IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

DATE 06 · 03 · 2009 SIGNATURE

CASE NO: 55896/2007
CASE NO: 10235/2008

DATE: 06 · 03 · 2009

In the matter between:

AGRI SOUTH AFRICA **(ASSOCIATION INCORPORATED UNDER SECTION 21)**	Plaintiff (Respondent in exception)
and	
THE MINISTER OF MINERALS AND ENERGY	Defendant (Excipient)
And	
In the matter between:	
ANNIS MÖHR VAN ROOYEN	Plaintiff (Respondent in exception)
and	
THE MINISTER OF MINERALS AND ENERGY	Defendant (Excipient)

JUDGMENT

HARTZENBERG J

[1] There are two identical exceptions, against the two very similar sets of Particulars of Claim, by the defendant, the Minister of Minerals and Energy. The two plaintiffs

Agri South Africa (Agri) and A M van Rooyen (van Rooyen) were respectively the holders of coal– and clay rights over fixed properties until 30 April 2004. On 1 May 2004 the Minerals and Petroleum Resources Development Act, no. 28 of 2002 ("the Act" or "the MPRDA") came into operation. The two plaintiffs claim compensation for what they allege amount to an expropriation of their respective rights. The defendant is of the view that their claims are vague and embarrassing and that in any event and *ex facie* the Particulars of Claim they have not exhausted their internal remedies and are accordingly barred from instituting action against the defendant.

[2] In its Particulars of Claim, Agri states its case as follows: At all relevant times and on 1 May 2004, when the Act came into operation, Bulgara Investment Holdings (Pty) Ltd ("Bulgara") was the holder of coal rights in respect of two properties, in terms of a Notarial Cession of Mineral rights. On 1 May 2004 the coal rights were expropriated in terms of section 5 of the Act read with sections 2, 3 and 4[1] thereof. In consequence it became entitled to

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[1] The sections read as follows:

2 ***Objects of the Act***

The objects of the Act are to -

(a) recognize the internationally accepted right of the State to exercise sovereignty over all the Mineral and petroleum resources within the Republic;
(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
(d) substantially and meaningfully expand opportunities for historically disadvantaged people, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
(e) promote economic growth and mineral and petroleum resources development in the Republic;
(f) promote employment and advance the social and economic welfare of all South Africans;
(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating

*3. **Custodianship of nation's mineral and petroleum resources***

(1) *Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.*

(2) *As the 4 custodian of the nation's mineral and petroleum resources, the State acting through the Minister, may –*

(a) *grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and*

(b) *in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.*

(3) *The Minister must ensure the sustainable development of south Africa's mineral and petroleum resources within a frame work of national environmental policy, norms and standards while promoting economic and social development.*

*4 .**Interpretation of Act***

(1) *When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this A ct must be preferred over any other interpretation which is inconsistent with such objects.*

(2) *In so far as the common law is inconsistent with this Act, this Act prevails.*

5 Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof

(1) *A prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.*

(2) *The holder of a prospecting right, mining right, exploration right or production right is entitled to the right referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or any other law.*

(3) *Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may –*

(a) *enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting, mining, exploration or production, as the case may be;*

(b) *prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;*

(c) *remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;*

(d) *subject to the National Water Act, 1998 (Act No. 36 of 1998), user water from any spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting mining, exploration or production on such land; and*

