

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-061972

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 24 July 2024

In the matter between:

NORTHERN COAL

Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY

First Respondent

**THE DIRECTOR GENERAL: DEPARTMENT OF MINERAL
AND RESOURCES AND ENERGY**

Second Respondent

**THE REGIONAL MANAGER: MPUMALANGA PROVINCE,
DEPARTMENT OF MINERAL RESOURCES AND
ENERGY**

Third Respondent

JAMENTS (PTY) LTD

Fourth Respondent

EMTHONJENI INVESTMENT (PTY) LTD

Fifth Respondent

JUDGMENT

DE VOS AJ

- [1] Northern Coal mines coal. It has been mining coal on Farm Jagtlust in Carolina, Mpumalanga for years. Faced with the retrenchment of hundreds of employees, Northern Coal sought to expand its mining operations by extending its mining area to include the neighbouring farm, Farm Roetz. Farm Jagtlust and Farm Roetz are contiguous, and Northern Coal owns both farms.
- [2] The Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA") specifically provides for the variation of a mining right by extending the mining area. Section 102 permits the variation of a mining right "by extensions of the area covered by it". A section 102 variation requires consent from the first respondent ("the Minister").
- [3] Northern Coal applied to the Minister, in terms of section 102, to extend the area of its mining right on the current mining area (Jagtlust) to include the neighbouring farm (Roetz). The Minister granted Northern Coal consent to extend its mining area to include the neighbouring farm ("section 102 consent"). Northern Coal has been mining on the neighbouring farm, keeping the retrenchments at bay.
- [4] Parallel to this process, the fourth respondent ("Jaments") applied for a prospecting right on the neighbouring farm. Its application was initially rejected because of the existing section 102 consent application. Jaments then launched an internal appeal against this rejection, which was successful. Jaments also requested the Minister to suspend Northern Coal's section 102 consent.
- [5] On 24 May 2024, the Minister acceded to Jaments' application under section 96 and suspended the consent for section 102 ("suspension decision"). The effect of the suspension decision is that Northern Coal may no longer lawfully mine on the Farm Roetz. Northern Coal seeks an urgent review of the suspension decision made by the Minister. It relies on *among other things* sections 6 (2) (d), (e)(iii), (e)(vi), (f)(ii), (h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- [6] The Minister has not filed any papers and did not appear at the hearing. The matter was heard shortly after the 2024 national elections, during a time when the new

government was still being negotiated and Ministers had not yet been appointed. The Court does not know if this had a bearing on the Minister's absence during the hearing.

[7] Jaments opposes the relief. It supports the Minister's suspension decision. Jaments' central case is that Northern Coal was, in fact, seeking to consolidate the mining right (Jagtlust) with the prospecting right on the neighbouring farm (Roetz). However, as the prospecting right on the neighbouring farm lapsed, the section 102 consent was no longer valid, creating a gap for Jaments to apply for the prospecting right over the neighbouring farm. Jaments' opposition is premised on the assumption that a prospecting right over Farm Roetz had to be valid for the section 102 consent. From Jaments' perspective, the section 102 consent is subject to a valid prospecting right over the neighbouring farm.

[8] First, the Court must be satisfied that the matter is urgent.

Urgency

[9] The applicant relies on commercial urgency. It relies on the fact that the Farm Jagtlust has reached the end of the life of mine, and the applicant can only conduct mining operations on the Farm Roetz. The effect of the Suspension Decision is that the applicant can no longer mine on the Farm Roetz or at all. The Suspension Decision poses "an existential threat" to Northern Coal. If the matter is not urgently considered, Northern Coal will be forced to go into liquidation. Without its income from its mining operations, Northern Coal cannot continue to shoulder the financial burden of its fixed expenses for R 5 million in salaries a month; contractual penalties charged by contractors; fixed depreciation costs of R 8 million per month; and complying its environmental and water use authorisations.

[10] On this basis, Northern Coal contended that the application meets the requirements of commercial urgency and, as it will essentially be bankrupted in the absence of immediate relief – it will not be afforded substantial redress at a hearing in the ordinary course.

