THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 179/2017

In the matter between:

PAN AFRICAN MINERAL DEVELOPMENT COMPANY (PTY) LTD	**FIRST APPELLANT**
ZIZA LIMITED	**SECOND APPELLANT**
MINISTER OF MINERAL RESOURCES	**THIRD APPELLANT**
DIRECTOR-GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES	**FOURTH APPELLANT**
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERAL RESOURCES	**FIFTH APPELLANT**
REGIONAL MANAGER: NORTHERN CAPE REGION, DEPARTMENT OF MINERAL RESOURCES	**SIXTH APPELLANT**

and

AQUILA STEEL (S AFRICA) (PTY) LTD	**RESPONDENT**

Neutral citation: *Pan African Mineral Development Company (Pty) Ltd & others v Aquila Steel (S Africa) (Pty) Ltd* (179/2017) [2017] ZASCA 165 (29 November 2017)

Bench: Ponnan, Bosielo, Willis and Mathopo JJA and Tsoka AJA

Heard: 8 November 2017

Delivered: 29 November 2017

Summary: Mineral and Petroleum Resources Development Act 28 of 2002 – s16 read with Item 8 of Schedule 2 – Department of Mineral Resources granting rights to two different entities in respect of same land and minerals – once the holder of an unused old order right submits an application within the one year exclusivity period, both the unused old order right and the exclusivity which it confers remain extant until the application is either granted and dealt with in terms of s 17 or refused - where the application is made but neither granted nor refused the unused old order right and its exclusivity period endure – that precludes the acceptance and processing of the later application.

ORDER

On appeal from: Gauteng Division, Pretoria (Tuchten J sitting as court of first instance):

(a) The appeal is upheld with costs.
(b) The cross appeal is dismissed with costs.
(c) The order of the court below is set aside and replaced by:
'The application is dismissed with costs'
(d) The costs in each instance shall include those of two counsel, where so employed.

JUDGMENT

Ponnan JA (Bosielo and Mathopo JJA and Tsoka AJA concurring):

[1] The Bechuanaland Railway Company Limited, which was incorporated as a limited liability company in the United Kingdom on 24 May 1893, was born out of Cecil John Rhodes' dream to build a railway line from Cape to Cairo. It acquired vast tracts of land in the Northern Cape along the envisaged route by way of a Government grant, as also, certain mineral rights that acceded to that land. The company thereafter underwent two name changes – the first, on 1 June 1899 to Rhodesia Railways Limited Company and, the second, on 26 September 1990 to ZIZA Limited (ZIZA) (the second appellant). ZIZA, which represents an amalgamation of the first two letters of the words Zimbabwe and Zambia, initially operated as the railway company of, and was co-owned by, those two countries.

[2] On 24 March 2005 the Governments of Zambia, Zimbabwe and South Africa concluded a Memorandum of Understanding. One of the objectives of the memorandum was to facilitate the establishment of the first appellant, the Pan African Mineral Development Company (Pty) Limited (PAMDC). According to the agreement: (i) 'the Governments of Zimbabwe, South Africa and Zambia [would] be the major participants in the new company'; (ii) PAMDC would be a 'special purpose vehicle to co-operate and collaborate in those areas where ZIZA holds mineral rights in South Africa; (iii) South Africa would own an equal one-third share in PAMDC; (iv) PAMDC would be registered in South Africa; (v) PAMDC would 'take over the prospecting and possible mining activities of ZIZA in South Africa'; (vi) all mineral rights 'owned by ZIZA . . . shall be transferred to PAMDC' and (vii) ZIZA shall continue to exist 'only for the purposes of winding up its operations'.

[3] On 19 April 2005 ZIZA submitted an application in terms of s 16 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) to the sixth appellant, the Regional Manager of the Northern Cape Region (the RM) of the then Department of Minerals and Energy (now Department of Mineral Resources (the DMR)) for a prospecting right in respect of its Kuruman properties. The application recorded that ZIZA was in the process of ceding its rights to PAMDC. On 17 August 2005 the RM confirmed in writing that ZIZA's application for a prospecting right had been accepted.

[4] On 2 May 2006 the RM accepted a prospecting right application in respect of certain overlapping properties from the respondent, Aquila Steel (S Africa) (Pty) Ltd (Aquila) and in October of that year the fifth appellant, the Deputy Director General (the DDG): Mineral Regulation of the DMR issued a letter of grant to Aquila. On 23 November 2006 the DMR prepared an internal memorandum, which noted the conflict between the ZIZA and Aquila applications. That notwithstanding, the Aquila prospecting right was notarially executed on 28 February 2007 and registered in the Mineral and Petroleum Titles Administration Office on 17 July 2007.

[5] On 26 February 2008 the DDG granted a prospecting right over the Kuruman properties to ZIZA. In the meanwhile, PAMDC was incorporated on 26 November 2007 and on 10 October 2008 the Governments of South Africa, Zambia and Zimbabwe concluded a shareholders' agreement in respect of PAMDC. On 22 December 2010 the RM accepted an application for a mining right lodged by Aquila over one of the Kuruman properties, namely Portion 114. On 19 November 2011 a prospecting right with reference number NC 30/5/1/1/2/179PR was executed by the DMR in PAMDC's name over the Kuruman properties. In the meanwhile, ZIZA was struck off the UK companies' register on 9 November 2010. Its registration was restored on 14 October 2014.

[6] On 29 October 2013 Aquila launched an appeal under s 96(1) of the MPRDA against the decision of the DMR to grant ZIZA a prospecting right. The third appellant, the Minister of Mineral Resources (the Minister) dealt with the appeal instead of the fourth appellant, the Director General of the DMR (the DG), to whom the power had been delegated, because of a perceived conflict of interest on the part of the latter. PAMDC opposed Aquila's appeal. In addition, it lodged its own appeal against the decision of the DMR to grant Aquila a 'competing' prospecting right.

[7] In dismissing Aquila's appeal and upholding PAMDC's cross appeal, the Minister reasoned:

'The prospecting right application of ZIZA Limited was lodged and accepted during a period which afforded it exclusivity in terms of the transitional provisions of the MPRDA. The 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.