(e) *carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.*

(4) *No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without –*

compensation for the expropriation as contemplated in section 12 of Schedule II of the Act. On 23 March 2006 Bulgara (then in liquidation) lodged a claim for compensation with the Regional Manager in terms of Regulation 82A(1) of the relevant Regulations. On 10 October 2006 Bulgara ceded its rights to the plaintiff. On or about 22 June 2007 the Director-General determined, in terms of the provisions of Regulation 82A(4) that Bulgara did not have a valid claim for compensation. Neither the plaintiff nor Bulgara appealed the decision of the Director-General. By virtue of the provisions of Regulation 82A(6A)(a) read with Regulation 82A(7) of the Regulations Agri is entitled to apply to this court in terms of section 14 of the Expropriation Act, 1975(Act No 63 of 1975) for the determination of the compensation to which it is entitled as a result of the expropriation. The amount of compensation to which Agri is entitled is not less than R750 000,00 in view of the open market value of the coal rights, the fact that it was acquired on 2 October 2001 for an amount of R1 048 800,00, that Bulgara was not entitled to sell or transfer its old order right as from 1 May 2004 due to item 8 read with item 1 of Schedule II and that Bulgara could not reasonably have taken steps to mitigate its loss by applying for and being granted a prospecting or mining right in terms of Schedule II read with sections 16 or 22 of the Act.

[3] The allegation by the plaintiff in the van Rooyen matter are very similar: It is alleged that the plaintiff was the registered owner of a property and as such the holder of the clay rights (except for the clay rights over 20 hectares of the property), that the plaintiff was

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(a) *an approved environmental management programme or approved management plan, as the case may be;*

(b) *a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and*

(c) *notifying and consulting with the land owner or lawful occupier of the land in question.*

expropriated by the relevant provisions of the Act, that the plaintiff lodged a claim to the Regional Manager on 14 September 2007, that the Director-General determined that the plaintiff did not have a valid claim on or about 26 July 2007, that the plaintiff did not appeal the decision and that the plaintiff is entitled to compensation of not less than R600 000,00. As to the determination of the market value of the clay rights it is alleged that but for the provisions of the MPRDA the plaintiff would have been able to sell the property including its remaining clay rights for R1 300 000,00 but as a result of the expropriation was only able to sell it for R700 000,00, that the plaintiff acquired the property during 1992 for R250 000,00, that it sold the clay rights in respect of 20 hectares during 1998 for R500 000,00 and that she was not able to mitigate her loss.

[4] The defendant's exception against the particulars of claim is two-pronged. The first leg of the exception is based on the fact that the plaintiffs explicitly aver that they did not appeal against the decisions of the Director-General determining that they do not have valid claims. The argument is that they failed to exhaust their internal remedies in terms of the Act, by failing to appeal to the Minister against the Director-General's decision in terms of section 96 of the Act. The argument is that in terms of Regulation 74(1) of the Regulations promulgated in terms of the Act a person who appeals in terms of section 96 of the Act, has to lodge a notice of appeal within 30 days of having become aware of the administrative decision, that the plaintiffs failed to lodge appeals and are accordingly barred from instituting action. The second leg of the exception is to the effect that the provisions in the MPRDA relied upon by the plaintiffs do not provide for the expropriation of the plaintiffs' rights and that insufficient facts have been alleged to apprise the defendant of exactly what the plaintiffs' claims are, thus rendering the Particulars of Claim vague and embarrassing. There was a third ground of exception which was not proceeded with during the hearing of the matter.

[5] I prefer to deal with the second ground of the exception firstly. Section 25 of the Constitution[2] is to be taken as the starting-point of the exercise. It will be necessary to compare the rights of mineral rights holders before 1 May 2004 with their rights, as regulated by the Act, thereafter, and to investigate whether the Act did not expropriate vested rights. If the answer is positive it is to be ascertained whether provision has been made for the payment of compensation by the expropriator. If the answer to that question is also positive the further enquiry is what procedure is to be followed by an expropriatee in order to enforce payment of compensation in a court of law.

