



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

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

CASE NO. 83780/2019

In the matter between:

RAZORBILL PROPERTIES (PTY) LTD

Applicant

and

THE MINISTER OF MINERAL RESOURCES

First Respondent

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

Second Respondent

**THE REGIONAL MANAGER: MPUMALANGA
DEPARTMENT OF MINERAL RESOURCES**

Third Respondent

**THE DEPUTY DIRECTOR GENERAL: MINERAL
REGULATION AND DEPARTMENT OF MINERAL
RESOURCES**

Fourth Respondent

JUDGMENT

NQUMSE AJ

[1] The applicant seeks an order in the following terms:

- 1.1. Directing the first respondent within 14 days of the order, to uphold an internal appeal lodged by the applicant on 19 October 2018 against the decision of the third respondent, in terms of which he/she rejected the applicant's application for a prospecting right under reference number: MP 30/5/1/2/14757 PR on the farms listed in Annexure "A" hereto attached;
- 1.2. Declaring that the acceptance of a Mining Right application lodged by the fifth respondent, by the third respondent was wrongful and unlawful, and the acceptance of such Mining Right application be set aside, alternatively be regarded as the second application in line after that of the applicant;
- 1.3. Directing the first to fourth respondents to suspend the processing of the fifth respondent's Mining Right application pending the outcome of these proceedings;
- 1.4. Directing the first respondent within 30 (thirty) days of the granting of the order, to decide the internal appeal referred to in prayer 1 above; and

- 1.5. Directing the costs of this application be paid by the first respondent on the scale as between attorney and client;
- 1.6. That the second to fifth respondents be ordered to pay the costs of this application only in the event of any of them opposing this application, and in that event the costs be paid by such opposing party;
- 1.7. Further and/or alternative relief.

[2] Parties:

- 2.1. The applicant is Razorbill Properties 98 (Pty) Ltd, a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, and having its principal place of business situated at 28A Schwikardt Street, Standerton, Republic of South Africa.
- 2.2. The first respondent is the Minister of Mineral Resources, who is cited in his official capacity, as he bears constitutional and statutory responsibilities in respect of the regulation of mineral resources, arising particularly from the Constitution of the Republic of the South Africa Act 108 of 1996 (“The Constitution”) and the Mineral Petroleum Resources Development Act 26 of 2002 (“the MPRISA”)
- 2.3. The second respondent is the Director General of the Department of Mineral Resources (“the Department”) who is cited in his official capacity.
- 2.4. The third respondent is the Deputy Director General: Mineral Regulation of the Department (“the DDG”) who is cited in his official capacity.
- 2.5. The fourth respondent is the Regional Manager (“the RM”) of the Mpumalanga Regional Office of the Department, who is cited in her/his official capacity.

2.6. The fifth respondent is South 32 SA Coal Holdings (Pty) Ltd, previously known as BHP Billiton Energy Coal South Africa Ltd, and further previously known as Ingwe Collieries Limited, and having its address situated at 39 Melrose Arch, Johannesburg, Gauteng Province.

Factual Matrix

[3] According to the founding affidavit deposed to by Verdi Scholtmeyer (Scholtmeyer) on behalf of the applicant states that on 24 August 2006, the DDG (Mineral Regulations) of the department by virtue of the powers delegated to him in terms of section 103(1) of the MPRISA, granted an application for a prospecting right under reference no.: MP 30/5/1/2/254 PR in favour of Ingwe Collieries Limited to prospect for coal on various portions of the farm Albert 429 IS, situated in the Magisterial District of Ermelo in Mpumalanga. A copy of the power of attorney dated 24 August 2006, signed by DDG, Mr Jacinto Ferreira dos Santos Rocha in terms of which the said Rocha granted RM the power to sign the Prospecting Right in favour of Ingwe Collieries is attached as "VS1". The aforesaid right was notarially executed on 5 December 2006 as per "VS2" attached.

