

Priority Disputes Between Holders of Old Order Mineral Rights and Holders of Prospecting Rights or Mining Rights Under the MPRDA in South Africa: *Aquila* has Landed (Continued)

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“Oh no, I see a darkness”[‡]

As part of the radical transformation of the mineral regime of South Africa, the African National Congress government introduced the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) on May 1, 2004. In a previous contribution, the transitional provisions of the MPRDA were discussed within the context of the rights of holders of old order rights (“OORs”) to convert their transitional rights to, or to apply for, new prospecting rights or mining rights under the MPRDA during different periods of transition. It was shown that due to poor administration by the state, as custodian of the mineral resources of South Africa, in post-apartheid South Africa, competing rights were granted to land that was subject to transitional rights. Also indicated was how priority rules have evolved to

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[‡] From the song “I see a Darkness” by Bonnie Prince Billy (Will Oldham), which song is said to be about an evil person trying to do good in the world and failing time and again to do so.

deal with competing prospecting or mining rights and transitional rights. In the category of priority disputes between holders of so-called unused old order rights (“UOORs”) and holders of prospecting or mining rights, the Supreme Court of Appeal set out the applicable priority rule in Pan African Mineral Dev. Co. v. Aquila Steel Ltd. 2017 (5) SA 124 (SCA) (S. Afr.) (discussed in the previous contribution). However, in the decision of Aquila Steel Ltd v. Minister of Mineral Resources 2018 (3) SA 621 (CC) (S. Afr.), the priority rule received the attention of the Constitutional Court of South Africa (“CC”). This Article examines the CC’s interpretation and application of the said priority rule. It also deals with the substitution of the Minister’s decision with an order granting an application for a mining right to an applicant who applied without notice (of prior rights) for prospecting and mining rights that were inconsistent with the rights of the holder of the UOORs. The nature of rights that are created under the MPRDA are examined with reference to the different legal acts that take place during applications for and granting of rights. The Article advocates for a private law approach to determine the nature of these rights. The problems associated with the public law style state custodian construction of the MPRDA are again discussed and highlighted with reference to the facts of the Aquila Steel decision.

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INTRODUCTION

The Mineral and Petroleum Resources Development Act 28 of 2002 (the “MPRDA”) introduced a new mineral law regime in South Africa that “fundamentally altered the legal basis upon which rights to minerals in

South Africa are acquired and exercised.”¹ The MPRDA established state sovereignty and state custodianship over all the Republic’s mineral resources “for the benefit of all South Africans and to promote equitable access for historically disadvantaged persons.”² Section 2 of the MPRDA sets out a list of custodial, economic, labor, and social objectives to be achieved by the MPRDA.³ This Article will show that the government does not always adhere to some of the noble objectives of the MPRDA.

The national state, acting through the Minister of Mineral Resources (the “Minister”), was empowered to grant rights to minerals, including reconnaissance permissions, prospecting rights, retention permits, mining permits, and mining rights.⁴ The MPRDA abolished mineral rights, prospecting rights, and mining rights that existed during the previous mineral law dispensation and replaced them with statutory rights called “old order rights” (“OORs”).⁵ The transitional arrangements of the

¹ *Xstrata South Africa (Pty) Ltd v. SFF Ass’n* 2012 (5) SA 60 (SCA) at 2 para. 1; *see Agri S. Afr. v. Minister for Minerals & Energy* 2013 (9) ZACC (CC) at 2 para. 2.

² Mineral and Petroleum Resources Development Act 28 of 2002 § 3(1) (2004); *Aquila Steel (S. Afr.) (Pty) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 4 para. 4; *Minister of Mineral Res. v. Sishen Iron Ore Co (Pty) Ltd* 2013 (45) ZACC (CC) at 22 para. 45; *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Res.* 2016 (3) SA 301 (GP) at 2 para. 6; *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd* 2017 (5) SA 124 (SCA) at 8 para. 12; *see* Pieter Badenhorst & Hanri Mostert, *Artikel (3)(1) en (2) van die Mineral and Petroleum Resources Development Act 28 of 2002: ‘n Herbeskouing*, 3 J. S. AFR. L. 469, 469 (2007) (offering differing academic views on the meaning of the MPRDA section 3(1)); HM van den Berg, *Ownership of Minerals Under the New Legislative Framework for Mineral Resources*, 20 STELLENBOSCH L. REV. 139, 139 (2009).

³ The objectives are, namely to: (a) recognize the state’s sovereignty over mineral resources; (b) implement state custodianship over the nation’s mineral resources; (c) promote equitable access to mineral resources for all South Africans; (d) expand the opportunities for historically disadvantaged persons to enter into and participate in the mineral industry and to benefit from the exploitation of mineral resources; (e) promote economic growth and development of the mineral industries; (f) promote employment and advance social and economic welfare; (g) provide security of tenure of prospecting and mining rights; (h) develop mineral resources in an orderly and ecologically sustainable manner whilst promoting justifiable social and economic development; and (i) ensure that mining right holders contribute towards the socio-economic development within areas of operation. Mineral and Petroleum Resources Act 28 of 2002 § 2. These objectives are to be considered during the application and interpretation of the provisions of the MPRDA. *Id.* § 4(1). For a discussion of these objectives, *see* ELMARIE VAN DER SCHYFF, *PROPERTY IN MINERALS AND PETROLEUM* 161–71, 477–78 (GJ Pienaar ed., 2016). Additional transitional objectives are contained in the Mineral and Petroleum Resources Development Act 28 of 2002 sched. II § 2.

⁴ Mineral and Petroleum Resources Development Act 28 of 2002 § 3(2)(a).

⁵ *Pan African Mineral Dev. Co. Ltd v. Aquila Steel (S. Afr.) Ltd* 2017 (5) SA 124 (SCA) at 8 para. 12; *Minister of Mineral Res. v. Sishen Iron Ore Co. Ltd* 2013 (45) ZACC 6 (CC) at 6 paras. 10–11, 13 para. 23, 30–31 para. 63.

MPRDA accorded preference to holders of OORs to convert their rights to prospecting or mining rights or to apply for new rights under the MPRDA.⁶ As indicated in a previous contribution,⁷ due to poor administration, the custodian at times granted new prospecting rights and mining rights to land that was still subject to applications or rights under the transitional arrangements. This state of affairs created disputes over the priority of competing rights and led to the development of priority rules to deal with situations where the custodian of mineral resources granted inconsistent rights. However, in priority disputes between holders of unused old order rights (“UOORs”) and holders of prospecting or mining rights under the MPRDA, the priority rule received the attention of the highest South African court, the Constitutional Court of South Africa (“CC”), in *Aquila Steel Ltd v. Minister of Mineral Resources*.⁸ If prospecting or mining operations did not take place on land immediately before enactment of the MPRDA, such OORs were recognized as UOORs.⁹

This Article focuses on the determination of priority between UOORs and prospecting or mining rights under the MPRDA in light of the CC’s decision in *Aquila Steel*. The priority principles of the MPRDA that are applicable to competing prospecting rights and mining rights are indicated with reference to the facts of the *Aquila Steel* decision. The Article argues that granting priority to one right in favor of another can be justified by either of two common law priority principles. First, a right that is created first in time receives priority over a subsequently created right (*prior in tempore, potior in jure*). Second, the holder of an inconsistent right who has knowledge of a prior right cannot benefit from such knowledge (in terms of the doctrine of notice).¹⁰ The Article also argues that a private

⁶ As to conversion of rights, see Mineral and Petroleum Resources Development Act 28 of 2002 sched. II §§ 6(2), 7(2). As to the application for new rights, see *id.* § 8(2). The first instance involves a conversion application whilst the second instance involves an application for new rights.

