

**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**

1 Introduction

The social rules of standing and waiting in a queue do not require explanation. When queuing at the post office, supermarket, or the theatre entrance, it is common knowledge that someone trying to enter the queue at any place but the rear end will cause, to say the least, an unfriendly reaction. Leaving the queue without good reason and without discussing this with the person behind one, may very well lead to losing one's place in the queue. There are nuances, of course, informed by other important social norms or common decency, such as allowing leniency to queuing decorum for the infirm or disabled; or to be reasonable in allowing someone back into the queue when he/she had to leave for a good reason and with the promise of return, for example, to fetch an ID document accidentally left in the car. Adherence to these rules and norms is an expression of the deeply democratic principle of "ordinality" – something going more commonly by the statement "first-come; first-served" (see Gray "Property in a Queue" in Alexander and Penalver (eds) *Property and Community* (2009) 167). Very simply, with limited exceptions, the person that is first in the queue must be served first.

The "first-come; first-served" principle is not only a social rule of queuing. The notion that priority must be given according to the time of arrival is a manifestation of distributive and procedural justice (Gray in Alexander and Penalver *Property and Community* 168–169), and is also "one of the most primitive canons of property jurisprudence" (Gray in Alexander and Penalver *Property and Community* 168 169 and 173). In South African mining law, the "first-come; first-served" principle is associated with the notion that overlapping applications for a licence to conduct extractive-related activities, must be processed in order of receipt.

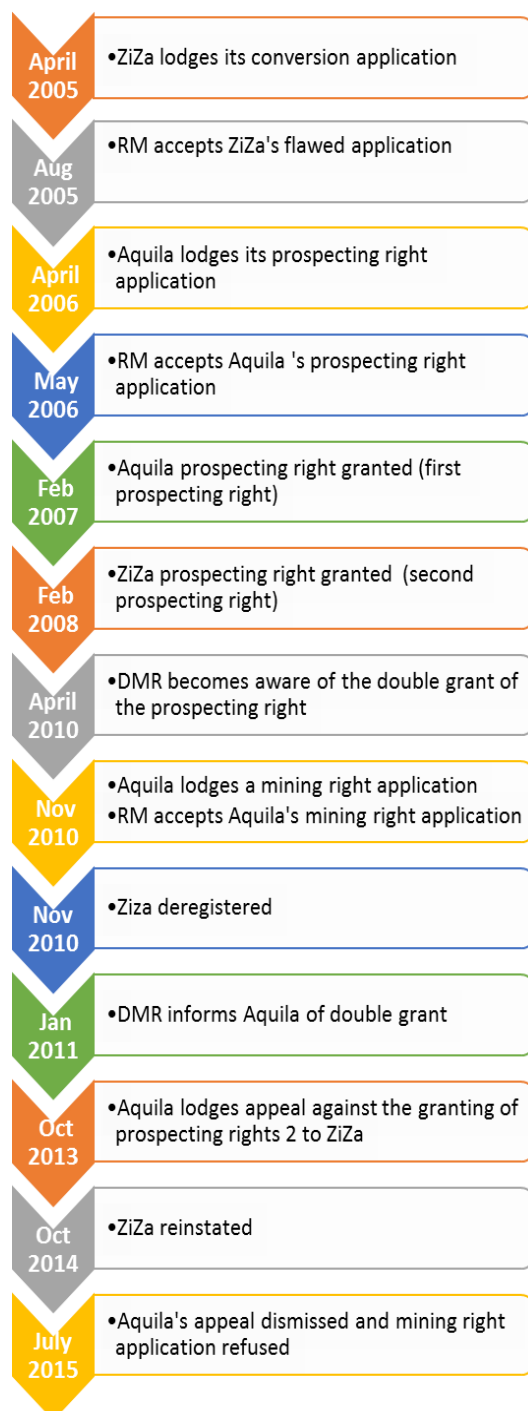
In the mining context, the application of rules related to queuing and the “first-come; first-served” principle is, of course, more complex in a social setting. The reason for this stems from the different, and at times conflicting, interests that must be taken into account. While a simple application of the “first-come; first-served” principle may benefit individual queuers, the government, for example, may be interested in granting rights to entities that have the best financial and technical skills to exploit a mineral deposit optimally. The government may also be interested in granting rights to entities that are best able to advance the objectives of transformation and equitable access to mineral resources.