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.'

[8] Consequent on the failure of its internal appeal, Aquila applied under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review and set aside:

(i) the acceptance and grant of ZIZA's prospecting right application;

(ii) the execution of a prospecting right in favour of PAMDC;

(iii) the Minister's refusal of its internal appeal and his decision to uphold the ZIZA and PAMDC appeal; and

(iv) the Minister's refusal of its mining right application.

Aquila also sought a declaratory order that ZIZA's prospecting right had lapsed with effect from 9 November 2010, being the date on which ZIZA had been deregistered. Finally, Aquila sought to substitute the Minister's decisions on the internal appeals, as well as his decision to refuse the Aquila mining right application, with a decision upholding that appeal and the granting of a mining right subject to conditions to be determined by the Minister within 30 days of the court order. The Minister, the DG, the DDG, and the RM (collectively referred to as the State appellants) were cited as the first to fourth respondents respectively, whilst PAMDC and ZIZA were cited as the fifth and sixth respondents.

[9] The Gauteng Division, Pretoria (per Tuchten J) upheld the review and granted the substitution sought. It agreed with Aquila that the ZIZA prospecting right had lapsed in November 2010 when ZIZA was deregistered, but declined to grant declaratory relief to that effect. The judgment of the high court is reported *sub nom Aquila Steel (South Africa) Ltd v Minister of Mineral Resources & others* 2017 (3) SA 301 (GP).

[10] With the leave of the high court:

(a) ZIZA and PAMDC appeal the high court's orders – (i) setting aside the Minister's decisions on their and Aquila's internal appeals, (ii) substituting them with decisions to uphold the Aquila internal appeal and to dismiss their internal appeal, (iii) substituting the refusal of the Aquila mining right application with a decision to grant Aquila a mining right on terms to be determined, and (iv) awarding costs of the application to Aquila;

(b) the State appellants appeal the whole of the high court's judgment and order; and

(c) Aquila conditionally cross-appeals the high court's refusal to grant it declaratory relief that the ZIZA right lapsed with effect from 9 November 2010, upon deregistration.

[11] To the extent here relevant s 16 of the MPRDA then read:

'(1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application –

(a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.

(2) The Regional Manager must accept an application for a prospecting right if –

(a) the requirements contemplated in subsection (1) are met; and

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.

. . . .'

Equally important for the purposes of this appeal are the transitional provisions contained in Schedule II of the MPRDA. Those applicable to the present dispute are to be found in Item 8, which provides:

'(1) Any unused old order right in force immediately before this Act took effect continues in force subject to the terms and conditions under which it was granted, acquired or issued or was deemed to have been granted or issued for a period not exceeding one year from the date on which this Act took effect.

(2) The holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of this Act within the period referred to in subitem (1).

(3) An unused old order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused.

(4) Subject to subitems (2) and (3), an unused old order right ceases to exist upon the expiry of the period contemplated in subitem (1).'

[12] The MPRDA, which came into effect on 1 May 2004, created a new regime governing the allocation of mineral rights.[1] It abolished private rights to minerals and vested all minerals in the State.[2] Existing mineral rights were replaced, by operation of law, with statutory rights called old order rights.[3] The transitional provisions contained in Schedule II to the MPRDA recognised two categories of old order prospecting rights: The first, being old order prospecting rights that were in force when the MPRDA took effect. Those continued in operation for two years and could, within that time, be converted to prospecting rights under the MPRDA, through a process stipulated in Item 6 of Schedule II.[4] If an applicant complied with that process, the DMR was obliged to convert its rights.[5] The second, being unused old order rights, were dealt with under Item 8 of Schedule II and afforded the holder an exclusive right, for one year, to lodge an application for a new prospecting or mining right under the MPRDA. That application had to comply with the requirements of the MPRDA and could take some time to process.[6]

[13] The holders of old order rights, who applied for conversion during the exclusivity period, enjoyed a preference under the MPRDA because the Act is structured to permit the grant of only one prospecting or mining right for the same mineral over the same land.[7] This meant that for as long as an application lodged in terms of Item 8(2) read with s 16 of the MPRDA remained pending, an applicant continued to hold an old order right over the properties in question. Section 9(1) stipulates the order in which applications must be processed. Applications received on different days must be dealt with in the order of receipt.[8] The applications of old order rights holders lodged during the exclusivity period would necessarily preclude any later application being dealt with until the old order application had been finally determined.

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[1] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 2.
[2] *Minister of Mineral Resources & others v Sishen Iron Ore Company (Pty) Ltd & another* 2014 (2) SA 603 (CC) paras 23 and 63.
[3] Ibid para 63.
[4] See, by analogy, the discussion of the conversion of old order mining rights in *Sishen* supra fn 2 paras 63-67.
[5] *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd & others* [2011] 1 All SA 364 (SCA) para 38.
[6] Ibid.
[7] *Sishen* supra fn 2 paras 73, 81, 106 and 118.
[8] Section 9(1)*(b)*.

[14] It follows that the RM is precluded from accepting or doing anything with a later application until an existing application has been decided.[9] That has been clarified by the amendment to s 16(2) of the MPRDA, which now expressly prohibits the RM from accepting a later application for the same mineral and the same land in the face of an earlier application that has yet to be determined.[10] If its prospecting application were to succeed, the unused old order rights holder would also procure an exclusive right to renew the prospecting right and to apply for a mining right in respect of the mineral and prospecting area in question.[11] 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]'.[12] An old order right holder's ability to preserve its existing right through the conversion process was central to the constitutionality of the property deprivation brought about by the enactment of the MPRDA.[13]

[15] In order to give effect to that constitutional objective, it is necessary to read ss 16 and 17 (and 22 and 23) of the MPRDA as being subject to Item 8(3). Consequently, although there is no mention of holders of unused old order rights in either section, on a proper interpretation of those sections, a RM may not accept another application for a prospecting right and the Minister may not grant another prospecting right during the exclusivity period guaranteed by Item 8(2).[14] Moreover, on a proper interpretation of

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[9] Dale, Bekker, Bashall, Chaskalson, Dixon, Grobler, Ash and Cox *South African Mineral and Petroleum Law* (Lexis Nexis, March 2007 update) S 112.5 and 151.1.

