

REPUBLIC OF SOUTH AFRICA



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

Case Number: 36955/202

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>9.6.2025</u>	
DATE	SIGNATURE

In the matter between:

SEFATENG CHROME MINE (PTY) LTD

APPLICANT

and

MINISTER OF MINERAL RESOURCES AND ENERGY

1ST RESPONDENT

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

2ND RESPONDENT

**DEPUTY DIRECTOR-GENERAL: DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

3RD RESPONDENT

REGIONAL MANAGER, LIMPOPO REGION:

DEPARTMENT OF MINERAL RESOURCES

AND ENERGY

4TH RESPONDENT

LETHABO EXPLORATION (PTY) LTD

5TH RESPONDENT

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

- [1] This is a review application on grounds as set out in the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").
- [2] The Applicant seeks the following relief:¹
- [2.1] That the First Respondent's decision to refuse the Applicant's administrative appeal (with Departmental Reference 9/2/4/3/796) on 12 January 2022, is reviewed and set aside.
- [2.2] That the decision of the Second Respondent dated 28 June 2017 to grant a mining right (LP 30/5/1/2/2/10073 MR) for andalusite and magnesite, excluding chrome ore, in terms of section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), in

¹ 0002-1

respect of farm Waterkop 113 KT in the Limpopo Province, to the Fifth Respondent ("the Mining Right"), is reviewed and set aside.

- [2.3] That the aforesaid decisions are replaced and substituted with the following decision by the Second Respondent to refuse the Fifth Respondent's application for a Mining Right: The Fifth Respondent's application for a Mining Right [LP 30/5/1/2/2/10073 MR] is refused;
- [2.4] to the extent that it may be necessary, any delay in the launch of this application is condoned in terms of s 9(1) of the Promotion of Administrative Justice Act 3 of 2000.
- [2.5] the First, Second and Fifth Respondents jointly and severally to pay the costs of this application.

FACTUAL MATRIX:

- [3] On 24 May 2013 the Applicant ("Sefateng") was a prospecting right holder in respect of the Farm Waterkop 113. Since 12 September 2014 Sefateng however held a Mining Right, with departmental reference LP 30/5/2/2/1/10062 MR.
 - [3.1] This right pertains to Chrome ore on the Farm Waterkop 113, granted under section 23 of the MPRDA until 2044.
 - [3.2] The applicant's prospecting right was initially held by *Corridor Mining Resources (Pty) Ltd.*
 - [3.2.1] The first respondent denied ministerial consent for the cession of this right to Sefateng on 10 and 17 May 2022. Sefateng sought a review, and the court overturned these decisions, granting consent under section 11 of the MPRDA.²

² FA2.3 at 0002-91

- [3.3] Sefateng is a lawful occupier of the Land under section 5(3) of the MPRDA, due to its registered Mining Right on the Land.
- [4] Sefateng, as the holder of a Mining Right under section 23 of the MPRDA, therefore has the right to mine and recover minerals (in this case, Chrome ore) on the Farm Waterkop 113. This right includes those outlined in section 5 of the MPRDA and additional rights conferred by its Mining Right terms and conditions, namely:
- [4.1] The right to mine for chrome ore on or under that land for its own benefit and accounting;³ and
- [4.2] the right to extract and dispose of any discovered mineral during mining operations.⁴
- [5] The Sefateng Mining Right⁵ explicitly states that Sefateng has been granted the exclusive right to mine and extract the minerals (Chrome ore) within the designated mining area for its own benefit and account.
- [6] Subsequent thereto the first respondent promulgated a moratorium pursuant to section 49 of the MPRDA by Notice 367 of Government Gazette 34690 of 24 May 2013. The restriction issued stated the following:
- "The Minister hereby impose a restriction under section 49(1) for a period not exceeding 10 years from the publication hereof on the granting of new reconnaissance permission, prospecting rights, mining rights, production right, exploration right and mining permits in respect of Unsurveyed State land known as Klein Letaba, the farms Alten 221 LT, Plange 222 LT, Zwartkoppies 413 KT Waterkop 113 KT, Molendraai 811 LR, Commandodrift 228 LR, Gezond 235 KR, Inhambane 802 LR, Twyfelaar 119 KT, Mineral Area No. 3 and 4 of the farm Maandagshoek 254 KT, Mineral Area No. 5 on*

³ Section 5(3)(b) of the MPRD

⁴ Section 5(3)(c) of the MPRD

⁵ Clause 2 of FA5 at 0002-107

Portion of the farm Mandaagshoek 254 KT and Portion of Portion 1 of the farm Mooihoek 255 KT.

This restriction will not affect those entities' rights to exercise their respective exclusive rights in terms of section 19(1)(b) of the Act, or the renewal of any rights in terms of the Act." (my underlining)

- [7] On 20 November 2014, the fifth respondent ("Lethabo") informed *Corridor Mining Resources (Pty) Ltd*, the former prospecting right holder about its mining right application.⁶
- [8] Upon being notified of the application by *Corridor Mining Resources (Pty) Ltd*, Sefateng filed an objection pursuant to section 10 of the MPRDA against the issuance of the Lethabo mining right.⁷
- [9] On 26 June 2017, Lethabo received a Mining Right for Andalusite and Magnesite at Farm Waterkop113 KT; PGM, Iron, Titanium, Andalusite, Vanadium, and Magnesite at Portions 2, 3, and 4 of Farm Mecklenburg 112 KT; and Iron, Titanium, Chrome, and Andalusite at Farm Malekskraal 509 KS, Limpopo Province.
- [9.1] The aforementioned mining right encroached upon the Land, Farm Waterkop 113, which was already encompassed by Sefateng's existing Mining Right where Sefateng operates its chrome mine;
- [9.1.1] Sefateng is the lawful occupier of Farm Waterkop 113, as well as an interested and affected party under section 5(3) of the MPRDA.
- [9.2] The mining right was granted without consulting Sefateng, who had an ongoing chrome mining operation on the specified land.