[4] According to Scholtmeyer the Prospecting Right in VS2 was valid for five (5) years as per paragraph 3 which stated as follows:-

"Commencement Duration and Renewal. The Prospecting Right shall commence on 5 October 2006 and, unless cancelled or suspended in terms of Section 47 of the Act, will continue in force for a period of five (5) years ending on 04 October 2021.

The Holder must commence with the prospecting operations within 120 days from the date on which the Prospecting Right becomes effective in terms of Section 17(5) of the Act or any later date as may, upon written request by the Holder, be authorized in writing by the Minister in terms of the Act, failing which this right may be cancelled or suspended. Any application for a renewal of this prospecting right shall be

submitted to the office of the Regional Manager not later than sixty (60) working days prior to the date of expiry of the right.”

[5] He stated that on 07 July 2011, BHP Billiton Energy Coal South Africa Limited lodged an application for renewal of the aforesaid Prospecting Right. A copy of the renewal application is attached as “VS3”. On 25 September 2012 the then DDG Mr Joel Maleatlana Raphela granted the renewal of the said Prospecting Right under Ref No.: 30/5/1/1/2/254 PR. A copy of the granting letter is annexed as “VS4”. On 13 August 2014 the renewal of the Prospecting Right under Protocol No 0015/2014, Ref No.: MP 30/5/1/1/2/254 PR was notarially executed by the RM. A copy of the Notarial Deed is attached as “VS5”.

[6] He further contends the following: -

- 6.1 the validity period of the renewal of a Prospecting Right was for three (3) years;
- 6.2 the commencement date of the renewal of a Prospecting Right is incorrectly stated as 13 August 2014 instead of 25 September 2012. The expiry date of the right was 24 September 2015, calculated from 25 September 2012;
- 6.3 pursuant to the grant of the application for renewal of this Prospecting Right BHP Billiton Energy Coal South Africa (Pty) Ltd passed a resolution on 16 October 2012 authorizing Vikesh Dhanookal as its representative to sign the notarial deed of renewal of the said Prospecting Right.
- 6.4 He further contends that the period for which the Notarial Deed of Renewal of the Prospecting Right endured, has to be computed from the time BHP Billiton was informed of the grant, which is 25 September

2012. He also contends that for purposes of such calculation it is irrelevant that the Notarial Deed of Renewal was executed on 13 August 2014. He also contended that if BHP Billiton received the notice of the grant of its application for renewal of the Prospecting Right on 16 October 2012, the right lapsed on 15 October 2015, which is three (3) years after it was granted. According to the applicant, relying on the *Mawetse*¹ decision of the Supreme Court of Appeal the duration of a Prospecting Right must be computed from the date the applicant was notified about the grant of the Prospecting Right. It is further contended that since BHP Billiton was notified about the grant of the application for Renewal of the Prospecting Right on 25 September 2012, the right lapsed by effluxion of time in terms of section 56(a) of the MPRDA on 24 September 2015 which is a period of three (3) years since the notification of the grant.

[7] According to the Renewal of Prospecting Right attached as “VS6” it is stated that the validity period of the Renewal Prospecting Right commenced on 14 August 2017. The applicant contends the correctness of “VS6” and stated that it is in conflict with the legal regime governing the method of calculation of the validity period of the Prospecting Right, in that, so it is contended, that the Renewal of the Prospecting Right must be computed from the date on which BHP Billiton received confirmation or notification of the grant.

[8] On 8 May 2017, Razorbill Properties 98 (Pty) Ltd lodged its application for a Prospecting Right with the office of the RM in Mpumalanga over the area and for the same mineral previously under BHP’s Prospecting Right, which according to Razorbill Properties lapsed on 24 September 2015. A copy of the application is attached as “VS7”. On 29 June 2017, the RM notified Razorbill Properties about the rejection of its application via a letter attached as “VS8”. The reason for rejection was stated in the said letter as the following: -

1 Mineral Resources and Others vs Mawetse (SA) Mining Corporation (Pty) Ltd 2016 (1) SA 306 (SCA)

“Failure to comply with section 16(2)(b) of the Act in that the area of application comprises of land and mineral in respect of which another party holds the right for.”