[10] Section 16(2) was amended by s 12*(b)* of the Mineral and Petroleum Resources Development Act 49 of 2008 by the addition of subsection *(c)*, which provides:
'(c) no 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.'

[11] In terms of s 19(1) of the MPRDA, which states:
'In addition to the rights referred to in s 5, the holder of a prospecting right has –
(a) subject to s 18, the exclusive right to apply for and be granted a renewal of the prospecting right in respect of the mineral and prospecting area in question;
(b) subject to subsection (2), the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question; and
(c) subject to the permission referred to in s 20, the exclusive right to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting.'

[12] *Agri SA* supra fn 1 para 71.

[13] Ibid paras 66-72.

[14] Dale et al supra fn 9 156(2).

Item 8, once the holder of an unused old order right submits an application for a prospecting or mining right within the one-year exclusivity period, both the unused old order right and the exclusivity which it confers remain extant until the application is either granted and dealt with in terms of s 17 or refused. Where the application is made but neither granted nor refused, the unused old order right and its exclusivity period endure.

[16] As outlined above, ZIZA was the holder of various unused old order rights over the Kuruman properties. As such, when it submitted an application for a prospecting right over those properties on 19 April 2005, it enjoyed, at the time, the exclusive right to apply for a prospecting right under Item 8 of Schedule II to the MPRDA. Its application was accepted by the RM on 17 August 2005 and thus became eligible for determination. It was ultimately considered and granted on 26 February 2008. Between August 2005 and February 2008, ZIZA continued to hold an old order right over the Kuruman properties in terms of Item 8(3) of Schedule II.

[17] Under the MPRDA, ZIZA's application had to be dealt with and determined before any other prospecting right application could be considered. Instead, before ZIZA's application could be finalised, the RM accepted a prospecting right application in respect of certain overlapping properties from Aquila on 2 May 2006. Aquila was granted a prospecting right over those properties a mere five months later on 11 October 2006. That grant precedes that of ZIZA by some 16 months. Aquila's prospecting right was executed on 28 February 2007 – at a time when the DMR was already aware of the overlapping applications. Aquila's application was thus accepted, processed, granted and executed in the face of ZIZA's pending application. That meant that two different entities held rights in respect of the same minerals and land. That is at odds with the scheme of the MPRDA.[15] The grant of competing prospecting rights to both ZIZA and Aquila appears to have occurred as a result of an administrative error on the part of the RM. No one has suggested that there was any deliberate malfeasance on his part.

[15] See *Sishen* supra fn 2 para 18.

[18] The administrative bungling on the part of the DMR did not end there. Section 22(2)*(b)* of the MPRDA precluded the RM from accepting an application for a mining right where another holds an existing prospecting right for the same mineral over the same land.[16] Yet, on 22 December 2010 the RM accepted an application for a mining right that Aquila had lodged over one of the Kuruman properties, namely Portion 114, in the face of ZIZA's prospecting right. On 15 December 2011 Aquila applied to renew its prospecting right. The DMR accepted and processed that application even though ZIZA's prospecting right was then still in place and PAMDC's right had by then been executed. The DMR later granted Aquila's renewal application on 31 July 2015 – some 29 days after the Minister had dismissed Aquila's internal appeal. This meant that at the time the renewal application was granted, the right sought to be renewed had already been set aside by the Minister.

[19] ZIZA's prospecting right has since lapsed (although the date on which it lapsed is in dispute) and cannot be revived. It matters not whether that right is declared invalid and set aside or merely lapsed by the effluxion of time. In either event, as a matter of fact, the ZIZA prospecting right had been accepted by the time that Aquila submitted its prospecting right application. The Aquila application could therefore not have been accepted or processed once the ZIZA prospecting application was under consideration. Once that is so, the DMR simply could not have accepted or granted a prospecting right to Aquila. Aquila seeks to escape that consequence by attempting to impugn the RM's decision to accept the ZIZA application. Aquila asserts that ZIZA's application was not submitted in the prescribed manner as required by s 16(1)*(b)* of the MPRDA because certain of the regulations in terms of the MPRDA[17] were not complied with. In particular, Aquila complains that ZIZA's application did not reflect the properties with sufficient

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[16] Section 22(2) provides:
'The Regional Manager must accept an application for a mining 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.'

[17] The contention is that Aquila did not comply with the prescribed requirements referred to in s 16(1) read with Regulations 2(2) and 5(1)*(h)* of the Regulations promulgated by the Minister pursuant to s 107(1) of the MPRDA. The regulations in place at the time were the Mineral and Petroleum Resources Development Regulations published in Government Notice R527 on 23 April 2004, in Government Gazette 26275.

particularity to allow the DMR to identify them on its systems (a complaint that found favour with the high court). It also contends that the RM could not permit the application to be supplemented after its initial lodgement.

[20] In my view, Aquila's contentions are misplaced. As Professor Hoexter points out, 'the failure to comply strictly with formalities and other procedural requirements imposed by a statute does not necessarily lead to invalidity'.[18] Much previously depended on whether the requirements were either 'mandatory' or 'directory'.[19] But, even then, categorization was never 'the entire key to the puzzle'.[20] For, as Trollip JA made plain in *Nkisimane & others v Santam Insurance Co Ltd*[21] the earlier clear-cut distinction between mandatory and directory requirements (the former requiring exact compliance and the latter merely substantial compliance) had become somewhat blurred.[22] More recently, Brand JA summed up the position thus: '[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved'.[23]

[21] Thus, although ZIZA's application did not strictly comply with all the requirements of the regulations, it sufficiently described the properties for the DMR to accept the

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[18] C Hoexter *Administrative Law in South Africa* 2 ed (2012) at p 292.
[19] Ibid.
[20] Ibid.
[21] *Nkisimane & others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434B.
[22] Trollip JA added: 'Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope, and purpose of the enactment as a whole and the statutory requirement in particular . . . Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity . . . On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non or defective compliance therewith may not have any legal consequence . . . In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective . . . It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect . . .'
[23] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

application, identify the relevant properties and log them onto its system. ZIZA's application included:

(i) hand-drawn plans that identified the co-ordinates of the Kuruman properties;

(ii) the registered descriptions of the farms;

(iii) the co-ordinates of the total area; and

(iv) a description of the old order rights and permits in respect of which the application had been made, including the farm name, division, certificate number, date of grant, area size and grid reference.

