



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 25781/2020

DELETE WHICHEVER IS NOT APPLICABLE

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

11/10/24



In the matter between: -

EYETHU COAL (PTY) LTD

Applicant

and

MINISTER OF MINERAL RESOURCES & ENERGY

First Respondent

DIRECTOR GENERAL: DEPARTMENT OF

MINERAL RESOURCES AND ENERGY

Second Respondent

MEC: DEPARTMENT OF MINERAL RESOURCES

MPUMALANGA PROVINCE

Third Respondent

REGIONAL MANAGER: MINERAL REGULATION

MPUMALANGA REGION

Fourth Respondent

MESSENGER TRADING CC

Fifth Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 4 October 2024.

JUDGMENT

Summary: Mining and Minerals- Prospecting Right-Lapsing of- Mining and Petroleum Resources Development Act 28 of 2002- Overlapping of rights in respect of same land and minerals-Appeal ito sec 96(1)- non compliance with requirements-failure by Director General to furnish reasons- review of decisions of Director General and Minister.

MOGAGABE AJ

INTRODUCTION

[1]

- 1.1. The genesis of this matter arises from overlapping mineral rights granted to the applicant and the fifth respondent to conduct mining activities on the same area of land and in respect of the same mineral i.e. coal.
- 1.2. At the heart of this matter lies two administrative decisions the applicant (Eyethu) seeks to declare void alternatively to review and set aside. The first relates to the decision of the second respondent (Director General), in upholding an internal appeal, initiated by the fifth respondent (Messenger Trading), in terms of sec 96(1)(a) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), against the refusal by the fourth respondent (Regional Manager) to execute the prospecting right of Messenger Trading granted over a portion of the remaining extent of the farm Suurwater 366 JS, (the disputed property). The second relates to the decision of the first respondent (Minister) in dismissing the internal appeal lodged by Eyethu, in terms of sec 96(1)(b) of the MPRDA, against the said decision of the Director General, upholding Messenger Trading's appeal (the impugned decisions).
- 1.3. Allied thereto, Eyethu seeks two declarators. Firstly, Eyethu seeks a declarator to the effect that the decision of the fourth respondent (Regional Manager) refusing to execute and register the prospecting

right so granted in favour of Messenger Trading, remains operative and in force.

- 1.4. Secondly, Eyethu seeks a declarator to the effect that the prospecting right so granted to Messenger Trading under reference MP305/1/1/2/13471PR, has lapsed and is not capable of being renewed.
- 1.5. Eyethu challenges such impugned decisions on the basis of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the principle of legality.
- 1.6. The Minister together with the officials of the Department of Mineral Resources and Energy, namely the Director General and the Regional Manager, (the State Respondents), responsible for the administration and implementation of the MPRDA, are not opposing this application, having elected not to file answering affidavits or for that matter explanatory affidavits furnishing the necessary input or elucidation relating to the decisions made by them, forming the subject matter of the litigation, for the benefit of the court. This is so, having regard to the fact that organs of state or public officers have an obligation to account to the court to ensure that all the necessary and relevant facts and information are placed before the court to assist the court in the consideration and determination of the matter i.e. to ensure the

effectiveness of the courts.¹ It is only Messenger Trading that is resisting the relief sought by Eyethu, as fully detailed hereinbelow.

- [2] Prior to dealing with the merits of the claim, it is appropriate for a proper appreciation of the matter, to provide the context that culminated in the launching of this application, as summarised hereafter.

CONTEXT

- [3] For present purposes, the salient features of this case are as follows. Eyethu is a coal mining company. Messenger Trading also operates in the mining industry. On 13 November 2007 Eyethu applied for a prospecting right to mine coal over certain farms, amongst others, the remaining extent of the Farm Doornkop 366 JS, located within the magisterial district of Emalahleni, Mpumalanga Province. The Farm Doornkop 366 JS was subsequently renamed Suurwater 366 JS, entailing that Eyethu's prospecting right was granted over the remaining extent of the Farm Suurwater 366 JS. Subsequent thereto Eyethu applied for a mining right over these farms, including the remaining extent of the farm Suurwater 366 JS, exercising the exclusive right pursuant to the provisions of section 19 (1)(b)² of the MPRDA. The mining right application was submitted to the Department on 24 November 2008 over *inter alia* the

¹ *Public Protector v South African Reserve Bank* [2019] ZACC 29 (22 July 2019); 2019 (6) SA 253 (CC) paras [152], [155], [156].

² Sec 19(1)(b) provides that subject to subsec (2), the holder of a prospecting right, has the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question.

remaining extent of the Farm Suurwater 366 JS. This mining right was subsequently notarially executed and registered in the Mining Titles Registration Office on 17 January 2013 under reference number MPT05/2013, covering inter alia, the remaining extent of the farm Suurwater 366 JS and a portion thereof (the disputed property). Thereafter Eyethu commenced its mining operations on inter alia, the remaining extent of the Farm Suurwater 366 JS.

[4] In September 2014, Messenger Trading applied for a prospecting right in terms of section 16(1) of the MPRDA³ to prospect for coal over a portion of the remaining extent of the Farm Suurwater 366 JS (the disputed property). This application was accepted by the fourth respondent (Regional Manager) on 5 March 2015, in terms of sec 16(2). Henceforth this property will for present purposes be referred to as the “disputed property”.

[5] I interpose to point out that at the time of the acceptance of Messenger Trading’s application for a prospecting right, a spatial report reflected an overlap with Superlane (Pty) Ltd’s application for a prospecting right under MP30/6/1/1/2/5078PR. However, Superlane was issued a prospecting right over a portion of Portion 4 of the Farm Driefontein 297 JS. The spatial report also reflected an overlap with Kubra Mining (Pty) Ltd under file

³ sec 16(1) provides that “any person who wishes to apply to the Minister for a prospecting right must simultaneously apply for an environmental authorisation and must lodge the application-

- (a) At the office of the Regional Manager in whose region the land is situated;
- (b) In the prescribed manner;
- (c) Together with the prescribed non-refundable application fee.”

MP30/5/1/2/2/0346MR. For present purposes, Kubra's application for a prospecting right over the disputed property is irrelevant as it was refused.

[6] On 23 September 2016, and pursuant to the provisions of section 17 of the MPRDA⁴, Messenger Trading was granted a prospecting right over the disputed property (a portion of the remaining extent of the Farm Suurwater 366 JS). It is important at this juncture, to highlight that Eyethu had no knowledge of this application by Messenger Trading for a prospecting right nor the granting thereof over the disputed property, until after the refusal by the Regional Manager to execute Messenger Trading's prospecting right as hereafter dealt with.

[7] Subsequent thereto, Messenger Trading applied for the notarial execution and registration of such prospecting right. The application for execution of its prospecting right was refused by the Regional Manager on the basis that its prospecting right overlapped with the mining right of Eyethu in respect of the (the disputed property) and the implications thereof. Mr Bonco, Messenger

⁴ Sec 17(1) provides that "the Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if –

- (a) *The applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;*
- (b) *The estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;*
- (c) *The prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;*
- (d) *The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);*
- (e) *The applicant is not in contravention of any relevant provision of this Act; and*
- (f) *In respect of prescribed minerals the applicant has given effect to the objects referred to in section 2(d)."*

Trading's sole member was verbally advised of such refusal by the Regional Manager in September 2016. Such refusal was confirmed by the Regional Manager to Messenger Trading in terms of a letter dated 12 December 2017.

- [8] On 2 August 2017 Messenger Trading in terms of sec 96(1)(a) of the MPRDA, launched an "internal appeal" to the Director General, against the refusal by the Regional Manager to execute its prospecting right and the suspension of Eyethu's mining activities on the disputed property with immediate effect, pending resolution of the matter, insofar as such mining right overlaps with that of Messenger Trading. The basis of Messenger Trading's challenge against the refusal by the Regional Manager to execute its prospecting right was to the effect that Eyethu's mining right application did not at the initial stage of the application, cover or extend over the entire remaining extent of the Farm Suurwater, but only covered a "portion or part" of the remaining extent of the Farm Suurwater and that it was only upon the issuing and notarial execution thereof by the department, that the mining right covered the entire area of the remaining extent of the farm Suurwater 366 JS including the disputed property. In other words, when Eyethu's mining right was issued, executed and registered by the Department, it covered the entire area of the remaining extent of the farm Suurwater 366 JS, including the disputed property, than was initially applied for.