⁷ Pieter J. Badenhorst, *Priority Disputes Between Holders of Old Order Mineral Rights and Holders of Prospecting Rights or Mining Rights under the MPRDA in South Africa: Aquila Has Not Landed*, 30 COLO. NAT. RES. ENERGY & ENVTL. L. REV. 35, 39 (2019).

⁸ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC).

⁹ Mineral and Petroleum Resources Development Act 28 of 2002 sched. II § 1 (defining “unused old order rights”); see *id.* sched. II, tbl.3 (listing old order rights).

¹⁰ For a discussion of the South African doctrine of notice, see Cornelius G. van der Merwe, *Things*, in 27 LAW OF SOUTH AFRICA §§ 214–16 (Durban: Lexis Nexis, 2014). As to the difference between the doctrine of notice in English law and South African law, see Pieter Badenhorst, *The South African Doctrine of Notice: A Comparative Law Perspective*, 5 PROP. L. REV. 119 (2015).

law approach can be adopted to identify rights that are created when the state grants prospecting and mining rights.

The first part of the Article sets out the statutory provisions applicable to UOORs. The Article provides the facts of the *Aquila Steel* decision and a brief synopsis of the preceding litigation in the court of the first instance and the South African Supreme Court of Appeal (“SCA”) as background information. The next Part sets out the CC’s reasoning and elaborate findings in the *Aquila Steel* decision. The Article’s discussion identifies the different rights that can arise in public and private law during the application for and grant of prospecting or mining rights under the MPRDA and compares it with the approach that the CC takes. The last Part of the Article argues that a private law approach should be followed to identify and to determine the nature of rights granted under the MPRDA. The private law approach recognizes that upon conclusion of prospecting or mining agreements, private law style personal rights are created. Upon registration of such agreements in the Mineral and Petroleum Titles Registration Office (“MPTRO”), private law style real rights are created and rely upon the abstract system of transfer for the creation of real rights. The Article finally indicates shortcomings of, and unanswered issues in, the *Aquila Steel* decision in terms of such a private law approach. The Article also expresses concern about the efficacy of the public law style custodian construction that was adopted in the MPRDA.

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

For the ease of the reader, the Article first discusses the priority principles applicable to UOORs. This is followed by a discussion of the facts, the litigation in the court of the first instance and the SCA, and the reasoning and findings of the CC in *Aquila Steel*. The commentary part of the Article provides an analysis of the correctness of the *Aquila Steel* decision.

The transitional arrangements accorded priority to UOORs.¹¹ Upon commencement of the MPRDA, UOORs were valid in terms of item eight of Schedule II of the MPRDA for a transitional period of one year (or for the period for which it was granted, if less than one year). A UOOR remained valid subject to the terms and conditions under which it was

¹¹ See Badenhorst, *supra* note 7, at 49–50.

granted or acquired.¹² During the transitional period, the holder of the UOOR had the exclusive right to apply for a prospecting right or a mining right under the MPRDA.¹³ A prospecting right is a statutory right that entitles the prospector to: (1) prospect and dispose of minerals for purposes of testing and analysis; and (2) apply for the renewal of a prospecting right or a mining right to minerals.¹⁴ A mining right is a statutory right that entitles the miner to: (1) prospect and mine for minerals; and (2) apply for a renewal of the mining right.¹⁵ As will be indicated, the MPRDA does not require an applicant for a mining right to hold a valid prospecting right. If the applications were lodged within the transitional period, the UOORs remained valid until a prospecting or mining right was “granted and dealt with in terms of the Act or [was] refused.”¹⁶ A UOOR was terminated either upon expiration of the transitional period if no application for a prospecting or mining right under the MPRDA was lodged, or upon the grant or refusal of an application for a prospecting or mining right.¹⁷

In *Aquila Steel Ltd. v. Minister of Mineral Resources*,¹⁸ the CC dealt with the priority dispute that arose between the holder of UOORs and the holder of prospecting rights under the MPRDA that the Department of Mineral Resources (“Department”) granted to the same minerals and land.

A. Facts

The historical facts of the case can be summarized as follows: As part of Cecil John Rhodes’s dream to build a railway line from Cape Town to Cairo, the Cape Colony government granted large tracts of land, including mineral rights, to the Bechuanaland Railway Company along the envisaged route in the Northern Cape.¹⁹ The railway company was incorporated in England in 1893, its name was subsequently changed to ZIZA Ltd. (“ZIZA”), and Zimbabwe and Zambia currently co-own it.²⁰

¹² Mineral and Petroleum Resources Development Act 28 of 2002 § 8(1). Lodgment had to take place at the office of the regional manager in whose region the land was situated. *Id.* § 6(2).

¹³ *Id.* § 8(2).

¹⁴ PIETER BADENHORST & HANRI MOSTERT, MINERAL AND PETROLEUM LAW OF SOUTH AFRICA 13–23 (Juta and Company (Pty) Ltd. ed., 2018).

¹⁵ *Id.* at 23–24.

¹⁶ Mineral and Petroleum Resources Development Act 28 of 2002 § 8(3).

¹⁷ *See id.* § 8(2)–(4).

¹⁸ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC).

¹⁹ *Id.* at 3 para. 2, 4 para. 4, 6 para. 8; Badenhorst, *supra* note 7, at 50.

²⁰ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 3 para. 2.

Due to the complexity of the facts, the Appendix to this Article provides a timeline for the different rights that existed and were granted to different holders in respect to the same land. Upon enactment of the MPRDA on May 1, 2004, ZIZA became the holder of UOORs to the land. On March 24, 2005, the Zimbabwean, Zambian, and South African governments decided to establish a private company, namely, Pan African Mineral Development Company Ltd. (“PAMDC”), to be co-owned by the parties as a special purpose vehicle to hold ZIZA’s mineral rights and to take over ZIZA’s possible prospecting activities.²¹ PAMDC was incorporated in South Africa on November 26, 2007, and the mineral rights were never transferred to PAMDC.²² It was no longer possible for the South African government to transfer old order mineral rights by registration in the Deeds Office to PAMDC because the enactment of the MPRDA terminated these rights.²³

On April 19, 2005, ZIZA applied for a prospecting right in respect of the so-called Kuruman properties.²⁴ The regional manager accepted the application on August 17, 2005.²⁵ On February 26, 2008, the Deputy Director-General granted a prospecting right to ZIZA for five years, despite the application being incomplete and missing important information.²⁶ Only in 2009 did ZIZA provide crucial information that was required for its application.²⁷ ZIZA was deregistered on November 9, 2010.²⁸ The Department executed a prospecting right on November 17, 2011, not in the name of ZIZA, but in the name of PAMDC, even though it did not submit an application for a prospecting right as required by the MPRDA.²⁹ ZIZA was restored to the companies’ register of England and Wales on October 14, 2014, by re-registration.³⁰

Meanwhile, Aquila Steel Ltd. (“Aquila”) submitted an independent application for a prospecting right over the same Kuruman properties on

²¹ *Id.* at 3 para. 2, 6–7 para. 9.

²² *Id.* at 3 para. 2, 12 para. 28.

²³ Registration of a transfer of mineral rights in the Deeds Office was not possible after enactment of the MPRDA. *Southern Era Resources Ltd. v. Farnell NO 2010 (4) SA 200 (SCA)* at 3–4 para. 4; Pieter Badenhorst & Hanri Mostert, *A Bridge Too Ghostly to Contemplate? Minerals and Petroleum Legislation and the Deeds Registries Act 47 of 1937*, DE REBUS (July 2004).

²⁴ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 6–7 para. 9.

²⁵ *Id.* at 7 para. 10.

²⁶ *Id.* at 8 para. 13, 36 para. 92.

²⁷ *Id.* at 8 para. 13.

²⁸ *Id.* at 8 para. 14.

²⁹ *See id.* at 8 para. 16.