The record of decision reflected that the ZIZA application had been captured on the DMR's system and, indeed, as early as November 2006 the DMR was aware that the ZIZA and Aquila applications related to overlapping properties. It is thus not correct to suggest that the DMR was unaware of the properties to which the ZIZA application related.

[22] In any event, the DMR appears to allow applicants to supplement their applications.[24] It follows that the RM was entitled to take the view that the ZIZA application complied sufficiently with the MPRDA to be accepted, but nevertheless to call for further documentation to be submitted. Once the application had been supplemented and, if it was compliant by the time that it was considered for grant or rejection, there is no reason to reach back and invalidate the initial acceptance or for that matter, as was urged upon us, to treat it as a nullity. Significantly, Item 8(3) provides that the relevant unused old order right only terminates once an application for a prospecting or mining right has been dealt with and granted or refused. A return of such an application by a RM under s 16(2) or 22(2) for want of compliance with the prescribed formalities does not constitute a refusal of such application. Only the Minister or his delegate, acting under s 17 or 23, can refuse an application for a prospecting or mining right respectively.

[24] See, for example, *Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) paras 3-4 and 17; and *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* 2014 (5) SA 138 (CC) paras 13 and 18.

[23] It follows that the setting aside on review of a decision to accept an application brought in terms of Item 8 has no effect on the continued existence of the relevant old order right. It also follows that a finding that the DG ought to have rejected ZIZA's application is of no moment. Had he done so, ZIZA could, as the holder of an unused old order right, simply have corrected its application. But, the RM had in fact accepted the ZIZA application and submitted it to the relevant officials for consideration and determination. That barred the processing and grant of Aquila's application in 2006 because, at the time, the ZIZA application had been accepted and had not been set aside. The DMR could not simply disregard the acceptance of the ZIZA application by the RM or treat that application as though it did not exist.[25] Contrary to the high court's finding a successful attack on the acceptance of the ZIZA prospecting application does not change the fact of its acceptance or eliminate the bar to Aquila securing prospecting rights over Portion 114.

[24] The high court equated the 'return' of the non-compliant application with its 'rejection'. In that, the high court appears to have misconceived the position. In terms of s 16(2) of the MPRDA, the RM must 'accept an application for a prospecting right' if, inter alia, the requirements contemplated in subsection 1 are met. According to subsection 3, if the application does not comply with the requirements of the section, the RM must notify the applicant in writing within 14 days of the receipt of the application. Thus, whilst subsection 2 employs the word 'accept', subsection 3 significantly does not employ its converse. The logical corollary therefore of the RM returning an application is not, without more, its rejection. The approach of the high court elevates the obligation to notify an applicant in terms of s 16(3) of non-compliance with the prescribed requirements of the MPRDA, with the rejection of that application. The distinction between the return and rejection of an application is an important matter of substance and not a mere matter of form. In terms of s 17 of the MPRDA, the power to grant or refuse an application for a prospecting right is that of the Minister, not the RM. The obvious consequence of Item 8(3) is that the continued validity of an unused old order

[25] See, by analogy, *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) para 100.

right falls away once the application for a prospecting permit is refused. The refusal referred to in Item 8(3) is therefore the exercise of the ministerial power referred to in s 17 of the MPRDA and not the return of a non-compliant application by the RM in terms of s 16(3) of the MPRDA.

[25] Moreover, the decision of the high court to set aside the RM's decision to accept ZIZA's application (as well as the Minister's decision to uphold that decision on appeal) is based on Aquila's contention that ZIZA's application for a prospecting right should have been returned within 14 days of receipt by the RM for want of compliance with s 16(1) read with Regulations 2(2) and 5(1)*(h)*. But Aquila did not plead a ground of review under PAJA based on the RM's failure to return ZIZA's application within 14 days. Rather, Aquila challenged the RM's decision to accept ZIZA's application. That acceptance occurred on 17 August 2005. It is distinct from the RM's failure to return ZIZA's application within 14 days of that date. Aquila accepts that the 14 day period expired on 3 May 2005. Yet, it did not rely on a ground of review based on the RM's failure to return ZIZA's application on or after 3 May 2005.

[26] But, even were it to be accepted that the high court was correct in its conclusion that the deficiencies in the ZIZA prospecting right application were such as to render the RM's acceptance invalid, it ought not to have granted the remedy of substitution. In the cross appeal submitted to the Minister in terms of s 96 of the MPRDA, ZIZA and PAMDC challenged the acceptance and grant of Aquila's application for a prospecting right. The high court set aside the Minister's decision to uphold the cross appeal and substituted its own decision for that of the Minister. The effect of the order of substitution is to validate the acceptance of Aquila's application and subsequent grant of a prospecting right to it. However, the decision of the high court is based on its interpretation of Item 8 that the exclusivity period referred to in that provision only endured for one year from the commencement of the MPRDA, in other words from 1 May 2004 until 30 April 2005, and not beyond. The high court favoured that interpretation because it conceived that such interpretation 'would far better' serve the objects of the MPRDA. It concluded that any other interpretation would sterilise the

exploitation of mineral resources in a manner inconsistent with the objects of the MPRDA and therefore rejected the argument that ZIZA's old order right continued to be of force until its prospecting application was either accepted or rejected. However, 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.