⁶ FA4.1 at 0002-98

⁷ FA4.2 at 0002-99

[10] The issues in paragraphs 9.1 and 9.2 were addressed in an internal administrative appeal, which was lodged on 15 December 2017.⁸

[11] Sefateng argued that the second respondent wrongly granted the Mining Right to Lethabo without considering the absence of a consultation record required by section 22(4) of the MPRDA.

[11.1] Section 22(4) reads as follows:

“4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and

(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.” (my underlining)

[11.2] Therefore, section 23(1)(g) read with subsection (3) of the MPRDA prohibited the grant.

“Granting and duration of mining right

23. (1) Subject to subsection (4), the Minister must grant a mining right if-

(g) the applicant is not in contravention of any provision of this Act; and ...”

3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).” (my underlining)

⁸ FA7 at 0002-134

- [12] On 27 August 2020, as part of the internal appeal process, the DMRE provided the fourth respondent's reasons for the decision.⁹ The reasons were the following:
- [12.1] Sefateng and Lethabo 'co-existed' on the Land whilst Lethabo still held a prospecting right;
- [12.2] An interested and affected party is determined by "*whoever, held a valid right (prospecting/mining right and permits) at the time Lethabo lodged the mining right application, is an interested and affected party.*"
- [12.3] Sefateng held no right save for the right to apply for and be granted a mining right and that it follows therefore, that Lethabo was not obligated to consult Sefateng.
- [12.4] Sefateng held no right save for the right to apply for and be granted a mining right and it follows therefore, that Lethabo was not obligated to consult Sefateng.
- [12.5] The objection referred to by Sefateng at paragraph 4.4.4 of the appeal was lodged outside the prescribed timeframes within which an objection in terms of section 10 of the Act maybe evaluated
- [12.6] The objection included grounds detailed in the initial appeal against the acceptance of the disputed mining right application. The second respondent reviewed and addressed these grounds during the first appeal. As the second respondent had already made a decision on this matter, the same grounds cannot be reconsidered in the second appeal.

⁹ FA9 at 0002-180

- [13] On 28 September 2020 Sefateng filed its response to the aforesaid reasons, as provided for in Regulation 74(8).¹⁰
- [14] Sefateng submitted in essence that it was an interested and affected party at all relevant times to the Lethabo mining right application and Lethabo was obligated to consult it. In the absence of any proof of any engagement to consult as required by section 22(4)(b) of the MPRDA, it cannot be regarded as compliance and accordingly, the Mining Right could not be granted, as provided for in section 23(1)(g) read with subsection (3) of the MPRDA.
- [15] Concerning the section 10 objection, Sefateng stated that the Regional Manager erred in this regard in that the mining right was granted by the second respondent and that the appeal had to be considered by the first respondent. The first respondent could indeed be called upon to consider the same grounds in the appeal.
- [16] The existence of the section 10 objection dated 11 December 2014 is common cause. In terms of section 10(2) of the MPRDA, the Regional Manager was compelled to refer the objection to the Regional Mining Development and Environmental Committee ("RMDEC") for consideration, which was to advise the first respondent thereon.¹¹
- [17] On 12 January 2022, the first respondent notified Sefateng that its internal administrative appeal had essentially been denied.¹²
- [18] The DMRE Minister's (the first respondent) grounds for the denial were as follows:¹³
- [18.1] that Lethabo, as a purported holder of a prospecting right, was exercising its exclusive right to apply for a Mining Right;

¹⁰ FA10 AT 0002-180

¹¹ Annexure B to FA4.2 at 0002-99

¹² FA12 at 0002-201

¹³ FA9 at 0002-180

- [18.2] that Lethabo applied for Andalusite and Magnesite, which are not included in Sefateng's Mining Right.
- [18.3] that Lethabo was not legally obligated to consult with Sefateng.
- [19] Sefateng asserts that both respondents were mistaken in concluding that consultation with Sefateng was unnecessary.
- [20] Section 22(4)(b) of the MPRDA requires applicants seeking a Mining Right to consult with landowners, lawful occupiers (such as Sefateng), and any affected parties following the acceptance of their application, and to include the results of such consultations in environmental reports.
- [21] Section 23(1)(g) of the MPRDA makes compliance with its provisions a prerequisite for the granting of a Mining Right. The Minister (or his delegate) is authorized to grant a Mining Right only if, among other conditions, *"the applicant is not violating any provision"*.
- [22] Sefateng argues that the decision that consultation was not required and the failure to consult as required by the MPRDA, renders the decision by the first and second respondent, to grant a Mining Right to Lethabo, over the same Land, unlawful and liable to be set aside on review.
- [23] Additionally it is contended that the minerals Andalusite and Magnesite are not present on the Farm Waterkop 113. The Lethabo Mining Right was furthermore granted during a moratorium which imposed a 10-year restriction on the issuance of any Mining Rights over, among other areas, the Farm Waterkop 113. This occurred under conditions where Lethabo did not possess a valid Prospecting Right at that time.

