, the grant of a prospecting right, and notarial execution thereof all occurred before June 2013.

¹⁷⁵ *Id.*

property deprivation brought about by the enactment of the
MPRDA.¹⁷⁶

According to the court, the above-mentioned constitutional objective is achieved by reading the provisions about the application for a prospecting or mining right¹⁷⁷ as being subject to item 8(3) of the transitional arrangements.¹⁷⁸ This item provides for the continuation of an UOOR until an application for a prospecting or mining right is granted or refused. The majority reasoned that the purpose of item 8(3) “is to perpetuate the continued validity of the unused old order right”¹⁷⁹ and to afford security of tenure to holders of UOORs until the prospecting application is either granted or refused.¹⁸⁰

The majority made the following findings about the competing prospecting rights for the Kuruman properties: (1) ZIZA held various UOORs;¹⁸¹ (2) ZIZA held an exclusive right to apply for a prospecting right during the one-year period of transition;¹⁸² (3) ZIZA timely applied for a prospecting right on April 19, 2005;¹⁸³ (4) ZIZA’s application did not strictly comply with all the requirements of the regulations but it sufficiently described the properties to have enabled the Department to identify the properties and log it into its system;¹⁸⁴ (5) the regional manager accepted ZIZA’s application for a prospecting right on August 17, 2005, and thus became eligible for determination;¹⁸⁵ (6) ZIZA’s supplemented its application with further documentation that the Department requested;¹⁸⁶ (7) ZIZA received its prospecting right on February 26, 2008,¹⁸⁷ for a period of five years, until February 25, 2013;¹⁸⁸ (8) between August 17, 2005 (acceptance of the lodged application), and

¹⁷⁶ *Id.*

¹⁷⁷ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, §§ 16–17, 22–23.

¹⁷⁸ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 15.

¹⁷⁹ *Id.* ¶ 26.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* ¶ 16.

¹⁸² *Id.* That was from May 1, 2004 to April 30, 2005.

¹⁸³ *Id.* Lodgement took place before April 30, 2005.

¹⁸⁴ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 21.

¹⁸⁵ *Id.* ¶ 16.

¹⁸⁶ *Id.* ¶ 22.

¹⁸⁷ *Id.* ¶ 16.

¹⁸⁸ See *id.* ¶ 31.

February 26, 2008, ZIZA continued to hold an OOR;¹⁸⁹ (9) ZIZA's prospecting right has since lapsed (although the date of lapsing was in dispute);¹⁹⁰ (10) Aquila's application for a prospecting right was accepted, processed, granted, and executed in the face of ZIZA's pending application;¹⁹¹ (11) the grant of a prospecting right to Aquila was due to an administrative error;¹⁹² and (12) Aquila's application for a prospecting right could not have been accepted or processed by the regional manager or granted by the Deputy Director-General once the prospecting application of ZIZA was under consideration.¹⁹³

With reference to (3) and (5) above, in terms of item 8(3) of the transitional arrangements, lodgement of an application at the office of the regional manager already triggered continuation of the UOOR and not the acceptance of the application by the regional manager. With reference to (8) above, an unused old order right existed for the entire one-year period of transition, until April 30, 2005, and thereafter continued to exist in terms of item 8(3) until the grant of the prospecting right on February 26, 2008, because the application was timely lodged during the transition period. Otherwise, there would be a gap in time between April 30, 2005 and August 17, 2005. Irrespective of which statement is correct, ZIZA's UOOR was, under item 8(3), terminated upon February 26, 2008, when a prospecting right was granted. According to the court, the processing and grant of Aquila's application on May 2, 2006, was barred because ZIZA's application was accepted and had not been set aside.¹⁹⁴ The court reasoned that the department could not simply disregard the regional manager's acceptance of ZIZA's application or treat the application as though it did not exist.¹⁹⁵ With reference to (12) above, Aquila simply did not acquire a prospecting right for the Kuruman properties because the acceptance of the application by the regional manager and the grant by the Deputy Director-General was irregular and *ultra vires*.