- [9] On 19 February 2018 Eyethu via registered post received Messenger Trading's internal appeal. On 19 June 2018, Eyethu furnished its response to Messenger

Trading's internal appeal. In terms of this letter, Eyethu, amongst others, contended that as the internal appeal was not directed against Eyethu's mining right, it reserves "its rights to do so in an appropriate forum should the need arise." Eyethu further contended that in terms of the "Oudekraal principle" the administrative action by the Department in issuing and executing its mining right to cover the entire remaining extent of the farm Suurwater 366 JS, is treated as valid until set aside by a court of law.

[10] On 25 April 2018, Eyethu wrote a further letter directed to the Director General, supplementing its response to Messenger Trading's internal appeal. In terms thereof, it challenged the validity or propriety of such "internal appeal" on *inter alia* the failure by Messenger Trading to pay the prescribed fee of R500 which must accompany the notice of appeal as prescribed in Regulation 74(3) read with Regulation 75(1)(f) and (3) of the Regulations made under the MPRDA (the Regulations). Furthermore, it challenged such purported appeal based on the delay on the part of Messenger Trading in the late noting of the appeal and the absence of a condonation application for the late noting thereof and prayed for the dismissal of the appeal on the basis of such procedural defects. On 19 September 2018, Messenger Trading's attorneys responded thereto disputing the contentions so raised by Eyethu.

[11] On 5 December 2018, the Director General after considering Messenger Trading's "internal appeal" upheld the appeal and made the decision to the following effect:

"2. After careful consideration of the facts before me, I Adv. T Mokoena, Director-General of Mineral Resources, hereby make the following order:

- Amend the decision of the former Acting Director-General: Mineral Resources to grant a mining right to Eyethu Coal (Pty) Ltd by excluding the area covered by a prospecting right (Ref: MP30/5/1/1/2/13471PR) granted to Messenger Trading.*
- Order the Regional Manager to comply with the acceptance letter dated 23 September 2016 to execute the granted prospecting right in favour of Messenger Trading CC.*
- The Appellant [Messenger Trading] is the person whose right or legitimate expectation have been materially and adversely affected or who is aggrieved by the decision of the Regional Manager.*
- The operation by Eyethu in the portion that is covered by existing prospecting right in favour of Messenger Trading should therefore be regarded as unlawful I."*⁵

[12] Aggrieved by such decision, Eyethu on 31 January 2019 lodged an internal appeal⁶ to the Minister in terms of section 96(1)(b) of the MPRDA, against the

⁵ Caselines 007-84 to 007- 85 Annexure "EC9".

⁶ Caselines 007 86 to 007-94 Annexure "EC10"

said decision of the Director General on the grounds summarised below. In terms of such appeal, Eyethu requested the Minister to uphold the appeal and set aside the said decision so taken by the Director General.

[13] The grounds on which Eyethu challenged the decision of the Director General are inter alia summarised as follows. First, on the basis of the delay on Messenger Trading's part in lodging the internal appeal in non-compliance with the provisions of sec 96(1) of the MPRDA read with Regulation 74(1) of the Regulations made under the MPRDA, requiring an appellant to lodge such internal appeal to do so within 30 days after becoming aware of the administrative decision concerned and the absence of a condonation application condoning such non-compliance. Second, based on Messenger Trading's failure to pay the prescribed appeal fee of R500.00, when lodging the appeal in non-compliance with the peremptory provisions of Regulations 74(3) and 75(1)(f) and (3) aforementioned, contending that such non-compliance rendered the purported "internal appeal" fatally defective, with the attendant consequences that the Director General lacked the competence to have considered, entertained or adjudicated the purported "internal appeal".

[14] Whilst Eyethu was awaiting the outcome of the urgent application it had launched in the Mpumalanga High Court for the suspension of the decision or order of the Director General pending the decision of the Minister pertaining to its internal appeal, Eyethu received a directive in terms of a letter dated 19 September 2019, from the Regional Manager in terms of section 93(1)(b)(ii) of

the MPRDA, in terms of which Eyethu (as the holder of the mining right) was ordered amongst other things, to cease all mining activities on the remaining extent of the Farm Suurwater 366 JS with immediate effect and to await the outcome of its appeal to the Minister. Further that such order shall remain in force pending the final determination of the Minister in respect of the appeal in terms of section 96(1)(b) of the MPRDA. Such directive concluded to the effect that in the event of Eyethu failing to comply with such directive, the process to cancel its mining right will be undertaken.

[15] On 15 October 2019, the Mpumalanga High Court by consent granted an agreement between the parties to the effect that pending finalisation of the application alternatively the finalisation of the appeal to the Minister the order/decision of the Director General as well as the said directive of the Regional Manager were suspended and the Minister was ordered to finally adjudicate and communicate the outcome of Eyethu's internal appeal on or before 30 November 2019.⁷

[16] The Minister failed to comply with the said court order directing him to adjudicate and communicate the outcome of the internal appeal on or before 30 November 2019. On the contrary, the Minister only did so about seven months later on 2 June 2020. In terms thereof, the Minister dismissed the appeal by Eyethu and upheld "the decisions made by the Regional Manager and the

⁷ CaseLines 007-134 to 007-135; **Court order Annexure EC13.**

Director General to accept and grant an application for execution of a prospecting right to Messenger Trading in respect of the remaining extent of the Farm Suurwater 366 JS” based on the reasons set out in the letter or memorandum communicating such decision. I hasten to point out that the Minister is incorrect in characterising the reasons tendered by the Regional Manager as a “decision”. On the contrary, these are reasons⁸ given by the Regional Manager “*for the administrative decision appealed against*”, in terms of Regulation 74 (5) (a)(i)(b) read with sub-regulation (6) thereof.⁹ This entails that the only decision made by the Regional Manager in the present matter, is the refusal by the Regional Manager to execute the prospecting right of Messenger Trading.

[17] The relevant parts thereof read thus:

⁸ Caselines 007-77 to 007-81(copy of memorandum recording such reasons).

⁹ Regulation 74(5) reads: “after receipt of the notice of appeal,the Director General or the Minister as the case may be, must-

- (a) Dispatch copies thereof to-
 - (i) The person responsible for the administrative decision concerned;
 - (ii) ...
- (b) Request the person contemplated in paragraph(a) to respond as provided for in subregulation (6) and (7).
 - (6) a person contemplated in subregulation 5(a)(i) must, within 21 days from receipt of the notice of appeal, submit to the Director General or the Minister, as the case may be, written reasons for the administrative decision appealed against. (my emphasis)

“2.1 The disputed property which forms the central topic of this appeal, is a portion of the remaining extent of the Farm Suurwater 366 JS, situated in the Magisterial District of Witbank, Mpumalanga province.

2.2 Eyethu held an earlier prospecting right over Portion 24 and 27 of the Farm Driefontein 27 JS ... and the remaining extent of the farm Doornkop 366 JS. [subsequently renamed Suurwater 366 JS]. It also subsequently held a mining right in respect of ... and the remaining extent of the farm Suurwater 366 JS previously known as Doornkop 366 JS ...”

6.4 At the time when Eyethu applied for a mining right, the disputed property was not available, since it was the subject of a prospecting right and pending mining right application by Kubra Mining. The Kubra Mining right application was, however, subsequently refused. Therefore, when Eyethu’s mining right application was processed and ultimately granted, the disputed property was excluded, as it was subject to the Kubra prospecting right and by then still pending mining right application.

6.5 Eyethu’s mining right was subsequently notary (sic) executed. However, a spatial comparison between the granted and executed rights reveals a discrepancy, in that the disputed area which did not form the subject of the granting decision, is included in the executed and subsequent(sic) registered right.

6.6 *There is no record of any section 102 amendment of the mining right. According to departmental records, there was also no application, either in terms of section 16 or 22 of the MPRDA for the inclusion of the remaining extent of the Farm Suurwater into the rights of the Appellant. In her response, the Acting Regional Manager confirmed that Eyethu had included the disputed portion of the remining (sic) extent of Suurwater without following a due process.*

6.7 *On 05 March 2015, an application for a prospecting right by Messenger was accepted by the Regional Manager on the basis that it complied with necessary legislative requirements. On 23 September 2016, an application for a prospecting right by Messenger was granted for a period of three years. The granting in favour of Messenger was in respect of the disputed portion of the remaining extent of the Farm Suurwater 366 JS only.*

6.10 *(sic) it therefore follows that the Messenger acceptance and grant was made lawfully.”¹⁰*

Thereafter Eyethu launched the present application seeking the relief foreshadowed in paragraph 1 above.

¹⁰ CaseLines 007-138 to 007-140; Annexure “EC15”.