PLEADINGS AND HEARING OF REVIEW:

- [24] On 11 July 2022, Sefateng initiated the review proceedings.¹⁴

¹⁴ 0002-1

- [25] The application was formally served on the First Respondent on 15 July 2022 at the principal place of business of the state attorney.¹⁵
- [26] The second and third respondents were served on 21 July 2022, at their principal place of business by handing the application to Ms. Given Makhubela.¹⁶
- [27] Service was effected on the 4th Respondent on 15 July 2022 at its principal place of business by handing the application to Mr. Abram Seimela.¹⁷
- [28] Lethabo was served on 14 July 2022 at its registered address. The application was received by Mr. Josias Nyamusa, who is the director's domestic help.¹⁸ On 18 October 2022, at the principal place of business of Lethabo, the application was served on Mr. Daniel Mabona, a clerk.¹⁹
- [29] None of the decision-makers within the Department of Mineral Resources and Energy (DMRE) oppose this application. (1st to 4th Respondents)
- [30] Lethabo served a Notice of Intention to Oppose dated 10 May 2023²⁰ and delivered an answering affidavit.²¹
- [31] Sefateng subsequently delivered a replying affidavit.²²
- [32] The matter was scheduled for hearing on the opposed motion court roll for 19 May 2025.²³ The setdown was sent to the attorneys of Lethabo (the 5th Respondent) via electronic mail on 27 November 2024.²⁴

¹⁵ 0027-1 and 0027-2

¹⁶ 0027-2

¹⁷ 0027-4

¹⁸ 0027-5

¹⁹ 0027-6

²⁰ 0004-1

²¹ 0002-216

²² 0002-255

²³ 0017-7

²⁴ 0017-6

- [33] On 21 May 2025, I was informed that Lethabo's lawyers, *Dixon Attorneys*, had filed and uploaded on Case-lines a notice of withdrawal as attorneys of record.²⁵ The said notice is dated 19 May 2025.
- [34] I proceeded to hear the matter as the 5th Respondent must have been informed of the hearing date by its attorneys as the notice of setdown preceded the notice of withdrawal.
- [35] I granted Sefateng leave to submit an additional affidavit to present a copy of the Lethabo Mining Right²⁶ before the Court. This document was neither included in the Record nor provided by Lethabo in its answering affidavit, thus no prejudice results from this submission.
- [36] Although not present in court I will at the outset address Lethabo's opposition to this application.

POINTS IN LIMINE:

- [37] Lethabo raised two *in limine* points, namely:

- [37.1] The authority of Mr. Gerard Jacobus Blaauw's to represent Sefateng in the proceedings and to verify the initial documents.²⁷
- [37.2] That the review is purportedly out of time. It contends that the review application is untimely on the grounds that Sefateng allegedly became aware of Lethabo's Mining Right earlier than Sefateng has claimed.²⁸

²⁵ 0004-4

²⁶ Annexure MR 1 at 0002-349

²⁷ 0002-220

²⁸ 0002-218

EVALUATION OF THESE POINTS:

LACK OF AUTHORITY:

[38] Lethabo pleaded that the Applicant's deponent is not authorised by the Directors of the company and the Companies Act to have deposed to the founding affidavit, and that the application is therefore fatally flawed.²⁹

[39] The resolution also did not meet the requirements of section 74(1) of the Companies Act as it was signed by only one director.

[39.1] ***"Directors acting other than at meeting***

74. (1) *Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.*

(2) *A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting."*

[40] This point lacks merit in that there was a resolution passed and signed by the majority of Sefateng's directors.³⁰

[41] Sefateng accordingly had:

[41.1] the authority to institute these proceedings and

[41.2] Mr. Gerard Jacobus Blaauw was authorised to depose to the founding and any other affidavits and to sign any and all documentation pertaining to the aforementioned litigation and in

²⁹ 0002-220

³⁰ Annexure RA2 at 0002-289

general, to do all the necessary required in this regard in execution of his mandate to ensure the institution of such application and obtaining the relief sought.

- [42] The Supreme Court of Appeal furthermore held that a party that is a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is merely the institution of legal proceedings and the prosecution thereof which must be authorised³¹
- [43] The Applicant did authorize the institution of these proceedings by means of the aforesaid resolution. The *point in limine* must accordingly fail.

LATENESS OF REVIEW APPLICATION

- [44] Lethabo claims that Sefateng failed to comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("the Act") by not lodging the Review application from the time it allegedly became aware of the Mining Right granted to Lethabo.³²
- [45] Section 7(1)(a) read with section 7(2)(a) of PAJA provides that judicial review must be instituted within 180 days after the date on which any proceedings instituted in terms of internal remedies "*have been concluded*".
- [46] Section 7(1) of the PAJA provides as follows:

"(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

³¹ Ganes v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) and PM v MM 2022 (3) SA 403 (SCA)

³² Paragraphs 4.1-4.7 of AA at. 0002-218

(a) *subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or*

(b) *where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."* [own underlining]

[47] Section 7(2)(a) of PAJA compels an applicant in a review (and absent an exemption under exceptional circumstances) to first exhaust an available internal remedy before instituting a review application:

"(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted." (my underlining)

[48] Section 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") expressly provides for an internal remedy against a decision to grant a Mining Right:

"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.

(2)(a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section" (my underlining)

[49] Therefore the relevant date from which the 180-day period is to be calculated is not the date when Sefateng became aware of Lethabo's Mining Right but the date when the section 96 MPRDA internal appeal was concluded.

[50] The internal appeal was concluded on 12 January 2022.³³

[50.1] It should be noted that Lethabo did not participate in the internal appeal process nor raise any opposition to the internal appeal process.

³³ FA12 at 0002-201

[51] Having considered the actions taken by the Applicant I find that Sefateng did exhaust its internal remedy in terms of section 96 of the MPRDA and did institute the review application on 11 July 2022 within 180 days.³⁴

[52] This *point in limine* must accordingly also be dismissed.

DECISIONS LEADING TO THE REVIEW:

[53] The decisions which gave raise to the review and are challenged are the following:

[53.1] the Second Respondent's decision dated 28 June 2017 to grant Letabho (the Fifth Respondent) mining right LP3015/1/1/1/10073 MR for andalusite and magnesite, excluding chrome ore in terms of section 23 of the MPRDA which overlapped with Sefateng's existing Mining Right land.

[53.2] the First Respondent's decision to refuse the Applicant's administrative appeal with departmental reference 9/2/4/3/796 12 January 2022.