[6] Section 25 of the Constitution[3] provides that no one may be deprived of property arbitrarily and except in terms of law of general application. It clearly forbids the targeting of the property of specific individuals or entities, for expropriation purposes. Apart from the commitment to land reform and to reforms to bring about equitable access to natural resources[section 25 (4)(a) and subsections (5), (6), (7) and (8)] some of the salient provisions

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[2] Act 108 of 1996

[3] The first four subsections of the section provide as follows::

"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2)Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest, and

(b) subject to compensation , the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court

(3)The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property

(c) the market value of the property;

(d)the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation

(4) For the purposes of this section –

(a) the public interest includes the nations commitment to land reform , and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land."

of the section are that expropriation has to be for public purposes or in the public interest [section 25(2)(a)]; subject to compensation, the amount whereof and the mode and time of payment, if not agreed upon by the parties, are to be determined by a court of law [section 25(2)(b)]; that the amount of the compensation has to be just and equitable taking into account, inter alia, the market value of the property {section 25(3)] and that property is not limited to land [section 25(4)(b)].

[7] Prior to 1 May 2004 mineral rights in respect of property formed part of the rights of the landowner. It was possible, however, to sever the mineral rights and the surface rights and third parties could and did become the holders of the mineral rights. Such rights were freely transferable and were valuable assets. It was even possible to sever the mineral rights, in for instance the rights to prospect or mine for particular types of minerals like precious metals or base metals or diamonds so that different entities could be the holders of the rights to different minerals. See for argument's sake the titanic battle by the holder of the rights to base metals for recognition of those rights, in the matter of *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others*[4]. The prospecting and mining of minerals were, throughout at least the previous century, regulated by legislation. The rights themselves, however vested in individuals and individual entities and not necessarily as undivided rights. It was not uncommon for an heir to have been the holder of a fraction of the mineral rights in respect of a property. However that may be, they had a commercial value. See the case of Erasmus *v Afrikander Proprietary Mines Ltd*[5] where the holder of 1/520th share of the coal rights in respect of the farm Brakfontein unsuccessfully tried

[4] 1996 (4) SA 499 (A).
[5] 1976 (1) SA 950 (W)

to extort a ridiculously high price for those rights from the mining house that had the necessary permission to mine for coal.

[8] For the purposes of this investigation it is sufficient to quote the exposition of the rights to minerals, given by Schutz JA in the *Trojan* matter *supra* at 509G-510A:

> *"The nature of rights to minerals which had been separated from the ownership of the land, as they had developed in South Africa, was described by Innes CJ in* ***Van Vuren and Others v Registrar of Deeds*** *1907 TS 289 at 294 as being the entitlement, 'to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away'. As these rights could not be fitted into the traditional classification of servitudes with exactness – they were not praedial as they were in favour of a person, not a dominant property – they were not personal as they were freely transferable – they had to be given another name, and the Chief Justice dubbed them quasi-servitudes, a label that has stuck. They are real rights. Their exercise may conflict with the interests of the landowner. In a case of a irreconcilable conflict the interests of the latter are subordinated, for if it were otherwise the grant of mineral rights might be deprived of content: see eg* ***Nolte's*** *case* ***supra*** *at 315:* ***Hudson v Mann and Another*** *1950 (4) SA 485 (T) at 488E-F. For so long as minerals remain in the ground they continue to be the property of the landowner: only when the holder of the mineral rights severs them do they become movables owned by him:* ***van Vuren's*** *case,* ***supra*** *at 295"*

[9] It is evident that the holder of the mineral rights was under no obligation to exploit the rights. He could keep it for as long as he wished. He could bequeath it to his heirs. He could sell it. The State could not force him to start with the exploration of the minerals

even if it would be to the public benefit. The advantage to individuals was that they could own valuable rights which they in many cases would be unable to exploit but which they could sell to mining houses or others for handsome amounts.

[10] That position changed as from 1 May 2004. The Act was assented to by the President on 3 October 2002 and came into operation on 1 May 2004. The preamble of the MPRDA acknowledges that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof. In section 2(a) and (b) under "Fundamental Principles" the objects of the MPRDA are stated, inter alia, to be to "recognize the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic" and "to give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources". Section (3) again states that the mineral and petroleum resources are the heritage of the South African people and that the State is the custodian thereof. It provides that the State, through the Minister, can grant rights and that the Minister in consultation with the Minister of Finance can determine and levy fees and must promote economic and social development whilst maintaining a national environmental policy. Section 4 deals with the interpretation of the Act and provides that a reasonable interpretation of the Act consistent with the objects thereof must be preferred over any other interpretation and in particular that where the common law is inconsistent with the Act, the Act is to prevail. In subsections 5 (1), (2) and (3) it is explained what the legal effect of the grant of rights is and what rights are conferred upon the holder by the grant of the rights. In section 5(4) the prospecting for minerals and the exploration of minerals are prohibited unless an environmental management programme or plan has been approved, the necessary rights have been granted and there was notification and consultation with the landowner.