The decision in *Aquila Steel (South Africa) Limited v Minister of Mineral Resources* ((72248/15) [2016] ZAGPPHC 1071) presents a striking illustration of the importance of rules related to queuing in the South African mining industry. This illustration is even more vivid, taking into account legislative changes to the Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter “MPRDA”) that were pending at the time of the judgment and that has subsequently taken effect. The judgment and legislative developments, furthermore, illustrate the interrelationship between the “first-come; first-served” principle and the notion of “exclusivity” as understood in the mining context.

This case note discusses all aspects of the *Aquila Steel* judgment, but hones in on its implications for the queuing system in the South African mining context and, in particular, the relationship between the “first-come; first-served” principle and the notion of exclusivity.

2 Facts

On 28 February 2007, the Department of Mineral Resources (hereinafter “DMR”) executed a prospecting right in favour of Aquila Steel South Africa (hereinafter “Aquila”), a subsidiary of an Australian resource company, over land in the Northern Cape (par 38). The company spent R156 million during the prospecting and discovered a significant manganese deposit (par 4). Subsequent to an unsuccessful application for a right to mine the deposit, Aquila lodged a review application in the High Court. The rejection of Aquila’s mining right application was closely linked to a double grant of the prospecting right to a United Kingdom incorporated company, ZiZa, and the registration of the right in the name of a further company, the Pan African Mineral Development Company Ltd (hereinafter “PAMDC”). The following paragraphs provide a simplified version of the intricate events that led to Aquila’s review application. A timeline is drawn to assist the discussion:



ZiZa, owned by the governments of Zimbabwe and Zambia, was the holder of an unused old-order prospecting right in terms of Schedule II of the MPRDA (par 8). According to Item 8 of Schedule II, ZiZa had an exclusive right for one-year from the commencement of the MPRDA to apply to convert its old-order right into a new-order right. In April 2005, within the one-year time period, ZiZa filed a number of applications in respect of different conglomerations of land, including the application before the court for a prospecting right over 500 000 hectares of land in the Northern Cape (hereinafter “the ZiZa application”) (par 27). The ZiZa application did not comply with the requirements that oblige the Regional Manager to accept applications for prospecting rights in section 16 of the MPRDA.

In terms of section 16(1) of the MPRDA, an application for a prospecting right must be lodged in the “prescribed manner”. To identify the land to which the application relates, the “prescribed manner” includes the requirement that the application must be accompanied by a plan of the land, containing the coordinates and one of three named “spheroids” (par 14). The ZiZa application did not contain such a plan (par 28). Furthermore, the ZiZa application did not show that the company had the necessary financial resources or technical abilities to conduct prospecting operations as required by section 17(1)(a) of the MPRDA (par 28).

Instead of notifying ZiZa that the application did not meet the requirements within the 14 day-period required by section 16(3) of the MPRDA, the Regional Manager accepted the application on 17 August 2005 (par 29). On 26 February 2008, about two and a half years after the application was accepted, contrary to the recommendations of his internal advisers, the Deputy Director General (as the delegate of the Minister) granted the prospecting right to ZiZa (hereinafter “second prospecting right”) (par 58).

ZiZa never attempted to prospect and, as it transpired, never planned to prospect or mine (par 34 and 35). ZiZa planned to transfer its rights, including the prospecting right in question, to PAMDC (par 35). PAMDC was formed by the governments of Zambia, Zimbabwe, and South Africa with the aim of taking over all of ZiZa’s mineral rights (par 25). The intention was that ZiZa would continue to exist only for purposes of winding up its business (par 25). ZiZa was dissolved and deregistered on 9 November 2010 but was restored to the companies register of England and Wales on 14 October 2014 (par 86). The prospecting right was never transferred to PAMDC and PAMDC never applied for a prospecting right (par 32 and 47). Despite this, the prospecting right was registered in the Mineral and Petroleum Titles Registration Office in PAMDC’s name (par 32).