The court decided that the Aquila application for a prospecting right could not have been accepted or processed while the ZIZA application for a prospecting right was under consideration.¹⁹⁶ Therefore, the department

¹⁸⁹ *Id.* ¶ 16.

¹⁹⁰ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 19.

¹⁹¹ *Id.* ¶ 17.

¹⁹² *Id.*

¹⁹³ *Id.* ¶¶ 15, 19.

¹⁹⁴ *Id.* ¶ 23.

¹⁹⁵ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 23.

¹⁹⁶ *Id.* ¶ 19.

could not have accepted or granted a prospecting right to Aquila.¹⁹⁷ Further, even if ZIZA did not strictly comply with the formalities and procedural requirements, it did not invalidate its application.¹⁹⁸

In his dissent, Judge of Appeal Willis, however, found that ZIZA's application for a prospecting right was seriously and fundamentally defective, "hopelessly inadequate,"¹⁹⁹ and did not comply with the requirements for lodging an application for a prospecting right.²⁰⁰ In the words of Judge of Appeal Willis, "A defective application is a non-application. It is dead. It has no existence. It has no 'life', no vitality."²⁰¹ Judge of Appeal Willis stressed that non-compliance with the requirements of Section 16 of the MPRDA makes the application "lifeless" and "stillborn."²⁰² Judge of Appeal Willis also found that the regional manager failed, in terms of Section 16(3) of the MPRDA, to inform the applicant²⁰³ within fourteen days about the non-compliance with the requirements for a prospecting right and return the application to the applicant.²⁰⁴ Judge of Appeal Willis referred to all these shortcomings as the regional manager's failure to return the application.²⁰⁵ The return of an application by the regional manager "is the funeral rite of the application, not its deathblow."²⁰⁶ It was found that the failure of the regional manager to return ZIZA's application "was unlawful," and could not deprive Aquila of its rights over the property nor confer upon ZIZA rights to which it was not entitled.²⁰⁷ According to Judge of Appeal Willis, the unlawful acts of public servants are not without remedy.²⁰⁸ Judge of Appeal Willis found that ZIZA's application for a prospecting right was

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* ¶ 20.

¹⁹⁹ *Id.* ¶ 38 (Wills, JA, dissenting).

²⁰⁰ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶¶ 38, 40, 45 (Wills, JA, dissenting).

²⁰¹ *Id.* ¶ 49 (Wills, JA, dissenting).

²⁰² *Id.* ¶ 50 (Wills, JA, dissenting).

²⁰³ The statement that the regional manager failed to notify Aquila in writing of ZIZA's non-compliance with the MPRDA seems incorrect.

²⁰⁴ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶¶ 39–40 (Wills, JA, dissenting).

²⁰⁵ *Id.* ¶ 40 (Wills, JA, dissenting).

²⁰⁶ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 50 (Wills, JA, dissenting).

²⁰⁷ *Id.* ¶ 51 (Wills, JA, dissenting).

²⁰⁸ *Id.* ¶ 54 (Wills, JA, dissenting) (citations omitted).

also not determined within thirty days, as required by the MPRDA.²⁰⁹ The requirements for an application for prospecting rights were not met.

The dissent also found that the grant of the prospecting right was conditional upon certain requirements, such as registration and lodging of documents, which ZIZA did not comply with.²¹⁰ Judge of Appeal Willis indicated that the appellants accepted that they were not validly granted prospecting rights and “ZIZA’s old order mining rights expired on April 30, 2004, in terms of item 7(1) of Schedule II of the MPRDA.”²¹¹ It should be noted that ZIZA was not the holder of OOMRs. Rather, its UOOR expired in terms of item 8(4) of the transitional arrangements on April 30, 2005. The requirements for the grant of a prospecting right had thus not been met.