³⁰ *Id.* at 8 para. 19.

April 18, 2006, which the regional manager accepted on May 2, 2006.³¹ The regional manager accepted this application almost eight months after accepting the ZIZA application. Aquila is a subsidiary of an Australian resources company that is incorporated in South Africa.³² The Deputy Director-General granted a prospecting right to Aquila on October 11, 2006.³³ The prospecting right was notarially executed and registered in the MPTR0 on July 17, 2007.³⁴ Aquila, in good faith and without notice of overlapping rights, spent R156 million (11.6 million USD) on prospecting operations and found “substantial manganese deposits, estimated at over 140 million tonnes, worth many billions of rands” that it intended to mine.³⁵ PAMDC maintained that it only became aware of the existence of Aquila’s rights in April 2010.³⁶ As a holder of a prospecting right, Aquila had an exclusive right to apply for and be granted a mining right.³⁷ On December 22, 2010, the regional manager accepted Aquila’s application for a mining right over the Kuruman properties to mine the manganese deposits.³⁸ But in January 2011, the Department informed Aquila that: (1) PAMDC held overlapping prospecting rights in the Kuruman properties; (2) ZIZA’s application had not been processed due to an administrative error; and (3) ZIZA’s rights had since been transferred to PAMDC.³⁹ ZIZA, however, did not transfer its rights to PAMDC.⁴⁰ Aquila applied in December 2011 to renew its prospecting right, and the regional manager accepted the application in February 2012.⁴¹

Aquila appealed to the Minister against the grant of a prospecting right to PAMDC. PAMDC cross-appealed, asking that the decisions to

³¹ *Id.* at 7 para. 11.

³² *Id.* at 3 para. 1.

³³ *Id.* at 7 para. 11.

³⁴ *Id.*

³⁵ *Id.* at 7–8 para. 12; *see id.* at 8 para. 14.

³⁶ *Id.* at 8 para. 14.

³⁷ Mineral and Petroleum Resources Development Act 28 of 2002 § 19(b).

³⁸ *See Aquila Steel (S. Afr.) (Pty) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 9 para. 17.

³⁹ *Id.* at 8 para. 15.

⁴⁰ *Id.* at 12 para. 28. Section 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 requires ministerial consent for such a transfer, which did not take place. Mineral and Petroleum Resources Development Act 28 of 2002 § 11. *See also* PJ Badenhorst & JJ Du Plessis, *Mogale Alloys (Pty) Ltd v. Nuco Chrome Boputhatswana (Pty) Ltd 2011 (6) SA 96 (GSJ): Alienation or Disposal of a ‘Controlling Interest’ in a Prospecting Company*, 45 DE JURE 388, 388 (2012) (discussing the practical problems of transferring prospecting or mining rights in terms of Section 11 of the MPRDA).

⁴¹ *Aquila Steel (S. Afr.) (Pty) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 9 para. 17.

accept and grant Aquila's prospecting right be set aside.⁴² On July 2, 2015, the Minister decided that: (1) ZIZA had lodged its prospecting right during the period in which it enjoyed an exclusive UOOR; (2) ZIZA's prospecting right was lawfully granted; and (3) Aquila's application had been wrongly accepted. The Minister also declined Aquila's application for a mining right because ZIZA had a prospecting right over the same land.⁴³ PAMDC submitted a new application for a prospecting right over the same properties on July 20, 2015.⁴⁴

B. Litigation

In *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Resources*,⁴⁵ the court of the first instance found that ZIZA's application did not comply with the requirements of the MPRDA and its prospecting right had lapsed. The court set aside the Department's acceptance of ZIZA's application for a prospecting right along with the administrative decisions to grant a prospecting right to ZIZA and to execute a prospecting right in favor of PAMDC.⁴⁶ It also set aside the Minister's decisions on the internal appeals and, by way of an order of substitution, granted Aquila a mining right, the terms of which were to be determined by the Minister within three months.⁴⁷ The court found that exceptional circumstances justified a substitution order under Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").⁴⁸ The court found that, for purposes of a substitution order, the court was in as good a position as the Minister to make the decision.⁴⁹

⁴² *Id.* at 9 para. 19.

⁴³ *Id.* at 10 para. 20.

⁴⁴ *Id.* at 10 para. 21.

⁴⁵ *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Res.* 2018 (3) SA 301 (GP) at 14–15 paras. 28–29, 16 para. 33. For a discussion of the decision of the court, see Heleen van Niekerk, *How Not to Queue: Judicial Scrutiny of the MPRDA's Queuing System, an Analysis of Aquila Steel (South Africa) Limited v. Minister of Mineral Resources (72248/15) [2016] ZAGPPHC 1071 and Legislative Changes to the Queuing System*, 38 OBITER 417 (2017).

⁴⁶ *Aquila Steel (S. Afr.) (Pty) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 14 para. 32, 33 paras. 84–85, 41 para. 103.

⁴⁷ *Id.* at 40–41 paras. 102–03, 44 para. 112, 46 para. 118.

⁴⁸ See *id.* at 42 para. 106. Section 8(1)(c)(ii)(aa) of PAJA determines as follows: "The court or tribunal, in proceedings for judicial review . . . may grant any order that is just and equitable, including orders setting aside the administrative action and substituting or varying the administrative action or correcting a defect resulting from the administrative action." Promotion of Administrative Justice Act 3 of 2002 § 8.

⁴⁹ *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at 56 para. 112.

On appeal, in *Pan African Mineral Development Company (Pty.) Ltd. v. Aquila Steel (South Africa) (Pty.) Ltd.*,⁵⁰ the SCA overturned the court of the first instance's finding that ZIZA's application for a prospecting right was irregular and held that the application sufficiently described the properties for the regional manager to accept the application, identify the relevant properties, and log them into its system. The SCA held that ZIZA's UOORs remained valid until the grant or refusal of a prospecting right.⁵¹ It also decided that the Minister's conclusions in the internal appeal were correct and the court of the first instance accordingly erred in setting the Minister's decisions aside and granting substitutionary relief to Aquila.⁵²

C. Decision

Judge Cameron (Acting Judges Basson, Dlodlo, Goliath, Petse and Judges Froneman, Khampepe, and Mhlantla concurring) delivered the majority decision of the CC while Judge Theron dissented as to whether a substitution of the Minister's decision is appropriate. This Article will now provide an exposition of the decision of the court.

The CC distinguished between the exclusive right of a holder of a UOOR to apply for a prospecting or mining right during the one-year grace period and the duration of a UOOR in terms of item eight of the transitional arrangements in Schedule II of the MPRDA.⁵³ According to the court, holders of UOORs enjoyed the same entitlements as mineral rights holders before the MPRDA came into force.⁵⁴ In addition, such holders were accorded the privilege of exclusivity, entitling them to apply for a prospecting or mining right within the one-year grace period that would be considered and conferred afresh under the MPRDA.⁵⁵ The holder is

⁵⁰ *Pan African Mineral Development Company (Pty) Ltd v. Aquila Steel (S. Afr.) (Pty) Ltd* 2017 (5) SA 124 (SCA) at 13–14 paras. 21–22, 15 para. 25–26; for a discussion of the decision, see Badenhorst, *supra* note 7, at 52–60.

⁵¹ *Pan African Mineral Development Company (Pty) Ltd v. Aquila Steel (S. Afr.) (Pty) Ltd* 2017 (5) SA 124 (SCA) at 18 para. 30.

⁵² See *id.* at 17–18 paras. 29–30.

⁵³ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 27–28 paras. 67–68.

⁵⁴ See *id.* at 30 para. 75. This is not correct as holders of UOORs could no longer dispose of their right and convey it to another person, as registration or transfer of old order mineral rights in the Deeds Office was no longer possible. See *Southern Era Resources Ltd. v. Fardell NO* 2010 (4) SA 200 (SCA) at 3–4 para. 4.