[54] The applicant in essence claims that Lethabo could not be granted a Mining Right under circumstances where its prospecting right had already lapsed by the time it applied for a Mining Right. Consequently, Lethabo did not possess the sole and exclusive right to apply for a Mining Right at that time, which was the basis for the finding against Sefateng during the internal appeal. Additionally, the decision to grant Lethabo a Mining Right was contrary to a Moratorium issued at the time. Lethabo's application for a Mining Right was therefore unlawfully accepted and granted.

[55] Lethabo's failure to consult Sefateng, along with the issue of the granting an overlapping Mining Right, have been the subject of ongoing administrative proceedings for several years.

³⁴ 0002-1

APPLICABLE LEGISLATION AND CASELAW

- [56] Under section 22(2)(b) of the MPRDA, a Mining Right application can only be accepted if no one else holds prospecting rights, mining rights, mining permits, or retention permits for the same mineral and land.
- [57] The prohibition outlined in section 22(2)(b) of the MPRDA was upheld by the Constitutional Court in the case of *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd and Another* 2014 (2) SA 603 (CC) (12 December 2013). The Court confirmed that if a right already exists in relation to the same mineral on the same land, the state cannot grant this right to anyone other than the current right-holder, as doing so would conflict with the framework of the MPRDA.
- [58] Section 22(4)(b) of the MPRDA mandated that upon applying for a Mining Right, a party has to notify and consult with the lawful occupier and interested and affected party, in the prescribed manner and incorporate the outcome of this consultation into the relevant environmental reports. This requirement must be adhered to.
- [58.1] Proof of consultation is accordingly essential. In the absence of such proof section 22(4)(b) of the MPRDA is violated.
- [58.2] In the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC), it was established that this compulsory consultation serves the purpose of achieving a prior fair and reasonable balance between conflicting rights regarding the use of the land.
- [59] Section 23(1)(g) of the MPRDA states that compliance with the MPRDA is a requirement for issuing a Mining Right. Consequently, the Minister or their delegate may grant a Mining Right only if specific conditions are satisfied, including that
- "...the applicant is not in contravention of any provision..."*

- [60] Section 6(1) of the MPRDA explicitly mandates that administrative processes and decisions made under the MPRDA must adhere to the principles of lawfulness, reasonableness, and procedural fairness.
- [61] A mining right, once granted and registered under the Mining Titles Registration Act 16 of 1967, constitutes a limited real right in relation to the relevant minerals and land in terms of section 5(1) of the Mineral and Petroleum Resources Development Act (MPRDA).
- [62] One of the explicit objectives of the MPRDA is to ensure security of tenure for mining companies that have invested substantial amounts of money into mining ventures.

THE CONSTITUTION AND MPRDA

- [63] The applicable rights in this application are outlined in the following sections of the Constitution and MPRDA:
- [63.1] Section 25 of the Constitution and section 2(g) of the MPRDA ensure mining right holders have security of tenure. The issuance of a Mining Right where there is already an existing one will impact on the security of tenure.
- [63.2] Section 5(1) of the MPRDA specifies that a mining right, once granted and registered in accordance with the Mining Titles Registration Act 16 of 1967, constitutes a limited real right in relation to the minerals and land concerned.
- [63.3] Section 33 of the Constitution provides individuals with the right to lawful, reasonable, and procedurally fair administrative action. It also permits court review if these rights are negatively impacted.
- [64] The fundamental right to administrative justice is enshrined in section 33 of the Constitution. The officials of the DRE also have a constitutional duty to ensure that the administrative actions of prosecuting, processing, and

deciding on an application for a mining right, as well as any subsequent internal appeal, are lawful, rational, reasonable, and procedurally fair.

- [65] Section 237 of the Constitution requires that this constitutional duty be performed diligently.

GROUNDINGS FOR REVIEW:

- [66] Sefateng challenges the decision of the DMRE Director-General (the second respondent) to grant Lethabo a Mining Right:

[66.1] notwithstanding a moratorium prohibiting the issuance of new mining rights over the Land;³⁵

[66.2] without consulting Sefateng, who already had a chrome mining operation on the Land;

[66.3] which overlapped with Land (Farm Waterkop 113) and was already part of the Sefateng Mining Right;

[66.4] for minerals Andalusite and Magnesite, when neither is found on the Land;³⁶

- [67] Sefateng also challenges the decision made by the DMRE Minister (the first respondent) to reject the internal appeal.

- [68] Sefateng's grounds of appeal contest the lawfulness, reasonableness, and rationality of the decision to grant the Lethabo Mining Right.

- [69] Sefateng argues it has a right to administrative justice under section 33 of the Constitution and relevant MPRDA provisions. DRE officials are constitutionally required to ensure that actions related to mining right

³⁵ FA3 at 0002-96

³⁶ FA6.1 and Regulation 11(1)(c) in respect of the details of the identified mineral deposit at 0002-116 and 0002-132

applications and appeals are lawful, rational, reasonable, and procedurally fair.

[70] The applicant contended that the appeal decision was made without considering several pertinent factors and without the Minister of the DMRE considering each of the grounds raised by Sefateng on appeal. As a result, the applicant argued that the Minister did not fully address the issues before him.

[71] The grounds for review are the following:

[71.1] A moratorium prohibited the granting of the Lethabo Mining Right the;

[71.2] the Lethabo Mining Right was unlawfully accepted;

[71.3] the failure to consult with Sefateng;

[71.4] the minerals are not found on the land and

[71.5] the Lethabo Mining Right's application is defective.

[72] I will discuss and evaluate these grounds sequentially here in below.

EVALUATION OF GROUNDS OF REVIEW:

Moratorium prohibited the granting of the Lethabo Mining Right

[73] The Lethabo Mining Right was granted despite a moratorium issued by the DRE Minister in the Government Gazette on 24 May 2013. This moratorium restricted the granting of Mining Rights for 10 years over areas including the Farm Waterkop 113, except for entities already holding a Prospecting Right and exercising their exclusive right to apply for a mining right as per section 19(1)(b) of the MPRDA.