According to Judge of Appeal Willis, the Deputy Director-General’s decision to execute a notarial prospecting right in the name of PAMDC on November 19, 2011, which it had not even applied for, was irregular and should not have been effective.²¹² According to Judge of Appeal Willis, at that time, Aquila held a valid prospecting right which meant that PAMDC’s application could not have been considered.²¹³

Aquila’s application for the renewal of its prospecting right was accepted by the regional manager and granted on July 31, 2015.²¹⁴ The majority held that the duration of a prospecting right is determined not from the effective date of the executed deed, but from the date on which the grant of the prospecting right is communicated to the applicant.²¹⁵ The Supreme Court of Appeal in *Palala Resources (Pty.) Ltd. v. Minister of Mineral Resources and Energy* had already come to this conclusion.²¹⁶ The court found that Aquila was informed of the grant of the prospecting right during November 2006,²¹⁷ and the prospecting right of Aquila

²⁰⁹ See *id.* ¶ 47 (Wills, JA, dissenting).

²¹⁰ *Id.* ¶ 58 (Wills, JA, dissenting).

²¹¹ *Id.* ¶ 60 (Wills, JA, dissenting); see also *id.* ¶ 43 (Wills, JA, dissenting).

²¹² *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 56 (Wills, JA, dissenting); see also *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) ¶ 32.

²¹³ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 57.

²¹⁴ *Id.* ¶ 18.

²¹⁵ *Id.* ¶ 27.

²¹⁶ *Palala Res. Ltd. v. Minister of Mineral Res. & Energy* 2014 (6) SA 121 (SCA) (S. Afr.).

²¹⁷ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 27.

therefore expired in November 2011 and consequently lapsed.²¹⁸ The court found that Aquila could not, therefore, have applied for the renewal of its prospecting right on December 15, 2011, because the application could not revive its expired prospecting right, which right had ceased to have any legal effect.²¹⁹ The regional manager was not able to renew Aquila's prospecting right.

An application for a mining right by Aquila over one of the Kuruman properties was accepted on December 22, 2010, by the regional manager but was not considered or granted by the Minister.²²⁰ The court found that Aquila could not claim that it had an exclusive right to apply for a mining right because it was not the holder of the prospecting right at the time it submitted its application.²²¹ The court also referred to Section 22(2)(b) of the MPRDA, which precludes the regional manager from accepting an application for a mining right where another prospector holds an existing prospecting right for the same mineral over the same land.²²² According to the court, ZIZA was holding a prospecting right from February 26, 2008 until February 25, 2013. Additionally, the court held that Aquila simply did not acquire, and could not have acquired, a prospecting right during the continued existence of the UOOR until February 25, 2008. If Aquila did not acquire the prospecting right, linkage rights to renew a prospecting right or to apply for a mining right would also be absent.

It was also argued, as decided by the court *a quo*, that the prospecting right of ZIZA lapsed on November 9, 2010, when ZIZA was deregistered. The lapsed prospecting right consequently did not preclude the acceptance by the regional manager of Aquila's application for: (1) renewal of a prospecting right on December 15, 2011; and (2) a mining right on December 22, 2010.²²³ As indicated in Part II, a prospecting right terminates upon deregistration of a company which held the prospecting right in the absence of ministerial consent to transfer the right to a successor in title.²²⁴ ZIZA was, however, restored to the company register on October 14, 2014.²²⁵ The court decided that the restoration of a

²¹⁸ *Id.* ¶¶ 27–28 (citations omitted).

²¹⁹ *Id.* ¶ 28.

²²⁰ *Id.* ¶ 18.

²²¹ *Id.* ¶ 27. Strangely, the court also seemed to have accepted the existence of Aquila's prospecting right. *See id.* ¶ 28.

²²² Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶¶ 18, 32.

²²³ *Id.* 31.

²²⁴ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II, § 56(c).