Almost a year after the ZiZa application was submitted and accepted but before the prospecting right was granted to ZiZa, on 18 April 2006, Aquila applied for a prospecting right for the same minerals on the same land (hereinafter “the Aquila application”) (par 36). The Aquila application met the requirements of section 16 of the MPRDA and the Regional Manager accepted the application within the statutory period of 14 days on 2 May 2006 (par 36). On 28 February 2007, a year before the ZiZa application was granted, the prospecting right was granted to Aquila (hereinafter “first prospecting right”) (par 38). The first right was registered in Aquila’s name in

the Mineral and Petroleum Titles Registration Office (par 38). The granting of the second prospecting right to ZiZa on 26 February 2008, resulted in a double grant (to Aquila and to ZiZa) of the right (par 37). The double grant resulted in a double registration of the right in the Mineral and Petroleum Titles Registration Office (in the name Aquila and PAMDC).

Pursuant to discovering the manganese deposit in the exercise of its prospecting right, Aquila applied for a mining right on 14 December 2010 (par 39). Between late 2009 and April 2010, the DMR became aware of the fact that there was a double grant (to ZiZa and Aquila) of the prospecting right (par 42). The DMR informed PAMDC of this double grant and extensive negotiations followed between PAMDC and the DMR, a process from which Aquila was excluded (par 42). Instead of informing Aquila of the double grant of the prospecting right, the DMR accepted Aquila's application for a mining right on 22 December 2010 (par 39).

Aquila was eventually informed of the double grant on 28 January 2011 (par 44). From this date until October 2013, through what is referred to as a "frustrating process" (par 49), Aquila attempted to gather information on the double grant, achieving limited success only after relying on the Promotion of Access to Information Act 2 of 2000 (par 44). This limited success took the form of being furnished with copies of the letter according to which the second prospecting right was granted to ZiZa and of the executed prospecting right in favour of PAMDC (par 49).

On the strength of these documents, Aquila launched an internal appeal on 29 October 2013 against the decisions of the Deputy Director-General to grant the second prospecting right to ZiZa and to register the prospecting right in PAMDC's name (par 49). PAMDC, in turn, cross-appealed against the DMR's decisions to accept the Aquila application on 2 May 2006 and to grant the first prospecting right to Aquila (par 54). The DMR decided the internal appeal, the cross-appeal and Aquila's mining right application on 2 July 2015, only after it was compelled to consider the matters through a mandamus application brought by Aquila (par 41 and 57). The decision was more than five years after Aquila lodged the application for a mining right and more than 20 months after Aquila launched the internal appeal (par 57).

The outcome of the decision on 2 July 2015 was a rejection of Aquila's appeal and its mining right application and upholding PAMDC's cross-appeal (par 58). The DMR thus decided that, despite not complying with the requirements of section 16 of the MPRDA, the decision to grant the second prospecting right to ZiZa was lawful. According to the Minister, the acceptance and grant of the first prospecting right to Aquila had been *unlawful* as this occurred during a time that ZiZa had an exclusive right to apply for conversion of its old-order right (par 58). The decision in the internal appeal also means that according to the Minister, notwithstanding the fact that the second prospecting right was never transferred to PAMDC or that PAMDC never applied for a prospecting right, registration in its name was correct. Subsequent to these adverse decisions, Aquila lodged a review application in court (par 60).

3 Arguments and judgment

The court was highly critical of the conduct of the DMR. The court found that the Department acted irrationally and irregularly and that the Minister “did not do justice” to the case by acting contrary to the advice of his internal advisers and not providing proper reasons for his decisions (par 114). Citing “institutional incompetence” (par 111) and “tardiness” (par 113) on the part of the DMR, the Court held in favour of Aquila and took the exceptional step of substituting the Minister’s decision to grant the prospecting right to ZiZa with that of its own. According to this substitution, the court set aside the decision to grant the second prospecting right to ZiZa, held that the first prospecting right was lawfully granted to Aquila, and also granted the mining right to Aquila (par 61, 84, 102–104 and 114). According to the court, by delaying the grant of Aquila’s mining right longer than what was necessary, the government failed to uphold the aim in the preamble of the MPRDA to build an internationally competitive administration and regulatory regime (par 113).

According to the court, the MPRDA presents a fundamental shift in mineral regulation (par 6). It vested privately held mineral rights in the State as custodian and enforced the “use-it or lose-it” principle (par 6). Similar to the Constitution, the MPRDA represents “a break with the past” (par 7). In this regard, the MPRDA recognises the need to promote development and community upliftment, to eradicate discriminatory practices in the mining industry and to redress past racial discrimination (par 7). The court further confirmed that the MPRDA reaffirms the State’s commitment to guarantee the security of tenure and the need to create an international competitive administration and regulatory regime (par 7).