[11] What is evident is that there is no acknowledgement of any existing holding of mineral rights. Insofar as they have not been exploited they simply disappear in thin air. As far as these four sections are concerned, an interpretation in terms of the dictates of section 4, indicates clearly that the only way to acquire new rights is to obtain them from the State, through the Minister. It would be futile to acquire an unused right that existed before 1 May 2004 and use it for a launch pad to acquire rights in terms of the Act. But for the further provisions under the heading "Transitional Arrangements" contained in Schedule II to the Act that gives certain rights to the holders of "old order rights" and in particular to the holders of "unused old order rights", the effect of the Act would have been to extinguish all those rights. Such an expropriation would have been effected without provision for compensation. That would clearly have offended against the provisions of section 25 of the Constitution and would have rendered the Act unconstitutional.

[12] But for Schedule II, the Act stood to be declared unconstitutional. For the purposes of this case it is necessary to analyse the Schedule to see what rights are conferred upon the holders of "unused old order rights". "Unused old order rights" are all the rights listed in table 3 to the schedule in respect of which no prospecting or mining was being conducted immediately before the Act took effect. There are 11 categories. The first category consists of common law mineral rights for which no prospecting permit or mining authorization was issued The definition of "holder" in relation to such a right, is the person to whom the right was granted or by whom the right was held before the Act came into effect i.e. before 1 May 2004. Both the plaintiffs in these matters are holders of unused old order rights.

[13] The objects of the schedule are to ensure security of tenure in respect of existing prospecting, mining or production operations, to give the holders of old order rights the

opportunity to comply with the Act and to promote equitable access to the nation's mineral and petroleum resources. Items 3,4,5,6 and 7 of the Schedule are aimed at bringing existing prospecting and exploration operations, conducted before the coming into operation of the Act, within the purview of the Act.

[14] Item 8 deals with the processing of unused old order rights. An old order right remains valid for not longer than a year from the commencement of the Act, the holder has the exclusive right to apply for a prospecting or mining right for a period of not longer than one year. The application has to be in terms of either section 16 or section 22 of the Act and the existing right remains valid until the application is granted or refused. Unless an application in terms of item 8 is brought the unused old order right ceases to exist after a period of not longer than a year. The holder of rights had no obligation to exploit those rights, before 1 May 2004. That situation changed drastically thereafter. The holder 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.

[15] 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.

[16] Items 9, 10 and 11 of the Schedule are not relevant for the purposes of this judgment. Item 12[6] is of vital importance. In my view sub-item (1) by necessary implication recognizes that expropriation in terms of the Act takes place in terms various provisions therein. Expropriation is not limited to administrative expropriation by the Minister in terms of section 55(1) of the Act but can also take place in terms of other provisions of the Act. It can hardly be different because, as has been shown, there were many holders of mineral rights with commercial value, before the commencement of the Act. But for the transitional arrangements those rights are not recognized in the Act, at all. Apart from the plaintiffs in these matters, I believe that many holders of other old order rights have not been expropriated in terms of section 55(1) of the Act. Except to the extent that the transitional arrangements afford some relief to them, those rights have been extinguished by the coming into operation of the Act.

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[6] It bears the heading "Payment of Compensation" and reads as follows"

"(1) Any person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State.