²²⁵ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 32.

company's register "retrospectively validated all acts and restored all assets to it."²²⁶ The court followed the decision of the Supreme Court of Appeal in *Palala Resources*, which was cited with approval.²²⁷ In the *Palala Resources* decision,²²⁸ the court held that upon restoration of the registration of a deregistered company, its legal personality is restored and all of its corporate activities are validated ex post facto, as if the company were never deregistered, even if validation of assets and rights takes place to the detriment of third parties.²²⁹ The court found that ZIZA's prospecting right did not lapse on deregistration.²³⁰ Thus, the court determined that ZIZA held its prospecting right throughout the period of its deregistration until its eventual expiration.²³¹ ZIZA's prospecting right was, therefore, in existence at the time Aquila submitted its application for a mining right²³² and application for renewal of a prospecting right. The court held that, in terms of Section 22(2)(b) of the MPRDA, the regional manager could not have validly accepted the application for a mining right at that time.²³³

C. Discussion

ZIZA held an UOOR during the interim period, which was extended in its duration by ZIZA's timely application for a prospecting right until the eventual grant of a prospecting right. During the existence of the UOOR, or period of exclusivity, the custodian was not able to consider or grant prospecting rights or mining rights to new applicants due to the priority accorded to UOORs. The custodian did not adhere to the priority that was accorded to the holder of an UOOR by considering an inconsistent application for a prospecting right or granting it during this

²²⁶ *Id.*

²²⁷ *Id.* ¶¶ 31–32.

²²⁸ *Palala Res. Ltd. v. Minister of Mineral Res. & Energy* 2014 (6) SA 121 (SCA) (S. Afr.); see generally Heleen van Niekerk & Shamila Mpinga, *A Biblical Lazarus: Deregistration of a Company and Revival of Rights to Minerals. A Discussion of Palala Resources (Pty) Ltd. v. Minister of Mineral Resources and Energy* 2016 (6) SA (SCA), 39(1) OBITER 203 (2018).

²²⁹ *Palala Res. Ltd. v. Minister of Mineral Res. & Energy* 2014 (6) SA 121 (SCA) (S. Afr.) ¶ 10–11.

²³⁰ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 32; However, the court decided *a quo* that restoration of ZIZA to the company register did not have the effect of revesting it with its prospecting right, and also had no legal effect on Aquila's prospecting rights. *Id.* ¶¶ 99–101.

²³¹ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 32.

²³² *Id.*

²³³ *Id.*

time. The priority accorded to holders of UOORs protected their rights and afforded security of tenure if a timely application for a prospecting right had been made.

The facts of the *Pan African Mineral* decision, however, provide an example of the haphazard manner in which the mineral resources of South Africa are at times dealt with by the ANC government on the one hand, and administered by the state as custodian of the mineral resources on the other. ZIZA was the beneficiary of mineral rights for the Kuruman properties that were granted by the colonial government of the Cape during the time of Rhodes, with the governments of Zimbabwe and Zambia as its shareholders. As indicated in Part I, under the MPRDA, mineral rights and prospecting and mining rights of the previous dispensation could no longer be alienated or transferred and were replaced with statutory OORs.

Less than a year after the introduction of the MPRDA, the ANC government negotiated an agreement with the governments of Zimbabwe and Zambia to transfer the mineral rights of ZIZA to the newly-created PAMDC. The PAMDC agreed to take over the prospecting and mining activities when it was no longer legally possible to transfer mineral rights in terms of the laws of the ANC government. As a holder of an UOOR, ZIZA held the exclusive right to apply for a prospecting right and, indeed, applied in a haphazard manner and was eventually granted a prospecting right by virtue of an administrative decision by the state as custodian of the mineral resources. Subsequently, a notarial prospecting agreement was executed in favor of PAMDC to enable it to register a prospecting right in its favor. It should be noted that PAMDC, as a relative newcomer, was neither the holder of mineral rights under the previous dispensation nor the holder of UOORs to the Kuruman properties under the transitional arrangements of the MPRDA. This irregularity was recognized by Judge of Appeal Willis but not by the majority of the court. In the court's view, the continued existence of ZIZA's UOOR until February 25, 2008, prevented the consideration and granting of a prospecting right to Aquila during that time. The notarial execution of a prospecting agreement in favour of PAMDC took place on November 19, 2011, when ZIZA was still a holder of a prospecting right. Even though the existence of a common law agreement upon execution of a notarial prospecting right is not always acknowledged by commentators,²³⁴ the facts of this decision illustrate that the existence of such an agreement cannot simply be ignored. ZIZA was holding a prospecting right by virtue of an administrative grant