The applicant contends that the decision of the RM was impartial and mala fide. It is further contended that RM had to act in a fair and transparent manner and in terms of section 6(2)(f)(i) of the Promotion of Administrative Justice Act, 3 of 2000. It was further contended that as at 8 May 2017 when the applicant lodged its application aforesaid, no other person held a prospecting right, mining permit or retention permit for the same mineral and land.

[9] On 17 July 2017, South 32 SA Coal Holdings (Pty) Ltd, lodged an application for a Mining Right under reference number MP 30/5/1/2/2/10182 MR attached as “VS9” in terms of which the RM in Mpumalanga confirmed the acceptance of the application of South 32.

[10] On 24 July 2017, the applicant lodged an internal complaint against the decision of the RM rejecting its application with the DG. In doing so, it acted in terms of S96 of the MPRDA and Regulation 74 of the Regulations made in terms of Section 107(1) of the MPRDA. According to the applicant, the DG failed to determine the appeal within the time frames provided in regulation 74. The failure by the DG to act prompted the applicant to elicit a response from the DG which came on 21 February 2018 from Legal Services Directorate of the department which advised that the appeal is still being processed and the outcome will be sent to the applicant. A copy of the e-mail is attached as “VS12”.

[11] On 12 September 2017, the DG Mineral Resources via email marked “VS13” forwarded to the applicant the reasons of the RM in response to the appeal. The applicant contends that the reasons given by the RM are contradictory, it referred to page 2 in paragraph 3 and paragraph 4 of the response. Furthermore, so it was contended by the applicant, that the RM’s reasons are contradictory wherein he stated in paragraph 3 of page 2 of his reasons that a prior Prospecting Right application has been issued on the same land and for the same mineral of interest to the applicant. As well as his allegation that there is record of a renewal on the area of application for the same area mineral and is still existing until 12 August 2017. It is

contended by the applicant that this is in conflict with the Supreme Court of Appeal's decision in *Mawetse*. It was also concluded that the reasons of the RM imply that from 25 September 2015 when BHP Billion's Prospecting Right lapsed the land was sterilized and the right was renewed for South 32 which lodged its application for a mining right on 7 July 2017.

[12] The applicant further contends that the reason of the RM that the *Mawetse* judgment was delivered on 28 May 2015 after the commencement of the renewal of the Prospecting Right and after the Renewal contract had been entered into by South 32 and the department must be rejected. Since according to the applicant the *Mawetse* judgment was restating the existing law and not introducing the new law.

[13] Scholtmeyer further referred to his affidavit which was filed in support of the appeal to the Minister which is attached as "VS13(a)" in which he advanced the same arguments. The applicant also stated that the administrative process which the DG and the Minister was supposed to follow in both the first and second appeals remains mystified since they failed to keep the applicant informed on the progress therewith, they also failed to take a decision in regard to the appeals within the prescribed time frames stipulated in Regulation 74(9). Notwithstanding the appeal lodged on 19 October 2018 to the Minister in which the issue is the failure of the DG to take a decision, no response has been forthcoming from the Minister.

[14] Applicant contends that the failure or omission by the Minister to determine the internal appeal negates the requirement for the Minister to comply with the administrative action in Regulation 74(8). In essence, the applicant seeks an order that directs the Minister to uphold its appeal, since the rejection of applicant's application for a Prospecting Right is unlawful and wrongful. A further delay in determining of the appeal by the Minister is unreasonable and inordinate such as to cause unjustifiable prejudice.