[27] Nor, I might add, can Aquila claim that it enjoyed an exclusive right to apply for a mining right by virtue of its own prospecting right. Section 19(1)*(b)* of the MPRDA affords the holder of a prospecting right 'the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question'. But Aquila was not the holder of a prospecting right at the time that it submitted its mining right application. It was granted a five year prospecting right on 11 October 2006 and informed of the grant in November 2006. The right consequently endured until November 2011. Aquila points to the deed of right executed in its favour, which records its effective date as 28 February 2007 and states that the prospecting right will endure until 27 February 2012. Aquila accordingly claims that its right consequently remained in place in December 2010, when it submitted its mining right application. But Aquila's reliance on the deed of right is not supported by the judgment of this court in *Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Ltd*.[26] There, this court held that the duration of a prospecting right must be determined from the date on which the grant of the right is communicated to the applicant. It stated:

'There are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of, and coming into effect of the right. A prospecting right is granted in terms of s 17(1) on the date that the DDG approves the recommendation (a contrary finding was

[26] *Mawetse* supra fn 18.

made in two Northern Cape High Court decisions to which I shall in due course refer). In the present instance that occurred on 21 June 2007. For practical purposes communication of that decision will enable challenges by the grantee to conditions which it might consider objectionable and furthermore will alert not only the grantee but also competitors who might have an interest. The period for which the right endures has to be computed from the time that an applicant is informed of the grant . . .'[27]

[28] *Mawetse* found that the purpose and effect of the registration of the right was to ensure 'that the right becomes binding on third parties, but it also serves as notice to the general public, akin to registration of immovable property in the Deeds Office'.[28] The effective date of the right similarly did not determine its duration, but rather set the date from which a successful applicant could actively start prospecting. That means that Aquila cannot rely on the effective date of the right, nor the period stipulated in the deed, to extend its duration beyond the five year term for which it was granted. It is particularly apt that it is prevented from doing so because five years is the maximum period for which a prospecting right may be awarded.[29] Aquila's prospecting right therefore expired during November 2011, and consequently lapsed.[30] Aquila subsequently applied, on 15 December 2011, to renew its prospecting right. But that application could not revive its expired right because the right had already ceased to have legal effect. Accordingly, the DMR's renewal of Aquila's prospecting right was not competent. Thus in declining to grant Aquila's mining right application, the Minister can hardly be faulted.

[29] It follows that the high court erred in setting his decision aside on this score. Here too, the high court was not content with merely setting the decision of the Minister aside. It proceeded to substitute the Minister's decision to reject Aquila's appeal with a decision to grant Aquila's mining right application on terms to be decided by the Minister. The high court accepted that under the test laid down in *Trencon Construction*

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[27] *Matwetse* para 19. See also paras 21 and 27-28.
[28] Ibid para 19.
[29] In terms of s 17(6) of the MPRDA.
[30] Section 56*(a)* of the MPRDA provides that a right lapses on expiry.

(Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another,[31] the most important factors to be taken into consideration were whether the decision was a foregone conclusion and whether the court was in as good a position as the decision-maker to take the decision. It concluded that substitution was appropriate in this case. But, the bifurcated approach of the high court is fraught with difficulty. 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.

[30] For all of the aforegoing reasons, it follows that the conclusions reached by the Minister in the internal appeal cannot be faulted and the high court accordingly erred in setting his decisions aside and granting Aquila substitutionary relief. Consequently, the appeal must succeed.

[31] I turn to Aquila's conditional cross appeal which, on the view I take of the matter, must fail. Aquila sought a declaratur to the effect that ZIZA's prospecting right had lapsed with effect from 9 November 2010. ZIZA was granted a prospecting right over the Kuruman properties on 26 February 2008, for a period of five years, until 25 February 2013. The high court held that the ZIZA right lapsed when the latter was deregistered on 9 November 2010 and that such right consequently did not preclude the acceptance – and subsequent grant – of the Aquila mining right application. That finding

[31] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 (CC) para 47.

is at odds with the decision of *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy & others*.[32] In *Palala*, this court was called upon to consider whether a mining right granted had irretrievably lapsed on the company's deregistration or whether its subsequent restoration served to revive the lapsed right. Relying on *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*,[33] this court found that the restoration of a company's registration automatically re-vests the company with its property with retrospective effective and validates all corporate activities undertaken during the period of deregistration. It held:

'There is nothing in the scheme of the MPRDA which, as the court a quo found, buttresses the conclusion that s 73(6A) does not retrospectively revive rights which had lapsed in terms of s 56*(c)*. The court a quo reasoned that a retrospective revival of rights would undermine the purpose and objectives of the MPRDA, since "the Department would be compelled in every case where a company is deregistered to treat its MPRDA rights as frozen." I disagree. As stated, third parties are at risk in their dealings with a deregistered company, even where they have no knowledge of such deregistration. Restoration of registration operates retrospectively and ex post facto validates all the company's corporate activities (including its mineral prospecting rights), even to the detriment of third parties. The legislature is presumed to know the law, and when it enacted s 56*(c)* of the MPRDA it must have been aware that companies and close corporations that had been deregistered could be restored to the register with automatic retrospective effect. Yet it did not qualify its reference to "whenever a company or close corporation is deregistered" as a trigger for the lapsing of mineral rights, by saying that the right would not be restored if the company or close corporation was restored to the register. Had it wished to ensure the finality of the lapsing of a mineral right on deregistration, it could easily have done so. The legislature could have excluded mineral rights from the rights restored to a company or close corporation on being restored to the register.'[34]

[32] ZIZA was struck off the company register on 9 November 2010 and restored on 14 October 2014. The effect of its restoration was that it was 'deemed to have continued in existence as if it had not been dissolved or struck off the register'.[35] Its restoration to

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[32] *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy & others* 2016 (6) SA 121 (SCA).
[33] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) paras 24-28.
[34] *Palala* supra fn 26 para 11.
[35] Section 1028(1) of the UK Companies Act, 2006 states:

the register retrospectively validated all acts and restored all assets to it. ZIZA's prospecting right was therefore deemed not to have lapsed on deregistration. The high court found that *Palala* was distinguishable because ZIZA's prospecting right had expired by the time its registration was restored. That, it held, 'put the rights previously enjoyed by the company . . . beyond the reach of the company' and meant that they did not re-vest in ZIZA on its restoration. It found that 'the restoration therefore had no legal effect on the Aquila prospecting right.' The high court is correct that the prospecting right did not re-vest in ZIZA on its restoration because it had, by that time, expired. But it does not follow that restoration had no legal effect. Its effect was to deem ZIZA to have continued in existence as if it had never been deregistered and thus to treat all the activities it engaged in and all the assets it held throughout the de-registration period as having been validly done or held.[36] ZIZA was therefore deemed to have held its prospecting right throughout the period of its deregistration until the expiry of the right. That also means that the ZIZA prospecting right is deemed to have been extant at the time that Aquila submitted its mining right application on 14 December 2010. And, in terms of s 22(2)*(b)*,[37] the RM could not have validly accepted that mining right application. It follows that the application therefore could not have been processed and granted.