- [11] Jaments opposes urgency on the basis that the facts leading to the Minister's decision in May 2024 were on the cards in December 2023 and January 2024. As these were known to Northern Coal before the decision was taken, Northern Coal's urgency is self-created.
- [12] The Court considers that the relief sought by Northern Coal is to review the suspension decision. The need for the application arises solely due to the suspension decision. There was no basis to expect Northern Coal to institute a review of the Suspension Decision before such a decision was taken. Northern Coal could not, in fact, or law, bring such proceedings any earlier. It is only now that the decision has been made that any application to review the Suspension Decision is ripe for hearing. Before May 2024, there was no need to launch these proceedings, as no cause of action existed.
- [13] The Court must consider if Northern Coal dragged its feet after the suspension decision. The applicant has set out the steps it took after it was informed of the decision and how it approached the matter as one of urgency. The Suspension decision was taken on 24 May 2024 and transmitted to the applicant on 27 May 2024. On 5 June 2024, Northern Coal launched this urgent review application. The present application was launched in less than 6 working days. The applicant did not create urgency or drag its feet when coming to Court.
- [14] The Court must be satisfied that Northern Coal cannot obtain substantial redress in due course. In addition to the financial losses already considered, if shut down, Northern Coal cannot meet its environmental duties of (i) monitoring underground water seepage and wastewater to ensure that it does not contaminate the local water supply; and (ii) active dust suppression on road, dumps and stockpiles.
- [15] In addition, if no relief at this stage – Northern Coal will be liquidated. This will have an impact on its employees. Specifically, 315 of Northern Coal's contractors' employees; and 187 employees of Northern Coal will lose their livelihoods.

[16] If Northern Coal is liquidated, its mining rights, amended to include the area of the Farm Roetz, will lapse. Northern Coal has presented facts that any internal appeal process will be rendered moot, and a review of the ordinary course will have been for nought. For the same reason, Northern Coal submits it cannot wait for the internal appeal process to complete, as these processes typically take approximately two years to conclude.

[17] The Court concludes that the facts of this case fall within the type of commercial urgency contemplated in *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd*,¹ Northern Coal will not be afforded substantial redress at a hearing. As it currently exists, Northern Coal will not be around at a hearing in due course.

[18] On this basis, the Court rejects the submission that urgency was self-created and concludes that the matter is urgent, not only because the applicant's commercial livelihood is at stake, the potential job losses, but also because of the environmental impact that flows from the dispute.

Facts

[19] On 31 March 2009, Northern Coal was granted a mining right over Farm Jagtlust. In 2013, Northern Coal purchased Farm Roetz, and in January 2020, it applied for consent, in terms of section 102 of the MPDRA, to extend its mining area to include Farm Roetz.

[20] On 30 March 2021, Northern Coal lodged its application for renewal of the Roetz Prospecting Right via e-mail as the DMRE's online SAMRAD system was experiencing technical difficulties. On 31 March 2021, Northern Coal delivers a hard copy of its application to renew the Roetz prospecting right. Also, on 31 March 2021, Jaments submitted an application for a prospecting right over the Farm Roetz. The Regional Manager accepts Northern Coal's application and rejects Jaments' application.

¹ 1982 (3) SA 582 (W) at 586

- [21] The parties dispute whether the prospecting right over Farm Roetz lapsed on 30 March 2021 because Northern Coal failed to lodge the renewal on time and online. However, this dispute only needs to be resolved if the validity of a prospecting right over Farm Roetz affects the section 102 consent.
- [22] On 24 December 2021, Jaments lodged an internal appeal against the Regional Manager's decision to reject Jaments' application for a prospecting right over the Farm Roetz.
- [23] On 26 October 2023, the DMRE granted Northern Coal its environmental authorisation to extend the mining area to include the Farm Roetz. On 16 November 2023, the Director-General upheld Jaments' internal appeal against the Regional Manager's decision to reject its application for a prospecting right. On 29 November 2023, the Regional Manager accepted Jaments' application for a prospecting position right over the Farm Roetz.
- [24] On 14 December 2023, the Director-General granted consent in terms of section 102 to amend/vary the Jagtlust Mining Right to include the Farm Roetz (the "Section 102 Consent"). On 10 January 2024, Northern Coal and the Acting Regional Manager executed a notarial deed of amendment to include the Farm Roetz in the mining area of the Jagtlust Mining Right.
- [25] On 29 February 2024, Jaments launched an internal appeal under section 96(1) of the MPRDA against the decision to grant the Section 102 Consent to Northern Coal (the "Section 102 Appeal"). As part of the Section 102 Appeal, Jaments sought to suspend the Section 102 Consent.
- [26] On 9 April 2024, Northern Coal launched an internal appeal against the Director-General's decision to uphold Jaments' appeal against the Regional Manager's decision to reject its application for a prospecting right over the Farm Roetz. Thereafter, Northern Coal filed its answering affidavit in the Section 102 Appeal, and Jaments filed its replying affidavit in the Section 102 Appeal.