²³⁴ See Heleen van Niekerk, *Mineral Tenure Security, Registration and Enforceability of Rights: Debunking the Property Law Paradigm*, 135 S. AFR. L. J. 159 (2018).

under Section 17 of the MPRDA,²³⁵ while PAMDC, as party to a notarial agreement with the State, acquired “prospecting rights” (personal in nature) and held the right to have a deed registered in the MPTRD in order to acquire a “limited real right” to prospect, a so called *ius in personam ad rem acquirendam*. In line with the decision of the court, a real right to prospect would have been created if registration of the prospecting right took place. In the custodian’s substitution of ZIZA by PAMDC, the prospecting rights to the properties were alienated to PAMDC, which would also have required the permission of the Minister pursuant to Section 11 of the MPRDA in order to be valid. It seems this provision was not ambiguous. The absurd outcome was that a prospecting right was administratively granted to ZIZA, whilst PAMDC, as “prospector,” acquired a personal right against the custodian to have the deed registered (*ius in personam ad rem acquirendam*). On the facts of the case, a limited real right to prospect was not acquired by PAMDC, whilst ZIZA’s prospecting right was terminated on February 25, 2013. The so-called *ius in personam ad rem acquirendam* of PAMDC, by virtue of its notarial prospecting agreement, probably prescribed after three years,²³⁶ namely on November 18, 2014. It will be interesting to see how the ANC government explains the above discrepancies, ZIZA’s loss, and PAMDC’s “rights,” to its fellow shareholders in the PAMDC.

The dissent points out the futility of the ZIZA and PAMDC proceeding with the appeal in the absence of clear beneficiaries:²³⁷ “Unanswered questions remain. Why are PAMDC and ZIZA persisting with the appeal? They accept that neither PAMDC nor ZIZA was validly granted prospecting rights. Neither has mining rights.”

If the majority of the Supreme Court of Appeal were as bold as Judge of Appeal Willis and also decided that ZIZA’s application for a prospecting right was so defective that its return amounted to a non-application for purposes of Section 8(3) of the MPRDA, ZIZA would not have continued to hold an UOOR, and all the rights for which Aquila properly applied would have been recognized and the present stalemate would have been avoided. It is, however, arguable that only lodgement, and not acceptance of an application, for a prospecting right is required by

²³⁵ See *Minister of Mineral Resources v. Mawetse (S. Afr.) Mining Corporation Ltd.* 2016 (1) SA 306 (SCA) ¶¶ 24, 26, 27.

²³⁶ Prescription Act 68 of 1969 § 11(d) (S. Afr.); *Frieslaar NO v. Ackerman* 2018 (3) SA (SCA) ¶¶ 36–41, 46; *Bondev Midrand Ltd. v. Puling*; *Bondev Midrand Ltd. v. Ramokgopa* 2017 (6) SA 373 (SCA) ¶¶ 21–22.

²³⁷ *Pan African Mineral Dev. Co. Ltd. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 60 (Willis, JA, dissenting).

Section 8(3) of the transitional arrangements to trigger the period of exclusivity.

Despite its poor application, priority was given to ZIZA, while ZIZA and PAMDC probably did not intend to prospect or mine. On the other hand, Aquila did prospect extensively at a high cost and intended to mine. Aquila was first informed of the double grant on January 28, 2011, in the course of a meeting with the department on the processing of its mining right application.²³⁸ Judge of Appeal Willis mentioned in passing that the holding of UOORs illustrates precisely why, amongst other reasons, the MPRDA was enacted:²³⁹ namely, to “phase out these rights because vast and valuable mineral deposits were left dormant as a result of the holder lacking the resources, financial and scientific, to exploit those deposits.”²⁴⁰ Despite such objectives, valuable mineral deposits are still lying dormant in the Kuruman properties due to poor custodial administration and shortcomings of ZIZA and PAMDC to operate successfully in the mining world.