- [74] In the case of the *Minister of Mineral Resources v Mawetse (SA) Mining Corporation Ltd*³⁷ the Supreme Court of Appeal was tasked with determining the commencement date for the duration of a right. The Court determined that the duration should be calculated from the date when the applicant was informed that the right would be granted, rather than from the date of notarial execution or any dates specified within the right itself
- [75] The DMRE Regional Manager notes that Lethabo held a Prospecting Right granted on 19 December 2007³⁸ for a period of 5 years. According to the *Mawetse* judgment, the 5-year period of the Lethabo Prospecting Right ended on 18 December 2012. The record shows that, based on the DMRE's Verification of Spatial Data, the Lethabo Prospecting Right expired.
- [76] The Lethabo Mining Right was granted on approximately 26 June 2017. This was in conflict with the moratorium that prohibited the granting of additional mining rights on Farm Waterkop 113 without a valid Prospecting Right.
- [77] Based solely on this reasoning, the decision to grant Lethabo a Mining Right and the subsequent decision to refuse the internal appeal are both subject to review and annulment under the Act.
- [78] Consequently, the decision of the DMRE Director-General to grant the Lethabo Mining Right, as well as the DMRE Minister's decision to refuse the internal appeal,
- [78.1] was made in contravention of the moratorium issued under section 49 of the MPRDA and
- [78.2] was based on the incorrect claim that Lethabo had an exclusive right to apply for a mining right as a Prospecting Right holder.

³⁷ 2016 1 SA 306 SCA

³⁸ FA9

[79] These decisions are subject to review and potential annulment due to the following reasons:

[79.1] the decisions were notably affected by a legal error, as outlined in section 6(2)(d) of PAJA;

[79.2] these decisions did not consider this significant and relevant fact, as required by section 6(2)(e)(iii) of PAJA;

[79.3] constitute administrative actions that are not logically related to the purpose of the empowering provision, as envisaged by section 6(2)(f)(ii)(bb).

[79.4] and constitute unconstitutional and unlawful administrative action, as contemplated by section 6(2)(i).

Lethabo Mining Right unlawfully accepted

[80] Since 24 May 2013, Sefateng has held a ceded Prospecting Right.³⁹ Under section 19(1)(b) of the MPRDA, Sefateng possesses the exclusive right to apply for a Mining Right for Chrome ore over the Farm Waterkop 113.

"19 Rights and obligations of holder of prospecting right

(1) *In addition to the rights referred to in section 5, the holder of a prospecting right has-*

(b) subject to subsection (2), the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question;" (my underlining)

³⁹ FA2.2 at

- [81] Sefateng's application for a Mining Right, submitted on *24 May 2013*,⁴⁰ was already under consideration by the DMRE when Lethabo submitted its application for a Mining Right on or about *26 August 2013*.⁴¹
- [82] The record indicates that Lethabo applied for the minerals: PGMs, Magnesite, Andalusite, Iron, Titanium, and Chrome over the farms Waterkop 113, Mecklenburg 112, and Malekskraal 509.⁴²
- [83] The Lethabo Mining Right was accepted on *29 January 2014*, pending the Sefateng Mining Right. On *12 September 2014*, Sefateng was granted a Mining Right for Chrome ore, simultaneous with the acceptance of Lethabo's application by the Regional Manager.
- [84] According to section 22(2)(b) of the MPRDA, the DRE Regional Manager can only accept a Mining Right application if no one else holds a prospecting right, Mining Right, mining permit, or retention permit for the same mineral on the same land.
- [85] In accordance with section 22(2)(b) of the MPRDA, the DMRE Regional Manager (the fourth respondent) was precluded from accepting Lethabo's Mining Right.
- [86] At this early stage of the MPRDA process, the Lethabo Mining Right was unlawfully and impermissibly accepted, thereby contravening section 22(2)(b) of the MPRDA.
- [87] Section 23(1)(g) of the MPRDA states that compliance with the MPRDA is a jurisdictional condition for granting a Mining Right. The DMRE Minister (or their delegate, in this case the DMRE Director-General) is authorized to grant a Mining Right only if, among other conditions, "(g) *the applicant is not in contravention of any provision*" of the MPRDA.

⁴⁰ FA2.2 at

⁴¹ Record p 520

⁴² Record p509 -520

- [88] Lethabo's application for a Mining Right was granted beyond the scope of the provisions outlined in the MRPDA. Consequently, the DMRE Director-General did not fulfil its duty to adhere to the mandatory and material procedures and conditions set forth by the MPRDA.
- [89] The Minister of the DMRE did not consider this ground of appeal, thereby failing to properly deliberate on the matter. Consequently, the denial of the internal appeal was unreasonable.
- [90] The decision to award Lethabo a Mining Right and the decision to deny the internal appeal are therefore both subject to review under PAJA.⁴³

Failure to consult

- [91] A meaningful consultation process is required to advance the objectives of the MPRDA. The notification and consultation with interested and affected parties align with the specified objectives of the MPRDA as set out in section 2.
- [92] The MPRDA aims to ensure that the nation's mineral and petroleum resources are exploited in an orderly and ecologically sustainable manner, while promoting social and economic development.
- [93] The Constitutional Court⁴⁴ emphasised the importance of consultation and clarified the nature and obligation to consult.
- [94] Section 22(4)(b) of the MPRDA required Lethabo, when applying for a Mining Right, to consult in the prescribed manner with Sefateng as the lawful occupier and interested and affected party.
- [95] After being notified of the acceptance of its Mining Right application, Lethabo was required to consult with the landowner, the lawful occupier (Sefateng),

⁴³ Sections 6(2)(d), section 6(2)(2)(iii), section 6(2)(e)(vi) and section 6(2)(i) of PAJA.