The court highlighted three fundamental principles of the MPRDA that were relevant to the dispute (par 9). The first principle is that the common-law owner of minerals no longer has the authority to sterilise exploitation by virtue of their ownership rights (par 9). The second principle is that the MPRDA establishes a queuing system when the Regional Manager receives applications for overlapping rights (applications for the same right to the same mineral on the same land) on different days (par 10). According to this queuing system, the applicant first in the queue is entitled to have his or her applications considered first and to the grant of the right if specified requirements are met (par 10). If the application first in the queue complies with the requirements of the MPRDA, other applications cannot be considered (par 10). If other applications are considered and rights granted, despite the first application complying with the requirements, the subsequent application is unlawful and the grant of the right is susceptible to being set aside (par 10). The third principle of the MPRDA is that the queuing system is subject to the exclusive rights that the transitional arrangements confer on holders of old-order rights to convert their rights into new-order rights (par 11). While the exclusive rights of holders of old-order rights were valid, prospective prospectors and miners could not join the queue at all, that is, the queuing system is suspended (par 77).

In coming to the decision to grant the mining right to Aquila, the court had to consider three issues. The first issue was whether Aquila exhausted its

internal remedies before lodging a court application to review the DMR's adverse administrative action against it (par 30). The second issue concerned the nature and duration of the exclusivity that the transitional arrangements conferred on the holders of old-order rights to apply for new-order rights under the MPRDA (par 11 and 22). The second issue also involved the impact that non-compliance with the provisions of the MPRDA has on an applicant's place in the queue that forms when there are applications for overlapping rights. The third issue concerned the effect that deregistration and reinstatement of companies have on the rights granted in terms of the MPRDA and on holders of old-order rights' exclusivity to apply for conversion of those rights into new-order rights (par 40 and 86).

The next section provides a description of all three aspects of the judgment. The case was decided according to the provisions of the MPRDA prior to amendments effected by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (hereinafter "2008 Amendment Act"), the relevant parts of which came into force in June 2013 (see Proc 14 in GG 36512 of 2013-05-31 and Proc 17 in GG 36541 of 2013-06-06). It is submitted that according to the MPRDA as it read at the time, all three parts of the judgment are correct. However, in the light of legislative changes pending at the time of the decision, and that has subsequently taken effect, section 4 below provides commentary on the queuing system in the MPRDA.

3.1 *Exhausting internal remedies*

According to section 96(3) of the MPRDA, no person may apply to the court for a review of administrative action until the person has exhausted the internal remedies in terms of section 96(1). According to section 96(1)(a) and (b), an appeal against an administrative act by the Regional Manager must be lodged with the Director-General, and an appeal against an administrative act of the Director-General must be lodged with the Minister.

One of the main grounds on which Aquila attacked the decision of the Deputy Director General (as delegate of the Minister) to *grant* the prospecting right to ZiZa was that the Regional Manager's decision to *accept* the ZiZa application was irregular (since ZiZa did not comply with the requirements of section 16 of the MPRDA) (par 51 and 63). ZiZa and PAMDC argued that Aquila's failure expressly to attack the Regional Manager's *acceptance* decision in its internal appeal meant that Aquila did not exhaust its internal remedies (par 52). Thus, according to this argument, Aquila had to exhaust its internal remedies by launching an internal appeal specifically against the Regional Manager's *acceptance* decision before it could ask the court to review this decision.

The court rejected ZiZa and PAMDC's argument, finding that the Minister had to consider the ZiZa *acceptance* decision before it could decide on the lawfulness of the decision to grant the prospecting right to ZiZa (par 67). According to the court, in concluding that the grant decision was lawful, the Minister must have concluded that the acceptance decision was lawful (par 67). Thus, consideration of the acceptance decision was a pre-requisite for deciding that the grant decision was lawful. Accordingly, the court found that Aquila complied with its duty to exhaust its internal remedies (par 69).