[15] In the answering affidavit by Sibongile Booi he stated that the fifth respondent previously known as BHP Billiton Energy Coal South Africa (Pty) Ltd, BHP Billiton Energy Coal South Africa Limited, Ingwe Collieries Limited, Trans Natal Collieries Limited and Usutu Koolmyne Bpk, is a globally diversified mining and metals company with high quality operations in Southern Africa, Australia and South America. Its operations consist of three primary coal mining operations and processing plants producing energy coal for the domestic and export market. Its subsidiary, South Africa Energy Coal (Pty) Ltd, employs approximately 4100 full time employees and 4300 contractors.

[16] He stated that the fifth respondent has been the holder of the Prospecting Right granted in terms of section 17(1) of the MPRDA with the department of Mineral Resources (“DMR”) under reference number MP 30/5/1/1/2/254 PR, over portions of various farms which are all situated in Mpumalanga. In pursuit of its prospecting right and to give effect to the objects of the MPRDA, it has committed financial and human resources and entered into an agreement with Scinta Development Coal (Pty) Ltd (“Scinta”), a black empowerment company. Scinta is focused on the acquisition and development of coal resources with the aim of being a reliable and cost-effective supplier of coal.

[17] The fifth respondent, in co-operation with Scinta, prospected for coal to the stage where it delineated a coal resource to a level of certainty where mine planning could proceed and a pre-feasibility study could be undertaken to a basis of a Bankable Feasibility Study. Various amounts of money were required as well as contribution from the Industrial Development Corporation of South Africa Limited partnered in order to develop a mine.

[18] On 17 July 2017, the fifth respondent lodged its application on line for a mining right in terms of section 22 of the MPRDA, a copy of which was lodged with the RM. Booi, further states that the applicant lodged its application for a prospecting right on the exact properties and mineral that form the subject of the fifth respondent’s prospecting right and the acceptance of such an application is prohibited by section 16(2)(b) of the MPRDA.

[19] The respondent concedes that the first appeal against the decision of the RM to the DG was lodged within the prescribed time frame and further avers that the written reasons for the rejection of the application from the department's Legal Services was furnished within the prescribed time frame. However, it bears no knowledge if its replying submissions were dispatched to the applicant by the DG. Further, there is no indication in the applicant's founding affidavit if it contacted the relevant authority to enquire about the state of the first appeal or put the DMR on terms as to time frames in processing the appeal or approached a court to compel the DG to comply with the appeal regulations.

[20] It is contended that the second appeal to the Minister against the failure of the DG to make a decision ought to have been made within the prescribed time frame but it was lodged more than four months late without an application for condonation. Furthermore, so it is contended that it was not competent for the applicant to lodge the second appeal before the decision of the first appeal was made. It was also contended that the alleged failure to decide the first appeal by the DG does not amount to a decision to dismiss the appeal.

[21] On 22 October 2018 the respondent was furnished with the second appeal. In response, thereto it filed an affidavit on 29 November 2018, which was received by the Legal Services of the department on the same day. A copy of the replying submission was annexed as "X6". The respondent once again bears no knowledge if its replying submissions were dispatched to the applicant by the Minister.

[22] The Respondent contends that the delay of almost a year for the applicant's affidavit since its replying submissions to the Minister should cause the applicant not to succeed in the relief it seeks. It is also denied by the respondent that the Minister delegated his powers to grant mining rights to the DDG. It is further denied that the applicant exhausted the internal remedy afforded by section 96 of the MPRDA. It is contended that the first appeal had not been decided upon, nor does the conduct of the DG in not deciding amount to a refusal of the internal appeal.

[23] It was further contended that the applicant ought to have lodged a mandamus ordering the DG to decide its appeal. Therefore, so it was contended, the appeal to the Minister is not competent under section 96(2) of the MPRDA nor is it competent for the applicant to apply to the court for a review of the alleged decisions by the DG and the Minister. The respondent denies that the powers of the DG and of the Minister as set out in section 96(1)(a) and (b) of the MPRDA amounted to powers to review administrative decisions.