⁴⁴ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC)

and any interested or affected parties, and incorporate the consultation results into the environmental reports.

- [96] This mandatory consultation serves an evident and significant purpose to achieve a prior equitable and just balance between conflicting rights concerning the use of the land.
- [97] Lethabo breached MPRDA provisions by not consulting Sefateng, thereby prohibiting the granting of a Mining Right to Lethabo.
- [98] Lethabo applied for a Mining Right over the same land for which Sefateng had already applied for, and was subsequently granted, a Mining Right for Chrome ore.
- [99] The granting of Lethabo's Mining Right resulted in overlapping physical mining operations, overlapping environmental management as per the approved environmental management plans, and an overlap in the implementation of mine health and safety legislation. This situation has the potential to cause significant health and safety concerns.
- [100] Had Lethabo complied with the MPRDA, Sefateng and Lethabo could have consulted and possibly reached an agreement on how to manage these overlaps to ensure compliance with legislation.⁴⁵
- [101] Consultation would have been necessary to prevent conflicting legislative terms and conditions. It is important to consult with existing Mining Right holders, such as Sefateng, who operate a Chrome mine on the overlapping land. This consultation helps address uncertainties and prevents practical and legal complications. Holders of competing rights may choose to enter into a working agreement, which would then be reflected in their respective Mining Work Programmes for approval by the DMRE. Such arrangements are optional and not mandatory.

⁴⁵ Sedibeng Iron Ore (Pty) Ltd v Minister of Mineral Resources and Energy 2021 JDR 3166 (GP)

- [102] The DMRE Regional Manager, in recommending to the DMRE Minister on the internal appeal, concluded that Lethabo was not legally required to consult Sefateng.
- [103] The basis for this conclusion was that, at the time Lethabo submitted its application for a Mining Right, Sefateng had not yet been granted a Mining Right but only had a pending application. Consequently, it is asserted that Sefateng was in the same position as Lethabo and therefore not considered an interested and affected party requiring consultation by Lethabo. The DRE Regional Manager further argues that once the Sefateng Mining Right was granted, Lethabo's duty to consult did not apply retrospectively.
- [104] The DMRE Regional Manager further advised that a task force be formed to facilitate negotiations among all appellants, including Sefateng and Lethabo, regarding how the four rights could coexist within the same area.⁴⁶
- [105] There appeared to be a misunderstanding by the DMRE Regional Manager regarding the status of the Sefateng, and there are errors in the reasoning provided.
- [106] The analysis by the DRE Regional Manager, albeit flawed in reasoning, brings to light several significant facts:
- [106.1] the Sefateng Mining Right application was lodged before the Lethabo Mining Right application;
 - [106.2] the Sefateng Mining Right application was accepted and granted before the acceptance of the Lethabo Mining Right application;
 - [106.3] Lethabo did not consult Sefateng either at the time when the Lethabo Mining Right was accepted, or thereafter or before the granting of the Lethabo Mining Right;

⁴⁶ FA9 at

[106.4] the DMRE Regional Manager was aware that no consultation with Sefateng took place; and

[106.5] that the conclusion of a working agreement is crucial and the only way to have competing mining rights co-exist over overlapping Land.

[107] Section 22(4)(b) of the MPRDA clearly stipulates that consultation is mandated after the acceptance of a Mining Right application, rather than at the time of submission of the Mining Right application.

"(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

...

(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports." (my underlining)

[108] Section 22(5) of the MPRDA also requires the DMRE Minister to expressly consider the results of the consultation.

[109] Regulation 1 of the MPRDA Regulations define an '*interested and affected party*' to mean:

"a natural or juristic person or an association of persons with a direct interest in the proposed or existing prospecting or mining operation or who may be affected by the proposed or existing prospecting or mining operation..."

[110] It is unequivocal that Sefateng has a direct interest and may be impacted by a mining operation overlapping in Land. Sefateng is evidently an interested and affected party and, at the time, was also the lawful occupier of Land involved in overlapping physical mining operations, environmental

management, mine health and safety legislation, and the mining work programme.

[111] The DMRE Regional Manager, in his recommendation to the DMRE Minister regarding the internal appeal, and the DMRE Minister, in deciding the internal appeal, both did not account for the following:

[111.1] the MPRDA compels prior consultation;

[111.2] that there is nothing which statutory compels the conclusion of a working agreement; and

[111.3] that consultation with Sefateng cannot take place after the fact.

[112] The DMRE Regional Manager's recommendation for the parties to agree on a working agreement post-approval further highlights the forced attempt to fix a clearly flawed Lethabo Mining Right.

[113] The reasoning of both the DMRE Regional Manager and the DMRE Minister is significantly flawed and leads to potentially severe consequences, thereby hindering the objectives of the MPRDA. Without such a prior agreement that has been duly consulted on, mining operations cannot be conducted without violating various provisions of the MPRDA, as well as environmental and mine health and safety legislation.

[114] Consultation is essential to fulfil the objectives of sections 2(g) and 2(h) of the MPRDA. It is undeniable that Sefateng, exercising its exclusive right to apply for a Mining Right over the same land that overlaps Lethabo's application, has always been an interested and affected party.

[115] Lethabo acknowledged Corridor Mining Resources (Pty) Ltd (predecessor to Sefateng) as an interested party, so there is no reason to decide otherwise for Sefateng, a fact known by DRME when making the decisions.

[116] The DRE Regional Manager's recommendations to the DMRE Minister were influenced by legal errors, and failure to consult with Sefateng, negating the purpose of such consultation.