[27] On 24 May 2024, the Minister decided to suspend the operation of the Section 102 Consent, in terms of Section 96(2) of the MPRDA, pending the finalisation of the Section 102 Appeal.

[28] On 27 May 2024, Moorosi Attorneys, on behalf of Jaments, sent the suspension decision by e-mail to Briel Inc, on behalf of Northern Coal.

[29] The facts show that Northern Coal's application for consent and Jaments' application for a prospecting right ran in parallel processes. It also shows that while the section 102 application was being considered, Jaments ran an internal appeal concerning its application for a prospecting right.

[30] These background facts indicate that the section 102 consent application took so long that the prospecting right on the neighbouring came close to lapsing. Believing it was about to lapse, Northern Coal applied for its extension over e-mail as the online systems were not working. It did so out of an abundance of caution. Jaments, believing it had lapsed, applied for the prospecting right. Jaments' application was rejected as there was an existing application over the property. Jaments successfully appealed that rejection. While it sought to appeal the rejection, it also asked the Minister to suspend section 102 consent.

Does a section 102 consent hinge on a valid right over the neighbouring farm?

[31] The dispute between the parties is whether Northern Coal extended its area of mining operations or consolidated its mining right over its existing mining area (Jagtlust) with a prospecting right (Roetz). The case hinges on this characterisation.

[32] Northern Coal contends it extended a mining area. It did not require the existence of a valid prospecting right on the neighbouring farm. Jaments contends that Northern Coal consolidated the mining right with a prospecting right, in which case the prospecting right over the neighbouring farm would have to be extant. If Northern Coal's characterisation is correct, the validity of the prospecting right is irrelevant. If Jaments is correct, then the validity of the prospecting right is central.

[33] Northern Coal's position is that the MPRDA, whether under section 102 or otherwise, does not require that the holder of a right also hold a right over the property it seeks to add to the mining area of its existing right. From this, Northern Coal's section 102 application (which led to the section 102 consent) takes precedent over any subsequent application lodged with the Department. A valid prospecting right over the neighbouring property is irrelevant to the Section 102 application.

[34] Jament's position is that section 102 consent required an existent prospecting right on the neighbouring farm. As the prospecting right on the neighbouring farm lapsed, Jaments could apply for it.

[35] The Court has carefully considered the party's submissions in this regard.

[36] The starting point is section 102. Section 102 reads –

“A mining right may not be amended or varied (including by extension of the area covered by it or by the additional of minerals or a shares or seams, mineralised bodies or strata, which are not at the time the subject thereof) without the written consent of the Minister.”

[37] Section 102 does not require that the applicant hold an existing right over the extended area when extending a mining right, and there is no such requirement elsewhere in the legislation. Jaments could not refer me to any case law or provisions for this requirement.

[38] Section 102 does not require a valid right over the new area or a consolidation of rights. However, the section expressly refers to an extension of a mining area. Northern Coal sought that, and the Minister granted that consent.

[39] The entire premise of Jament's case is that the prospecting right over the neighbouring farm had lapsed, and therefore, the section 102 consent was affected. The premise of this position is unclear. It is so that the Department required, whilst

the prospecting right over the neighbouring farm was extant, that it be consolidated under section 11. That requirement must fall away if the prospecting right lapses. But even if not so, there is no basis to contend that Northern Coal's section 102 consent, once granted, required an existent prospecting right over the neighbouring farm.