[24] It is alleged by the respondent that the letter containing the notification that the application for renewal of the Prospecting Right which was granted as per annexure "X7", did not state for which period the renewal was granted, nor when such period will commence and end. All that was conveyed in the letter was that the application for renewal had been granted, but that the final notarial deed for renewal would be prepared by the Regional Office and therefore the fifth respondent argues that it assumed as it was entitled to do so, that the terms on which the application for renewal was granted would be set out in the said notarial deed. The letter further conveyed that the right had to be registered in terms of Section 19(2)(a)(ii) of the MPRDA. The respondent states that the period of renewal as well as the beginning and end thereof was conveyed to the respondent only when it was handed with the notarial deed. Therefore, so it is contended that whilst the part of the renewal of the prospecting right was communicated on 25 September 2012 to the respondent, that was not the date on which the terms of the grant were communicated to the respondent. Neither does the power of attorney, "VS4" state the actual terms of the renewal. Therefore, the respondent denies that its renewed Prospecting Right lapsed on 24 September 2015.

[25] The respondent denies the allegations of bad faith and mala fide. It is further denied that the RM acted wrongfully and unlawfully for not accepting the applicant's application for a prospecting right. The *Mawetse* judgment, so it was contended is misunderstood and not applicable in casu. The respondent disputes that a proper case has been made out for the relief sought by the applicant. However, it contends that in the event the court finds that the applicant has made out a case on the merits, it should exercise its discretion against the applicant for the declaratory order sought.

[26] In its replying affidavit, the applicant reiterated its allegations and submissions made in its founding affidavit. Its focus was largely in the interpretation of the relevant sections of the MPRDA and the application of the Supreme Court of Appeal judgment in *Mawetse*. Furthermore, the applicant contends that its review application under PAJA has been lodged within the 180 days period as envisaged in section 7(1)(a) of PAJA.

[27] The issues for determination as I see them are:

27.1 Whether the failure by the DG to make a decision on the first appeal amounts to an administrative decision;

27.2. Whether the appeal (second appeal) to the Minister is competent;

27.3 Whether the applicant had exhausted the internal appeal remedies as envisaged in S96 of the MPRDA;

27.4. The applicability of the *Mawetse* Principle and

27.5. Whether the review application under PAJA against the DG and the Minister is an appropriate remedy.

Discussions and the Applicable Legislations

[28] It is common cause that the first appeal directed to the DG against the decision of the RM was never finalized since no decision therein was made by the DG.

[29] As a starting point I wish to refer to the specific provisions of the MPRDA which regulate the procedure for and granting of the Prospecting Rights and the important role albeit limited, which is played by the RM. Section 16 (4) provides:

‘(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 submit an environmental management plan ...’

section 16 (5) provides:

‘(5) *Upon receipt of the information referred to in subsection (4) (a) and (b), the Regional Manager must forward the application to the Minister for consideration.*’ Following the above duties by the RM, section 17 kicks in and provides:

‘(1) *Subject to subsection 4, the Minister must 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;*
- (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 Of 1996); and*
- (e) the applicant is not in contravention of any relevant provision of this Act.’*

[30] Section 17(6) governs the duration of the prospecting right granted by the Minister and stipulates as follows –

‘(6) A prospecting right is subject to this Act, any other relevant law and the terms and conditions stipulated in the right and is valid for the period specified

in the right, which period may not exceed five years. A holder of a Prospecting Right which has expired has the right under section 18 of the Act to apply to the Minister for the renewal of a Prospecting Right. Relevant to this matter are subsections (4) and (5)

[31] Section 18(4) provides:

‘(4) A prospecting Right may be renewed once for period not exceeding three years. And subsection 5 states:

‘(5) A prospecting right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused.