- [117] Section 23(1)(g) of the MPRDA, along with section 22(4), required Lethabo to consult with Sefateng before a Mining Right could be granted. According to section 23(3), the DMRE Minister had to refuse the mining right application if it failed to meet subsection (1) requirements.
- [118] The Record and answering affidavit show that there was no consultation with Sefateng. The documentation indicates that Lethabo's only attempt at consultation was a notification sent to Corridor Mining Resources, which preceded Sefateng, rather than to Sefateng itself.⁴⁷
- [119] Lethabo has failed to provide any proof of consultation with Sefateng, despite being confronted with this major shortcoming to its application for a Mining Right. Lethabo's failure to consult Sefateng has also not been addressed.
- [120] The DMRE Regional Manager wrongly concluded in the internal appeal that consultation was unnecessary, contradicting section 22(4)(b) and several other provisions of the MPRDA.
- [121] The Director-General of the DMRE did not fulfil the obligation to adhere to the mandatory and significant procedures and conditions stipulated by the MPRDA.
- [122] A decision maker must apply his/her mind to a decision and not exercise a power arbitrarily or capriciously. When a decision is made without considering relevant factors, or based on irrelevant ones, the decision maker acts arbitrarily. Consequently, their decision is subject to review.
- [123] When a decision maker ignores the specific question at hand, they fail to use the discretion given by the statute, making their decision flawed.⁴⁸ A decision is unlawful if the decision maker does not properly consider important factors or gives undue weight to less significant ones.⁴⁹

⁴⁷ FA4.1

⁴⁸ Littlewood v Minister of Home Affairs 2006 (3) SA 474 (SCA) para 16-17

⁴⁹ Bangtoo Bros and others v National Transport Commission 1973 (4) 667 (N)

- [124] In accordance with section 6(2)(b) of PAJA, a decision can be reviewed if a mandatory and material procedure or condition prescribed by an empowering provision was not followed. This provision requires decision makers to aim to achieve the objectives of the Act when making decisions under legislation. This is especially important when the objectives are clearly defined, and the legislation specifies numerous procedures and considerations necessary to meet those objectives. An invalid decision-making process results in an irrational decision.
- [125] According to section 6(2)(h) of PAJA, a decision is subject to review if it is deemed so unreasonable that no reasonable person would have made it. The irrationality of a decision is further demonstrated when it lacks support from the reasons provided. Therefore, a decision made without considering input from key stakeholders, or without considering essential information needed for a proper decision, or without thoroughly addressing the questions at hand, cannot be considered procedurally rational, fair, or reasonable.
- [126] Failure to adhere to jurisdictional conditions of the MPRDA is a reviewable non-compliance with mandatory procedures. The DMRE Director-General's decision to grant Lethabo a Mining Right was unlawfully granted and procedurally unfair. Despite clear evidence of a lack of required consultation, the DMRE Minister dismissed the internal appeal. As a result, the appeal decision is unreasonable and not logically connected to the available information. The crucial significance of administrative justice within the regulatory framework of the MPRDA cannot be overstated.
- [127] Consequently, beyond the grounds for reviewing the decision to grant Lethabo a Mining Right, the appeal decision is also subject to review under section 6(2)(h) and section 6(2)(f)(ii)(cc) of PAJA.
- [128] These decisions were significantly impacted by a legal error, as the Director-General of the DRE and the Minister of the DMRE failed to recognize that prior consultation is a mandatory condition for the granting of a mining right under section 23(1)(g) in conjunction with section 22(4)(b) of the MPRDA.

- [129] The reasoning that Sefateng did not qualify as an interested party is incorrect. This made the administrative decisions procedurally unfair (section 6(2)(f) of PAJA), considered irrelevant factors (section 6(2)(e)(iii)), and was not rationally connected to the purpose of consultation (section 6(2)(f)(i)(bb)). The outcome was so unreasonable that no reasonable person could have made the same decision (section 6(2)(h)), making these decisions unconstitutional and unlawful (section 6(2)(i)).

Minerals do not occur on the Land

- [130] It is undisputed that Andalusite and Magnesite minerals covered by the contested Mining Right are not found on Farm Waterkop 113.

- [131] Section 23 of the MPRDA provides that:

"(1) Subject to subsection (4), the Minister must grant a mining right if-
(a) the mineral can be mined optimally in accordance with the mining work programme..."

- [132] The Record shows that Lethabo's Mining Work Programme (MWP) is deficient and lacks detail in many areas.⁵⁰

- [133] The MWP of Lethabo lists minerals, including Magnetite, Andalusite, PGMs, Iron, Titanium, and Chrome. However, the Lethabo Mining Right was granted for Magnesite, not Magnetite.

- [134] The MWP does not mention the mineral for which the Lethabo Mining Right was granted. Although Andalusite is mentioned, it does not occur on Farm Waterkop 113.

⁵⁰ Record pages 467 – 504.

[135] Paragraph 4.3 of the MWP, which is intended to address the geological map of the land, only references the "*chromite*" layers, without reflecting any other minerals.

[136] Section 1 of the MPRDA defines a '*mining work programme*' to mean:

"the planned mining work programme to be followed in order to mine a mineral resource optimally;"

[137] Section 25 of the MPRDA obligates of a Mining Right holder to conduct its mining in accordance with its MWP:

"25 Rights and obligations of holder of mining right

...

(2) The holder of a mining right must –

...

(b) actively conduct mining in accordance with the mining work programme;.."

[138] The Lethabo Mining Right is therefore flawed and cannot be issued for minerals that are not included in the MWP or for minerals that are absent from the Land.

[139] The Director-General of the DMRE failed to consider these significant discrepancies in the MWP, resulting in an absence of a rational or reasonable connection or basis for granting the Mining Right for minerals that do not exist on the Land or were not addressed in the MWP.

[140] The Lethabo Mining Right should be reviewed and set aside because the MWP has a fatal defect: there is a discrepancy between the minerals on the land, those listed in the MWP, and those granted in the mining right.