Furthermore, the court held that even if Aquila did not comply with its duty to exhaust internal remedies, Aquila qualified for an exemption in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 (par 69). According to section 7(2)(c), a court may in exceptional circumstances and in the interest of justice, exempt a person from exhausting internal remedies (par 69). The exceptional circumstances, in this case, were the commercial interests of Aquila and the negative impact of the inordinate delays in the administrative processes of the DMR and the Minister (par 70).

This case note does not present an in-depth analysis or commentary on this part of the decision. The court's decision regarding the question whether Aquila exhausted its internal remedies is accepted as correct.

3.2 *Deregistration and restoration of companies*

The court had to consider whether ZiZa's deregistration from and restoration of, the companies' register of England and Wales had an effect on the validity of Aquila's prospecting right and on its subsequent application for a mining right. The effects that deregistration of a company, and its subsequent restoration, have on the validity of rights to minerals that the company holds, is influenced by two pieces of legislation. According to section 56(c) of the MPRDA, rights to minerals lapse when the holder is a company or closed corporation that is deregistered (unless there was an application for consent from the Minister to transfer rights in terms of section 11 of the MPRDA. In this case, there was not such an application). However, according to section 82(4) of the Companies Act (71 of 2008), any interested person may apply to the Companies and Intellectual Property Commission to reinstate the company to the register. Based on a similar provision in section 73(6A) of the 1973 Companies Act 61 of 1973, in *Palala Resources (Pty) Ltd v Minister of Mineral Resources* ([2016] 3 All SA 441 (SCA)), the Supreme Court of Appeal held that restoration to the register reconstituted the company with its property and validated its corporate activities during the time of deregistration (*Aquila Steel (South Africa) Limited v Minister of Mineral Resources supra* par 94). According to the court in *Palala Resources*, the *ex post facto* reconstituting of property and validation of corporate activity meant that rights to minerals revived upon reinstatement of the company.

The court in *Palala Resources* did not overlook the manifest injustice that the reviving of rights could cause to third parties (*Aquila Steel (South Africa) Limited v Minister of Mineral Resources supra* par 95). One can imagine such an injustice if a right that has lapsed as a result of deregistration, is granted to another entity ("new holder"). To pursue the objectives of the MPRDA, including optimal exploitation of, and equitable access to, the country's mineral resources, the government may have an interest in granting the lapsed right to a new holder as soon as possible. Upon reinstatement of the company that originally held the right, the revival of the right will place the new holder in an extremely unfavourable position. Despite the risks for a new holder, according to the court in *Palala Resources*, there is nothing in the MPRDA that supports an interpretation according to which lapsed rights do not revive when a company is restored (*Aquila Steel (South Africa) Limited v Minister of Mineral Resources supra* par 96). If the legislator so desired, it could have drafted the MPRDA in a manner that ensured that

rights to minerals are not subject to effects of restoration as provided for in the Companies Act (*Aquila Steel (South Africa) Limited v Minister of Mineral Resources supra* par 96). The legislator could thus easily have ensured the finality of the lapsing of rights to minerals upon the deregistration of a holder.

ZiZa was deregistered from the companies' register of England and Wales on 9 November 2010 (par 40). Thus, according to section 56(c) of the MPRDA, if the granting of the prospecting right to ZiZa were lawful (despite the irregularities in the process), the prospecting right would have lapsed on 9 November 2010 and could not be an impediment to Aquila's mining right application and acceptance in December 2010 (par 88 and 89). ZiZa and PAMDC, however, argued that, according to *Palala Resources*, when ZiZa was reinstated to the companies' register on 14 October 2014, the prospecting right that ZiZa had revived and revested in the company (par 90). According to this argument, the exclusive right that ZiZa had to apply for a prospecting right to convert its unused old-order right into a new-order right, also revived upon reinstatement of the company on 14 October 2014 (par 98).

Aquila submitted that the circumstances in *Palala Resources* are distinguishable from the circumstances in this case (par 98). The distinguishing factor was that in *Palala Resources*, the deregistration of the company was the only reason why the prospecting right lapsed (par 98). When *Palala Resources* was reinstated, there was no other impediment against the validity of the prospecting right and the right could re-vest in the company. Contrary to this, in *Aquila Steel*, ZiZa's prospecting right was no longer valid when the company was reinstated because it expired (par 98). According to section 56(a) of the MPRDA, rights to minerals lapse when they expire. In October 2014, when ZiZa was reinstated, the prospecting right had expired and therefore no longer existed (par 100 and 101).

