Remedies in respect of decisions made under the MPRDA: there are no quick fixes

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When it comes to appealing against or reviewing administrative decisions under the Mineral and Petroleum Resources Development Act (MPRDA), the wheels of administrative justice tend to grind slowly. However mining and exploration companies need to understand the process to achieve results.

The backlog in internal appeals under the MPRDA is growing daily and currently stands at approximately 2 000 unresolved matters. The main spoke in the wheel is the sheer volume of appeals being lodged and the lengthy, convoluted appeal process, which, unfortunately, is unavoidable.

For a party aggrieved by a decision of an official of the Department of Mineral Resources (DMR) under the MPRDA, it is not possible to sidestep, circumnavigate or accelerate the appeal process. However, it can be managed, provided that the appellant has a clear understanding of the process itself and of the appellant's rights and remedies.

Mining and exploration companies should also consider that there comes a time when it makes business sense to explore alternative avenues rather than continue with or even initiate the appeal process.

Appeals and reviews

In the past three or four years, a number of high-profile disputes around the granting or refusal of mining or prospecting rights in South Africa have been the subject of appeals and/or reviews.

A well-known example is the case in which the Bengwenyama community appealed against the grant of a prospecting right. The community argued that it had not been properly consulted over the decision to grant the prospecting rights to the mining company Genorah and that the fairness requirements of the Promotion of Administrative Justice Act had not been met. The matter eventually went all the way to the Constitutional Court, which ruled in favour of the Bengwenyama community. The matter had been initiated by an internal appeal and ended up being the subject of a High Court review, an appeal to the Supreme Court of Appeal (SCA) and a further appeal to the Constitutional Court.

Other recent high-profile disputes over decisions around decisions to grant mining rights or prospecting rights include Sishen Iron Ore Company versus Imperial Crown Trading, Norgold versus Rhodium Reefs, Southern Sphere versus Rhodium Reefs and BHP Billiton Energy Coal versus Finishing Touch Trading, all of which ended up in the High Court on review.

Such matters demonstrate that MPRDA administrative decisions may result in various parties becoming aggrieved, including surface owners, competing right holders, environmental groups and communities with rights of preference.

The MPRDA allows the right of appeal to any person or party who is aggrieved by, for example, a decision to accept or reject a prospecting right or mining right application or to grant or refuse a mining or prospecting right application.

The MPRDA and the Regulations in force thereunder set out the process for submitting an appeal, as well as the timeframes that go with it.

No initial recourse to the courts

One of the most important points to note about the MPRDA's internal appeal process is that it is an internal administrative process managed by the Department of Mineral Resources. There is no option available for an administrative review through the courts - at least not until all the prescribed internal avenues have been exhausted.

The Supreme Court of Appeal in the Bengwenyama matter confirmed that a decision of the Deputy Director-General or the Director-General as delegatee of the Minister is not a Ministerial decision but rather a decision of the Deputy Director-General or the Director-General and thus is subject to the appeal process.

Here is a brief outline of the main steps involved in lodging an appeal against a decision under the MPRDA.

Firstly, any party wishing to appeal must do so within 30 days of gaining knowledge of the decision, or should reasonably have become aware of the decision, and such party must submit the appeal to the correct appeal authority.

If the decision concerned was made by the regional manager or another officer of the Department of Mineral Resources, the correct appeal authority is the Director-General of the Department. On the other hand, if the Director-General made the decision, the appeal must be directed to the Minister of Mineral Resources.

After receiving the appeal, the Director-General or the Minister, as the case may be, must then send copies of it to whomever in the Department made the decision, as well as to any person whose rights could be affected by the outcome of the appeal. These parties then have 21 days to respond in writing. Generally, the appeal is sent to the Regional Manager who would have recommended the grant or refusal of the right. These responses must be sent by the Director-General or the Minister, as the case may be, to the appellant to furnish a response.

Within 30 days of receiving the latter response, the Director-General or the Minister, as the case may be, must do one of the following: confirm the initial decision, set it aside, amend it, or make another decision in the place of the original one.

There are often delays in that the Regional Manager does not furnish the reasons to the Director-General timeously or the Director-General or the Minister fails to take a decision on the appeal timeously after having received all prescribed responses.

Dealing with delays

Should there be an unreasonable delay in receiving a decision on the appeal, the appellant may turn to the High Court for a *mandamus* – an order of court instructing the Director-General or Minister, as the case may be, to furnish a decision on to the appeal forthwith. The Bengwenyama decision held that a four month delay in furnishing a decision on an appeal is unreasonable.

Such an order may get the process moving but will not necessarily bring it to a speedy conclusion. For example, if the appeal authority dismisses the appeal on its merits after the *mandamus*, the next step would be to appeal to the Minister if the initial appeal was decided by the Director-General.

That, too, might take an unduly long time, in which case the appellant's recourse would be to obtain another *mandamus*, this time against the Minister.