⁵⁵ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 5 para. 6, 28 paras. 68–69, 29 para. 72, 32 paras. 81–82.

also entitled to subsequently fix any defects in the application.⁵⁶ During the one-year grace period, no one else may apply for the same right over the same land.⁵⁷ Usually, Section 9 of the MPRDA requires that competing applications must be dealt with in the order in which they are received.⁵⁸ During this grace period, however, the normal order for processing competing applications in terms of Section 9 of the MPRDA does not apply.⁵⁹

Judge Cameron contextualized the exclusivity period and the duration of UOORs:

Broadly, the statute's transitional provisions balance the rights held by previously privileged holders of mineral rights (which excluded most South Africans because they were black) with the rights of new, previously disadvantaged, entrants to the mining and resources sector. Both logically and practically, the privileges of exclusivity and priority inhibit new entrants. They do this to protect old order rights holders. But they do not endure indefinitely.⁶⁰

The majority held that the UOOR remains valid until the holder of an UOOR's application for a prospecting right or mining right is disposed of.⁶¹ According to the majority, item eight of the transitional arrangements does not emphatically state that "the right to *apply exclusively* is preserved for so long as the old order right remains valid."⁶² The sustained validity did not grant holders of UOORs indefinite exclusivity pending "conversion."⁶³ The continued validity of the UOOR, pending conversion, "does not bar others from standing in line to apply for MPRDA rights over the same land."⁶⁴ The majority thus differed on this point from the decision of the SCA, which held that a pending old order application would preclude any latter application until the old order application had finally

⁵⁶ *Id.* at 30 para. 75.

⁵⁷ *Id.* at 30 para. 75, 32 para. 82.

⁵⁸ *See id.* at 31 para. 77.

⁵⁹ *Id.* at 30 para. 75.

⁶⁰ *Id.* at 32 para. 83.

⁶¹ *Id.* at 28 para. 68, 29 para. 72, 32 para. 81.

⁶² *Id.* at 29 para. 72.

⁶³ *Id.* at 32 para. 81. It should be noted that the Mineral and Petroleum Resources Development Act 28 of 2002 sched. II § 8 does not involve a conversion of an unused old order right but a *de novo* application under the general provisions of the MPRDA. *See also id.* at 6–7 paras. 8–9 (for incorrect terminology used).

⁶⁴ *Id.* at 30 para. 76.

been determined.⁶⁵ Section 16 of the MPRDA sets out how the applications are processed, while Section 9, which takes effect after the one-year grace period, determines the order in which the applications must be processed.⁶⁶ Once the one-year grace period ends, the requirements of the MPRDA are said to apply equally to all applications, irrespective of where they are in the queue.⁶⁷

Judge Cameron summarized the applicable priority principles as follows:

In other words, the one-year exclusivity period does not bar other applications after its lapse, but it does confer priority of consideration and processing, simply because the old order rights holder's application was in first. This means that the old order rights holder obtains priority (though not exclusivity) for the disposal of its application, until the MPRDA right it seeks is granted and dealt with in terms of the MPRDA or is refused. Until that happens, no competing application for an MPRDA right may be processed.⁶⁸

Section 9 of the MPRDA thus bars other applications from being processed until the application for prospecting or mining rights by a holder of a UOOR has been processed.⁶⁹ If the requirements for a new order right are not met, the regional manager has to inform the applicant about non-compliance with the requirements.⁷⁰ If the regional manager fails to do so, and the requirements remain unmet, the applicant runs the risk of the application being set aside on review and losing its place in the queue.⁷¹ This may also happen to holders of UOORs after the one-year grace period.⁷²

Applied to the facts, the CC made the following findings:

1. By lodging its application for a prospecting right within the one-year grace period, ZIZA preserved the priority of its application.⁷³ ZIZA's old order right remained valid "until its application was granted and dealt

⁶⁵ *Pan African Mineral Development Company (Pty) Ltd. v. Aquila Steel (S. Afr.) (Pty) Ltd* 2017 (5) SA 124 (SCA) at 8 para. 13.

⁶⁶ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 30 para. 75.

⁶⁷ *Id.* at 31 para. 79.

⁶⁸ *Id.* at 31 para. 78.

⁶⁹ *Id.* at 30 para. 76.

⁷⁰ *Id.* at 31 para. 79.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 2–3 para. 1, 6 para. 8, 33 para. 85.

with under the MPRDA or refused.”⁷⁴ Other applicants could only apply after the one-year grace period had expired.⁷⁵

2. The grant of a prospecting right to ZIZA on February 26, 2008 was invalid because it did not comply with the requirements of the MPRDA.⁷⁶ The regional manager should have returned the grossly defective application to the applicant.⁷⁷ Even though the court accepted that the regional manager has an evaluative function during the acceptance process, the application remained defective when the Deputy Director-General considered it.⁷⁸

3. Because the acceptance and the award of a prospecting right to ZIZA were flawed and deficient, it should be set aside.⁷⁹ Judge Cameron decided that the order of the court, in the first instance, setting aside the grant of a prospecting right to ZIZA and substituting it for a refusal of that right, was correctly granted.⁸⁰ Determining the validity of ZIZA’s prospecting right was crucial because it constituted the basis on which the Minister refused to grant a mining right to Aquila.⁸¹ The CC also considered the validity of Aquila’s mining right in finding seven below.

4. It was necessary to determine whether Aquila was entitled to apply for a prospecting right before ZIZA’s conversion application was fully processed.⁸² This was the case despite the court’s finding that ZIZA’s prospecting right was invalid and that it was factually impossible to determine the validity of Aquila’s prospecting right.⁸³ The CC justified its consideration of the priority issue because the court of the first instance

⁷⁴ *Id.* at 33 para. 84.

⁷⁵ *Id.*

⁷⁶ *Id.* at 7 para. 10, 16 para. 39. As to the requirements, see Mineral and Petroleum Resources Development Act 28 of 2002 §§ 16–17; Mineral and Petroleum Resources Development Regulations 2004, GN R.527 of GG 26275 (23 Apr. 2004) §§ 2, 5, 7.

⁷⁷ *Aquila Steel (S. Afr.) (Pty) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 22–23 paras. 52–53. The maps were deficient, lamentable, and of a very poor quality. See *id.* at 17–19 paras. 41–44. The exact parameters of the land held by ZIZA were unclear. *Id.* at 7 para. 10.

⁷⁸ *Id.* at 22–23 paras. 51, 53. The prospecting work program was deficient. Access to financial resources and the technical ability to prospect, as required by § 17(1), was not demonstrated. *Id.* at 19–21 paras. 46–49. Cameron J. found that ZIZA “never had funding to carry out prospecting, let alone mining.” *Id.* at 21 para. 49. “Regulations 7(1)(h) and (i) were also not complied with.” *Id.* at 20 para. 48.

⁷⁹ *Id.* at 21–22 para. 50, 23 para. 53, 24 para. 58; see also *id.* at 17 para. 40. The minority of the court made the same finding. *Id.* at 47 para. 122.

⁸⁰ *Id.* at 23 para. 53.

⁸¹ *Id.* at 24 para. 56.

⁸² *Id.* at 24 paras. 57–58.