As explained in the next section, the court decided that ZiZa's exclusive right to apply for a prospecting right to convert its old-order right into a new-order right lapsed when the one-year period provided for in the transitional arrangements came to an end. As with the prospecting right that could not revive because it already lapsed, ZiZa's exclusive right to apply for a prospecting right to convert its old-order right into a new-order right, also no longer existed. Comparing ZiZa's position regarding its prospecting right and exclusivity with paint that is used up or potatoes that are consumed before reinstatement, the court found that it was impossible that the prospecting right or the exclusivity to apply for a prospecting right, re-vested in ZiZa when it was reinstated (par 99 and 100).

The court's decision that the lapsing of ZiZa's prospecting right and the exclusive right to apply for a prospecting right meant that these rights could not re-vest in ZiZa when the company was reinstated is accepted. This case note does not present further commentary on this aspect of the judgment.

3.3 *Exclusivity and the queuing system*

Section 9 of the MPRDA determines the order in which applications must be processed if the government receives more than one application for the same mineral on the same land. When applications are received on different

days, section 9(1)(b) incorporates the “first-come; first-served” principle according to which applications must be “dealt with” in order of receipt. Section 9(1)(b) in effect creates a “queuing system” in terms of which the application that is first in the queue must be considered first.

If the application that is first in the queue meets certain requirements, the Regional Manager does not have any discretion but is obliged to accept the application (par 16). Similarly, if the first application does not meet the requirements, the Regional Manager must reject the application, inform the applicant of the rejection and, according to the MPRDA as it read at the time, send the application back to the applicant (par 16). Upon rejection of an application, the Regional Manager has the authority to consider the next application in the queue.

According to the court, when a defective application was returned to an applicant, the applicant lost its place in the queue (par 21). This meant that if an applicant wants to amend a defective application, the amended application would be treated as a new application, taking its place at the back of the queue (par 21).

If the queuing system in section 9(1)(b) was the only consideration, Aquila’s problems would have been solved: since the ZiZa application did not comply with the requirements of section 16 of the MPRDA, ZiZa would have lost its place in the queue, meaning that the DMR had the authority to accept and grant the Aquila application. However, the MPRDA as it read at the time provided for an exception to the queuing system. According to this exception, during the period of exclusivity afforded to holders of old-order rights, prospective prospectors and miners could not join the queue at all (par 77). ZiZa and PAMDC argued that this exception applied even after the expiry of the one-year period until the (in this case unused) old-order right holders’ application was granted or refused (par 75). Accepting this interpretation would mean that although the ZiZa application did not meet the requirements of section 16 of the MPRDA, ZiZa’s exclusivity to apply for a prospecting right continued (par 75). Thus, the Aquila application could not have been placed in the queue (par 76). If the Aquila application was not allowed in the queue, the prospecting right was unlawfully granted to Aquila. It then follows, according to this argument, that Aquila could not apply for a mining right and that the decision of the DMR to reject Aquila’s mining right application was lawful.

The court confirmed that the objectives of the transitional arrangements according to which ZiZa had the exclusive right to apply for a prospecting right to convert its old-order rights into new-order rights is to ensure the protection of security of tenure in relation to ongoing operations (par 73). However, security of tenure of ongoing operations was not the only consideration. According to the court, by requiring applicants for conversion to comply with all of the requirements of section 16, the transitional arrangements further aimed to ensure equitable access to the country’s mineral resources (par 77).

The court rejected ZiZa and PAMDC’s argument that an unused old-order right holders’ exclusivity extended beyond the one-year period provided for in the transitional arrangements (par 77). The court found that extending the exclusivity in this way, would frustrate the objectives of the MPRDA to

ensure equitable access to the country's mineral resources and that it could lead to absurd results (par 77 and 80). Absurd results could follow if, for example, a defective application was sent back to an applicant but not expressly rejected (par 80). If the applicant's exclusivity persisted after the one-year transitional period, the application would remain valid, and others would be precluded from joining the queue, for as long as the applicant did not take steps to rectify the application (par 80).