[32] It is further common cause that the prospecting right which was granted to the respondent was notarially executed on 5 October 2006 and was valid for a period of five years ending on 4 October 2011. Pursuant the expiry of the said prospecting right, the respondent’s application for renewal of the said right for another three years was granted on 25 September 2012 and the respondent was informed thereof on the very same day. The bone of contention arises on the commencement and end of the right as stated in the Notarial Deed “VS6” as 13 October 2014 to 12 August 2017.

[33] This brings me to the calculation of the period of a prospecting right and its calculation as propounded in the *Mawetse* judgment. I find the reasoning of Majiedt JA very instructive where the learned judge remarked as follows. “The period for which Dikolong’s prospecting right endured must in my view be calculated from the date on which it was informed of the granting of the right, namely 18 July 2007. On that date Dikolong became holder of a valid prospecting right, subject to compliance with the request to prove BEE compliance. It matters not, for purposes of computing the period of the duration of the right, that the right still had to be executed and that the right had not yet become effective”.²

² Op cit at page 319 para [21]

[34] *In casu*, of relevance is the date on which the respondent was granted the renewal of its prospecting right, which is the 25 September 2012. It is common cause that it is also the date on which the grant of the renewal was communicated to the respondent. In terms of the MPRDA the right was valid for three years. However, the thrust in the respondent's contention is that the letter which communicated the decision to grant the renewal did not contain the conditions or period of the renewal and the end thereof. It is only when the grant was notarially executed on 13 August 2014 did it become final and it was only at that time did it commence. On this basis the respondent argues that the *Mawetse* judgment is not applicable.

[35] It was further submitted in the respondent's heads of argument that the notarial deed of renewal stated the period of the renewed prospecting right to be from 13 August 2014 until 12 August 2017, therefore an indication that the Minister intended for the renewed right to take effect in the future. The contention of the respondent is similar to the contention that was made by Dilokong in the *Mae* matter. The DDG in that matter approved and signed the recommendation for the granting of the prospecting right in favour of Dikolong on 21 June 2007. The decision was conveyed to Dikolong by way of letter dated 18 July 2007. Following the analysis of the court under the subheading 'has the right lapsed' in paragraph 19 of its judgment, the court made the following comment:

"19. There are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of, and coming into effect of the right. A prospecting right is granted in terms of s17(1) on the date that the DDG approves the recommendation ... In the present instance that occurred on 21 June 2007. For practical purposes communication of that decision will enable challenges by the grantee to conditions which it might consider objectionable and furthermore will alert not only the grantee but also competitors who might have an interest. The period for which the right endures has to be computed from the time that an applicant is informed of the grant, in this instance, 18 July 2007."

[36] Analogous to this matter the period for which the renewed granting of Prospecting Rights endures, has to be computed from the date the granting of the prospecting right was communicated to the respondent, in this instance is 25

September 2012. By operation of law that right is valid for a period not exceeding three years. Regard being had to the provision here above, the end of the three-year period is 24 September 2015, the date on which the renewed prospecting right has to come to an end.

[37] In applying the *Mawetse* judgment which I find applicable in the circumstances of this matter, I am of the view that the argument that the Minister intended the renewed right to take effect in the future which is from 13 August 2014 to 13 August 2017 is untenable since it conflicts with the very provisions of the law as propounded in the *Mawetse* judgment.

[38] This brings me to the question whether the appeal to the Minister is competent. As alluded above that it is common cause that the DG did not make a decision on the first appeal. There can therefore be no dispute that the first appeal to the DG had not been concluded. The second appeal to the Minister can only be understood to be requiring of the Minister to deal with the appeal which arises from the decision of the RM as well as the appeal arising from the conduct of the DG, something that is not sanctioned by the provisions governing the appeal procedure. For sake of completeness I shall refer in full to internal appeal procedures as they appear in the Act.

[39] Section 96 provides:

- (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 in the prescribed manner to –
 - (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
 - (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.

- (2) 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.
- (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 No. 3 of 2000), apply to any court proceedings contemplated in this section.

