CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 157/18

In the matter between:

MAGNIFICENT MILE TRADING 30 (PTY) LIMITED	Applicant
and	
CHARMAINE CELLIERS N.O.	First Respondent
MINISTER OF MINERAL RESOURCES	Second Respondent
DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES	Third Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERAL RESOURCES	Fourth Respondent
ANNEKE DENISE LE ROUX N.O.	Fifth Respondent

Neutral citation:	*Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers N.O. and Others* [2019] ZACC 36
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgments:	Madlanga J (majority): [1] to [67] Jafta J (concurring): [68] to [110]
Heard on:	7 March 2019

Decided on: 9 October 2019

ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The order of the Supreme Court of Appeal is set aside.
4. It is declared that the unused old order right that the late Mr Nicolaas Petrus Gouws enjoyed during his lifetime is still valid in terms of item 8(3) of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (Act).
5. It is declared that the application for a prospecting right lodged by Mr Gouws on 29 April 2005 in terms of section 16(1) of the Act in respect of portion 9 of the farm Driefontein 338JS in the district of Middelburg, Mpumalanga is yet to be decided in terms of section 17 of the Act.
6. It is declared that the award of a prospecting right on 16 January 2006 to Magnificent Mile Trading 30 (Pty) Ltd in terms of section 17(1) of the Act in respect of portion 9 of the farm Driefontein 338JS in the district of Middelburg, Mpumalanga is invalid.
7. The application referred to in paragraph 5 must be decided within 30 days from the date of this order.
8. The second, third and fourth respondents must pay the first respondent's costs, including costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

JUDGMENT

MADLANGA J (Cameron J, Froneman J, Khampepe J, Ledwaba AJ, Mhlantla J, Nicholls AJ, Theron J concurring):

Introduction

[1] Yet again the Mineral and Petroleum Resources Development Act[1] (MPRDA) is before us for the adjudication of some aspects.[2] The first aspect concerns the transmissibility – after the death of the holder – of a right[3] arising from the MPRDA. The second concerns the applicability of the *Oudekraal*[4] / *Kirland*[5] rule (*Oudekraal* rule) to the award of a prospecting right contrary to the right enjoyed by the holder of an unused old order right under item 8 of Schedule II to the MPRDA.[6] This rule says an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside.[7]

[1] 28 of 2002.

[2] This Court has considered it in *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA*); *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* [2018] ZACC 5; 2019 (3) SA 621 (CC); 2019 (4) BCLR 429 (CC) (*Aquila*); *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* [2018] ZACC 41; 2019 (2) SA 1 (CC); 2019 (1) BCLR 53 (CC); and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama)*.

[3] I explain the nature of the right later.

[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA).

[5] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

[6] Here I am referring to the exclusive right to a decision, not the exclusive right to lodge an application. On the distinction, see *Aquila* above n 2 at paras 39, 76, 78 and 84.

[7] *Oudekraal* above n 4 at para 26; *Kirland* above n 5 at para 90.

[2] This matter comes before us as an application for leave to appeal against a judgment of the Supreme Court of Appeal that upheld an appeal from a judgment of the High Court of South Africa, Gauteng Division, Pretoria (High Court).

Background

[3] I will not rehash the objects and impact of the MPRDA with regard to the holding and exploitation of mineral resources in the Republic of South Africa. They have been dealt with sufficiently by this Court[8] and the Supreme Court of Appeal.[9] Suffice it to pay attention to the MPRDA's abolition of the sterilisation of mineral rights which Mogoeng CJ described in *Agri SA* as "the entitlement not to sell or exploit minerals".[10]

[4] At the centre of this litigation are the provisions of item 8 of Schedule II to the MPRDA. These provisions are applicable to unused old order rights. Item 1(ix) of Schedule II defines an unused old order right as "any right, entitlement, permit or licence listed in Table 3 to [Schedule II to the MPRDA] in respect of which no prospecting or mining was being conducted immediately before [the MPRDA] took effect".[11] At the time relevant to this matter, item 8 of Schedule II to the MPRDA provided:

> "(1) Any unused old order right in force immediately before this Act took effect, continues in force, subject to the terms and conditions under which it was granted, acquired or issued or was deemed to have been granted or issued for a period not exceeding one year from the date on which this Act took effect. . .

[8] *Agri SA* above n 2 at paras 25-31; *Aquila* above n 2 at para 4; and *Bengwenyama* above n 2 at para 29.