PRELIMINARY ISSUES

[18] It is necessary, at the outset, to deal with some preliminary issues that arose at the hearing of the matter. These are related to the leave by the parties to file supplementary affidavits as follows. Messenger Trading's leave to file a supplementary opposing affidavit seeking *inter alia* to withdraw an admission contained in its answering affidavit dated 9 February 2021 and abandoning a point *in limine* raised in such affidavit concerning the administrative nature of the impugned decisions of the Minister and Director General. In turn, Eyethu sought leave to file its first supplementary replying affidavit in response to Messenger Trading's supplementary opposing affidavit, followed by Messenger Trading's second supplementary answering affidavit to Eyethu's supplementary replying affidavit. In response thereto, Eyethu sought leave to file a conditional second supplementary replying affidavit to Messenger Trading's second answering supplementary affidavit. Eyethu does not oppose the filing of Messenger Trading's supplementary answering/opposing affidavits subject to the court granting it leave to file its supplementary replying affidavits. In terms of rule 6(5)(e) of the Uniform Rules of Court, a court is endowed with a discretion to permit the filing of further affidavits provided good reason or good cause has been shown or proved for doing so and the absence of prejudice to the other party. In the circumstances, I am satisfied that Messenger Trading and Eyethu have shown or established good cause for admitting these further sets of affidavits. Having regard to the nature of the matter and the contents of these supplementary affidavits, I am of the considered view that admitting such further

sets of affidavits will enable the court to consider the full conspectus of the evidence in these proceedings with the attendant consequences of curing any prejudice that could be suffered by any of the parties in the determination of this matter. Neither party has raised any prejudice in this regard. Accordingly, in the exercise of the court's discretion and in the interests of justice the court admits the full sets of supplementary affidavits of the parties to attain a fair and proper ventilation of the matter. I turn now to deal with the points in limine raised by Eyethu.

EYETHU'S POINTS *IN LIMINE*

Messenger Trading's lack of *locus standi*

- [19] Eyethu challenges the *locus standi* of Messenger Trading to oppose the present application and in particular the relief sought by Eyethu in this application as foreshadowed in the notice of motion as outlined above. This point *in limine* of lack of *locus standi* on the part of Messenger Trading relates to the declaratory order sought in prayer 4 of the notice of motion to the effect that Messenger Trading's prospecting right has lapsed and is not capable of being renewed.
- [20] This point *in limine* is predicated on two grounds. First, it is based on the admission by Messenger Trading in paragraph 41 of its opposing affidavit to the effect that its prospecting right lapsed prior to its renewal and if so, such admission signifies the end of Messenger Trading's opposition or resistance to

the application and in particular the relief sought by Eyethu herein, in that the subject matter of Messenger Trading's "complaint(s) falls away, both in fact and law". Such admission is contained in paragraph 41 of Messenger Trading's answering affidavit to the following effect:

"41. To cut a long story even shorter, the Fifth Respondent [Messenger Trading] has now applied for the renewal of the prospective right after it lapsed on the 18th September 2019 and the renewal was granted and executed somewhere in 2020".

[21] In the supplementary opposing affidavit, Messenger Trading tenders reasons explaining the incorrectness of such admission to the following effect. That the prospecting right (which is common cause) was granted to it on 23 September 2016 and it applied for the renewal thereof on 19 September 2019, as is apparent from a copy thereof, annexure "**SB8**" to the opposing affidavit¹¹, evidencing that the renewal application was submitted before its prospecting right had lapsed, explaining that reference to "the renewal thereof after the right had lapsed" in the answering affidavit, constituted an "unfortunate choice of wording" i.e. an error. Furthermore, it pointed out that the prospecting right was subsequently renewed on 30 July 2020, as per a copy of the renewed prospecting right annexed to the supplementary affidavit marked annexure

¹¹ Caselines 009-60 Annexure "**SB8**" letter by Acting Regional Manager dated 19 September 2019.

“SB15”. This explanation is not controverted by Eyethu, nor does Eyethu object to the withdrawal of the admission.

[22] In the circumstances, I am satisfied that a proper case for the withdrawal of such admission has been made and in the absence of any prejudice shown by Eyethu,¹² the withdrawal of such admission is in the circumstances granted.

[23] The second ground challenging the lack of *locus standi* on Messenger Trading’s part is based on the fact that on its own version Messenger Trading’s prospecting right lapsed on 29 or 30 July 2023, having been renewed on 30 July 2020 for a period not exceeding three years, as per the said copy of the renewed prospecting right, annexure “SB15” to the supplementary opposing affidavit.

[24] In developing this argument, Eyethu submits that in terms of the provisions of section 18(4) of the MPRDA as amended, a prospecting right “may be renewed once for a period not exceeding three years”. As such, so it is submitted, that having regard to the fact that Messenger Trading was in terms of section 18(4) of the MPRDA only allowed to renew its prospecting right once on 30 July 2020 for no longer than three years, this entailed that such prospecting right lapsed on 29 or 30 July 2023, with the attendant consequences that as from this date, such prospecting right was not capable in law of any further renewal

¹² *Bellairs v Hodnett and Another* 1970 (1) SA 1109 (A) at 1150-1151; *Blose v Ethekewini Municipality* [2015] JOL 33306 (SCA) para [6]

as stipulated in terms of section 18(4). The nett effect thereof being that Messenger Trading's rights, title and interests in (a) opposing the relief so sought herein by Eyethu as outlined above, and (b) its rights, title and interest in the disputed property over which Eyethu has the mining right, in law expired by effluxion of time and became moot as at 29 or 30 July 2023.

- [25] Section 17(6) of the MPRDA expressly stipulates that a prospecting right remains valid for a maximum period not exceeding five years and Section 17(5) stipulates that a prospecting right granted in terms of subsection (1) thereof, comes into effect on the effective date. For present purposes, the period in terms of which Messenger Trading's prospecting right endured is calculated from the date on which it was informed of the renewal of the right,¹³ namely 30 July 2020. On this date Messenger Trading became the holder of a valid prospecting right. It is immaterial for purposes of calculating or computing the period of the duration of this right, that this right had not yet become effective as it still had to be executed. This being so, Messenger Trading's prospecting right had expired by the effluxion of time on 29 or 30 July 2023, i.e. three years after the date of 30 July 2020, on which it had been notified of the granting of the prospecting right. As such, Messenger Trading's prospecting right had lapsed due to its expiry by effluxion of time on 29 or 30 July 2023. Accordingly, it follows in law that such prospecting right had become moot as of this date, with the attendant consequences that as of this date (29 or 30 July 2023),

¹³ Minister of Mineral Resources and Others v Mawetse (SA) Mining Corp [2015] 3 All Sa 408 (SCA) para [21]

Messenger Trading no longer had a direct and substantial legal interest in the outcome of the relief sought herein, in that its substantive rights it relied on in terms of section 5 of the MPRDA, expired *ex lege* and due to effluxion of time on 29 or 30 July 2023.

[26] In the circumstances, Messenger Trading lacks any *locus standi* to oppose the relief sought by Eyethu as so foreshadowed in the notice of motion as outlined above, and in particular the declaratory order sought in prayer 4 of the notice of motion to the effect that Messenger Trading's prospecting right has lapsed and is in law incapable of being renewed. This point of lack of locus standi on the part of Messenger Trading is not only dispositive of the declaratory order sought by Eyethu as per prayer 4 of the notice of motion, to the effect that as of 29 or 30 July 2023, Messenger Trading's prospecting right had lapsed and is in law not capable of being renewed, with the attendant consequences that as of 29 or 30 July 2023, such right had become moot, thus dispositive of Messenger Trading's resistance of the entire matter i.e. opposing the further relief sought by Eyethu as outlined above. This being so, *cadit quaestio*.

[27] In the circumstances, it is not necessary to deal with the point *in limine* raised by Messenger Trading relating to *lis pendens*. In any event, this point of *lis pendens* is based on the urgent application launched by Eyethu in the Middleburg High Court, Mpumalanga, in essence seeking, pending finalisation of Eyethu's internal appeal to the Minister, the suspension of the decision issued

by the Director General on 5 December 2018 as aforementioned.¹⁴ This point of *lis pendens* is in the circumstances misplaced if not misconceived, simply by virtue of the fact that the relief so sought by Eyethu in the urgent application before the Middelburg High Court is simply not the same or similar relief between the same parties based on the same or similar cause of action as is in the present application.¹⁵

[28] It follows then that even if I had dismissed the point *in limine* pertaining to lack of *locus standi* on the part of Messenger Trading, based on its prospecting right having not expired by effluxion of time, this point *in limine* of *lis pendens* would nonetheless still be dismissed.