[40] It may be helpful to juxtapose the aforementioned provisions of the Act with the relevant provisions of PAJA. Section 6 of PAJA reads as follows:

- “6. Judicial Review of Administrative action – (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action, (2) A court or tribunal has the power to judicially review an administrative action if –
- (a) the administrator who took it (i) – (iii)
 -;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken;
 - (i) to (ii)....;
 - (ii) ...
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) to (v) ...;
 - (v) arbitrarily or capriciously;
 - (f) the action itself (i) – (ii) (aa) – (dd) ...;
 - (g) the exercise of the power or the performance of the function authorized by the empowering provisions, in the pursuance of which

the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

[41] Administrative action is defined in section 1 of PAJA to mean:

'..... any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, or

(b)

A decision is referred to mean

'.....any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision including a decision relating to –

(a) making suspending, revoking or refusing to make an order, award or determination;

(g)doing or refusing to do any other act or thing of an administrative nature'

[42] Undoubtedly the action of the RM constitutes an administrative action which is subject to review under PAJA. Similarly, the failure of the DG to act in pursuance of an empowering provision to consider the appeal that was lodged arising from the decision of the RM is reviewable under PAJA. The question is whether the applicant failed to exhaust the internal remedy referred to in section 96 of the MPRDA which renders the application for review under PAJA incompetent or premature.

[43] I find it necessary to refer as far as it is relevant to section 7 of PAJA which deals with the procedure for judicial review in full. Section 7 provides:

' (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 –

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

(b)

(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.

(6) subject to paragraph (c), a court or tribunal must, if it not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) a court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

[44] In dealing with internal remedies in ***Reed v Master of the High Court***³, Plasket J (as he then was) interpreted s7 (2) of PAJA as follows: “20. ‘A remedy, in this context, is defined in the new Shorter Oxford Dictionary as a “*means of counteracting or removing something undesirable, redress, relief, legal redress*”. If therefore follows that in its legal context an internal remedy, in order to qualify to be regarded as such, must be capable, as a matter of law, of providing what the Constitution terms appropriate relief. It must be an effective remedy.

[45] In ***Koyabe v Minister of Home Affairs and Others***⁴ (Lawyers for Human Rights as Amicus (Curiae) the Constitutional Court held at paragraph 34 as follows:

“[34] Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it has been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions __ __ Thus, unless exceptional circumstances are found to exist by a court an

3 [2005] 2 ALL SA 429 E para 20
4 2010 (4) SA 327 (CC)

application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action”.

[46] The author C. Hoexter⁵ states:

“The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted. There must be a clear legislative or contractual intention to that effect. Even then, there is no general principle at common law that an aggrieved person may not go to court while there is hope of extra-judicial redress. In fact there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decision at all, does away with the common law duty to exhaust domestic remedies altogether⁶.

[47] Turning to the procedure of appeal that is provided in section 96 of the Act read with regulation 74 of the Act which simply prescribes the time frame within which the DG has to consider an appeal arising from the decision of the RM and the time frame within which the Minister has to determine an appeal arising from a decision of the DG.

[48] Undoubtedly, the DG has failed to take a decision as envisaged in the MPRDA. It is also undisputed that the DG’s failure has adversely affected the rights of the applicant. This failure by the DG is conceded by the respondent, however, it contends that it does not amount to a decision which entitles the applicant to appeal to the Minister. I tend to agree with the submission made by the respondent that the failure of the DG to decide the appeal is not a deemed refusal or a decision on the appeal. What I do not agree with is the contention made that the only remedy available to the applicant was to apply for a mandamus to order the DG to take a decision. Failing that, the review application made under PAJA is misplaced.