(2) When claiming compensation, a person must –

(a) prove the extent and nature of actual loss and damage suffered by him or her;

(b) indicate the current use of the property;

(c) submit proof of ownership of such property;

(d) give the history of acquisition of the property in question and price paid for it;

(e) detail the nature of such property;

(f) prove the market value of the property and the manner in which such value was determined; and

(g) indicate the extent of any State assistance and benefits received in respect of such property.

(3) In determining just and equitable compensation all relevant factors must be taken into account, including, in addition to sections 25(2) and 25 (3) of the Constitution –

(a) the State's obligation to redress the results of past racial discrimination in the allocation of and access to mineral and petroleum resources;

(b) the State's obligation to bring about reformsto promote equitable access to mineral and petroleum resources;

(c) the provisions of sections 25(8) of the Constitution; and

(d) whether the person concerned will continue to benefit from the use of the property in question or not.

(4) Any claim for compensation must be lodged with the Director-General in the prescribed manner.

Not only have those rights been extinguished by the Act but the State is now at liberty and obliged to administer those rights. The Minister now has the right to grant mining rights, for the extraction of minerals to any successful applicant. Before 1 May 2004 there were completely other holders of the rights to those minerals, who had justified expectations, one day, to mine for those minerals and become the owners thereof.

[17] It seems to me as if item 8 of Schedule II does no more than afford an opportunity to the holders of affected rights to mitigate their damages. If the holder has the necessary financial resources, like for instance a mining house, it can apply for the necessary permission to exploit those rights. If the holder does not have the financial resources the opportunity afforded by the schedule is more apparent than real. It is in any event in my view not something on which the Minister can rely to maintain that the holder had not been deprived of his rights. It affords the Minister a defence against a claim for compensation on the basis that the holder acted unreasonably by not having obtained similar rights in terms of the schedule[7]. In short it is my interpretation of the Act that it admits that holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof.

[18] In the light of that conclusion it is unnecessary to deal with the interesting argument on behalf of the plaintiffs as to exactly what constitutes an expropriation. The argument is that an expropriation is not necessarily a transfer of all the expropriatee's rights to the expropriator. It is sufficient if the expropriatee has been deprived of his rights to the property, and the expropriator has derived some benefit in respect of the property. I was

[7] A defence which would be a sound one in respect of claims over some areas of land in the country would be that the mineral rights had no commercial value as at 30 April 2004.

referred to the Northern Ireland decision in *Ulster Transport Authority v James Brown and Sons Ltd.* 1953 N I 79 (in which it was held that a provision in an Act that caused someone to lose property, without compensation, offended against the principle that no one's goods may be taken without compensation) and the Australian case of *Georgiades v Australian and Overseas Telecommunications Corporation,* 1994 179 CLR 297 (wherein it was found that an enactment that shortened the period within which an action could be instituted was, in the circumstances of the case, unjust and unfair and accordingly invalid as it offended against the Constitution). As the argument leads to the same result as that reached hereinbefore it is unnecessary to deal with it in greater detail.

[19] The conclusion to which I have come is that it is possible for holders of old order rights to prove that their rights have been expropriated. The Act affords them a right to claim compensation. Section 55(2) and in particular Regulation 82A(7) make the provisions of the Expropriation Act, No 63 of 1975 applicable to such claims. The plaintiffs have referred to the aspects that item 12 of the Schedule requires them to refer to. In the circumstances I think that I understand what the plaintiffs' cases are. I do not find them to be vague or embarrassing.

This leg of the exception cannot succeed.

[20] The other leg of the exception is based on the provisions of Regulation 82A(5), read with section 96 of the Act and the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The argument is that the plaintiffs had to and did file claims with the Director-General. The Director-General decided that the plaintiffs had no valid claims. Regulation

82A(5)[8] bestows a right upon the plaintiffs to appeal to the Minister in terms of section 96 of the Act. That section provides that any person whose rights have been materially affected by an adverse administrative decision of the Director-General may appeal to the Minister. An appeal does not suspend the decision. No person may apply to court for a review of an administrative decision until that person has exhausted his or her remedies in terms of section 96(1). Section 96(4) specifically makes sections 6, 7(1) and 8 of PAJA applicable to court proceedings in terms of the section. The gist of the argument is that administrative decisions, having been made, cannot be ignored and remain valid until set aside, bearing in mind that an unlawful administrative act produces legally valid consequences for so long as it is not set aside[9].