PROCEDURAL DEFECTS BESETTING MESSENGER TRADING'S INTERNAL APPEAL

[29] Eyethu challenges the decision of the Director General on the basis of procedural defects besetting the internal appeal so lodged by Messenger Trading. These procedural defects relate firstly, to the delay on Messenger Trading's part in lodging the internal appeal within the prescribed 30-day time limit as so stipulated in terms of sec 96(1) of the MPRDA and the absence of an application condoning such non-compliance. Secondly, it relates to the failure on Messenger Trading's part to pay the prescribed appeal fee in the sum

¹⁴ CaseLines 007-129 to 007-133, Notice of Motion Annexure "EC12" at 007-130.

¹⁵ *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 279 (EC) at para 28.

of R500.00 at the time of lodging the internal appeal in non-compliance with the provisions of Regulation 74(3) read with Regulation 75(1)(f) and (3) of the Regulations made under the MPRDA, as more fully dealt with hereafter. In this regard, Eyethu contends that such procedural defects besetting the lodging of the internal appeal, entailed that the Director General lacked competence to consider, entertain or adjudicate the purported “internal appeal”, thus vitiating or rendering nugatory the said decision of the Director General upholding the appeal. The nett effect thereof being that if the Director General lacked the competence to consider, entertain or adjudicate the defective appeal by Messenger Trading, that should have been the end of the matter, i.e. *cadit quaestio*. I turn now to deal in detail with such procedural defects.

AD DELAY AND CONDONATION

[30] Eyethu pointedly raised the issue of excessive or unreasonable delay on Messenger Trading’s part in lodging the internal appeal, in attacking the propriety and competency of the Director General in considering, entertaining or adjudicating Messenger Trading’s internal appeal against the refusal by the Regional Manager to execute its prospecting right over the disputed property, overlapping with Eyethu’s mining right. The facts relating to this issue are set out in paras [4] to [8] above. It is unnecessary to repeat them save for the following. It is common cause on Messenger Trading’s own version that initially

the decision of the Regional Manager to refuse to execute Messenger Trading's prospecting right was verbally communicated by the Regional Manager in September 2016 to Messenger Trading (via Mr. Bonco, its sole member)¹⁶. Thereafter it was confirmed in writing by the Regional Manager in December 2017¹⁷. Messenger Trading only lodged the internal appeal on 11 August 2012¹⁸, in terms of a letter dated 2 August 2017¹⁹. The assertion by Messenger Trading to the effect that it first became aware of the refusal by the Regional Manager on receiving the letter in December 2017 and lodged the internal appeal on 11 January 2018, is irreconcilable with the objective facts as evidenced by the appeal letter dated 2 August 2017, lodged on 11 August 2017 as aforesaid, rendering such assertion unmeritorious and unacceptable.

- [31] In terms of section 96(1) of the MPRDA dealing with internal appeals (as fully quoted below), Messenger Trading was obliged to launch such internal appeal within 30 days from the date of it "becoming aware of such administrative decision". Likewise, Regulation 74(1) of the Regulations promulgated under the MPRDA provides that such internal appeal must be lodged within 30 days after an applicant has become aware or should reasonably have been aware of the administrative decision concerned. This in the circumstances entails that

¹⁶16 Caselines 009-17 Messenger Trading's Ans Aff para 21 by Mr Bonco to the following effect: "in the same month of September 2016, I approached the then Regional Manager of the Department ... (Mr Aubrey Tshivandeko) and requested to know when will the prospecting right be executed. The above Regional Manager verbally informed me that the Right cannot be executed because he discovered that there exists an overlap in the aforesaid portion with another mining right."

¹⁷ Caselines 009-18 Answering Affidavit para 26

¹⁸ Caselines 007- 71, email dated 14 August 2012 by a certain Ms Kholofelo Mocumi from the Department's legal services.

¹⁹Caselines 007-54 to 007-56 Annexure "EC4".

Messenger Trading launched the internal appeal about eleven months late, after having been so informed (on its own ipse dixit) by the Regional Manager in September 2016 of the refusal to execute its prospecting right.

[32] In developing this argument, Eyethu asserts that in the absence of an application on Messenger Trading's part seeking condonation for such excessive or unreasonable delay, there was no proper or valid appeal before the Director General, entailing that it was not competent for the Director General to consider, entertain or adjudicate the purported defective "internal appeal". In other words, so contends Eyethu, the failure by Messenger Trading to apply for condonation for the delay rendered the purported appeal fundamentally defective, and as such fatal to the consideration and adjudication by the Director General of the internal appeal. As such, it was incompetent or impermissible for the Director General to consider, adjudicate or decide the defective "internal appeal".

[33] As alluded to above, the Director General elected not to participate in these proceedings or file an answering affidavit furnishing reasons for adjudicating such defective "internal appeal", in the absence of a condonation application by Messenger Trading advancing an explanation let alone a reasonable one for the condonation of the excessive delay i.e. furnishing "just cause" for such remissness.

[34] The key issue to be decided in this regard is clearly whether it was competent for the Director General to consider let alone decide or adjudicate the defective appeal or whether he applied his mind properly to the question whether condonation for the excessive or unreasonable delay in launching the internal appeal, should be granted or not. In **Aurecon**,²⁰ the Supreme Court of Appeal pronounced that the relevant factors to be considered in deciding whether condonation should be granted are: the nature of the relief sought; the extent and costs of the delay; its effect on the administration of justice; the reasonableness of the explanation for the delay; the importance of the issues raised; and the prospects of success on review.

[35] In the absence of a condonation application on the part of Messenger Trading furnishing a full and proper explanation for such delay or remissness, it follows that there was no evidence or evidentiary material in terms of which the Director General could have considered the factors listed above, which factors are key and relevant in determining whether condonation for such delay should be granted or not, when he (the Director General) adjudicated the defective “appeal” and upheld same as outlined above. This being so, I conclude that such excessive or unreasonable delay in lodging the internal appeal coupled with the absence of an application condoning such delay, was in non-compliance with the said legislative prescripts, rendering the purported internal appeal fundamentally defective, with the attendant consequence that it was not

²⁰ **Aurecon South Africa (Pty) Ltd v Cape Town City** 2016 (2) SA 199 (SCA) para 17, endorsed by the Constitutional Court in **Cape Town v Aurecon SA (Pty) Ltd** 2017 (4) SA 223 (CC) para 18.

competent for the Director General to consider, decide or adjudicate the defective “internal appeal”, vitiating the administrative decision of the Director General upholding Messenger Trading’s defective “internal appeal”, rendering such administrative action improper, invalid, unlawful. On this score the decision of the Director General falls to be set aside in terms of section 6(2)(d) of PAJA, having been influenced by an error of law, in accordance with the decision of the Supreme Court of Appeal in **Sand Hawks**.²¹ As such, this conclusion is dispositive of the matter. Be that as it may, I turn to consider the second procedural defect raised by Eyethu relating to the failure of, Messenger Trading to pay the prescribed appeal fee when lodging the notice of appeal as detailed hereafter.

AD FAILURE TO PAY THE PRESCRIBED APPEAL FEE

[36] Allied to this, is the issue of the failure by Messenger Trading to pay the prescribed appeal fee at the time of lodging the internal appeal to the Director General, in non-compliance with the provisions of section 96(1)(a) of the MPRDA read with the provisions of Regulation 74(1) and (3) and Regulation 75(1)(f) and (3) of the Regulations made under the MPRDA.²²

[37] For present purposes, the relevant part of sec 96 (1) reads:

²¹ See fn 29 infra.

²² Mineral and Petroleum Resources Development Regulations published under Government Notice R527, Government Gazette 26275 dated 23 April 2004 as amended.

“96 Internal appeal process and access to courts

(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days becoming [sic] aware of such administrative decision in the prescribed manner to –

(a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act.

(b) The Minister, if it is an administrative decision that was taken by the Director General or the designated agency.”

Regulation 74(1) and (3) provides thus:

(1) Any person who appeals in terms of section 96 of the Act against an administrative decision, must within 30 days after he or she has become aware of the (sic) or should reasonably become aware of the administrative decision concerned, lodge a written notice of appeal with the Director-General or the Minister, as the case may be.

(2) ...

(3) The appeal fee specified in regulation 76 [75](1)(f) must accompany a notice of appeal. (my emphasis)

Regulation 75(1)(f) and (3) under Chapter 4 provides as follows:

“75. APPLICATION FEES FOR PERMISSIONS, PERMITS, RIGHTS AND APPEALS

(1) Application fees payable in terms of Chapter 4 of the Act, shall be as follows:
in relation to –

(f) the lodging of an appeal: R500,00.

(2) ...