5 Hoexter C. Administrative Law in South Africa, 2nd Ed. Juta 2011
6 At 539

[49] In its reliance on section 6 (2) (g) of PAJA the applicant referred to ***Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others***⁷, where the following was stated:

“Where S6 (2)(g) of PJA refers to the failure to take a decision, it refers to a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues. It is directed at dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling. As such its focus is the person who applies for an identity document, government grant, license, permit or passport and does not receive it within an appropriate period of time, and whose attempts to chivvy officialdom along are met with: *“Come back next week*⁸.”

[50] More relevantly is what was stated in ***Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another***⁹ where the court said: “It is common cause that no final decision has been taken in respect of the tenders, despite the effluxion of a more than reasonable time for a decision to be taken. This means that there can be no dispute that Intertrade is entitled to relief: S6(2)(g), together with S6(3)(a) of PAJA, provide that the failure to take a decision is a ground of review and hence an infringement of the fundamental right to just administrative action. Once that is accepted, the only remaining issue is what is the appropriate remedy that should be awarded.

[51] I therefore do not agree that the applicant’s review proceedings are misplaced. It was perfectly within its right to have launched the review proceedings under PAJA. I am further satisfied that the application for review was launched within the 180 days required in terms of section 7(1) of PAJA. What I disagree with albeit of little consequence given my finding regarding the DG’s conduct is the appropriateness of the second appeal to the Minister. The appeal procedure under S96 of MPRDA is specific regarding the appeal that lies for consideration before the Minister. As correctly agreed by the respondent the Minister does not have review

7 2010 (4) SA 242 (SCA)

8 Ibid at para 43

9

powers but only appeal powers in respect of decisions which arise from the DG.¹⁰ As already alluded the DG has not taken a decision which constitutes an administrative decision as required by the Act, it should therefore follow that the Minister had no appeal to consider as he was also not empowered to consider an appeal arising from a decision of the RM.

[52] In light of the above there can be no doubt that the applicant is entitled to some relief. In its amended notice of motion, the applicant has in addition to its prayers framed a prayer for the court's substitution of its decision in the following terms. "4A.2. Substituting the [DG's] failure to consider and decide the internal appeal with a decision upholding the appeal...." In support of its prayer it referred me to **Trencor Construction (ty) Ltd v Industrial Development Corporation of South African Ltd**,¹¹ where the court crystallized the principles to be considered for an order for substitution as whether:

- (i) It is in a good position as the administrator to make the decision;
- (ii) Whether the decision of the administrator is a foregone conclusion. Thereafter, it must consider other factors such as delay, bias or the incompetence of the administrator and whether it would be in the interest of justice".

[53] In considering an appropriate remedy particularly the proposal of the applicant. I took into account that under normal circumstances, the DG's decision, if not satisfactory to the applicant would have been the subject of appeal to the Minister who is the ultimate appeal authority. As indicated above that because the second appeal to the Minister is not authorized by the applicable legislation and therefore of no consequence to the Minister. A decision to uphold the appeal referred to the DG by way of substitution effectively ousting the Minister's role and participation as required by the law, is in my view untenable and will deprive the Minister of his obligation to exercise her administrative powers as envisaged in S96 of the Act.

¹⁰ See footnote 38

¹¹ 2015 (5) SA 245 (CC)

[54] In conclusion, it is my view that the application should succeed to the extent that the DG has failed to act in accordance with the empowering provision in considering the appeal which stems from the decision of the RM.

[55] In the result the following order is made

Order

1. The application is granted in the following respect:

1.1 The DG is ordered to consider the appeal arising from the decision of the RM within 30 days of this judgment.

1.2 The fifth respondent is ordered to pay the costs of this application on a party and party scale.

VM NQUMSE
ACTING JUDGE OF THE HIGH COURT

APPEARANCE

For the Appellants : Adv: T T Tshivhase

Instructed by : W A DU PLESSIS

For the Respondent : Adv: G L Grobler SC

: Adv: DC Du Plessis

Instructed by : EDWARD NATHARN SONNENBERGS

Heard on : 15 February 2022

Judgement handed down on : 24 August 2022

