



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-044452

DELETE WHICHEVER IS NOT APPLICABLE

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

1/9/25
DATE

[REDACTED]
SIGNATURE

In the matter between:

Rio Tinto Mining and Exploration
Proprietary Limited

Applicant

and

Buchberg Resources Proprietary Limited

First Respondent

Regional Manager: Mineral Regulation,

Western Cape Province

Second Respondent

Deputy Director General: Mineral and Petroleum
Regulation

Third Respondent

Order:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of the First Respondent, including the costs of two counsel where so employed.

JUDGMENT

TOLMAY J

1. The applicant Rio Tinto Mining and Exploration Proprietary Limited ("RTME") applies for an interim interdict to prohibit the first respondent Buchuberg Resources Proprietary Limited ("Buchuberg") from conducting prospecting in terms of two prospecting rights granted to Buchuberg in November 2023 by the third respondent ("Deputy Director-General") in terms of the Minerals and Petroleum Resources Development Act¹ (MPRDA). RTME says that it became aware of the decisions to grant prospecting rights ("the Grant Decisions") in February 2024. RTME has up to date hereof not brought any challenge to the Grant Decisions. But has indicated that it intends doing so in the future. It seeks interim relief pending the determination of a review application ("the Review Application") it brought in 2022 against the decisions taken by the second respondent ("the Regional Manager") in 2021 to accept Buchuberg's application for prospecting

¹ 28 of 2002.

rights that was submitted by Buchuberg in January and February 2021 ("the Acceptance Decisions").

2. The following issues need to be determined:
 - 2.1. Whether RTME has established the requirements for an interim interdict.
 - 2.2. Whether the legality, validity and effectiveness of the Prospecting Right Decisions should be suspended on an interim basis pending the final determination of the Review Application, under section 8(1)(e) of the Promotion of Administrative Justice Act (PAJA).
 - 2.3. Whether RTME should be exempt from the duty to exhaust any internal remedies.
3. RTME first launched an urgent application seeking materially the same relief as in this application on 28 March 2024 ("the first urgent application") but withdrew it on 18 April 2024 after receiving Buchuberg's answering affidavit. RTME then launched another urgent application on 22 April 2024, (the second urgent application). This application was struck from the roll due to lack of urgency. On 18 June 2024, RTME set down this application for an interim interdict on the opposed motion roll for hearing.
4. The background facts are that on 27 August 2020, Buchuberg applied for two prospecting rights on contiguous areas on the West Coast of the Western Cape. Buchuberg submitted prospecting right application WC30/5/1/1/2/10338PR

("application 10338PR") and application WC30/1/1/2/10339PR ("application 10339PR").

5. On 28 August 2020, RTME submitted its own application for a prospecting right to prospect for the same minerals as Buchuberg on 56 properties, including 32 properties that were the subject of Buchuberg's applications (the overlapping properties"). This application is referred to as application 10340PR.
6. On 1 and 8 September 2020, the Regional Manager accepted Buchuberg's applications 10338PR and 10339PR (the initial applications) respectively. On 21 September 2020, the Regional Manager partially accepted RTME's application 10340PR, the acceptance excluded prospecting rights on the overlapping properties.
7. Because Buchuberg's initial applications were submitted before RTME's, application they had to be dealt with ahead of RTM's applications in terms of s 9 of the MPRDA. Once Buchuberg's applications were accepted, RTME's own application for a prospecting right in respect of the overlapping properties could not be accepted by the Regional Manager, in terms of s16(2)(c) of the MPRDA. The Regional Manager therefore issued a letter to RTME in September 2020 indicating that he had accepted application 10340PR only in respect of the properties that were not the subject of Buchuberg's initial applications.
8. Section 9 of the MPRDA reads as follows:
"Order of processing of applications:

(1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on-

(a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);

(b) different days must be dealt with in order of receipt.

[Para. (b) substituted by s. 6 (a) of Act 49 of 2008 (wef 7 June 2013).]

(2) When the Minister considers applications received on the same day he or she must give preference to applications from historically disadvantaged persons.

[Sub-s. (2) substituted by s. 6 (b) of Act 49 of 2008 (wef 7 June 2013).]"