The court held that an interpretation according to which prospective prospectors may join the queue after the one-year exclusive period would better serve the objective of the MPRDA (par 78). Such an interpretation will allow the government to consider and grant the next application in the queue if such a grant will promote the objectives of the MPRDA, including equitable access to the country's mineral resources (par 77, 78 and 81). The interpretation accepted by the court meant that, as the holder of an unused old-order right, ZiZa's exclusive right to apply for a prospecting right to convert the old-order right into a new-order right, expired in April 2005 (par 83).

4 Commentary

It is submitted that the outcome of the judgment, namely to grant the mining right to Aquila, is correct. A different decision would have been unjust towards Aquila and may also have had a negative impact on investors' confidence in the South African mining industry. In particular, a different outcome would have caused an unreasonable infringement of Aquila's security of tenure between the prospecting phase and the mining phase. Continuity of tenure between the different phases of a mineral development project is an essential component of an internationally competitive administration and regulatory regime.

The court's decision regarding the expiry of the exclusive right that the transitional arrangements conferred on holders of old-order rights to apply for rights under the MPRDA, provides clarity and legal certainty. According to the decision, since all of the periods provided for in the transitional arrangements have come to an end, holders of old-order rights no longer have the exclusive right to apply for rights under the MPRDA.

Apart from providing legal certainty regarding old-order right holders' exclusive rights, the decision promotes two objectives of the MPRDA. The first objective, expressly identified by the court, is equitable access to the country's mineral resources. A further objective that can be added is optimal exploitation of the nation's mineral resources. These objectives are promoted, in particular, by the court's assessment of the queuing system that the MPRDA provides for when the Regional Manager receives applications for overlapping rights.

The effect of the decision is to allow prospective prospectors and miners to join the queue as soon as the periods provided for in the transitional arrangements have come to an end. If the old-order right holders' application for conversion does not comply with the requirements of the MPRDA, the Regional Manager may consider the next application in the queue. Placing the defective application for conversion at the back of the queue allows the

Regional Manager immediately to consider the next application. Allowing the Regional Manager to continue the process of assessing applications prevents time delays that may otherwise occur in waiting for the old-order right holders' amended application. If the subsequent application complies with the provisions of the MPRDA, the right can be granted to promote equitable access to, and optimal exploitation of, the nations' mineral resources.

The effect of the decision to promote the optimal exploitation of, and equitable access to, the country's mineral resources not only applies when there is an application to convert old-order rights into new-order rights but also when applicants apply for new rights. According to the court, when any application for rights to minerals is rejected and sent back to the applicant, the Regional Manager may continue with the process that will lead to the granting of rights. Thus, when new rights are applied for, time delays in the granting of rights may also be prevented. The positive impact of the decision to promote the objectives of optimal exploitation of, and equitable access to, mineral resources will not apply to applications that were lodged after the 2008 Amendment Act came into operation in June 2013.

Before the 2008 Amendment Act, the MPRDA placed two limitations on the queuing system provided for in section 9 of the Act. The first is the exception explained above, namely the exclusive right of holders of old-order rights to apply for new-order rights that prevented prospective applicants to join the queue. The second limitation, which was retained by the 2008 Amendment Act, is that prospective prospectors and miners cannot join the queue if another entity already holds an overlapping right (s 16(2)(b) of the MPRDA for prospecting rights and s 22(2)(b) for mining rights). The second limitation is important for investor confidence because it guarantees the exclusivity of right holders by preventing other applicants to join the queue once rights have been granted. If prospective prospectors and miners cannot join the queue after rights have been granted, the Regional Manager cannot consider subsequent applications and overlapping rights cannot be granted.

Similar to the continuity of tenure between the different phases of a mineral development project, exclusivity forms an important component of an international competitive administration and regulatory regime. On the facts of the case, at the time when Aquila applied for its prospecting rights, an overlapping right was not granted to ZiZa, and there was thus no limitation that prevented Aquila from joining the queue. Furthermore, the principle of exclusivity according to which applications should not be accepted after rights have been granted would not have been violated.

The principle of exclusivity may also apply to applications *before* rights are granted. At this level, once an application is accepted by the Regional Manager, the exclusivity of the application is guaranteed. The 2008 Amendment Act incorporated exclusivity of applications by providing that the Regional Manager may not accept applications for, *inter alia*, prospecting rights and mining rights if a prior overlapping *application was accepted* (not right granted) and is pending (s 12(b) of the 2008 Amendment Act for prospecting rights and s 18(c) for mining rights). Thus, if the Regional Manager accepted a prior overlapping application, but the Minister has not

yet decided to grant or reject the right, further applicants cannot join the queue. As is explained in the following paragraphs, exclusivity of applications becomes a proverbial double-edged sword, presenting positive and negative consequences.