(3) The fees specified in this Chapter shall be paid when the application or appeal concerned is lodged and shall not be refundable: Provided that the fee payable in respect of an appeal shall be returned to the applicant if his or her appeal is upheld”. (my emphasis)

[38] These provisions are manifestly clear. A person aggrieved by an administrative decision taken by a regional manager in terms of the MPRDA may in the prescribed manner appeal such decision within 30 days of becoming aware thereof to the Director General or any officer to whom the power has been

delegated or duty assigned by or under the MPRDA. "Prescribed" is defined in terms of the MPRDA to mean "prescribed by regulation". The procedure for doing so is prescribed in Regulation 74(1) and (3) read with Regulation 75(1)(f) and (3). In terms of Regulation 74(1) such appeal should be made by lodging a written notice of appeal to the Director General, within 30 days after the applicant or appellant "has become aware or should reasonably become aware of the administrative decision concerned". Regulation 74(3), stipulates that the "appeal fee must accompany the notice of appeal". This is reinforced in Regulation 75(3) to the effect that the fees for an appeal shall be paid when the appeal is lodged. The fees specified in Regulation 75(1)(f) for lodging an appeal is fixed in the sum of R500,00.

[39] It is common cause if not undisputable that Messenger Trading's notice of appeal to the Director General was dated 2 August 2017 and was lodged on or about 11 August 2017.²³ In this regard, reference is made to an email from the Department dated 14 August 2017 addressed to Messenger Trading to the following effect:

"We refer to your notice of appeal dated 2 August 2017 received on 11 August 2017. In terms of Regulation 75, you are requested to pay the sum of R500,00 when lodging an appeal. the appeal fee may be paid in cash or by electronic transfer. Should you elect the latter option, you are requested to liaise with this

²³ CaseLines 007-71 email dated 14 August 2017 by a certain Ms Kholofelo Mocumi from the Department's legal services.

office beforehand to be allocated a unique reference number for the deposit. The contact person is Ms Luwinda Viljoen; telephone number (012) 444 3380 or Ms Mpho Manyuwa on (012) 444 3381. (my emphasis)

You must then submit proof of payment to Directorate: Legal Services, Fax No: 086 533 558 or by email to Kholofelo.mocumi@dmr.gov.za. You are advised that the appeal will not be processed further until you have complied with the above.”²⁴

[40] It is also common cause if not undisputable having regard to the contents of the said email from the Department, that at the time of so lodging the notice of appeal, same was not accompanied by the prescribed fee of R500,00 as so stipulated in Regulation 74(3) read with Regulation 75(1)(f) and (3). This entails that the lodging of the notice of appeal was in non-compliance with the peremptory provisions of section 96(1)(a) of the MPRDA enjoining the aggrieved party to lodge the appeal in the manner as prescribed in terms of Regulation 74(1) and (3) read with Regulation 75(1)(f) and (3).

[41] It is furthermore common cause if not undisputable that in terms of the said email correspondence between Messenger Trading and the Department, despite Messenger Trading being advised of the importance of the payment of the prescribed fee, it nonetheless failed to do so from August 2017 until January

²⁴ CaseLines 007-71.

2018, constituting non-payment thereof for a period of about 4 to five months. It is apparent from Messenger Trading's email correspondence dated 10 January 2018, that Messenger Trading only undertook to pay the prescribed fee the next day i.e. 11 January 2018 as per the email of Mr Bonco to the Department to the following effect: *"Please find the appeal document as requested and I will come tomorrow to pay for the appeal."*²⁵ It is important to note that despite such undertaking, there is no evidentiary proof in the papers that such payment was indeed made, i.e. no proof of payment.

- [42] The provisions of Regulation 74(1) and (3) read with Regulation 75(1)(f) and (2), are not only clear but peremptory. These Regulations clearly, unambiguously and unequivocally enjoin a party aggrieved by an administrative decision of the Regional Manager to pay the prescribed fee of R500,00 simultaneously or at the same time when lodging the notice of appeal. In other words, these Regulations obliges a party aggrieved by the administrative decision of the Regional Manager when lodging a notice of appeal against such administrative decision, to ensure that the lodging or submission of the notice of appeal is accompanied by payment of the prescribed fee of R500.00. Failure to pay the prescribed fee at the time of lodging the notice of appeal, renders the notice of appeal non-compliant with these peremptory provisions, with the attendant consequences of rendering defective the notice of appeal. The nett effect thereof is that Messenger Trading's failure to pay the prescribed fee at

²⁵ Caselines 007-117 Annexure "E"

the time of lodging the notice of appeal on 11 August 2017, constituted a violation of these peremptory provisions, and as such fatal to the validity of the notice of appeal.

- [43] A proper construction of these Regulations clearly indicates that what is required is actual payment of the appeal fee when lodging the notice of appeal i.e. proof of actual payment of the appeal fee must accompany the lodging of the notice of appeal. This is so, in that a proper construction of these regulations shows that such an “internal appeal” by an applicant or appellant comprises of (i) a written notice of appeal accompanied by (ii) payment of the appeal fee in the sum of R500,00. This then is the form of the contemplated “internal appeal”, and no other, which was required to be lodged by Messenger Trading with the Director General as so contemplated in sec 96(1) read with Regulation 74(1) and (3) and Regulation 75(1)(f) and (3). These regulations properly construed are clear, unequivocal and unambiguous. This is so, in that on more than one occasion, it is stipulated that a notice of appeal must be accompanied by payment of the prescribed fee. As such, the purported “internal appeal” lodged by Messenger Trading was non-compliant with the requirements of these regulations and as such defective, with the attendant consequences that the Director General was precluded from considering, adjudicating or entertaining the defective appeal. On this score too, it was likewise not competent for the Director General to consider, decide or adjudicate such defective appeal, as the failure to make such payment at the time of lodging the appeal or late payment thereof, is fatal not only to the validity of the defective appeal but also to the

consideration and adjudication by the Director General of such fundamentally defective appeal and the outcome thereof, with the attendant consequence of vitiating or rendering nugatory his decision in upholding the appeal as per the letter dated 5 December 2018, as afore-quoted above.

[44] I turn now to deal with the supposition that the said regulations accorded or conferred on the Director General a discretionary power to condone such procedural defect, assuming that in the exercise of such discretion, the Director General decided to consider and adjudicate the appeal, notwithstanding it being non-compliant with the said requirements. An explanatory affidavit by the Director General on the matter would have been very useful in assisting the court in this regard. As the existence and authority of the regulations are founded on the MPRDA, they are regarded as subordinate legislation and interpreted accordingly.

[45] The general principle is that an administrator or administrative authority has no inherent power to condone non-compliance with a peremptory requirement. Such administrator or administrative authority can only do so, if accorded the discretionary power to do so. It cannot be gainsaid that the Director General derives his/her powers and authority to consider, adjudicate or decide an appeal, from the empowering law read in conjunction with the relevant applicable regulations.²⁶ Where these legislative enactments confers or

²⁶²⁶ Sec 96(1)(a) of the MPRDA read with Regulation 74(1)

accords the Director General no discretion, the Director General has none. As such, the key question whether such discretion is conferred or accorded to the Director General depends on a proper interpretation of these legislative enactments.

[46] It cannot be gainsaid that a proper interpretation of the plain wording of the provisions of Regulation 74(3), clearly and plainly states that the appeal fee “must accompany the notice of appeal”. In turn Regulation 75(3) is likewise couched in peremptory terms i.e. the specified appeal fee “shall be paid when the application or appeal concerned is lodged ...”. The general principle of interpretation is that the wording or language of an imperative nature such as “shall” and “must”, are to be construed as peremptory instead of directory, unless there are circumstances negating such interpretation. In the final analysis such language leaves no room for any other construction, permitting or conferring a discretion on the Director General’s part to condone non-compliance.

[47] It is apposite in the circumstances, to quote the pronouncements of the Supreme Court of Appeal in **Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd**,²⁷ relating to timeous and proper

²⁷ 2004 (1) SA 308 (SCA) paras [31], [32], [34]

payment of a peremptory fee and discretion to condone non-compliance thereof, to the following effect:

" [31] As a general principle an administrative authority **has no power to condone failure to comply with a peremptory requirement**. It only has such power if it has been afforded the discretion to do so (see for example, *Le Roux and another v Grigg-Spall* 1946 AD 244 at 252; *SA Cooperative Citrus Exchange Ltd v Director General: Trade and Industry* 1997 (3) SA 326 (SCA) [1997] 2 B All SA 321...)

[32] Nevertheless, it cannot be ignored that the provisions of the invitation pertinent to the *Pepper Bay* case, on their plain wording, clearly state that the application fee must be paid at the time that the application is lodged. Paragraphs 15 and 16 of the instructions are similarly couched in peremptory terms. An applicant 'must pay' the application fee and 'must pay the application fee promptly and timeously'. The general principle is, of course, that language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg *Sutter v Scheepers* 1932 AD 165 AT 173-4)...
- an application submitted without proof of proper and timeous payment will not be considered (cf *Sutter v Scheepers supra* 174)

[34] if the requirement is peremptory, failure to comply will result in the application not being considered".

