

Business Law & Tax Review

Resources act faces challenge

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to schedule II to the development act, dealing with the transitional provisions, which allowed holders of unused old order mineral rights a limited period in which to apply for a new order prospecting or mining right, and concluded that the situation after May 1 2004 had changed drastically. In this regard he said that:

“The holder [of old order mineral rights] had a maximum of one year within which to bring an application, either in terms of section 16 of the act or in terms of section 22, depending on the circumstances.

“Such an application is not a mere formality. Some of the requirements are the following. It has to be accompanied by a non-refundable application fee. The applicant has to submit an environmental management plan, in the case of an application for a prospecting right, or has to conduct an environmental impact assessment, and submit an environmental assessment programme, in the case of an application for a mining right in terms of section 22. To obtain such plans or programmes of necessity entails that studies have to be done over a period of time and certainly not without expenditure. Before a right can be granted the minister must be satisfied that the applicant has access to such financial resources that he can conduct the prospecting operations or the mining operations optimally. It is not all holders of such rights that will be able to bring such applications. All applications need not necessarily be successful.”

The judge, after considering the protection of property right provisions contained in the constitution, held that item 8 of schedule II to the act does no more than afford an opportunity to holders of affected mineral rights to mitigate their damages if they are in a position to avail themselves of its provisions and that it is possible for holders of old order rights to prove that their rights had indeed been expropriated by the coming into force of the development act, which expressly affords a right to claim compensation.

He concluded that the act admits that holders of mineral rights will be deprived of their rights and that coupled with the state’s assumption of custody and administration of those rights constitutes an expropriation thereof. The judge therefore cut across the arguments relating to whether the effect of the act was to be considered a form of constructive expropriation or deprivation of property.

He also dismissed the second ground for the minister’s exception which she based on the fact that the plaintiffs had not sought to exhaust the internal appeal provisions contained in the regulations to the act.

While this is undoubtedly round one of a long legal tussle, it has clearly gone to the plaintiffs and it is expected that previous holders of now effectively nationalised mineral rights, including those holders of mining rights which are shortly to attract royalties, will pay keen attention to the outcome of the subsequent rounds in this intriguing and far-reaching legal battle.

Claimants have until April 30 2011 to lodge their claims for compensation pursuant to the regulations to the Mineral and Petroleum Resources Development Act.