[40] It is unclear how the lapsing of the prospecting right impacts Northern Coal's mining right over the neighbouring farm. I see no basis in the MPDRA, particularly in section 102, to support the Minister's position.

[41] The Court would have to read section 102 in language to the effect that the consent is subject to the existence of a valid right over the new area to support Jaments' interpretation. There is no language in the text of section 102 to support Jaments' read-in requirement that the prospecting right be valid.

[42] It appears to be nonsensical to subject the extension of a mining right to a new area to the existence of a valid existing mining right over the new area. It would result in an irrational requirement. If there is such a valid existing right, that right either precludes the extension or already permits the extension. Either way, there would be no logical reason to seek an extension.

[43] The question before the Court is whether the Minister's decision to suspend the mining right over the neighbouring farm to permit Jaments to pursue its application for a prospecting right is reviewable. I see no basis in law to conclude that the section 102 consent required the existence of a prospecting right over the neighbouring farm.

[44] Jaments leans on language in the applications by Northern Coal that referred to a consolidation of rights. The odds stack equally, as there are equal references to the consolidation of rights and the extension of a mining area in the various permissions sought from the Department on the papers before the Court. However, whatever the parties may have termed the issue and whatever language various consultants may

have used during the applications, the Court must consider the substance of the application, the legislation and the Minister's section 102 consent decision.

[45] Substantively, Northern Coal sought to extend the area on which it could mine. The Court must have regard to substance over form.² Substantively, it was a section 102 consent application – whatever language may have been used. Even if Northern Coal had faltered in the format of some of its correspondence, it is clear from the facts that what it sought was to farm over an extended area – onto the neighbouring farm. In substance, this is apparent from the papers. Despite what is written on various documents, Northern Coal applied in terms of section 102 for a variation of an existing mining right.

[46] Northern Coal did not seek to mine on Jagtlust and prospect on Roetz. It sought, plainly, to extend the area it is entitled to mine.

[47] The legislation is clear, section 102 applies to a variation of the area over which a mining right applies. There is no requirement in either section 22 (relating to applications for mining rights) or section 102 of the MPRDA that an applicant for a mining right or an amendment/variation thereof must hold a prospecting right or any other right or permit over the property which it intends to mine (i.e. the prospective mining area) before it may apply for or be granted a mining right.

[48] In *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others*,³ The Supreme Court of Appeal confirmed that a prospecting right is not a prerequisite for a mining right. A prospecting right is also not a prerequisite for an application in terms of section 102, which seeks to vary a mining right to include another property in the mining area of that right.

² Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 547.

³ Unreported judgment, *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* (1109/2020) [2022] ZASCA 157 (18 November 2022). Available on SAFLII at <https://www.saflii.org/za/cases/ZASCA/2022/157.html> At paragraph 54

[49] In addition, the Court weighs the text of section 102 and the language of the actual section 102 consent, which unambiguously provides that Northern Coal is permitted to extend the area covered by its mining right. The consequence of such a substantive consent was that Northern Coal had the right to mine on the Farm Roetz.

[50] Nothing in the language of section 102 or the section 102 consent supports Jaments' interpretation that the section 102 consent was for the consolidation of a mining right and a prospecting right.

[51] Of course, it would operate in Jaments' favour if this requirement is read in, as that would introduce a question of the validity of the prospecting right and its application for the prospecting right. However, as the Section 102 application and the Section 102 consent did not hinge on a prospecting right's existence, the prospecting right's validity is entirely irrelevant to these proceedings.

[52] The Court accepts Northern Coal's submission that this dispute is a red-herring due to Northern Coal's existing application for consent in terms of section 102, which long preceded the facts which give rise to the dispute mentioned above and which is, in fact, dispositive thereof.

[53] The Court concludes that section 102 of the MPRDA does not require the consolidation of existing rights to extend the area of a mining right.

First in time, first in right

[54] Northern Coal submits that an application in terms of section 102 is either an application for a mining right or is akin to an application for a mining right in substance and that the first-in-time principle applies.