⁸³ *Id.* at 17 para. 40, 24 para. 56.

and the SCA extensively dealt with it and there may still be unprocessed “older-order right applications” in the system.⁸⁴

5. Aquila was entitled to apply for a prospecting right after the one-year grace period on April 18, 2006, even though its place in the queue was behind ZIZA.⁸⁵

6. The grant of a prospecting right to Aquila was invalid and premature because ZIZA’s application for a prospecting right was first in the queue and had not been processed as required by Section 9 of the MPRDA.⁸⁶ The CC explained that, despite the deficiencies of ZIZA’s application for a prospecting right, the CC only set it aside at the time of its decision.⁸⁷ However, the validity of Aquila’s prospecting right was irrelevant for the application for a mining right, as the MPRDA does not require an applicant for a mining right to hold a valid prospecting right.⁸⁸

7. The grant of a mining right to Aquila was precluded as long as ZIZA’s prospecting right existed, because an application for a mining right may not be accepted if someone holds a prospecting or mining right for the same mineral and land.⁸⁹ Because the court of the first instance set aside the grant of a prospecting right and substituted it for a refusal of the right, it meant that there was no other prospecting right blocking Aquila’s path to a mining right.⁹⁰ The CC found that once ZIZA’s prospecting right was set aside as invalid,⁹¹ “Aquila would be entitled to apply for a mining right, as ZIZA would not have a valid prospecting right”⁹² and “nothing stands in the way of [recognizing] Aquila’s application for a mining right on 14 December 2010, and the Department’s acceptance of that application on 22 December 2010, as valid.”⁹³ Judge Cameron reasoned that the “legally null award of the prospecting right to ZIZA does not enjoy a zombie afterlife to thwart the legal conclusion that a mining right could validly be granted to Aquila.”⁹⁴

⁸⁴ *Id.* at 24 para. 60.

⁸⁵ *Id.* at 33 para. 85, 35 para. 89.

⁸⁶ *Id.* at 33 para. 85, 35 para. 89, 43 para. 109.

⁸⁷ *Id.* at 33 para. 85.

⁸⁸ *Id.* at 17 para. 40, 24 para. 56.

⁸⁹ *Id.* at 24 para. 56, 40–41 para. 102; Mineral and Petroleum Resources Development Act 28 of 2002 § 22(2)(b).

⁹⁰ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 23 para. 53.

⁹¹ *Id.* at 40 para. 102.

⁹² *Id.* at 17 para. 40.

⁹³ *Id.* at 41 para. 102.

⁹⁴ *Id.* at 39 para. 98.

8. The Minister should have considered Aquila's internal appeal, and ZIZA's counter-appeal "on the footing that ZIZA's prospecting right was invalid."⁹⁵ The Minister, however, indicated it was not in a position to grant the mining right to Aquila because of the existence of ZIZA's prospecting right.⁹⁶ The CC accordingly found that the Minister's determination of the appeal was flawed and irregular, and set it aside.⁹⁷

9. The substitution order of the court of the first instance was competent, imperatively just, and equitable.⁹⁸ Judge Cameron accordingly reinstated the order of the court of the first instance.⁹⁹

In the minority judgement, Judge Theron held that a substitution order was not an appropriate court order.¹⁰⁰ According to Judge Theron, a court is not in as good a position as the administrator to determine whether the requirements for the grant of a mining right have been met and the decision of the administrator to grant a mining right was not automatic.¹⁰¹ A further discussion of the requirements and appropriateness for a substitution order by a court and the issue of separation of powers fall beyond the discussion of the priority issues.

D. Discussion

The outcome of the *Aquila Steel* decision will now be discussed and analyzed. To undertake such discussion, one has to first determine the different legal acts that take place during the process of application for and granting of prospecting or mining rights. During the performance of the different legal acts, various statutory and private law-style rights are created. The following legal acts take place and corresponding rights are created during applications for and grants of prospecting or mining rights:¹⁰²

⁹⁵ *Id.* at 41 para. 103.

⁹⁶ *Id.* at 45 para. 116.

⁹⁷ *Id.* at 41 para. 103.

⁹⁸ *Id.* at 42 para. 106, 46 para. 118.

⁹⁹ *Id.* at 46 para. 120.

¹⁰⁰ *Id.* at 47 para. 122.

¹⁰¹ *Id.* at 49 para. 127, 52 para. 134; *see generally id.* at 48–52 paras. 126–134.

¹⁰² PJ Badenhorst, *The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?*, 134 SALJ 361, 380 (2017) (arguing that private law rights are also created in addition to the administrative grant of rights); *but see* Heleen van Niekerk, *Mineral Tenure Security, Registration and Enforceability of Rights: Debunking the Property-Law Paradigm*, 135 SALJ 159 (2018) (arguing that a private law analysis of prospecting and mining rights in the MPRDA is unsuitable); *see also* HANRI MOSTERT, THE "THING" CALLED "MINERAL RIGHT": RE-EXAMINING THE NATURE, CONTENT AND SCOPE OF A RATHER CONFOUNDING CONCEPT IN SOUTH AFRICAN LAW 28 (2014) (arguing that the

1. An applicant lodges an application for a prospecting or mining right at the regional manager's office.¹⁰³

2. The regional manager makes an administrative decision to accept or return the application.¹⁰⁴

3. The Deputy Director-General or Minister makes a unilateral administrative decision to grant a prospecting or mining right to the prospector or miner.¹⁰⁵ Upon such administrative grant of a prospecting or mining right, statutory rights are acquired in terms of the MPRDA.¹⁰⁶

4. An agreement, which is notarially executed, is concluded between the state and the prospector or miner.¹⁰⁷ At the execution of a notarial agreement between the state and the prospector or miner, conclusion of a contract between the parties takes place and personal rights are created.¹⁰⁸

5. A (notarial) prospecting or mining right (deed) is lodged for registration in the MPTRD.¹⁰⁹

private law construction of mineral rights in the previous dispensation did not explain the notion of a mineral right satisfactorily and should not be used to interpret the MPRDA). The CC, however, rejected a public law approach in *Agri S. Afr. v. Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at 17 para. 35.

¹⁰³ Mineral and Petroleum Resources Development Act 28 of 2002 § 16(1).

¹⁰⁴ Badenhorst, *supra* note 102, at 380; Mineral and Petroleum Resources Development Act 28 of 2002 §§ 16(2), 18(2).

¹⁰⁵ Mineral and Petroleum Resources Development Act 28 of 2002 §§ 17(1), 23(1); *Minister of Mineral Res. v. Mawetse Mining Co.* 2015 (1) SA 306 (SCA) at 17 para. 24, 19 paras. 26–27. In *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at para. 12, it was emphasized that a distinction be made between the acceptance of an application and the grant of a prospecting or mining right.

¹⁰⁶ PJ Badenhorst, *New Order Rights to Minerals in South Africa: Ten Years After May Day*, 26 AFR. J. OF INT'L & COMP. L. 366, 388 (2018). For instance, the right to enter into an agreement that is notarially executed and the right to have the agreement registered (even though it is conceded that a duty is rather placed upon the prospector or miner to lodge the agreement for registration).

¹⁰⁷ Mining Titles Registration Act 16 of 1967 § 15(1) (requiring notarial attestation of a “contract” in order to be registrable).

¹⁰⁸ Pieter Badenhorst & Hanri Mostert, MINERAL AND PETROLEUM LAW OF SOUTH AFRICA 13–29 (JUTA and Co. Ltd, Revision Serv. 13, 2018); Christopher Ian Stevens ‘*South Africa*’ in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO MINING LAW 2017, 177 (2016) (indicating that negotiations between the state and applicants take place and a contract is concluded between the parties). Conclusion of the agreement takes place when the parties reach consensus. This usually happens upon notarial execution of the contract, but it may also take place before notarial execution of the contract. Notarial execution of the agreement is not a requirement for its validity but rather a requirement for registration.

¹⁰⁹ Mineral and Petroleum Resources Development Act 28 of 2002 §§ 19(2)(a), 25(2)(a) (requiring lodgment within a prescribed period of time).