The Minister might then take a decision that goes against the appellant, prompting the appellant to take the next step in the process, namely a High Court review. The outcome of that could result in an appeal to the Supreme Court of Appeal and ultimately, as we have seen in numerous instances, an appeal to the Constitutional Court.

If the matter is taken to the High Court on review there is a specific rule of the High Court Rules of South Africa, namely Rule 53, which sets out the process. Often a delay results from the lack of furnishing of a record of decision by the DMR and often one has to resort to obtaining a Court order directing the DMR to furnish the record, after which it is produced. Adherence to the strict time limits and the rules will help to expedite the review application, but obtaining a court date, if it is opposed, can delay the matter somewhat.

By this time, two to three years may have passed since the original appeal was lodged and ultimately the decision may go against the appellant.

Managing the process and exploring alternatives

As mentioned earlier, there is simply no sidestepping the appeal process set out in the MPRDA, but it can be managed.

The most effective way to approach an appeal is to ensure one follows the process correctly and completely, including submitting all the required documentation and directing the appeal to the correct appeal authority within the prescribed timeframe.

A very important piece of advice, however, is to be aware of an aggrieved party's right to object *before* a decision on a mining or prospecting right application is taken. The fact that an aggrieved party has objected upfront will more than likely strengthen the objector's case if, and when, the objector lodges an appeal. Conversely, not objecting may well be taken into account, to the detriment of an appellant, in the event of an appeal being lodged against the grant of a prospecting right or mining right.

Provision for the lodging of objections is built into the process of applying for mining or prospecting rights. Within 14 days after accepting any application for such a right, the regional manager must call on interested or affected parties to comment on the application in writing which objections have to be made within 30 days thereafter.

The regional manager is then obliged to refer any objection to the Regional Mining Development and Environmental Committee (RMDEC). This is an internal committee, one per province, which meets once a month to consider objections and advise the Minister on the grant or refusal of an application.

Another critical point to be aware of is that the lodging of an appeal under the MPRDA does not suspend the decision leading to the appeal. For instance, if one is appealing against the grant of an overlapping or competing right granted to another party, the fact that one appeals does not suspend the other party's right pending the outcome of the appeal. On the contrary, the other party may continue exercising their granted right until the MPRDA appeal process has run its course, which, as pointed out above, can take years to complete. In this event, one should, as the appellant apply to the High Court for an urgent interdict preventing the other party from exercising its right while the administrative appeal process and any subsequent review is pending, which

interdict should be granted if the requirements for an interim interdict are met.

There may also be times when it is advisable to consider alternatives to litigation (which, as we have seen, often goes hand in hand with the appeal process). For example, it might be worthwhile to approach the other party for a commercial settlement as opposed to litigation. A commercial settlement could benefit both parties and obviate a long, drawn-out dispute where potentially no party wins at the end of the day. The rights which are the subject of the dispute may lapse before finalization of the dispute. The costs of running the matter through the entire process up to the Constitutional Court could run into millions of rands.

One must bear in mind furthermore that an appeal must be based on the merits of the matter. The appellant will have to demonstrate that the decision taken by the administrative authority was wrong in law or unlawful. For example, if the holder of a platinum mining right wishes to appeal against the decision to grant a chrome mining right to a third party over the same piece of land, the appeal will not necessarily be granted merely because the right was granted to the chrome right company. The appellant will have to demonstrate that in taking the decision to grant the right under section 23 of the MPRDA, the Minister erred in concluding that the chrome right company fulfilled all of the requirements of section 23(1) of the MPRDA. The appellant would have to demonstrate that one of the elements of section 23(1) was not satisfied. For example, the platinum right company may argue as appellant that the mining of chrome would not be optimal because the chrome is situated in the same ore body as the platinum and chrome cannot be mined optimally on its own.

Otherwise the appellant may wish to argue that the chrome right holder cannot mine in a healthy and safe manner thus contravening the provisions of section 23(1) of the MPRDA because of the existence of the platinum operation, or that mining for chrome in addition to the platinum will result in unacceptable pollution and degradation to the environment, This once again does not satisfy the requirements of section 23 of the MPRDA. The platinum right company could not successfully bring an appeal merely because the mining of chrome on the same property would be an irritation to the platinum right company. Similarly, if a landowner wishes to appeal against the grant of a right on his property, the landowner would have to argue that the holder, whether it be a prospecting right or mining right, did not satisfy the requirements of section 17(1) or 23(1) of the MPRDA respectively. Thus, the landowner would have to argue for example that the holder would cause unacceptable degradation to the environment or could not mine in a healthy and safe manner or does not have the financial competence to execute the work programme properly.

In the final analysis, whatever choice a company takes when faced with an unfavourable MPRDA decision, it pays to be fully informed about the appeal process, aware of one's rights and willing to consider all options at one's disposal.

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