[55] The Court considers that section 102 applies expressly to mining rights. It provides for the extension of a mining right – and grants, it follows, a mining right. The Section 102 application sought to incorporate the Farm Roetz into the mining area of the Jagtlust Mining Right. The definition of a “mining area” in “relation to a mining

right, means the area on which the extraction of any mineral has been authorised and for which that right or permit is granted". If the mining area is extended under section 102, it grants a mining right over it.

[56] In other words, if consent is granted to amend the mining area of the Jagtlust Mining Right in terms of section 102 of the MPRDA to include the Farm Roetz, Northern Coal is after that entitled to mine on the Farm Roetz in terms of the amended Mining Right.

[57] The text of section 102, read with the definition of mining area, indicates that what section 102 covers is a mining right. At all relevant times before the Section 102 Consent being granted, Northern Coal's application in terms of Section 102 was, therefore, in substance, an application for a mining right in respect of the same mineral and land which remained to be granted or refused as contemplated in section 16(2)(c) of the MPRDA and the Regional Manager could, therefore, not accept any subsequent applications for prospecting or other rights for coal over the Farm Roetz.

[58] The Court upholds Northern Coal's primary submission that the section 102 consent granted a mining right. Consequently, the principle of first in the right—first in time applies, and Jaments's subsequent application ought not to have been validly received by the Department.

[59] As I am sitting as a court a quo, I should follow a belt-and-braces approach and also consider Northern Coal's alternative submission that a section 102 application is akin to an application for a mining right.

[60] Northern Coal's alternative submission is that upon a proper interpretation of the MPRDA, such an application is akin to an application for a mining right and ought to be processed by the DMRE in the same manner as any other application.

[61] The MPRDA does not contain any express provisions relating to the order of processing applications received by the Minister in section 102. This must be

compared to other application processes prescribed in the MPRDA. I see no reason why a section 102 consent application is not akin to an application for a mining right and ought to be dealt with by the DMRE in accordance with the first-in-time principle. The process that is to be followed is akin to a mining right application. The considerations are akin. The applicable principle of first in time, it follows, should also find application.

[62] In any event, the principle of first in time, first in right, would apply, regardless of the characterisation of the right. The first-in-time principle expressed by the maxim *qui prior est tempore potior est jure* is based on equity.⁴ In addition, real rights are stronger than personal rights, and in a conflict between real rights, the maxim *qui prior est tempore potior est jure* applies.⁵ I see no reason why this principle of equity should not apply to a section 102 consent application when it applies to other types of mining right applications, particularly in light of the nature of the right at play.

[63] The inequity of not applying the principle means that Jaments can rely on it to further its interests in seeking a prospecting right, but Northern Coal cannot rely on it to extend an existing right. The unfairness is clear.

[64] In addition, Northern Coal submits that the first-in-time principle is recognised throughout the MPRDA as the orderly basis on which the DMRE processes applications for the same land and the same mineral. Section 6 of the MPRDA gives effect to the first-in-time principle concerning other applications as a reasonable and procedurally fair manner to process all applications under the MPRDA.

[65] The Court is persuaded by this submission. I see no reason not to apply the principle to the present matter. If not, core administrative justice principles will be eroded, particularly those relating to a fair process.

⁴ *Wahlloo Sand BK en Andere v Trustees, Hambly Park Trust en Andere* 2002 (2) SA 776 (SCA) at 788D

⁵ *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) at 258BC.

[66] The Court also embraces its duty under section 39(2) of the Constitution to interpret legislation in a manner that best gives effect to the Constitution. Interpreting section 102 in a manner that gives effect to the first-in-time principle accords with the Constitutional right to administrative justice and administrative action, which is procedurally fair.

[67] Northern Coal submits that such an interpretation further avoids a gap in the legislative scheme and any absurdity or repugnancy in the MPRDA where, for some unknown reason, a later application takes precedence over Northern Coal's Section 102 Application. The submission is that such an assertion is "insensible and unbusinesslike and would, with respect, lead to chaos in the processing of applications. I am persuaded by this submission.