6. A prospecting or mining right is registered in the MPTR. ¹¹⁰ Upon registration of prospecting or mining rights in the MPTR, “limited real rights” are created by statute. ¹¹¹

These personal and real rights do not endure forever, and termination of prospecting or mining rights may take place in different instances. ¹¹² In the present context, prospecting or mining rights are, among others, terminated upon deregistration of a company holding such rights and the failure to transfer it to another person. ¹¹³

In the *Aquila Steel* decision, the CC only dealt with the attempts to create a prospecting right in favor of ZIZA and Aquila by virtue of an administrative grant, and its findings in this regard cannot be faulted. Because ZIZA lodged its application within the one-year grace period, its UOOR continued to exist until a prospecting right was granted or refused. ZIZA’s prospecting right, however, was invalid in the first place because its application was wholly deficient. Because the CC only set aside the grant of a prospecting right to ZIZA at the time of judgement, a priority dispute did technically exist between the two prospecting rights. The lodgment of an application for a prospecting right by ZIZA during the one - year grace period barred Aquila’s application for a prospecting right from being processed until ZIZA’s UOOR had been terminated.

During the continuation of ZIZA’s UOOR (beyond the one-year grace period), competing applications for prospecting or mining rights were permissible, but the holder of the UOOR enjoyed priority over other applications (or erroneous grants of a prospecting or mining right) until the holder of the UOOR’s application for a prospecting or mining right had been disposed of. The scope of the priority rule was thus wider in the decision of the SCA in *Pan African Mineral Development Company (Pty.) Ltd. v. Aquila Steel (S. Afr.) (Pty.) Ltd.*, ¹¹⁴ where the SCA decided that, as long as an application for a prospecting or mining right is pending, a competing application may not be accepted. Both decisions precluded a consideration of a competing application until the termination of the UOOR. The outcomes of the decision of the SCA and CC would have been the same (if the CC regarded ZIZA’s prospecting right as valid) because

¹¹⁰ Mining Titles Registration Act 16 of 1967 § 5(1)(c).

¹¹¹ Mineral and Petroleum Resources Development Act 28 of 2002 § 5(1); Mining Titles Registration Act 16 of 1967 § 27(9); see generally Badenhorst, *supra* note 106, at 368–70 (arguing that limited real rights granted and registered under the MPRDA are not the same as common law limited real rights and can only be perceived as a new kind of real right).

¹¹² Mineral and Petroleum Resources Development Act 28 of 2002 § 56.

¹¹³ *Id.* § 56(c).

¹¹⁴ *Pan African Mineral Dev. Co. (Pty) Ltd. v. Aquila Steel (S. Afr.) (Pty) Ltd.* 2018 (5) SA 124 (SCA) at 8 para. 13, 9 para. 14.

competing applications could only be considered after the UOOR was terminated.

The priority that ZIZA could have enjoyed, if its prospecting right was valid, can be justified because its application took place first in time (*prior in tempore potior in iure*). This principle is reinforced by Section 9 of the MPRDA and provides additional justification to the CC for the priority treatment of a holder of a UOOR. During its application for a prospecting right and the grant thereof, Aquila did not know of ZIZA's prior application for a prospecting right (and the poor state of the application). Its inconsistent right was acquired in the absence of notice.

During the continued existence of ZIZA's UOOR, the grant of a mining right to Aquila was precluded. Setting aside ZIZA's prospecting right made it possible for Aquila to apply for and be granted a mining right. The CC's substitution of the Minister's decision with an order granting Aquila's application for a mining right, subject to conditions determinable by the Minister within three months, was just and equitable. It was just and fair, given the haphazard way in which the state, as custodian, and the government, as shareholder in ZIZA, acted. This time, Aquila had landed upon the Kuruman properties armed with a mining right, the conditions of which still have to be determined, to mine for manganese on the properties, which is in line with most of the objectives listed in Section 2 of the MPRDA.¹¹⁵

Judge Cameron at the outset acknowledged that holders of UOORs were given a tight deadline to apply for new prospecting or mining rights.¹¹⁶ The tight deadline was justified by relying on the so-called "use-it-or-lose-it" principle.¹¹⁷ This principle attempts to ensure that a holder of a mineral right could no longer sterilize or lock up its mineral rights by sitting on them.¹¹⁸ If it is accepted that the "use-it-or-lose-it" principle applies to holders of UOORs,¹¹⁹ the facts of the *Aquila Steel* decision ironically illustrate that UOORs can still be locked up. Specifically, the UOORs were locked up by the poor custodial administration of the transitional arrangements and the shoddy applications of UOOR holders who either do not intend to prospect or mine or are clearly unequipped to

¹¹⁵ See VAN DER SCHYFF, *supra* note 3.

¹¹⁶ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 4 para. 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See also *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at 4 para. 6; but see *Agri S. Afr. v. Minister of Minerals & Energy* 2012 (1) SA 171 (GNP) at 36 para. 70 (holding the view that the MPRDA did not introduce the "use-it-or-lose-it" principle).

operate successfully in the mining world.¹²⁰ ZIZA became the victim of the ANC government's own tight deadline and propagation of the populist principle of "use-it-or-lose-it," as it could not lodge a technical and costly application for a prospecting right or mining right within a very short period of time.

The CC did not deem it necessary in the *Aquila Steel* decision to consider whether the Department's execution of a prospecting right in favor of PAMDC, an entirely different entity, was lawful.¹²¹ Whether personal rights were created in favor of PAMDC upon entering into an agreement, which was notarially executed, despite the purported administrative grant of a prospecting right to ZIZA, remains unanswered. In addition, a prospecting agreement, which was notarially executed, was concluded with Aquila, and even registered in the MPTR. This took place despite the fact that the prior administrative grant of a prospecting right to Aquila was invalid because ZIZA's application for prospecting rights was not yet dealt with. The CC also did not consider the possible acquisitions of these private law rights.

The CC also deemed it unnecessary to consider the possible termination of ZIZA's rights upon its deregistration (and failure to transfer the rights to PAMDC).¹²² The applicable principles are briefly explained.¹²³ Upon deregistration of a company, the company loses its legal personality, ownership of assets, and other rights.¹²⁴ By operation of law, prospecting and mining rights become void or legally invalid.¹²⁵ Lapsed prospecting or mining rights revert to "the custodianship of the State, which assumes the power to reallocate the rights in terms of the MPRDA"¹²⁶ Upon restoration of the registration of a deregistered company, its legal personality is restored, and all of its corporate activities are validated *ex post facto*, as if the company was never deregistered.¹²⁷ Validation of assets and rights, such as prospecting or mining rights, takes

¹²⁰ Badenhorst, *supra* note 7, at 63.

¹²¹ *Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 46 para. 119.

¹²² *Id.*; Mineral and Petroleum Resources Development Act 28 of 2002 § 56(c).

¹²³ BADENHORST & MOSTERT, *supra* note 14, at 16–22.

¹²⁴ *Palala Res. (Pty) Ltd. v. Minister of Mineral Res. & Energy* 2014 (6) SA 403 (GP) at 18 para. 47.

¹²⁵ *Id.* at 17 para. 45, 26 para. 70.

¹²⁶ *Id.* at 24 para. 65.

¹²⁷ *Palala Resources (Pty) Ltd v. Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) at 16 para. 41, 18 paras. 48–49, 26–27 para. 70; *Palala Resources (Pty) Ltd v. Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA) at 7–8 paras. 10–11. As to restoration of a deregistered company, see Companies Act 61 of 1973 § 73(6A).

place.¹²⁸ Such validation takes place even if the validation of rights is to the detriment of third parties.¹²⁹

II. PRIVATE LAW APPROACH

A private law approach should be followed to analyze the rights that are created and granted under the MPRDA. The reason for such an approach is that statutes addressing prospecting and mining rights in South Africa developed for over a century against the background of property law rather than public law.¹³⁰ Private law rights are theoretically much more developed than public law rights. The MPRDA also requires a private law approach because it determines that common law principles are applicable, unless the common law is inconsistent with the provisions of the MPRDA.¹³¹ This Article will now further explore the value of the private law approach.

