



7 May 2014

**UPDATE FOR SHAREHOLDERS RE THE COMPANY'S INTENTION TO PROCEED TO THE COURT OF APPEAL
RE PL 69/2003**

BACKGROUND

On 9 July 2013 the Minister for the Ministry of Minerals, Energy and Water Resources (MMEWR) rejected the appeal of Mount Burgess (Botswana) (Proprietary) Limited (**The Applicant**), to renew its Prospecting Licence PL69/2003, The Kihabe – Nxuu Zn/Pb/Ag project, Botswana. The appeal had been appropriately lodged with and was awaiting a response from the Vice President of Botswana as a consequence of an initial rejection by the Minister MMEWR on 13 May 2013 not to renew PL69/2003. The Minister rejected the renewal of PL 69/2003 on the grounds that the **Applicant** had not completed a feasibility study in the two year term to 30 June 2012. The **Applicant** was not able to complete a feasibility study because of the lack of availability of a commercial grid power supply which it had previously been assured would be available by the end of 2012. The **Applicant** was obliged to comply with MMEWR's own Checklist for Appropriate Company Programme of Prospecting/Development Operations, completed when renewing PL69/2003 for the two years to 30 June 2012. Sections D and E of the checklist required compliance with one of the International Codes so far as **RESERVES** are concerned when dealing with feasibility studies. The Australian JORC Code is an internationally recognised code with which the **Applicant** must comply. The JORC Code stipulates that a feasibility study can only be signed off by a competent person when dealing with **ORE RESERVES**. It further stipulates, without the availability of appropriate infrastructure such as a commercial power supply, **RESOURCES** cannot be upgraded to **ORE RESERVE** status. **In compliance therefore with both the MMEWR checklist and the JORC Code, the Applicant was not able to complete a feasibility study.**

PROCEEDINGS

On 27 September 2013 the **Applicant** lodged in the High Court of Botswana, a Notice of Motion and Founding Affidavit in regard to the decision by the Minister MMEWR not to renew PL69/2003. In accordance with subsections 3(1) and 3(2) of section 127 of the Constitution of Botswana and section 4 of the State Proceedings Act, Botswana, copies were also lodged with the Attorney General, as **Respondent** on behalf of the Minister MMEWR.

On 21 October 2013 the **Applicant** received a Notice of the **Respondent's** intention to oppose the **Applicant's** Notice of Motion and Founding Affidavit.

However, contrary to precedent established in the Court of Appeal, the **Respondent** did not lodge an opposing Affidavit. Instead, on 4 November 2013, the **Respondent** filed a Notice intending to raise Points of Law in Limine and a Notice to strike out paragraphs from the **Applicant's** Founding Affidavit.

On 13 February 2014, the **Respondent's** points of Law in Limine were put forward in the High Court. The first of these points was that the **Respondent** maintained that in terms of Order 61 Rule 1, the

Applicant had not cited the person who made the decision and that the Attorney General does not have the authority to make decisions regarding mining licences. The High Court ruling on the issue was set down for 28 April 2014.

On 28 April 2014, the High Court judge ruled that the **Applicant's** application for the renewal of PL69/2003 be struck out with costs. The ruling was based on the fact that the decision maker, being the Minister MMEWR, was not joined in the proceedings. Only the Attorney General was cited as the Respondent. However, in section 30 of his ruling, the judge even highlights the fact that under Order 16 Rule 9(1) **"No cause shall be defeated by reason of the misjoinder or non-joinder of parties** and the judge may in every cause deal with the matter in controversy so far as regards the rights and interests before him".

Legal advice conveyed to the **Applicant** confirmed that subsections 3(1) and 3(2) of section 127 of the Constitution impose a legal duty on the **Applicant** to cite the Attorney General in this matter, as **actions by or against the Government shall be instituted by or against the Attorney General**. Botswana High Court case authority supports such process.

In Tim's Lock and Key (Pty) Ltd V. the Attorney General 2003 BLR 283 (HC) it was determined that Section 4 of the State Proceedings Act defined a distinction between actions against the Government and against a public officer. In respect of a complaint against a public officer it was contended that the service ought to be against the public officer. **However a Minister was not a public officer** and could not correctly be categorised as a servant or employee of the State. **A Minister was included in the word "Government" and therefore represented by the Attorney General in any litigation.**

Section 127 of the Constitution defines a person holding or acting in any public office where "public office" means an "office of emolument in the public service". **Subsection 3 of that section (127) states that a person is not a public officer because he is a Minister of the State.**

In the Tim's Lock and Key case, Judge Nganunu (the first Motswana to be appointed to the High Court and who later became Chief Justice of Botswana) states: **"That definition of public officer shows that a Minister is not a public officer** and I think these words have the same meaning in the Act (State Proceedings Act) we are considering in this application and **therefore a Minister is not a public officer. He would in my view be included in the word "Government" used in this act and therefore to be represented by the Attorney General in any litigation** authorised by the Act (State Proceedings Act). That way of reading the provisions of section 3 (1) (of the Constitution) makes common sense, because if a Minister were excluded from the meaning of the word "Government" it would be difficult to find any persons who would be included in that word for the purpose of section 4, (of the State Proceedings Act) for instance".

Based on what is outlined in the Constitution and State Proceedings Act of Botswana, together with precedent established in both the High Court and the Court of Appeal, the Applicant, a wholly owned subsidiary of the Company is proceeding to take this matter to the Court of Appeal.

ACN: 009 067 476
8/800 Albany Hwy
East Victoria Park
Western Australia 6101
Tel: (61 8) 9355 0123
Fax: (61 8) 9355 1484
mtb@mountburgess.com
www.mountburgess.com