[21] The submission may have been a good one, but for the provisions of Regulation 82A(6A) which was later introduced into the Regulations by Government Notice R1203 of 30 November 2006[10]. Although it is couched in the negative the Regulation in fact authorizes three instances where a claimant may institute action without taking any further steps.. The first one is where the claimant has lodged a claim in terms of Regulation 82A(1) and the Director-General has informed him in terms of Regulation 82A(4) that he has no valid claim

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[8] It reads:

"The claimant shall have the right to appeal the decision of the Director-General in terms of section 96 of the Act."

[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,* 2004 (6) SA 222 (SCA) at 26 and *Khabisi NO v Aquarella Investments 83 (Pty) Ltd,* 2008 (4) SA 204G -205H

[10] It reads:

"(6A) A claimant may not issue legal proceedings against the Minister in respect of the determination of payment of compensation for an expropriation contemplated in item 12(1) of Schedule II to the Act , unless a claim has been lodged as contemplated in subregulation (1) and –

(a) the claimant has been informed, in writing of the determination of the Director-General that the claim is invalid as contemplated in subregulation (4) and the claimant has not appealed the decision of the Director-General as contemplated in subregulation (5); or

(b) where the claimant has appealed the decision of the Director-General as contemplated in subregulation (5), the claimant has been informed in writing by the Minister of the confirmation of the said decision; or

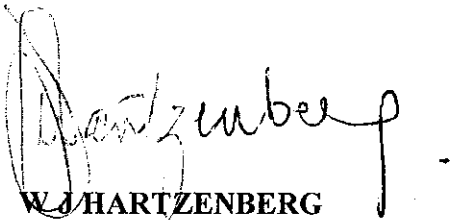
(c) *the period contemplated in sub-item (6)(b) has expired.*

and the claimant has not appealed the decision of the Director-General, in terms of Regulation 82A(5). The second instance is where the claimant, having been informed by the Director-General that he has no valid claim has appealed against that decision to the Minister, in terms of Regulation 82A(5) (and obviously section 96 of the Act) **and the Minister has confirmed the decision.** The third instance is where the claimant's claim has been recognized by the Director-General or by the Minister, on appeal to him, and no agreement as to the amount could be reached within 180 days. Regulation 82A(6)(b) specifically provides that in the absence of agreement the amount is to be determined by the court. It is clear that these two cases fall directly within the ambit of Regulation 82A(6A)(a).

[22] It is clear that Regulation 82A(6A)(a) specifically allows a claimant not to avail himself of his right of appeal in terms of Regulation 82A(5). The right of appeal is the review of an administrative decision. If the appeal is upheld by the Minister the Minister's decision is also an administrative decision. If an application is brought in terms of PAJA against the Minister's decision the application is still an application for the review of the administrative decisions What item 12 of the schedule allows a claimant to do is to assert that he has been expropriated and to prove it in a court of law. Those issues are not administrative issues. If Regulation 82A(6A) had not been introduced into the Regulations the fact that a claimant did not have direct access to the court, and first had to exhaust administrative remedies, may have jeopardized the Constitutionality of the MPRDA.

The exception also cannot succeed on this leg.

The exceptions in both cases are dismissed with costs, inclusive of the costs occasioned by the employment of two counsel.



W J HARTZENBERG
JUDGE OF THE HIGH COURT

HEARD ON : 10 February 2009

ON BEHALF OF THE PLAINTIFF

Counsel : G L GROBLER SC
J L GILDENHUYS
Instructed by : MACROBERT INC

ON BEHALF OF THE DEFENDANT

Counsel : S H J BADENHORST SC
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