In the CC's recent decision in *Maledu v. Itereleng Bakgatla Mineral Resources (Pty) Ltd.*, the court adhered to a private law approach.¹³² The CC relied heavily on the private law principles regarding the reasonable exercise of (common law) mineral rights, and on rules of conflict resolution that applied to mineral rights in the previous dispensation, to resolve a dispute between a mining company holding a mining right and an indigenous community holding informal customary title to land.¹³³ The court relied on private law principles that were espoused in case law of the previous mineral law dispensations.¹³⁴ These principles are useful in the

¹²⁸ *But see Aquila Steel (S. Afr.) Ltd v. Minister of Mineral Resources* 2017 (3) SA 301 (GP) at 50–51 paras. 99–100. Judge Tuchen concluded that “the restoration of ZIZA to the company register did not have the effect of revesting it with the ZIZA prospecting right. The restoration, therefore, had no legal effect on the Aquila prospecting right.” *Id.* at 51 para. 101.

¹²⁹ *Palala Resources (Pty) Ltd v. Minister of Mineral Resources and Energy* 2016 (6) SA 121 (SCA) at 7–8 paras. 10–11.

¹³⁰ *See also* PJ Badenhorst, *Trojan Trilogy: III Mineral Rights and Mineral Rights Law*, 10 STELLENBOSCH L. REV. 96, 102–08 (1999).

¹³¹ Mineral and Petroleum Resources Development Act 28 of 2002 § 4(2).

¹³² *Maledu v. Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) at 45–46 paras. 109–111.

¹³³ *Id.* at 25–26 para. 59, 43 para. 104; *see* PJ Badenhorst & CN Van Heerden, *Conflict Resolution Between Holders of Prospecting or Mining Rights and Owners (Or Occupiers) of Land or Traditional Communities: What is Not Good for the Goose is Good for the Gander*, 133 SALJ 303, 321–22 (2019).

¹³⁴ *Hudson v. Mann* 1950 (4) SA 485 (T) at 488B–H; *see* *Finbro Furnishings (Pty) Ltd v. Registrar of Deeds, Bloemfontein* 1996 (4) SA 499 (A); *Trojan Exploration Company (Pty) Ltd v. Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 126A–E;

current day conflict resolution between the exercise by holders of prospecting or mining rights and owners of the land.

In terms of such a private law approach, entering into a prospecting or mining agreement (that is notarially executed) with the state creates personal rights.¹³⁵ Therefore, personal rights may have been created in favor of PAMDC upon entering into an agreement that was notarially executed, despite the fact that a (statutory) prospecting right was previously administratively granted in favor of ZIZA. The same holds true for the possible creation of personal rights in favor of Aquila when it entered into an agreement that was notarially executed, despite the fact that its administratively granted prospecting right was invalid.

Real rights, which are enforceable against third parties, are acquired upon registration of a prospecting or mining right in the MPTRD.¹³⁶ In addition, the purpose and effect of the registration of a right in the MPTRD also serves as notice to the public, similar to registration of immovable property in the Deeds Office.¹³⁷ In determining whether Aquila indeed acquired such a real right, basic property law principles regarding the derivative acquisition of real rights by registration can be taken into account. In general, real rights in respect of land are created or transferred upon registration in the Deeds Office.¹³⁸ In addition to the act of registration, two other juristic acts are involved, namely, conclusion of a contract (the so called “obligation creating agreement”) and reaching of an agreement to transfer and receive a real right (the so called “real agreement”).¹³⁹ Personal rights are created upon conclusion of a contract.¹⁴⁰ Personal rights are, however, not registrable in the Deeds Office.¹⁴¹ Real rights are created or transferred in terms of the real

see also PJ Badenhorst, *Trojan Trilogy: I Competing Mineral Rights*, 9 STELLENBOSCH L. REV. 143, 149 (1998).

¹³⁵ These rights seem to be effective from the date the right is “executed.” Mineral and Petroleum Resources Development Act 28 of 2002 § 1 (definition of “effective date”).

¹³⁶ *Id.* § 5(1); Mining Titles Registration Act 16 of 1967 § 2(4).

¹³⁷ *Minister of Mineral Resources v. Mawetse (S. Afr.) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) at 13–14 para. 19.

¹³⁸ The Deeds Registries Act 47 of 1937 § 16.

¹³⁹ PJ Badenhorst, *The South African Land Registration: A Case Involving Fraud*, 4 PROP. L. REV. 129, 132–33 (2014). For a discussion of the requirements of these juristic acts and payment of a purchase price, *see* Van Der Merwe, *supra* note 10, para. 209; PJ BADENHORST, JUANITA M. PIENAAR & HANRI MOSTERT, SILBERBERG AND SCHOEMAN’S THE LAW OF PROPERTY 72–74 (Durban: Lexis Nexis, 5th ed. 2006).

¹⁴⁰ *National Stadium South Africa (Pty) Ltd v. Firststrand Bank Ltd* 2011 (2) SA 157 (SCA) at 11 para. 31.

¹⁴¹ The Deeds Registries Act 47 of 1937 § 63(1).

agreement upon registration in the Deeds Office.¹⁴² Real rights to land are registrable.¹⁴³ The abstract system of transfer of real rights applies to South African law.¹⁴⁴ In terms of the abstract system, a real right will pass pursuant to a valid real agreement, notwithstanding that the underlying obligation creating agreement is invalid or defective.¹⁴⁵ However, if the real agreement is void due to mistake, misrepresentation, fraud, or duress, transfer of a real right to land will not take place.¹⁴⁶ In other words, as long as there is a valid real agreement between the parties to create or transfer a real right, the real right is transferred to the transferee.¹⁴⁷ Van der Schyff¹⁴⁸ correctly considered and dealt with the mechanics of transferring prospecting rights or mining rights from one prospector or miner to another (transferee) in terms of Section 11 of the MPRDA within the context of the abstract system of the transfer of real rights.

The abstract system of transfer should also be applied in cases such as the present one in *Aquila Steel*. Such application would mean that Aquila acquired a real right upon registration in the MPTRO, even if the underlying notarial agreement may have been invalid or *ultra vires*. It should also be noted that only the Director-General of the MPTRO can remove a registered deed, conveying a real right, as “provided for by law.”¹⁴⁹ Aquila’s registered right would remain on the register unless it was removed by a court order.¹⁵⁰

The CC should have investigated and confirmed the creation of these above-mentioned rights and their possible demise in light of the statutory priority principles. The facts of the *Aquila Steel* decision serve as a perfect example to illustrate that different legal acts took place creating different kinds of rights and different holders of such rights. The identification and

¹⁴² *Id.* § 3(c)–(d); as to the distinction between real and personal rights, see BADENHORST, PIENAAR & MOSTERT, *supra* note 139, at 50–65.

¹⁴³ Deeds Registries Act 47 of 1937 § 3.

¹⁴⁴ *Commissioner of Customs and Excise v. Randles Bros and Hudson Ltd* 1941 AD 369 at 398–99, 411; *Trust Bank van Afrika Bpk v. Western Bank Bpk*, 1978 (4) SA 281 (A) at 301H–302A; *Air-Kel (Edms) Bpk h/a Merkel Motors v. Bodenstein*, 1980 (3) SA 917 (A) at 923H.

¹⁴⁵ BADENHORST, PIENAAR & MOSTERT, *supra* note 139, at 74–75; Van der Merwe, *supra* note 10, para. 210.

¹⁴⁶ BADENHORST, PIENAAR & MOSTERT, *supra* note 139, at 79–80.

¹⁴⁷ Badenhorst, *supra* note 139, at 133; Van der Merwe, *supra* note 10, para. 210.