9. On 22 January 2021, Buchuberg lodged applications WC30/5/1/1/2/10352PR ("application 10352PR") and WC30/5/5/1/1/2/10353PR ("application 10353PR"), which were identical to the initial applications. On 3 February 2021, Buchuberg withdrew the initial applications. Application 10352PR was accepted by the Regional Manager on 10 February 2021 and application 10353PR was accepted by the Regional Manager on 3 March 2021.

10. RTME accepts that its application was correctly rejected by the Regional Manager at the time it was submitted, on 8 April 2021. It is however of the view that once the initial applications were withdrawn, its application 10340PR was revived. And seeing that it was next in line, the prospecting rights on the overlapping properties should have been granted to RTME.

11. RTME submitted an appeal to the Director-General in terms of s96 of the MPRDA against the Regional Manager's decisions to accept Buchuberg's applications 10352PR and 10353PR. On 20 January 2022 the Director-General dismissed RTME's appeal ("the Appeal Decision").
12. On 20 December 2022, RTME launched the Review Application to review and set aside the Director-General's Appeal Decision and the Acceptance Decisions. Buchuberg opposes the Review Application. This application is still pending.
13. Buchuberg's applications were evaluated by the DMRE and in November 2023, the Deputy Director-General issued the decision granting the prospecting rights. The prospecting rights were notarially executed on 25 January 2024 and registered in the Mineral and Petroleum Titles Registration Office on 27 February 2024 and 15 March 2024. Buchuberg informed RTME that it had been granted prospecting rights on 20 February 2024.
14. At this point the Grant Decisions have not been challenged. RTME has now taken steps to include such a challenge in the review application. An amended notice of motion was delivered in the Review Application, which included relief in respect of the Grant Decisions. Buchuberg objected to the amendment as it did not comply with Rule 28 of the Uniform Rules of Court.

15. RTME withdrew the amendment and gave notice of an amendment in terms of Rule 28 of the Uniform Rules of Court. Buchberg again objected on the basis that the decision-maker of the Grant Decisions, the Deputy Director-General, was not a party in the Review Application and no relief could be sought in respect of the Grant Decisions, and on the basis that there were no allegations in the founding papers in the Review Application in support of the relief sought in respect of the Grant Decisions. RTME then allowed the proposed amendment to lapse.
16. In August 2024, RTME brought an application to join the Deputy Director-General as a respondent in the Review Application, which it says was enrolled for hearing in March 2025. It says that once the Deputy Director-General has been joined as a respondent, it will seek to amend its notice of motion and deliver a supplementary founding affidavit in the Review Application. No information regarding the joinder application's outcome was provided to this Court.
17. There is no dispute that in this matter, the Regional Manager's decisions to accept Buchberg's initial applications were correct at the time they were taken. RTME's complaint is that rather than rejecting their application, the Regional Manager ought to have held it in abeyance — until Buchberg's application was refused or, if granted, until it expired.

18. At this stage this Court is only seized with an application for an interim interdict. The legal requirements for an interim interdict are well established. It must be demonstrated that —
- 18.1 a prima facie right exists to final relief in due course. The applicant must establish a prima facie right, which means demonstrating the existence of a right in terms of substantive law. This right does not need to be clear or definitive at this stage but must be sufficient to justify the interim relief sought;
 - 18.2 a reasonable apprehension of irreparable harm if the interim interdict is not granted. This harm must be such that it cannot be adequately remedied by other means, such as damages, and must be objectively assessed;
 - 18.3 that the balance of convenience favours the grant of an interim interdict. The court must weigh the prejudice that the applicant will suffer if the interim interdict is not granted against the prejudice the respondent will suffer if it is granted. The stronger the applicant's prospects of success, the less the need for the balance of convenience to favour them, and vice versa and;
 - 18.4 that there are no reasonable alternative remedies available.
19. These requirements are interrelated and must be considered holistically by the court. The court retains a discretion in granting or refusing an interim interdict, and this discretion must be exercised judicially based on the facts of each case.