[33] In the result:

(a) The appeal is upheld with costs.

(b) The cross appeal is dismissed with costs.

(c) The order of the court below is set aside and replaced by:

'The application is dismissed with costs'

'Effect of administrative restoration
(1) The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.'

[36] See, by analogy, *Newlands Surgical Clinic* supra fn 27 para 24.

[37] At the relevant time, s 22(2) stated:
'(2) The Regional Manger must, within 14 days of receipt of the application, accept an application for a mining 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.'

(d) The costs in each instance shall include those of two counsel, where so employed.

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V M Ponnan

Judge of Appeal

Willis JA (dissenting)

[34] I have had the benefit of reading the judgment prepared by Ponnan JA. Save for the issue concerning the order of high court to substitute the decision of the Minister to refuse to grant Aquila a mining licence with the court's own decision that the mining licence be granted to Aquila, subject to conditions to be determined within three months by the Minister, I consider that the appeal should have been dismissed with costs, including the costs of two counsel. Insofar as the substitution of the court's own decision for that of the Minister in regard to the grant of a mining licence is concerned, I think there is much merit in the reasoning of the court that as the only reason the Minister advanced was that ZIZA had been granted a prospecting right and that decision to grant it a prospecting right had fallen away, the court was as well placed as the Minister to make the decision. I do, however, see potential practical difficulties arising from the formulation of the high court's order in this regard. What if Aquila wished to take the Minister's decisions in regard to the conditions or take those decisions on review, for example? As this is a minority judgment, I shall refrain from expressing a final view on the 'substitution' issue. It is unnecessary.

[35] A solution may lie in the issue of a so-called 'structural interdict', requiring the Minister to remedy the wrong but leaving him with a residually wide discretion, reporting back to the court within a reasonable time.[38] Problems may arise, however, where there is non-compliance with such an order.

[36] Alternatively, it may be that the most appropriate manner to deal with the directive to the Minister would have been to have recourse to the issue of a rule nisi on the narrow point of whether there may be other reasons why he should not be required to grant Aquila a mining licence. Another option may be to use the more 'English' terminology of 'Pending further order by this court, the first respondent [ie the Minister] is directed to grant the applicant's application for a mining right within three months of the date of this order'.[39] The purpose behind either of these qualified directives would be to afford an opportunity to both the Minister and the court to apply their minds to other relevant issues that may not have been raised during the hearing. An obvious example would be an environmental impact assessment that was adverse to Aqulia.

[37] Critically relevant to this appeal, however, is the decision of the high court to review and set aside the decision of the fourth respondent, the Regional Manager, Northern Cape Region, Department of Mineral Resources (the DMR) to accept ZIZA's application for a prospecting right on 17 August 2005 and all else that follows from that review and setting aside. Here, I consider the high court's reasoning to have been correct. The so-called application by ZIZA to the Minister for a prospecting right was in fact, for reasons that follow, a non-application. It was a nullity. It matters not whether a court made this determination after the event. The declaration by the court setting it aside was made *ex tunc* (as if from 'then', the time it was lodged or at least not returned to ZIZA).

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[38] See for example *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 113; *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security & others* [2014] ZACC 12; 2014 (4) SA 179 (CC) para 71 (*Allpay 2)*; *Black Sash Trust v Minister of Social Development & others (Freedom Under Law Intervening)* [2017] ZACC 8; 2017 (3) SA 335 (CC) paras 16 and 40-44.

[39] I here use the word 'English' in the sense of 'as they do in England'.

[38] The relevant facts have been comprehensively set out in the judgment of Ponnan JA as well as the reported judgment of the high court.[40] I need not dwell on them. ZIZA was the holder of 'so- called old order' mineral rights. On 19 April 2005, it made a seriously defective application for 'new order' prospecting rights. These defects are set out over several pages in the founding affidavit and in further supplementary affidavits. These allegations were not disputed. Indeed, as the court a quo observed, none of the material facts in this case is in dispute. The plans ZIZA submitted, its prospective work programme and its financial information, for example, were so hopelessly inadequate that, other than to reject the application, the Minister would not have been able to make a proper and informed decision in regard thereto. There was not even an indication of ZIZA's technical capacity to prospect. The defects were not of a narrow or technical nature. They were fundamental.

[39] In my opinion, the case turns on the interpretation of s 16(3) of the MPRDA. It is all-important in this case. At the relevant time, it read as follows:

'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.'

[40] Not only is it common cause that the application did not comply with the requirements of s 16 but also that the Regional Manager (the RM) did not notify Aquila in writing of ZIZA's non-compliance with the MPRDA within 14 days of receipt of the application and thereupon return the application ZIZA. As the notification to the applicant of the non-compliance with the requirements of the section and the return of the application are so closely linked conceptually I shall, for convenience, refer to them collectively simply as 'the return of the application.' It is the non-return of the application by the RM which provides the peg upon which the appellants hang their entire case.

[40] *Aquila Steel (SA) Ltd v Minister of Mineral Resources & others* [2016] ZAGPPHC 1071; 2017 (3) SA 301 (GP).

[41] The MPRDA has not escaped criticism for prioritising transformational objectives over wealth and job creation for the nation. It is not for this court in this matter to express a view one way or another. What is relevant, however, is that if one reads the MPRDA as a whole, having particular regard to its long title, its preamble, its objects as set out in s 3 and the interpretative injunctions set out in s 4, there can be no doubt that a purposive interpretation of the provisions of the MPRDA requires that the development of a modern and progressive system of mining is the MPRDA's first order priority.