Exclusivity of applications in itself may promote an international competitive administration and regulatory regime. The necessity of rendering applications exclusive may, of course, be questioned. At this stage of the process, positions have not been established and rights have not been granted, and there may, therefore, be no need for exclusivity. However, some of the amendments that are proposed by the Mineral and Petroleum Resources Amendment Bill ([B15-2013]) (hereinafter “2013 Amendment Bill”) render the exclusivity of applications important.

The 2013 Amendment Bill proposes to substitute the queuing system in section 9 of the MPRDA with a system according to which the Minister will have the power to invite applications for rights to minerals (s 5 of the 2013 Amendment Bill). The proposed amendments thus delete the well-established notion of competitive mineral regulatory regimes that the first application received is considered first and the right granted if certain requirements are met. If the 2013 Amendment Bill obliterates the queuing system, the first applicant will be protected by the requirement in the 2008 Amendment Act that a subsequent application may not be accepted if a prior application is pending. The protection flows from prohibiting the Regional Manager to accept a later ranking application if the outcome of the first application is pending.

The facts of the case clearly illustrate the negative impact that the third limitation may have on the objectives to promote the optimal exploitation of, and equitable access to, the country’s mineral resources. If the third limitation on the queuing system applied in this case, the Regional Manager would not have had the authority to accept the Aquila application and to place Aquila in the queue. The reason for this is that the ZiZa application was already accepted at the time when Aquila applied for the prospecting right. If Aquila’s application were never accepted, the manganese deposit would never have been discovered, that is, the country’s mineral resources would not have been exploited optimally. Furthermore, the prospecting right would not have been granted to an entity that complied with the transformation requirements in the MPRDA. The third limitation does not, however, only present negative consequences.

On the facts of the case, the application of the pre-2008 amended MPRDA had the desired result, namely to place Aquila in the queue lawfully and to protect the company’s continuity of tenure. It is arguable that the post-2008 amended MPRDA would also have protected Aquila, albeit in a different manner. According to the requirement that the Regional Manager may not accept a later ranking application if a prior ranking application is pending, the ZiZa application would have been exclusive. Aquila would thus not have been placed in the queue at all. If Aquila was not in the queue, it would not have been granted a prospecting right and would not have spent R156 million in discovering the manganese deposit. Thus, according to the post-2008 amended MPRDA, Aquila would never have been placed in this unfortunate position.

The pre-2008 scenario, however, has one advantage that is lost by the post-2008 amended MPRDA, namely to promote the objectives of optimal exploitation of, and equitable access to, the country's mineral resources. It is possible to argue that the loss of this advantage may be offset against the advantages of ensuring exclusivity of applications. This argument will become particularly compelling if the 2013 Amendment Bill comes into operation and eradicates the queuing system by deleting the "first-come; first-served" principle. If the queuing system is annihilated, investors may find some comfort in the exclusivity that the MPRDA affords to applications.

5 Conclusion

An analysis of the decision in *Aquila Steel* coupled with legislative changes that were pending at the time of the judgment, and that have subsequently taken effect, illustrate the importance of queuing rules in mining legislation. In *Aquila Steel*, the court's interpretation of the queuing rules had the effect of protecting Aquila's interests and advancing an internationally competitive administration and regulatory regime. The decision, furthermore, promoted the MPRDA's objectives of equitable access to, and optimal exploitation of, the country's mineral resources. These objectives would not have been promoted if the changes to the queuing system effected by the 2008 Amendment Act were operational at the time of the judgment.

Taking into account proposed legislative changes that will abolish the "first-come; first-served" principle, the analysis in this case note also illustrates the close connection between the queuing system and the notion of exclusivity in South African mining law. If the 2013 Amendment Bill deletes the "first-come; first-served" principle, the exclusivity of applications effected by the 2008 Amendment Act, may provide similar protection for applicants who lodge their applications first. It is, however, unfortunate, that these legislative changes may have a limiting impact on the objectives of equitable access to, and optimal exploitation of, the country's mineral resources.

Heleen van Niekerk
University of Cape Town