[48] As the requirement that the appeal fees must accompany the notice of appeal is a peremptory one, failure to comply therewith has the attendant consequences of the appeal not being considered, adjudicated or entertained, due to such fundamental and material defect besetting the appeal. As such, I conclude that these regulations do not confer a discretion on the Director General to condone such defect besetting the lodging of the internal appeal by Messenger Trading. Eyethu raised the same fundamental defects in respect of the appeal lodged to the Minister against the decision of the Director General upholding Messenger Trading's defective appeal. These regulations likewise do not confer any discretion on the Minister to condone non-compliance with such procedural defects. The discretion conferred on the Director General and the Minister in terms of Regulation 74(4)²⁸ is expressly confined or limited to condoning the late noting of an appeal i.e. the delay in noting the appeal within the prescribed 30-day time limit. As alluded to above, the absence of a condonation application by Messenger Trading, was fatal to the exercise of such discretionary by the Director General and the Minister, condoning the delay on the part of Messenger Trading in noting its appeal.

[49] Having no discretion to condone non-compliance with such peremptory requirements relating to the payment of the prescribed fees, the Director

²⁸ Regulation 74(4) reads "the director-general or the Minister, as the case may be, may in his or her discretion and on such terms and conditions as he or she decide, condone the late noting of an appeal".

General and for that matter the Minister were likewise precluded from considering, adjudicating or entertaining the appeal. The Director General and the Minister's conduct in considering or adjudicating the appeal amounted to the exercise of an unauthorised discretion, which conduct was *ultra vires*, invalid and unlawful.

[50] For these reasons, both the Director General and the Minister were precluded from considering, deciding or adjudicating the respective appeal(s).

[51] In any event, assuming that these Regulations do not preclude the Director General or the Minister from condoning non-compliance by an aggrieved party in paying the prescribed fee timeously i.e. condoning late payment of the prescribed fee, it is common cause if not undisputable that Messenger Trading never applied for such condonation. As such, the absence of any condonation application by Messenger Trading is fatal to the exercise of the discretionary powers on the part of the Director General or the Minister to decide whether to grant such indulgence or not. Hence, neither the Director General nor the Minister for that matter, made any reference in their respective decisions to a condonation application by Messenger Trading or a finding or decision pertaining to an application by Messenger Trading condoning any failure on its part to pay the prescribed fee or late payment thereof. In the circumstances, the failure by Messenger Trading to pay the prescribed appeal fee in compliance with the provisions of Regulation 74(1) and (3) read with Regulation 75(1)(f) and (3), or the absence of an application on its part condoning the failure to do so

or late payment thereof, (coupled with the failure to apply for the condonation of the unreasonable/excessive delay in noting the appeal), was fatal to the validity of the defective appeal, precluding the Director General from considering, adjudicating or deciding Messenger Trading's defective appeal as well as and the Minister from doing so, thus vitiating the outcomes thereof.

- [52] From the reading of the entire papers herein, it is manifestly clear, that the Director General did not consider the basic factors so catalogued in **Aurecon**, constituting trite factors, when considering a condonation application, when upholding Messenger Trading's appeal, nor did the Minister do so when upholding "the decision of the Director General to accept and grant an application for execution of a prospecting right to Messenger Trading in respect of the remaining extant of the farm Suurwater 366 JS" and dismissed Eyethu's appeal. The Director General and the Minister elected not to participate in the present application. Nor did they file at least explanatory affidavits for the benefit of the court. The nett effect thereof is that both have proffered no reasons regarding considering and adjudicating the appeal(s) in the absence of the condonation application by Messenger Trading. In the circumstances, I am impelled to the conclusion that the decisions of the Director General taken on 5 December 2018 concerning the internal appeal lodged by Messenger Trading and that of the Minister, taken on 2 June 2020 in connection with the internal appeal so lodged by Eyethu, falls to be declared unlawful and set aside pursuant to the provisions of sec 6(2)(d) of PAJA, having been influenced by a material

error of law, in line with the latest decision of the Supreme Court of Appeal in **Sand Hawks**²⁹.

[53] In the circumstances, the cumulative effect of these issues is dispositive of the entire matter. Put otherwise, all these issues are cumulatively dispositive of the entire matter. However, for the sake of completeness, I deem it appropriate in the circumstances to consider the merits of the matter as detailed hereinafter

AD MERITS

[54] The dispute forming the subject matter hereof revolves around the disputed property. Messenger Trading accepts that Eyethu is the registered holder of the mining right over the remaining extent of the farm Suurwater 366 JS. However, Messenger Trading contends that the disputed property over which it holds a prospecting right, did not initially form part of Eyethu's mining right application over the remaining extent of the farm Suurwater 366 JS, but was wrongly included in such mining right by the department, when executing and registering Eyethu mining right, entailing that this is a matter concerning overlapping rights,³⁰ placing reliance on the impugned decisions of the Director General upholding Messenger Trading's appeal against the refusal by the Regional Manager to execute its prospecting right in respect of the disputed

²⁹ **Sand Hawks (Pty) Ltd and Ano v Labonte 5 (Pty) Ltd and Others (190/2023) [2024] ZASCA 122 (16 August 2024)** paras [21], [22], [26]

³⁰ **Minister of Mineral Resources & Others v Sishen Ore Co (Pty) Ltd & Another 2014 (2) SA 603 (CC)** paras [73], [81], [106] and [118].

property and that of the Minister dismissing Eyethu's appeal against the decision of the Director General upholding Messenger Trading's appeal. This then entails the evaluation of the correctness, propriety and lawfulness of the said decisions of the Director General and that of the Minister.

- [55] In essence then, Eyethu challenges the decisions by the Director General and the Minister (state respondents) to accept and grant an application for execution of a prospecting right to Messenger Trading in respect of the disputed property, maintaining that the refusal by the Regional Manager to execute Messenger Trading's prospecting right was correct, on account of the grant and execution of its mining right over the disputed property, contending that such administrative actions (decisions) by the state respondents are void or fall to be reviewed and set aside, for the reasons as more fully outlined below.

AD THE DECISION OF THE DIRECTOR GENERAL

- [56] It is common cause if not undisputable that Messenger Trading lodged an appeal to the Director General against the refusal by the Regional Manager to execute its prospecting right over the disputed property, on the basis that such prospecting right was in conflict or overlapped with the mining right granted and executed in favour of Eyethu over the same disputed property for the same mineral, as set out above. I interpose to point out that at all times material hereto, Eyethu was unaware that Messenger Trading had applied for and was granted a prospecting right over the disputed property in respect of which

Eyethu was a registered holder of a mining right, until it received correspondence from the Director General about the appeal by Messenger Trading.

- [57] Messenger Trading's challenges such refusal by the Regional Manager based on the narrative summarised as follows. At the time Eyethu applied for a prospecting or mining right in respect of *inter alia* the disputed property, there was an application pending for a mining right by an entity called Kubra Mining (Pty) Ltd over the disputed property, entailing that Eyethu's application for a mining right in respect thereof could not be accepted or granted due to such overlapping. At the time that Messenger Trading submitted an application for a prospecting right in respect of the disputed property on 9 September 2014, Kubra's prospecting right in respect of the disputed property had lapsed. It's mining right was refused, entailing that the disputed property was then available for consideration, hence Messenger Trading's application was accepted by the Department on 5 March 2015. The prospecting right was granted to it on 23 September 2016 over such disputed property. When the department was supposed to execute the prospecting right, Messenger Trading was informed by the Regional Manager that its prospecting right overlapped with that of Eyethu, hence the Regional Manager refusing to execute its prospecting right. Messenger Trading contends that the disputed property in respect of which Kubra had previously applied for a mining right, is the property over which the Department granted it the prospecting right on 23 September 2016. Messenger Trading points out that initially Eyethu applied for and was granted the mining

right over the remaining extant of the farm Suurwater 366 JS, excluding the disputed property due to the pending Kubra application as aforesaid. However, when the Department registered and executed Eyethu's mining right over the remaining extant of the farm Suurwater 366 JS, it erroneously included the disputed property in such mining right, showing 2418.81 hectares instead of the 1186.14 hectares Eyethu applied for and was so granted the mining right. The nett effect thereof being that despite Eyethu's mining right being granted over the remaining extant of the farm Suurwater 366 JS, the Department when executing and registering such right, erroneously or wrongly included the disputed property in such mining right.