Lethabo Mining Right application defective

- [141] In its answering affidavit, Lethabo claims that it was granted a Mining Right for Chrome ore, which Sefateng currently possesses. However, the Record does not contain any documentation confirming the granting of a Mining Right to Lethabo, despite this issue being central to the Review. Furthermore, Lethabo has not produced a copy of its Mining Right.
- [142] Based on Lethabo's claim of holding a Mining Right over Chrome ore, it is indicated that the Lethabo Mining Right may be subject to review and possible invalidation, as the MPRDA prohibits the issuance of two Mining Rights for the same mineral and land.
- [143] The Constitutional Court in *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* and Another 2014 (2) SA 603 (CC) (12 December 2013) confirmed that under section 22(2)(b) of the MPRDA, the state cannot grant mineral rights to anyone other than the existing right-holder for the same mineral and land. Based on Lethabo's Mining Right, the disputed Mining Right should be revoked upon review.
- [144] Upon review, the Record indicates that Lethabo's Mining Right application is deficient. There was inadequate public participation, and Lethabo's Mine Work Program (MWP) lacks essential details and contains numerous deficiencies. Despite assertions that environmental studies were conducted on the Farms Waterkop 113, Mecklenburg 112, and Malekskraal 509, there is no reference to Sefateng or its neighbouring entities Chromex or Bauba.⁵¹
- [145] Lethabo's MWP submission failed to include required Regulation 8 information, despite previously holding a lapsed Prospecting Right. Specifically, it marked "N/A" for comprehensive progress reports on previous prospecting, which is necessary according to Regulation 8. This omission violates the MPRDA and the responsibilities of a prospecting right holder,

⁵¹ Record pages 762-1238

making the Lethabo Mining Right ineligible for approval by the DMRE under section 23(1)(g) of the MPRDA.

[146] In paragraph 5.9 of the MWP, it is claimed that the price used in the cashflow forecast is USD \$380 per tonne, which applies only to Chrome. Titanium and Vanadium are measured and priced per kg, while PGMs are priced per ounce. This discrepancy means the financing forecast for Lethabo was misrepresented and flawed, making it impossible for the DMRE to approve the Mining Right, as it requires a compatible financing plan under section 23(1)(c) of the MPRDA.

[147] Without an approved MWP, Lethabo could not have received a Mining Right. Therefore, due to these significant flaws in the MWP, the Lethabo Mining Right should be reviewed and set aside.

CONCLUSION:

[148] Sefateng as a result of the specified grounds of appeal seeks a review and setting aside of the decisions, as well as an order to correct and substitute the decision to grant the Lethabo Mining Right with a decision to refuse the Mining Right.

[149] This Court is empowered both by section 172(1)(b) of the Constitution as well as section 8(1) of the PAJA to make any order that is just and equitable.

[150] Section 8(1)(c)(i) of the PAJA permits the remittance of the matter for reconsideration by the administrator. Additionally, Section 8(1)(c)(ii) stipulates that in exceptional circumstances, a court is authorized to substitute or modify the administrative action.

[151] In *Gauteng Gambling Board v Silverstar Development & others*⁵² Heher JA said:

"An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations...That is why remittal is almost always the prudent and proper course."

[152] Exceptional circumstances existed in the aforesaid case, deeming remittal unnecessary and opting for substitution due to the inevitable outcome.

[153] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*⁵³ the Constitutional Court highlighted factors that should inherently hold more weight in this inquiry:

[153.1] Firstly, whether the court is in as good a position as the administrator to make the decision; and

[153.2] Secondly whether the decision of the administrator is a foregone conclusion.

[153.3] Thereafter the court should consider other relevant factors, including delay, bias or the incompetence of the administrator.

[154] The main consideration is whether a substitution order is fair and just, considering all parties involved. This requires an evaluation of each case based on its specific facts and circumstances.

⁵² 2005 4 SA 67 (SCA) para 29

⁵³ 2015 5 SA (CC) at para 47

[155] I agree with counsel for the Applicant that this is an extraordinary case, and there are significant grounds to employ the court's authority in favour of Sefateng:

[155.1] The outcome appears inevitable, given the DMRE's ongoing position which contradicts the MPRDA. They maintained that Sefateng was either exempted from consultation requirements or that consultation could occur retrospectively.

[155.2] It is abundantly clear that *andalusite and magnesite* are not found on the Land.

[155.3] The internal appeal has already faced excessive delays, and further postponement to the DMRE Minister or Director-General would be unjust.

[155.3] The Rule of Law necessitates certainty and predictability, enabling ordinary citizens to manage their affairs in advance.

[156] Accordingly, I find that the request by Sefateng to have the original decision corrected and substituted is warranted.

[157] Costs must follow the event. Due to the intricacy of this matter the costs shall include counsel's fees on scale C.

Order

[1] The applicant is granted leave to file the further affidavit dated 20 August 2024;

[2] The first respondent's decision to refuse the applicant's administrative appeal with Departmental Reference 9/2/4/3/796 on 12 January 2022, is reviewed and set aside;

- [3] The decision of the second respondent dated 28 June 2017 to grant mining right *LP 30/5/1/2/2/10073 MR* and the consequent Mining Right Notarially Executed on 3 February 2023, for andalusite and magnesite, excluding chrome ore, in terms of section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), in respect of farm Waterkop 113 KT in the Limpopo Province, to the fifth respondent ("the Mining Right"), is reviewed and is set aside;
- [4] The aforesaid decisions are hereby replaced and substituted with the following decision by the second respondent to refuse the fifth respondent's application for a Mining Right namely:
- The fifth respondent's application for a Mining Right [LP 30/5/1/2/2/10073 MR] in respect of the andalusite and magnesite over the Farm Waterkop 113 KT in the Limpopo Province, is refused.*
- [5] The First, Second and Fifth Respondents are to pay the costs of this application inclusive of Counsel's fees on scale C, jointly and severally, the one paying the other to be absolved.


S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:

Adv N Fourie instructed by Venter & De
Villiers Attorneys

For the Respondents:

No appearance