[9] See, for example, *Executrix of the Estate of the Late Gouws v Magnificent Mile Trading 30 (Pty) Ltd* [2018] ZASCA 91; 2018 JDR 0754 (SCA) (Supreme Court of Appeal judgment) at paras 1, 2 and 21-7, this being the judgment that is the subject of the present application for leave to appeal.

[10] *Agri SA* above n 2 at para 2.

[11] Table 3 lists a number of examples of rights, entitlements, permits and licences that existed in terms of various laws that were applicable before the MPRDA took effect.

> (2) The holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right, as the case may be, in terms of this Act within the period referred to in subitem (1).
> (3) An unused old order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused.
> (4) Subject to subitems (2) and (3), an unused old order right ceases to exist upon the expiry of the period contemplated in subitem (1)."

[5] The MPRDA took effect on 1 May 2004. That means the exclusive right under item 8(2) of Schedule II to apply for a prospecting right or a mining right had to be exercised at the latest by 30 April 2005. When the MPRDA came into operation, the late Mr Nicolaas Petrus Gouws held an unused old order right in respect of a coal deposit on his farm Driefontein, Middelburg, Mpumalanga. On 29 April 2005, a day before the deadline, he made an application in terms of section 16(1) of the MPRDA for the conversion of this right to a prospecting right. On 3 May 2005, a mere three days after the deadline, the applicant, Magnificent Mile Trading 30 (Pty) Ltd (Magnificent Mile), applied in terms of the same section for a prospecting right in respect of the coal deposit on Mr Gouws' farm.

[6] Here is how Magnificent Mile appears to have become aware of the coal deposit. In her answering affidavit before the High Court, Mrs Josephine Terblanche Gouws, the widow of Mr Gouws, explained that Mr Gouws had requested his son-in-law to find a reputable company that would advise and assist him in applying for a prospecting right. To this end, the son-in-law approached a Mr Martin Pretorius, a director of Magnificent Mile. The son-in-law shared a confidential geological report Mr Gouws had obtained some years previously and which indicated that there was a substantial coal deposit on Mr Gouws' farm. In the end, instead of Magnificent Mile, Mr Gouws engaged for purposes of professional assistance another company, Benicon Earthworks and Mining Services (Pty) Ltd. It is quite remarkable that Magnificent

Mile was ready with and lodged its own application within three days after the 30 April 2005 deadline.

[7] The Department of Mineral Resources accepted Mr Gouws' application in terms of section 16(2) of the MPRDA on 20 May 2005, and Magnificent Mile's on 31 May 2005. Mr Gouws died on 7 November 2005 before a decision had been taken on his application.

[8] From then onwards "a veritable comedy of official errors" [12] commenced. In the High Court judgment Fabricius J says "[w]hatever could go wrong with the applications . . . did go wrong".[13] On 13 December 2005 the Department purported to grant Mr Gouws a prospecting right he had not applied for. This was in respect of the farm Driefontein, Wakkerstroom, Mpumalanga instead of Driefontein, Middelburg, Mpumalanga, the farm he owned before his death. On 16 January 2006 it granted Magnificent Mile a prospecting right in respect of Mr Gouws' farm.

[9] An attempt by Magnificent Mile to conduct prospecting operations did not achieve much as the late Mr Gouws' family resisted it. On 18 November 2009 Magnificent Mile applied for a mining right in terms of section 22(1) of the MPRDA.

[10] Next came efforts by the Department to undo the mess it had made. On 9 November 2010 it purported to amend the prospecting right it had granted to Mr Gouws by: changing "Wakkerstroom" to "Witbank";[14] and substituting as the grantee of this prospecting right "the Beneficiary, Late Estate Nicolaas Petrus Gouws". Instead of making the "amendment" applicable to the whole of Mr Gouws'

[12] This is how Mrs Gouws in her answering affidavit before the High Court aptly described the deplorable manner in which the Department handled the Gouws and Magnificent Mile applications.

[13] High Court judgment at para 1.

[14] The reference to "Witbank" instead of "Middelburg" is confusing, but nothing turns on this as it seems reference was now meant to be to the correct farm. Although the farm is in the Middelburg district, it is said to be close to Witbank.

farm, it made it in respect of only one of the two deeds of transfer under which Mr Gouws owned the farm. This, despite the fact that the application by Mr Gouws was in respect of both deeds of transfer and thus the whole farm.