[42] How best to deal with the so-called 'unused old order rights' as set out in the 'transitional arrangements' set out in Schedule II of the Act is plainly secondary. As in most statutes, the underlying philosophy is one of 'out with the old, in with the new'. The protection of so-called 'old order rights' is clearly intended not only to be transitional in nature but also to show appropriate respect for but not undue deference to historically vested mineral rights.

[43] It is perhaps of more than passing interest that ZIZA came into being as a result of land grants made by the then Cape Colony to Cecil John Rhodes in the late 19th century. ZIZA was incorporated in England on 24 May 1893 under the name of The Bechuanaland Railway Company Limited. It is now owned by the governments of Zimbabwe and Zambia, which probably explains its present name. When it comes to so-called 'old order rights', ZIZA's holding thereof was about as old as one could get in South Africa. The history of ZIZA's holding of these old order mining rights illustrates precisely why, among other reasons, the MPRDA was enacted. It was done 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.

[44] Prospecting rights are important because, in terms of s 19(1) of the MPRDA, the holder thereof has the exclusive right to apply for and be granted a mining right. Aquila had been granted prospecting rights in the Northern Cape on 28 February 2007, more

than ten years ago. It had applied for the prospecting right on 18 April 2006. Aquila has spent some R156 million on prospecting activities and found a significant reserve of manganese. It now wishes to mine that reserve. It has applied for rights to mine the manganese. Aquila has been frustrated in the grant of that application which it made on 14 December 2010. That is why it brought the application before the high court.

[45] Section 16(1)*(b)* of the MPRDA provides that a person who wishes to apply for a prospecting right must do so 'in the prescribed manner.' The prescribed requirements are contained in Regulation 2(2), 5 and 7 thereof, published thereunder.

[46] The appellants contend that regardless of the defects in ZIZA's application for prospecting rights, the exclusivity conferred on ZIZA, as a holder of so-called unused old order rights under Item 8(2) of Schedule II to the MPRDA, remained in existence until ZIZA's application (that which had not been returned by the RM) had either been granted and dealt with in terms of the MPRDA or refused. Accordingly, so the argument went, Aquila could not lawfully have applied for and been granted a prospecting right while this 'right' of ZIZA to have its application disposed of was still pending. This reasoning, it seems, is the basis upon which the majority of this court has decided in favour of the appellants.

[47] I disagree. I agree with the court a quo that this interpretation would frustrate the objects of the MPRDA, including the transitional provisions in Schedule II thereof. Moreover, s 17 of the MPRDA gives the Minister 30 days from the receipt of an application for a prospecting right either to grant or refuse the application. The Minister made no such decision within 30 days of ZIZA's application.

[48] ZIZA's exclusive right to apply for prospecting rights in terms of Item 8(2), read with 8(1) of Schedule II, expired on 30 April 2005. At no time before Aquila applied for its prospecting right on 18 April 2006, did ZIZA follow up, protest or object to this non-decision by the Minister. It cannot be correct that such a supine attitude by a person

claiming to be a bona fide aspirant prospector can confer rights upon ZIZA of the kind now claimed.

[49] Moreover, a plain reading of s 16(3) at the time is that it is cast in imperative terms. A defective application is a non-application. It is dead. It has no existence. It has no 'life', no vitality. The return of the application by the RM 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.

[50] It is not the return of the application that brings about its death or is the sine qua non of its death. It is the lack of compliance with the requirements of s 16 that makes the application lifeless. It was stillborn. The return of the application is the funeral rite of the application, not its deathblow. The return is neither a suspensive condition upon which the invalidity of the application depends nor a resolutive condition upon which the validity of the application depends.

[51] The RM's failure to return ZIZA's defective application to it within 14 days, as required in terms of s 16(3) of the MPRDA, was unlawful. That unlawfulness, without Aquila's having been complicit therein, cannot operate to deprive Aquila of its rights or to confer upon ZIZA rights to which it is not entitled.

[52] There are yet further indicia of where the axe must fall. There does not appear to be any requirement, either in the MPRDA itself, or anywhere else for that matter, of a public posting of information as to who has applied for prospecting rights and whether or not the RM has returned the application. How is anyone to know the facts upon which the appellants now purport to rely, namely that there is another application for prospecting rights, ahead of the queue and still pending? An applicant can only rely on the public servants who administer the MPRDA so to be informed. And, if none these

public servants not only do not advise that applicant that another application is ahead in the queue and still pending but also go so far as to issue the applicant with a prospecting licence, how can it lie in the mouth of various of the appellants, who were responsible for the administration of the MPRDA, to claim that the prospecting permit was not validly issued?

[53] Of course, mining entails financial risk but that risk must be amenable to reasonable economic calculation based on mathematics, science and other information to hand. That is how investors discount risk. It is precisely the intelligent discounting of risk that mobilises the vast amounts of capital that are necessary for the mining industry to function. If the risk of either incompetence or corruption by public servants is endorsed by the courts as one to be borne by prospectors for minerals, prospecting is likely have an uncertain future in this country, with serious long-term economic consequences.

[54] As matter of law, in a modern constitutional state, the unlawful acts of a public servant, including not doing what the law requires him or her to do, cannot be treated as mere economic risk. A court cannot easily countenance unlawfulness as being remediless, especially when the unlawfulness is of an administrative nature.[41] For reasons that will more fully appear later, the unlawfulness is now irrelevant to ZIZA although it matters very much indeed to Aquila. The MPRDA was enacted consonantly with the ideals of a successful, progressive modern state in mind. The MPRDA must be interpreted accordingly.

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[41] See for example *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others* 2000(2) SA 674 (CC) para 51; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2005 (3) SA 589 (CC) para 25; *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) paras 99 and 102; *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as Amici Curiae*) 2006 (2) SA 311 (CC) para 313; *Steenkamp NO v Provincial Tender Board Eastern Cape* 2007 (3) SA 12 (CC) para 29; *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security & others* (*Allpay 2*) (supra) n1 paras 29-32; *Black Sash Trust v Minister of Social Development & others (Freedom Under Law Intervening)* (supra) n1 paras 16 and 40-44.