20. As far as the requirement for a prima facie right is concerned RTME submits that it has prospects of success in the Review Application. The crux of RTME's argument is that s9 of the MPRDA envisages a queuing system and for purposes of the argument relies on *Aquila Steel (South Africa) (Pty) Ltd V Minister of Mineral Resources and Others*². This was a Review Application under PAJA seeking to set aside prospecting rights that was granted in terms of the MPRDA. The Constitutional Court explained that:

*"Section 9 requires that, if received on the same day, competing applications from historically disadvantaged persons must enjoy preference; but, if received on different days, competing applications must be dealt with in the order in which they are received." Section 9 indeed provides for a queuing system which may indeed imply that one cannot withdraw an application and replace it with a new application and by so doing jump the queue."*³

21. It was argued on behalf of Buchberg that even if RTME obtains the final relief it currently seeks in the Review Application, this will not have the effect of prohibiting Buchberg from conducting prospecting. This is because the Review Application challenges only the lawfulness of the Acceptance Decisions and these decisions have been superseded by the Grant Decisions.
22. RTME counters this argument by submitting that the setting aside of the Grant Decisions must follow if it is successful in setting aside the Acceptance Decisions.

² 2019 (3) SA 621 (CC) (15 February 2019).

³ Id. at para 77.

In so doing it relies on *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁴ the argument is that the judicial invalidation of an administrative decision has the automatic effect of invalidating every subsequent administrative decision that has been made as a consequence of the administrative decision that the court has declared unlawful.

23. What *Oudekraal* made clear is that in appropriate circumstances a consequential act may be declared invalid, once an earlier act is declared invalid. The principle is not that the consequential act must be automatically set aside. In review proceedings the court has a wide discretion to grant an appropriate remedy where an impugned decision is found to be unlawful and such a remedy must be fair to all effected by it while vindicating the right that was violated.⁵In *Bengwenyama* the Constitutional Court explained:

'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be

⁴ 2004 (6) SA 222 (SCA) (28 May 2004). See also *Seale v Van Rooyen no and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA) (27 March 2008).

⁵ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007(3) SA 121 (CC) par29; *BENGWENYAMA MINERALS (PTY) LTD AND OTHERS v GENORAH RESOURCES (PTY) LTD AND OTHERS* 2011 (4) SA 113 (CC). (Bengwenyama).

relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented — direct or collateral; the interests involved, and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case. ⁶

24. The above illustrates that a court has a wide discretion whether to grant or withhold a remedy even if a ground of review has been established. ⁷ One can then conclude that the court hearing the Review Application will consider all the relevant circumstances of this case before determining an appropriate remedy, if any, even if it is established that the impugned decision was unlawful. The prospect of success is thus not as clear as was proposed by RTME. and whether the interim interdict should be granted will require a balancing and weighing up of all the requirements of an interim interdict. There is a further aspect that impacts on the prospects of success and that is that RTME did not exhaust the internal remedies available to it under the MPRDA. This aspect is discussed later in the judgment when the issue of internal remedies is considered.

⁶ Id. Par.85.

⁷ NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND ANOTHER v PG GROUP (PTY) LTD AND OTHERS 2020 (1) SA 450 (CC) par.89.

25. Whether RTME will suffer irreparable harm if the interdict is not granted is now considered. The applicable test is objective and must be determined on the facts before the court.
26. RTME is not the owner of the overlapping properties and even if any physical harm occurs, Buchberg will be liable for that damage. Buchberg was obliged to provide an environmental management plan in terms of the MPRDA and the National Environmental Management Act ⁸(“the NEMA”). These acts collectively require an applicant for a prospecting right to obtain an environmental authorisation for its prospecting activities. It is also required to undertake an environmental assessment of the likely impact of prospecting and to put in place remedial measures to mitigate any such impacts. An applicant is also obliged to put in place financial provision sufficient to remedy such impact.
27. Buchberg has concluded land access agreements with the relevant owners of the properties. Section 54 of the MPRDA makes provision for the payment of compensation to a landowner for any loss or damage caused by prospecting, even without such an agreement. Consequently, there is no merit in the argument that RTME will suffer physical harm if the interdict is not granted.
28. Another argument raised by RTME is that Buchberg will analyse and obtain valuable information in respect of the mineral resources on the prospecting area that

⁸ 107 of 1998.

should be proprietary to RTME if it succeeds in obtaining its own prospecting right .However, if the review application succeeds ,RTME will be granted prospecting rights and will have exclusive mining rights and any information obtained by Buchuberg will be of no use to it.