[58] The Director General upheld Messenger Trading's appeal and made the decision as outlined above. The nett effect thereof was that the Director General ordered the reduction of Eyethu's mining right by excluding the area covered by the prospecting right granted to Messenger Trading (i.e. the disputed property) and ordered the Regional Manager to execute Messenger Trading's prospecting right granted over the disputed property. The Director General also declared the mining activities operated by Eyethu over such disputed property, as unlawful.

[59] I deem it imperative to highlight the fact that the Director General when making such decision failed to give reasons therefor. In our constitutional democracy based on the rule of law and in the interests of an open, transparent, accountable and proper administration of justice, the Director General as an

organ of state, administrator or public official exercising public powers is obliged to furnish reasons for the benefit not only of the parties but the public at large, why the administrator made such decision. In addition, an appellate forum or tribunal has a similar interest regarding the reasons why the administrator made the decision, in determining whether such decision was correct or proper. Furnishing reasons for the decision provides the assurance that an administrator, adjudicator or presiding officer did not *inter alia* act arbitrarily or actuated by ulterior motives or bias, for the maintenance of public confidence in the administration of justice, particularly in a state founded on the values of an open, transparent, democratic and accountable government.

- [60] Eyethu challenges such decision on essentially five grounds as follows. Firstly, Eyethu asserts that its mining right was lawfully and properly lodged, accepted, granted, registered and notarially executed over the remaining extent of the farm Suurwater 366 JS, including the disputed property, contending that such mining right (albeit erroneously executed to include the disputed property), remains in extent, is enforceable, operative and binding against third parties, until set aside by a court of law, entailing that whatever its defects, Eyethu's application for a mining right, the grant, execution and registration and thereof in January 2013 remained in extent and operative when Messenger Trading applied for such prospecting right in September 2014, accepted in March 2015 and awarded or granted the prospecting right on 23 September 2016. In support thereof, Eyethu invokes the *Oudekraal/Kirkland* principle or doctrine.

[61] In developing this argument, Eyethu contends that neither Messenger Trading nor the Department have ever challenged, whether by internal appeal, judicial review or collateral application (counter application), the acceptance, grant, execution and registration of its mining right to include the disputed property. As such, its mining right remains extant until set aside by a competent court of law. Therefore, it was not competent or permissible for the Director General to unilaterally reduce the extent of the area of land covered by such mining right, by excluding the disputed property or area of land covered by Messenger Trading's prospecting right, until such mining right was reviewed and set aside by a court of law. As such, the decision of the Director General was invalid, irregular, improper and unlawful and falls to be reviewed and set aside on this basis, contending that an organ of state or state officials, cannot simply ignore its own binding decisions on the basis that they are a nullity or invalid. In other words, an organ of state or public official (like the Director General *in casu*) cannot usurp the role of the courts in determining the validity or legality of such administrative action, by taking it upon themselves to pronounce on the legality or validity thereof.

[62] The Constitutional Court in **Aquillia Steel**³¹ per Cameron J, clarified the Oudekraal/Kirkland principle to the following effect:

³¹**Aquillia Steel (SA) v Minister of Mineral Resources and Others** [2019] ZACC 5; 2019 (3) SA 621 (CC) paras [94] to [96].

“Kirkland and Oudekraal are concerned with constraining misuse of the bureaucracy’s power. They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful. As explained in Merafong, the import of these decisions was that government cannot simply ignore its own seemingly binding decisions on the basis that they are invalid. The validity or invalidity of a decision has to be tested in appropriate proceedings. And the sole power to pronounce that decision defective, and therefore invalid, lies with the courts. The lodestar principle is that the courts’ role in determining legality is pre-eminent and exclusive. Government officials may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them. And, unless set aside, a decision erroneously taken may well continue to have lawful consequences.

But what Kirkland/Oudekraal doctrine does not do is to fossilise constitutionally invalid administrative action as indefinitely effective. For rule of law reasons and for good administration, the principle puts a provisional halt to determining invalidity, without bringing the process to an irreversible end. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

The key point of the doctrine is that since ‘consequential acts which follow on constitutionally invalid conduct are commonplace’, bureaucratic self-help is prohibited. This is because legal remedies are the province of the courts, and the courts alone. Since even an invalid administrative act may have lawful

consequences, no official is entitled to pronounce a decision a nullity without going to court. It is the court that must consider whether to undo the invalid act, and its consequences, before pronouncing the act invalid. And in our constitutional dispensation, the key provision in determining a remedy is the just and equitable power section 172(1)(b) of the Constitution affords.” (footnotes omitted)

[63] It is common cause if not undisputable that Eyethu is the lawful holder of a properly executed and registered mining right so granted to it by the Department over the remaining extent of the farm Suurwater 366 JS, including the disputed property. Messenger Trading does not dispute or challenge the validity or legality of such mining right on the basis of it being wrongly awarded due to it being grossly or woefully defective by virtue of it being non-compliant with the MPRDA and its regulations. The complaint levelled against Eyethu's mining right is based on the conduct of the Department in erroneously including the disputed property when executing and registering Eyethu's mining right.

[64] However, in accordance with the Oudekraal/Kirkland principle, such administrative actions give rise to lawful consequences, the effect of which is that state or government officials are not entitled to pronounce same invalid or a nullity and ignore them, without going to court i.e. unless reviewed and set aside by a court. Such a decision has not been set aside on review or in this judgment as invalid. The principle requires that such invalid decisions be challenged by the “right actor in the right proceedings”. As such for rule of law

reasons and for good administration, absent an application to court to review and set aside the erroneous inclusion of the disputed property in the mining right of Eyethu, the decision by the Department including the disputed property (albeit erroneous and invalid) in Eyethu's mining right, stands and gives rise to lawful consequences and is binding on the Department and third parties, until set aside by a court of law. This being so, the decision by the Director General so nullifying or invalidating Eyethu's mining right, constitutes bureaucratic self-help (i.e. misuse of the bureaucracy's power), if not usurpation of the court's role to do so, and thus falls to be reviewed and set aside on this basis.

[65] Put otherwise, where a consequential act would be invalid as a result of the factual existence – not legal validity – of an earlier act, the consequential act would be invalid for as long as the earlier act is not set aside. In practical terms, the grant to Messenger Trading of a prospecting right over the disputed area of land is precluded for so long as Eyethu's mining right in respect of such disputed property exists. Only when Eyethu's mining right is set aside by a court of law as invalid, will the grant of the prospecting right to Messenger Trading be judged capable and valid.

[66] Secondly, the decision of the Director General is challenged on the basis that the reduction by the Director General of Eyethu's mining right to exclude the disputed property covered by Messenger Trading's prospecting right (i.e. reduction of the extent of the area of land covered by Eyethu's mining right) was not the subject of the refusal by the Regional Manager to execute Messenger

Trading's prospecting right or that of the internal appeal that served before the Director General, or for that matter the subject of a collateral challenge by Messenger Trading or any of the state respondents, in the present application.. This submission is in the circumstances correct. This is so, in that the subject matter of the appeal by Messenger Trading was the refusal by the Regional Manager to execute Messenger Trading's prospecting right on the basis that the area of land (disputed property) covered by such prospecting right overlaps with the same area of land covered by Eyethu's mining right, entailing that, the issue that served before the Director General was the refusal by the Regional Manager to do so, and nothing else or more. This was the issue which the Director General had to decide. This was also the issue which Eyethu was called upon by the Director General to make representation. Nor did the Regional Manager in her further reasons in terms of Regulation 74(5)(a)(i) and sub-regulation (6) thereof as set out above, seek such relief or order.

[67] However, in dealing with the appeal, the Director General veered beyond the subject matter of the appeal and made a decision or order reducing Eyethu's mining right as aforesaid. However, the Director General's conduct in doing so was irregular, improper, impermissible and *ultra vires*, in violation of the sec 6(2)(c);(e)(vi) of PAJA. On this score too, the Director General's decision falls to be reviewed and set aside.

[68] Thirdly, the Director General's purported decision is challenged on the basis that the unilateral decision to reduce Eyethu's mining right, adversely and

negatively affected its mining rights, contrary or in violation of the *audi alteram partem* principle i.e. without giving Eyethu a hearing or affording it an opportunity to make representations regarding the reduction of its mining right, and as such procedurally unfair and arbitrary. In the absence of evidence showing or establishing that the Director General afforded Eyethu an opportunity to make such representations concerning the reduction of its mining right, this ground or submission has not been controverted and accordingly accepted and should prevail or hold sway, being in violation of sec 6(2)(c)(e)(vi)(e)(i) of PAJA.