If ZIZA and PAMDC remain out of the picture in the future, Aquila may successfully apply for prospecting rights and/or mining rights. Even if successful, the impact of the conduct of ZIZA, PAMDC, and the massive administrative errors by the custodian, is encapsulated as follows by Judge of Appeal Willis:

If it is correct that Aquila is likely to straddle these hurdles, then almost seven years of opportunity for this country to generate huge amounts of foreign currency, create jobs for thousands of people and harness revenues for the fiscus will have been squandered. All of these benefits would have contributed to

²³⁸ Aquila Steel (SA) Ltd. v. Minister of Mineral Res. 2017 (3) SA 301 (GP) ¶ 44.

²³⁹ Judge of Appeal Willis’ reference to “old order mining rights” is incorrect.

²⁴⁰ Pan African Mineral Development Company (Pty) Ltd. (5) SA 124 ¶ 43 (Willis, JA, dissenting). The court *a quo* held that the MPRDA “abolished the entitlement of a right-holder to [sterilize] the mineral rights in question unless and until it was ready to mine.” Aquila Steel (SA) Pty. Ltd. (3) SA 301 ¶ 6. The issue of sterilization of mineral resources in the past received the attention of the Constitutional Court. Mogoeng CJ acknowledged that the MPRDA deprived holders of UOORs of, amongst other things, the “free or unregulated right to [sterilize] mineral rights” but decided that such entitlement was not acquired by the state in order to constitute an act of expropriation. *Agri SA v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) ¶ 51; *see also id.* ¶¶ 2, 66; *id.* ¶ 71; *see also* P.J. Badenhorst, *Onteiening van onbenutte ou-orde regte: ‘Het iets niets geword?’* *Agri South Africa v. Minister of Minerals and Energy* 2013 (4) SA 1 (CC), J. CONTEMP. ROMAN-DUTCH L. 313, 324–30 (2014) (S. Afr.); Pieter Badenhorst & Nicolaas Johannes Jacobus Olivier, *The Agri South Africa Constitutional Court Decision*, 33 AUSTL. RESOURCES & ENERGY L. J. 230 (2014).

raising the standard of living and the quality of life in our country. The result has been hardly sensible.²⁴¹

In this case, poor administration of the transitional provisions by the custodian resulted in the sterilization of rights to minerals and exclusion of a meritorious applicant for seven years or more to the severe detriment of the people of South Africa, as beneficiaries under the MPRDA.

VI. COMMENTARY

The transitional arrangements provide for the transition of mineral rights from the old order to rights under the MPRDA, and security of tenure has largely been achieved.²⁴² The transitional arrangements recognize different kinds of OORs and provide for their continued existence during different periods of transition. Applicants who applied for rights under the Minerals Act, whose applications were pending when the MPRDA went into effect, were treated as applicants for prospecting or mining rights under the MPRDA. During the transitional periods, the holders of OOPRs or OOMRs were afforded the opportunity to apply for conversion of their rights into prospecting rights or mining rights, and the holders of UOORs were granted the right to apply for new prospecting or mining rights. By providing for the continued existence of OORs and conversion of pending old applications into new applications, it was implicitly accepted by the legislature that applications by third parties or outsiders would not take place in land subject to such transitional rights. In practice, inconsistent prospecting rights and mining rights were indeed granted by the custodian, which has led to costly priority right disputes.