29. Finally, RTME says that Buchuberg, in its prospecting, will remove material that contains the "best data", preventing RTME from accessing this data. In its answering affidavit, Buchuberg says that its drilling is limited in scale and scope. RTME does not provide a substantive response to this in its replying affidavit.
30. The enquiry into balance of convenience follows .There is a relationship between the prima facie right that must be established and the balance of convenience. It is an established principle that the weaker an applicant's prospects of success is, the greater the need for the balance of convenience is to favour it. RTME says that it will suffer irreparable harm if the interim interdict is not granted. This argument has already been dealt with and it was shown that there simply is no merit in it.
31. There is no merit in the argument that Buchuberg will suffer no prejudice if the interdict is granted. Buchuberg has already spent approximately R5.4 million on prospecting. This money can only be recouped if and when the mining ultimately starts mining. The granting of interim relief will delay the process.
32. There is also a public interest element at play. The general principle underlying the MPRDA is to ensure the greatest possible access to the national mineral

resources. Once a prospecting right is granted, the public interest supports the exploitation of the resources. The granting of interim relief will postpone the benefits that prospecting and ultimately mining will bring to both the local communities and the public in general. This must be weighed against the interests of RTME which is at this stage purely commercial in nature. It is obvious that the public interest should be preferred. The balance of convenience accordingly does not favour RTME.

33. RTME faces another obstacle as in respect of the Grant Decisions, RTME has not exhausted internal remedies. Section 7(2) of PAJA requires the exhaustion of any internal remedy, unless exceptional circumstances exist. No case is made out on the papers that exceptional circumstances exist.
34. RTME should have submitted an appeal to the Director-General in terms of s96 of the MPRDA. In terms of s96(2)(a) of the MPRDA, RTME could have requested the Director-General to suspend the Grant Decisions pending the determination of the appeal. Such a suspension would have provided the relief sought in this application.
35. RTME raised several reasons why it was not obliged to exhaust the internal remedy provided for in s96 of the MPRDA. First, RTME says the remedy of a suspension request is not adequate because the MPRDA does not expressly make

provision for the determination of requests for suspensions on an urgent basis. No specific time periods are set out in the MPRDA for the request for suspension and there is nothing to indicate that it could not have been brought on an urgent basis.

36. Second, RTME makes the cynical observation that it should not be required to exercise the internal remedy because it should not be required 'to place its faith in the off-chance that the Director-General will agree to suspend the Prospecting Right Decisions and do so urgently.' This argument cannot be supported as it would require the court to disregard legislation and the important role administrators play. Such an approach would place the principle of separation of powers in jeopardy. The Director-General's powers and duties are set out in the MPRDA and he is obliged to act within the confines of the statutory framework. If he fails to comply with his obligations RTME will be entitled to approach the court for appropriate relief.
37. Third, in the heads of argument RTME argued that it could not submit an appeal to the Director-General because it does not seek to challenge the merits of the Grant Decisions. This argument does not have any merit. The fact that RTME sought to include the Grant Decisions in the review by way of amendment points to a contradictory position. In any event, the fact that an appeal may not be meritorious can never justify non-compliance with legislation. In any event s96 makes specific provision for the suspension of the Grant Decision which could

have addressed the dispute pending the determination of the Review Application. RTME therefore had an alternative remedy and should have availed itself of it.

38. When one considers the requirements for an interim interdict holistically it is apparent that RTME did not succeed in making out a case for such relief. The facts underlying this case justifies an exercise of the Court's discretion in favour of Buchberg.
39. In prayer 4 of the notice of motion, RTME prays for an order "*to the extent that the court deems it necessary to do so for the purposes of granting*" the interim interdict. In the heads of argument RTME clarified that the suspensory relief is aligned with the primary relief sought. This prayer can only be granted if it was found that RTME satisfied the requirements for an interdict and the suspension of the Grant Decisions is necessary. Due to the conclusion reached in relation to the interdictory relief this Court does not have to consider this aspect.

The following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the respondent, including costs for two counsel if employed on scale C.



R TOLMAY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances

Counsel for Applicant: Adv MD Stubbs instructed by Webber Wentzel

Counsel for First Respondent: Adv M Wesley SC & Adv P Maharaj-Pillay instructed by
Malan Scholes Inc

Date heard: 6 February 2025

Date of Judgment: 01 September 2025