[55] ZIZA and PAMDC did not seek leave to appeal against the orders setting aside the decision to accept ZIZA's application, the decision to grant ZIZA a prospecting right and the decision to execute a prospecting right in the name of PAMDC. This has a domino effect that I consider to be fatal to the appellants.

[56] It follows that the DDG's decision to issue a prospecting right to PAMDC in November 2011 and for which had not even applied, was irregular and should not have been effected. This, too, is common cause. Aquila applied for this to be set aside.

[57] Similar considerations apply in respect of the Minister's decision to dismiss an internal appeal by Aquila and to uphold PAMDC's cross-appeal regarding both the RM's 'acceptance' of Aquila's 'application' in August 2005 and the DDG's decision to grant PAMDC a prospecting right in 2006. There was, as a matter of law, no 'application' for the RM to accept. He had no discretion in the matter. At the time when PAMDC was issued with a prospecting right, this was validly held by Aquila. In terms of s 16(2) of the MPRDA, there can be no consideration of an application for a prospecting right while another person is the holder of such a right.

[58] Meanwhile, ZIZA was dissolved and deregistered as a company in England and Wales on 9 November 2010. It was restored to the register in those countries on 14 October 2014. Although it appears that ZIZA may purportedly have been granted a prospecting right on 26 February 2008 (ie after the grant to Aquila on 28 February 2007), both the letter of grant and the MPRDA itself stipulated that grant was conditional upon certain requirements such as registration and the lodging of documents being fulfilled. There was no compliance therewith. In any event, in terms of s 17(6) of the MPRDA, the prospecting licence would have expired five years after its grant. In other words, there can be no question that, by the time of ZIZA's restoration to the register of companies in England and Wales, any rights it may have had to prospect would have expired. In other words, it was not ZIZA's deregistration that would have stripped it of its prospecting rights (assuming that it had them) but the effluxion of time.

[59] I agree with the court a quo's application of *Palala Resources (Pty) Ltd v Mineral Resources & others*[42] concerning the consequences of ZIZA's subsequent restoration to the register. It may have revived rights that it had at the time of deregistration, but it was legally impossible for the restoration to 'revive' rights that ZIZA either did not have at the time of deregistration or which it would not, in the ordinary course, have had at the time of restoration.[43] The restoration to the register cannot create rights for a company that it would not have had, even if it had remained on the register throughout the relevant period. There is no merit in this point whatsoever.

[60] 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. They accept that ZIZA's old order mining rights expired on 30 April 2004 in terms of Item 7(1) of Schedule II of the MPRDA. This provides that these old order rights expire five years after the MPRDA came into effect.

[61] PAMDC and ZIZA claim that they not want Aquila to have mining rights because Aquila was granted prospecting rights at a time when ZIZA's rights had not yet expired. The appellants contend that it would be far more equitable for neither Aquila nor ZIZA to have rights over the properties and for the process to commence afresh. For more than two thousand years, the question *'cui bono?'* has been a useful tool of legal analysis.[44] It means 'To the good of whom' or 'Who will benefit from all this?' Who indeed?

[62] Starting 'afresh' presupposes that the Minister was correct in not granting a mining licence because the prospecting licence had not been correctly granted. But this ignores the fact that the whole point of prospecting is to find out whether there are

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[42] *Palala Resources (Pty) Ltd v Mineral Resources & others* [[2016] ZASCA 80; 2016 (6) SA 121 (SCA); [2016] 3 All SA 441 (SCA).
[43] *Aquila Steel (SA) Ltd v Minister of Mineral Resources & others* (supra) paras 86 to 101.
[44] The Roman orator and statesman Marcus Cicero made the expression famous when he attributed it, in one of his orations, as a favourite question asked by Lucius Cassius Ravilla, regarded by the people as a wise old judge. See *Pro Roscio Amerino*: '*Lucius Cassius ille quem populus Romanus verissimum et sapientissimum iudicem putabat identidem in causis quaerere solebat "cui bono fuisset".'* See also *The Concise Oxford Dictionary of Quotations.* The answer to the question may require reflection and analysis.

minable deposits on a particular property. We now know there are. It seems to me to be absurd to look again at the whole question of 'prospecting' as if we do not know what we now do, in fact, know.

[63] Commencing the process afresh on the basis that it would be more 'equitable' to do so, seems to me to be an intellectually false premise. One cannot start 'afresh' when we now know what no one knew when Aquila started prospecting: there is a significant reserve of manganese on the properties in question. This we know only as a result Aquila having spent R156 million on prospecting activities.

[64] The architecture of the MPRDA includes a clear bargain: investors are encouraged to prospect for minerals on the premise that if they are successful, they are first in line for the issue of a licence to mine. Common sense, ordinary, everyday morality and first principles of the interpretation of statutes require that the bargain be respected and affirmed by the courts.[45]

[65] I must assume, for the purposes of this matter, that Aquila's application for a mining right will survive environmental scrutiny and will not fall short on any of the legitimate socio-economic objectives set out in the MPRDA. In a record of more than 2000 pages, there is no indication of any deficiency in regard to these issues. 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 raising the standard of living and the quality of life in our country. The result has been hardly sensible. When it comes to the interpretation of statutes, this court has made it clear that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results.[46]

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[45] An attempt to find the intention of the legislature has, despite qualifications and reservations, been one of the golden rules of interpretation of statutes for more than 100 years. See the illuminating discussion on the point in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 20 to 24.

[46] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) paras 18 and 19 and *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013]

[66] I have expressed my reservations about the correctness of the court a quo substituting its own decision for that of the Minister in the granting of a mining right. Nevertheless, I agree with the thrust of that court's reasoning that, having successfully prospected consequent upon the issue of a valid permit to do so and having made an investment of R156 million in that process, Aquila is entitled to the issue of a mining right, subject to reasonable terms and conditions determined by the Minister.

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N.P. WILLIS

Judge of Appeal

ZASCA 76; 2013 (5) SA 1 (SCA) para 21.

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