¹⁴⁸ VAN DER SCHYFF, *supra* note 3, 477–80.

¹⁴⁹ Mining Titles Registration Act 16 of 1967 § 7(1) (heading of § 7 refers to cancellation of registered right by a court order even though § 7 does not refer to removal by a court order).

¹⁵⁰ *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at 16 para. 32 (the ZIZA’s prospecting right was also registered in the name of PAMDC); *Id.* at 61 para. 118 (the court of the first instance also set the right aside).

recognition of these rights in terms of a private law approach highlights the custodian's haphazard way in which mineral resources are administered and runs contrary to the narrative of a public law supremacy for the benefit of the people of South Africa. It is conceded that upon application of private law principles within the sphere of the MPRDA, one must be mindful that the point of departure of the MPRDA is different from the dispensation of the past. It differs in the sense that the MPRDA empowers the state, as custodian, to grant prospecting or mining rights without the state being the private law successor in title or formal holder of former mineral rights, prospecting rights, or mining rights.¹⁵¹ The state is also not the owner of unsevered minerals in the land.¹⁵²

Judge Cameron labeled the conduct of the Department as "delinquent" and "unlawful."¹⁵³ The *Aquila Steel* decision is a cause of great concern for South Africa insofar as public law-style state custodianship under the MPRDA entails fiduciary responsibilities and duties owed by the state towards beneficiaries under the MPRDA.¹⁵⁴ The MPRDA does not contain provisions or principles to hold the custodian accountable to its beneficiaries, like for instance, a private law trust. Due to the custodian's failure in this instance to comply with its fiduciary duties, "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" have been squandered.¹⁵⁵ The custodian's poor administration of the transitional provisions sterilized rights to minerals and excluded a meritorious applicant and miner from mining, to the detriment of the people of South Africa, as beneficiaries under the MPRDA.¹⁵⁶ The *Aquila Steel* decision illustrates that the public law style state custodianship structure does not always fulfil its "promises of equality and prosperity for our great nation."¹⁵⁷ The substitution order

¹⁵¹ *Agri S. Afr. v. Minister for Minerals and Energy* 2013 ZACC 9 (CC), at 33 para. 68, 35 para. 71; *contra id.* at 30–31 paras. 80–81, 54 para. 106 (Froneman, J., dissenting). For criticism of the decision, see generally PJ Badenhorst & NJJ Olivier, *The Agri South Africa Constitutional Court Decision*, 33 AUSTL. RES. & ENERGY L. J. 230, 232 (2014).

¹⁵² Badenhorst, *supra* note 106, at 371. In terms of the maxim *cuius est solum eius est usque ad coelum et ad inferos* (The owner of the soil owns everything, up to the sky and down to the center of the earth (including unsevered minerals)), owners of land would still own unsevered minerals. It remains unclear whether the MPRDA has abolished the *cuius est solum* rule.

¹⁵³ *Aquila Steel (S. Afr.) (Pty) Ltd. v. Minister of Mineral Res.* 2018 (3) SA 621 (CC) at 3 para. 3.

¹⁵⁴ See VAN DER SCHYFF, *supra* note 3, at 246–47.

¹⁵⁵ *Pan African Mineral Development Co. (Pty) v. Aquila Steel (S. Afr.) (Pty) Ltd* 2018 (5) SA 124 (SCA) at 31 para. 65 (Willis, J.A., dissenting).

¹⁵⁶ Badenhorst, *supra* note 7, at 64.

¹⁵⁷ See VAN DER SCHYFF, *supra* note 3, Preface.

granted by the CC is, indeed, just and equitable to halt and rectify the incompetent state of affairs.¹⁵⁸ The substitution order also prevented personal enrichment by unknown beneficiaries.¹⁵⁹

CONCLUSION

The CC clearly set out the transitional arrangements applicable to holders of UOORs in the *Aquila Steel* decision. Holders of UOORs are entitled, within the one-year grace period, to apply exclusively for a prospecting or mining right that will be considered and conferred under the MPRDA. Upon such timely application, the UOOR continues to exist until a prospecting or mining right is granted to a holder of a UOOR or is refused. Other applications for prospecting or mining rights may take place after the one-year exclusivity period, but these competing applications may not be processed until the UOOR is terminated. Once the grace period ends, the MPRDA's requirements apply equally to all applications, no matter where they are in the queue. The priority of considering and processing an UOOR over an inconsistent prospecting or mining right is based upon the principle that first in time is stronger in law (*prior in tempore, potior in jure*), which principle is also encapsulated in Section 9 of the MPRDA.

The facts of the *Aquila Steel* decision are cause for great concern in South Africa insofar as state custodianship is the cornerstone of the MPRDA. The custodian discarded its fiduciary duties owed indirectly to beneficiaries under the MPRDA and abused its position as custodian of minerals for the benefit of all South Africans. The failure of the custodian to comply with its duties in the *Aquila Steel* decision has led to the loss of foreign currency, employment opportunities for thousands of people, revenue, and the sterilization of mineral resources for almost a decade. The time has come to review the ability of the public law style state

¹⁵⁸ *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at 55–56 para. 111 (“[I]n my view Aquila has established a high degree of institutional incompetence on the part of the government respondents and a lack of energy in resolving the issues which arose from that very incompetence.”).

¹⁵⁹ *Pan African Mineral Dev. Co. v. Aquila Steel (S. Afr.) Ltd* 2018 (5) SA 124 (SCA) at 29 para. 61 (Willis, JA, dissenting) (“... the question remains, in the words of Cicero: ‘*Cui bono?*’, which translates to, ‘Who will benefit from all this?’ Who indeed?”); *Aquila Steel (S. Afr.) Ltd. v. Minister of Mineral Res.* 2017 (3) SA 301 (GP) at 55 para. 110 (Tuchten was more to the point by explaining that the purpose of PAMDC and ZIZA was “to obstruct the exercise by Aquila of the rights which it has acquired and seeks to acquire, no doubt in the hope that its capacity to obstruct will drive Aquila commercially to cut PAMDC or one or more of those associated with PAMDC into its operation or to pay PAMDC a sum of money to stop obstructing the process.”).

custodianship structure to achieve equality and prosperity for all South Africans.

APPENDIX

This table provides a timeline for the different rights that existed and were granted to different holders in respect to the same land.

DATE	RIGHTS	ZIZA	AQUILA	PAMDC
Before May 1, 2004	Mineral rights:	Registered holder		
May 1, 2004	Unused old order rights and exclusive right to apply for new new-order rights:	Holder		
March 24, 2005 Agreement establishing PAMDC				
April 19, 2005	Prospecting right (1):	Application		
April 30, 2005	End of transitional period			
August 17, 2005		Accepted		
April 18, 2006	<i>Prospecting right (2):</i>		<i>Application</i>	
May 2, 2006			<i>Accepted</i>	
October 11, 2006			<i>Granted</i>	
February 28, 2007			<i>Notarized</i>	
July			<i>Registered</i>	

17, 2007				
November 26, 2007				Incorporated
February 26, 2008	Prospecting right (1):	Granted		
November 9, 2010		Removed from UK companies register		
December 2010	<i>Mining right:</i>		<i>Application</i>	
December 22, 2010			<i>Accepted</i>	
November 17, 2011	Prospecting right (1):			Executed in name of PAMDC
December 15, 2011	<i>Renewal of Prospecting right (1):</i>		<i>Application</i>	
February 2012			<i>Accepted</i>	
October 14, 2014		Registration of company restored		
July 2, 2015	<i>Mining right</i>		<i>Refused by minister</i>	
July 20, 2015	Prospecting right (3):			Application
July 31, 2015	<i>Renewal of Prospecting right (1):</i>		<i>Granted</i>	