[68] These submissions persuade the Court. The Court, therefore, finds that in the event it erred in finding that a section 102 consent is a mining right, then the alternative argument by Northern Coal that it is akin to a mining right is correct.

Review

[69] The Minister's reasons for the suspension decision read as follows –

"My decision is based on the following reasons:

1. The Appellant has demonstrated sufficiently that there is potential prejudice on its part should the Third Party [Northern Coal] continue to mine on [Farm Roetz] without allowing it to exhaust internal remedy (sic).

2. There is prima facie evidence that the DG's decision to grant in terms of section 102 of the MPRDA the amendment of the Third Party's mining right dated 14 December 2023 contradicts his appeal-decision to set aside the rejection of the Appellant's prospecting right application in a letter dated 16 November 2023."

[70] The Minister's suspension decision provides two reasons for the decision.

[71] The first is that Jaments has sufficiently demonstrated potential prejudice on its part should [Northern Coal] continue to mine on [Farm Roetz] without affording it an opportunity to exhaust internal remedies. Jaments' alleged prejudice is that if "Jaments is certain that if Northern Coal's illegal conduct continues unabated, Jaments will suffer severe financial losses."

[72] The Court has held, above, that a valid prospecting right is not needed for the section 102 consent. Jaments could only lawfully apply for a prospecting right if it was not subject to a section 102 consent application. As the section 102 consent application was first in time and did not lose its validity on the alleged lapsing of the prospecting right, Jament's application for prospecting rights was not first in time, ought not to have been accepted and bear no prospects of being granted.

[73] Neither the law nor the facts support the Minister's reliance on financial losses. Jaments has no right in law to apply – let alone be granted a prospecting right over a piece of land on which a section 102 consent application is pending. Factually, it cannot suffer any losses based on a non-existent right. In this way, the Minister had regard to irrelevant considerations.

[74] The Court finds the Minister's suspension decision reviewable on this basis alone.

[75] The Minister failed to apply his mind to the provisions of section 102 of the MPRDA and erred in law. Had the Minister applied his mind, he would have concluded that as Jaments' application for a prospecting license is not first in time, it ought not to be accepted. Further, no financial loss can flow from a right to which someone is not entitled. In this way, the Minister failed to apply his mind to the facts of the case.

[76] In addition, the Minister failed to consider the real and imminent irreparable harm that granting the Suspension Decision would have on Northern Coal. This Court has set out the real prejudice above, which amounts to R 14 million per month, potentially hundreds of job losses and severe environmental consequences. On this basis, also, the Minister's decision needs to be reviewed and set aside as he failed to consider all relevant facts.

[77] The second reason the Minister provided in support of the Suspension Decision is that on first sight, the Director-General's decision to grant the Section 102 Consent on 14 December 2023 contradicts his decision of 16 November 2023 to set aside the rejection of Jaments' prospecting right application.

[78] These decisions only appear contradictory on the surface and devoid of circumstances. The contradictory appearance is caused by the fact that the section 102 application took years to finalise—two years, in fact. During these two years, the internal appeal was instituted. The legal position changed between the two decisions – so they are not in effect contradictory – despite how they appear on first sight.

[79] The issue is that the legal position changed whilst the internal appeal was being considered, as the section 102 consent was granted. However, in any event, the fact that two decisions appear contradictory is not a sufficient basis to essentially withdraw a mining license.

[80] For these reasons, the Court reviews and sets aside the Minister's suspension decision

Just and Equitable Remedy

[81] Northern Coal seeks that the Court not remit the decision but rather substitute the decision of the Minister. It relies on this Court's powers in PAJA to do so. Courts must be slow to assume a discretion which has been entrusted by statute to another functionary,⁶ and that, as a general rule, the Court will not substitute its own decision for that of the administrator.⁷ Northern Coal must show that specific, exceptional circumstances permit such a substitution. Indeed, section 8(c)(ii)(aa) of PAJA provides that a Court may only do so in exceptional circumstances.

⁶ Medirite (Pty) Limited v South African Pharmacy Council 2015 JDR 0564 (SCA) at para 20

⁷ Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T) at 76D-E.