To summarize, the transitional arrangements can be interpreted to create the following priority rules to resolve priority rights disputes:

- During the conversion of pending applications for rights under the Minerals Act into applications for prospecting or mining rights under the MPRDA, the applicant receives priority over an inconsistent application by another applicant or the grant of prospecting or mining rights under the MPRDA to another.
- During the existence of OOPRs or OOMRs, such rights receive priority over an inconsistent prospecting or

²⁴¹ Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd. 2017 (165) ZASCA (SCA) ¶ 65 (Willis, JA, dissenting).

²⁴² See Badenhorst, *supra* note 19, at 5, 29, 33 (arguing that security of tenure was achieved with OOPRs and OOMRs but not always with UOORs); see *Agri SA v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) (S. Afr.).

mining right that was accepted by the regional manager and granted by the Deputy Director-General or Minister, respectively, during the existence of such OORs.

- During the existence of UOORs, such right receives priority over an inconsistent prospecting or mining right that was accepted by the regional manager and/or granted by the Deputy Director-General or Minister, respectively, during the existence of such UOORs.

A simple provision in the transitional arrangements—that an application for, or grant of, a prospecting or mining right under the MPRDA that is inconsistent with an application by a holder of an OOR is null and void—would have avoided the priority of rights disputes that have developed during the transition from the old order to the new order. The need for the development of priority rules at a high cost would have been avoided as well.

The priority rules to determine disputes between holders of OORs and holders of new order rights are, however sufficient in theory, fair and beneficial to holders of OORs. Holders of OORs held rights that were prior in time. Holders of OORs that were prospecting or mining, or whose applications to prospect or mine were pending under the old order, were usually in the best position to conduct prospecting or mining operations. Holders of UOORs were not always in a position to conduct prospecting or mining operations. Granting of priority in the above instances can also be based on the knowledge on the part of the holder of inconsistent rights.

CONCLUSION

The transitional arrangements of the MPRDA not only recognized OORs and provided for their transition into new prospecting or mining rights during different periods of transition. Poor custodial administration, ulterior motives, and continued existence of OORs over long periods of time meant inconsistent prospecting or mining rights under the MPRDA were granted in respect of land subject to such transitional rights. By according priority to holders of OORs, the transitional arrangements could be interpreted as priority rules to resolve priority disputes in such cases. In a priority dispute between OORs and prospecting or mining rights under the MPRDA, priority is accorded to the holder of the OOR during the existence of such rights.

The granting of priority to OOPRs or OOMRs is fair, as these rights were acquired first in time, and the holders are usually in the best position to prospect or mine for minerals if they were already doing so. According priority is also fair if holders of inconsistent rights had notice of an

application by a holder of prior OORs. The continuation of prospecting or mining operations by holders of OOPRs or OOMRs is for the benefit of the people of South Africa. Incompetent administration and long delays before prospecting or mining operations can commence on land that was subject to UOORs, as illustrated by the *Pan African Minerals* decision,²⁴³ do not always benefit the people of South Africa and run contrary to the objectives of the MPRDA. As stated by Judge of Appeal Willis, the question remains, in the words of Cicero: “*Cui bono?*”, which translates to, “Who will benefit from all this? Who indeed?”²⁴⁴ The answer to all this is perhaps to be found elsewhere, namely, in penetrating the darkness of the captured state of South Africa.²⁴⁵

²⁴³ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶¶ 18, 53; *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) ¶ 111.

²⁴⁴ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd.* 2017 (165) ZASCA (SCA) ¶ 61 (internal citation omitted) (Willis, JA, dissenting).

²⁴⁵ Under continued pressure and outrage about the endemic corruption within the ANC government, a commission of enquiry on alleged state capture and corruption was appointed by President Zuma. Proclamation No. 3, Gov’t Gazette 41403 (Jan. 25, 2018). President Zuma stepped down as president on February 15, 2018. David McKenzie, *Jacob Zuma Resigns as South Africa’s President, Mired in Corruption Scandal*, CNN, Feb. 15, 2018, <https://www.cnn.com/2018/02/14/africa/jacob-zuma-resigns-as-south-africa-president-intl/index.html>.