- [69] Fourthly, Eyethu asserts that the decision by the DG in so reducing Eyethu's mining right constituted a contravention of the provisions of sec 96(1)(b) of the MPRDA. This section provides that an appeal against an administrative decision of a Director General, should be directed to the Minister, entailing that the person authorised to deal with or determine appeals against an administrative decision of a Director General, is the Minister and no one else. In this regard, Eyethu contends that the decision to award or grant it the mining right was taken by the Acting Director General in January 2013. As such, the Director General lacked the competence or authority to adjudicate or determine an appeal against the decision of the Acting Director General or for that matter effect a reduction of the extant of the area of land covered by the mining right granted or awarded by the Acting Director General. Only the Minister is empowered or authorised to do so. In essence, the decision of the Director General is attacked on the basis that it was impermissible and unlawful for him

to serve as an appellate body or forum in respect of a decision of another Director General, as only the Minister was authorised by law to do so. I agree. The Director General's action or decision in doing so, not only contravened sec 96(1)(b) and as such unlawful but also constituted a violation of the principle of legality. On this score too, the decision of the Director General falls to be reviewed and set aside, in terms of sec 6(2)(a)(i) and (f)(i) of PAJA.

[70] Fifthly, the decision by the Director General reducing the extant of the property (area of land) covered by Eyethu's mining right, by excluding the disputed property, without following due process, amounted to an arbitrary deprivation of the property covered by such mining right, constituting a violation of the provisions of section 25 of the Constitution, protecting property rights. On this score too, the Director General's decision is unlawful and unconstitutional.

[71] For these reasons, the decision or order so made by the Director General as per the letter dated 5 December 2018 falls to be reviewed and set aside.

AD THE DECISION OF THE MINISTER

[72] The Minister dismissed Eyethu's appeal and upheld the decision by the Director General to accept and grant the application for execution of a prospecting right to Messenger Trading in respect of the disputed property. The reasons advanced by the Minister for such a decision are contained in the letter or memorandum signed by the Minister on 2 June 2020, a copy of which is

annexure “**EC15**” to Eyethu’s founding affidavit,³² as so quoted in full in paragraph 16 above.

- [73] An examination of Eyethu’s notice of appeal reveals that it challenged the decision of the Director General based on the procedural defects of Messenger Trading’s notice of appeal and on the ground of the unilateral, unlawful and unconstitutional reduction of Eyethu’s mining right by excluding the disputed property and finally on the ground that it was impermissible and unlawful for the Director General to serve as an appellate body or forum in respect of the decision of another Director General, as only the Minister was authorised by law to adjudicate an appeal in respect of a decision of a Director General, as fully dealt with above. As such, Eyethu contended that on these grounds, there was no proper “appeal” before the Director General as the purported “appeal” was fundamentally flawed and defective, entailing that the Director General was not entitled to consider let alone adjudicate the purported appeal, rendering the Director General’s decision a nullity or void, alternatively susceptible to be reviewed and set aside. For these reasons or on these bases, so contended Eyethu, the Minister should have set aside the decision of the Director General as being void or reviewed and set aside same in terms of PAJA or confirm the decision of the Regional Manager refusing to execute the prospecting right of Messenger Trading. However, the Minister without engaging with these issues or advancing any reasons for not engaging with these issues or dismissing

³² CaseLines 007-138 to 007-140.

them, proceeded to consider and adjudicate the appeal, notwithstanding the fundamental flaws or irregularities besetting the defective appeal before the Director General, as fully traversed above. The Minister's decision in doing so, builds up on the "nullity, irregularity, invalidity and unlawfulness of the decision of the Director General, fatal to his conduct in considering and adjudicating the appeal, likewise vitiating his decision or rendering his decision void or susceptible to being reviewed and set aside in terms of PAJA.

[74] An analysis of the reasons proffered by the Minister in upholding the decision of the Director General, likewise suffers from the same fundamental flaws afflicting the decision of the Director General, in that it is apparent from the analysis and consideration thereof, that the decision of the Minister is squarely based on the wrongful or erroneous inclusion by the department of the disputed property in Eyethu's mining right. Likewise, the invocation of the Oudekraal/Kirkland principle, as discussed above, finds application in this regard too.

[75] It should be borne in mind that the internal appeal by Eyethu to the Minister, was directed against the decision of the Director General *inter alia* unlawfully reducing the mining right of Eyethu to exclude the disputed property covered by Messenger Trading's prospecting right and declaring unlawful the mining activities of Eyethu on the disputed property. However, what is conspicuous from the Minister's decision, is the glaring failure to deal with such fundamentally flawed and untenable decision of the Director General, with the attendant

consequence that such decision was not set aside, reversed or overturned. The ineluctable inference to draw therefrom is that the Minister by upholding the decision of the Director General to accept and grant the execution of Messenger Trading's prospecting right in respect of the disputed property, is that the Minister implicitly endorsed or confirmed such fundamentally flawed decision.

- [76] The Minister asserts that at the time Eyethu applied for the mining right, the disputed property was the subject of a prospecting right and pending mining right application by Kubra Mining, entailing that such application constituted an impediment to the grant of Eyethu's mining right application incorporating or covering the disputed property. Such assertion is in the circumstances untenable in that even if such impediment existed (which is denied by Eyethu), the administrative decision by the Department to award Eyethu the mining right covering the remaining extant of the farm Suurwater 366 JS including (albeit erroneous) the disputed property, remains in extant and is binding, having legal consequences in terms of the Oudekraal/Kirkland principle, until reviewed and set aside by a competent court of law. Since 2013 (when the mining right was executed and registered) to date, neither Messenger Trading has challenged such mining right by way of an internal appeal, review application or collateral challenge (counter application) in the present application. Nor has the Department applied to set aside same by way of self- review proceedings. As such, the conduct of the Minister in advancing such reasons in support of his decision to uphold the Director General's decision, amounted to bureaucratic self-help and usurpation of the function and role of the courts in doing so i.e. in

pronouncing on the validity or legality of such administrative action. Same applies to the assertion to the effect that Eyethu incorrectly amended its mining right to include the disputed property without following due process in terms of section 102 of the MPRDA.

[77] In any event, the issue whether or not Eyethu so incorrectly amended its mining right application to include the disputed property, without following due process in terms of sec 102 of the MPRDA, was not an issue before the Minister let alone the Director General. Nor is this issue before me in the absence of a collateral challenge (counter application) by Messenger Trading or any of the state respondents challenging the validity or legality thereof, in these proceedings. Neither has Messenger Trading, the Department or the Minister challenged same by way of review application. In any event, the central issue in casu concerns the award/grant, execution and registration of Eyethu's mining right covering, the disputed property and not the amendment (correctly or otherwise) of Eyethu's mining right application to include the disputed property.

[78] For these reasons, the Minister's decision likewise falls to be reviewed and set aside in terms of section 6 of PAJA.

CONCLUSION

[79] In the light of the foregoing, both the impugned decisions of the Director General and Minister fall to be reviewed and set aside in terms of PAJA or the principle

of legality. Having reached such conclusion, it is unnecessary to decide the other issues raised. In any event, the principle of judicial deference relied on by Messenger Trading, is not only misplaced but misconceived in that there is nothing technical or of a kind in which the court has no particular proficiency, relating to the administrative actions or decisions, forming the subject matter of these proceedings.³³

ORDER

[80] In the result, I make the following order:

80.1. The decision of the second respondent (Director General) dated 5 December 2018, in adjudicating the appeal initiated by the fifth respondent (Messenger Trading) in terms of section 96 of the Mineral and Petroleum Resources Development Act, 28 of 2002, against the refusal by the fourth respondent to execute and register the prospecting right granted to the fifth respondent with reference MP305/1/1/2/13471PR, is reviewed and set aside, alternatively declared void.

80.2. The decision of the first respondent (the Minister) dated 2 June 2020, in adjudicating the internal appeal initiated by the applicant in terms of section 96 of the Mineral and Petroleum Resources Development Act

³³ Minister of Environmental Affairs v Phambili Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA) para 53.

28 of 2002, against the decision of the second respondent (the Director General) referred to in prayer 1 above, is reviewed and set aside, alternatively declared void.

80.3. It is declared that the prospecting right awarded to the fifth respondent under reference MP305/1/1/2/13471PR, has lapsed and is not capable of being renewed in terms of section 18(4) of the Mineral and Petroleum Resources Development Act 28 of 2002.

80.4. The fifth respondent is ordered to pay the costs of this application on Scale B, which costs shall include the costs of two counsel where so employed, one being Senior Counsel.


S J R MOGAGABE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Counsel for the Applicant: J Roux SC and LJ Pretorius

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Date of Hearing: 26 April 2024

Date of Judgment: 4 October 2024