[82] Northern Coal submits, however, that exceptional circumstances are not exotic, rare, or bizarre but circumstances that sensibly justify an alternate route.⁸ It further relies on the authority of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*, where the Constitutional Court stated the factors and test for exceptional circumstances to be present before a Court ought to substitute its own decision for the administrator's if it is just and equitable which involves a consideration of fairness to all implicated parties and that the Court will consider factors such as whether the Court is in as good a position as the administrator.

[83] Guided by these principles, the Court considers the specific facts of this case. The present review does not concern a technical field where the Minister is part of a board composed of certain specialities considering the suspension application with the benefit of experience and access to relevant information or expertise sources.

[84] The review turns on the interpretation of the MPDRA. It is a matter of interpretation, not about policy, politics, or technical competencies. Here, scientific considerations do not abound. It is a purely legal issue: does section 102 require a valid right on the new area before the current area can be extended? It is purely a legal consideration.

[85] The Court weighs that the suspension decision is judicial in nature: it involves the application of law and the weighing up competing legal rights. It does not require any particular skills or expertise peculiar to the Minister.

[86] The Court also has the necessary documents to consider the issue. The Court has the documents that served before the Minister and is in the same position as the Minister when the Minister made the suspension decision.

⁸ *ABSA Bank Ltd and Another v Commissioner, South African Revenue Service* 2021 (3) SA 513 (GP) at para 27.

Gauteng Gambling Board v Silverstar Development Ltd 2005 (4) SA 67 (SCA) at para 29. 2015 (5) SA 245 (CC) at paras 47 to 55

[87] The Court also weighs that the parties do not have factual disputes or disagreements regarding the weight to be attributed to certain facts. The dispute between the parties is purely one of legal interpretation.

[88] The Court also concludes that it would be nonsensical to conclude that legally, section 102 consent does not require a valid prospecting right over the neighbouring farm but then remits the matter for consideration by the Minister. Having decided the dispute, a remittal would serve no purpose. The Minister would have no new facts or reasons and would be bound by the decision of this Court. Here, the decision to be substituted, is a foregone conclusion. In the circumstances of this matter, there is only one proper outcome at the Minister's discretion: to refuse the suspension application. To remit the matter in these circumstances would only result in a further delay of the matter.

[89] Thus, exceptional circumstances justify the Court substituting its decision for the Minister's Suspension Decision rather than remitting it back to the Minister. The Court substitutes the decision.

Declaratory relief

[90] Northern Coal seeks an order declaring that its Section 102 Application (which led to the Section 102 Consent) takes precedence over any subsequent application lodged at the DMRE. Jaments contends that such a declaration is unnecessary.

[91] The Court is, however, persuaded by Jaments' submission that the declarator serves no purpose other than to be of academic assistance. The relief granted – in particular, the substitution- means there is no need to make a formal declaration.

Costs

[92] The applicant is successful in its application and is entitled to its costs. The matter is complex. There is no existing case law on the issue, and the matter is just shy of 2000 pages long. Oral argument took the entire day, and the parties filed extensive and substantive submissions. The matter is further complex as it involves multiple applications for different rights within the MPDRA. This justifies costs on Scale C.

Conclusion

[93] The Court orders:

- a) The first respondent's decision in terms of section 96(2)(a) of the MPRDA to suspend the operation of the consent granted to the applicant by the second respondent in terms of section 102 of the MPRDA is reviewed and set aside;
- b) The first respondent's decision in terms of section 96(2)(a) of the MPRDA is substituted with the following: "*The Appellant's application to suspend the operation of the Director-General's decision to grant consent in terms of section 102 of the MPRDA to Northern Coal pending the outcome of the Appellant's appeal is dismissed.*"
- c) The fourth respondent is to pay the costs of this application, including the costs of two counsel on scale C.

I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

Counsel for the applicant: C Woodrow SC

JL Verwey

Instructed by: Briel Inc

Counsel for the fourth respondent: T Modise

Instructed by: Moorosi Attorneys

Date of the hearing: 25 June 2024

Date of judgment: 24 July 2024