[11] Pursuant to an application in terms of section 11 of the MPRDA by Mrs Gouws for a cession of the prospecting right, on 2 November 2011 the Department registered the prospecting right in the name of Mrs Gouws in respect of the one portion of Driefontein, Middelburg held under one of the two deeds of transfer. Subsequent to this, Magnificent Mile appealed internally against the award of the prospecting right to the Gouwses. Mrs Gouws opposed the appeal which is yet to be decided. On 10 April 2013 the Department refused Magnificent Mile's application for a mining right on the basis that the right applied for by Magnificent Mile "comprise[d] of land in respect of which rights for the same minerals ha[d] been granted in respect of an application received prior to [Magnificent Mile's] application in this regard". This was an obvious reference to the application by Mr Gouws for a prospecting right that had been lodged before Magnificent Mile's.

[12] Magnificent Mile brought a review application at the High Court against the following people: the Minister of Mineral Resources; the Director-General: Department of Mineral Resources; the Deputy Director-General, Mineral Regulation: Department of Mineral Resources;[15] Ms Anneke Denise Le Roux, the executor of the estate of Mr Gouws;[16] and Mrs Gouws who has since been substituted by Ms Charmaine Celliers, the executor of her estate.[17] Mrs Gouws is survived by her two daughters who are her heirs. Only Mrs Gouws opposed the application. Magnificent Mile's original and amended notice of motion sought extensive relief. For present

[15] Before us the three litigants are second to fourth respondents, respectively (government respondents or Department).

[16] She is the fifth respondent before us.

[17] Mrs Gouws passed away on 12 December 2016, three days after the High Court gave reasons for its order that was favourable to Magnificent Mile. She died soon after instructing her attorneys to apply for leave to appeal against that order and judgment. Before us Ms Celliers, the executor of the estate of Mrs Gouws, is the first respondent.

purposes I highlight only that the amended notice of motion asked for: the setting aside of the award of rights that had been made in favour of the Gouwses;[18] the refusal of the application for a prospecting right by Mr Gouws in respect of Driefontein, Middelburg; the setting aside of the decision to refuse Magnificent Mile's application for a mining right; and the substitution for this refusal decision of a decision granting the mining right.

[13] Magnificent Mile contended that the right that Mr Gouws enjoyed terminated when he died with the result that no other right could have been granted to any other person pursuant to the application for a prospecting right he had lodged. In other words, Mr Gouws' right was not transmissible to his sole heir, Mrs Gouws. It also contended that the relief relating to the mining right flowed as a matter of course from the prospecting right which it had already been granted.

[14] Mrs Gouws opposed the first prong of the application on the basis that Mr Gouws' right was transmissible first to the executor and ultimately to her, the sole heir. As for the rest, her opposition was that Magnificent Mile was precluded from lodging an application for a prospecting right before Mr Gouws' application had been decided. She added that, as a result of this preclusion, Magnificent Mile was not entitled to relief in respect of the application for a mining right. This was because the application for a mining right was made "on the back of" the invalidly granted prospecting right. She characterised this defence as a collateral challenge. By way of a counter-application the foundation of which was the same as the collateral or defensive challenge, she sought a declarator. In the main, this counter-application was to the effect that Magnificent Mile's application for a prospecting right was void and that Mr Gouws' application for a prospecting right was valid and had either been granted or was still pending.

[18] I choose to use "Gouwses" because of how confusing it is to determine what the Department granted and to whom.

[15] In parrying the defence and counter-application, Magnificent Mile called in aid the provisions of section 7(1) of the Promotion of Administrative Justice Act[19] (PAJA). This section stipulates that a review of administrative action must be brought without unreasonable delay and not later than 180 days after the date the person concerned became, or might reasonably have been expected to have become, aware of the administrative action. In terms of section 9(1) of PAJA the 180-day period may be extended by agreement between the parties or by a court on application by the person concerned. Magnificent Mile contended that – since the defence and counter-application were effectively a PAJA review – they were hit by the 180-day time limit. This was so because a period in excess of nine years had elapsed from the time Magnificent Mile's application for a prospecting right had been granted to the time of lodgement of the counter-application, and Mrs Gouws had not applied for an extension of the time limit in terms of section 9(1).

[16] The government respondents have conveniently opted to remain supine throughout, including before this Court.

[17] The High Court held in Magnificent Mile's favour. It is this decision that the Supreme Court of Appeal overturned.[20] That is what has brought Magnificent Mile knocking at our door. Magnificent Mile makes two principal arguments and submits that success on any one of them means success for it in the proceedings. First, it contends that the right that Mr Gouws enjoyed at the time of his death, which – according to Magnificent Mile – was only a right that his application for a prospecting right be decided, came to an end when he died; it was not transmissible. Second, it argues that, as the relief prayed for by Mrs Gouws in her High Court counter-application was sought long after the 180-day time limit stipulated by section 7(1) of PAJA had elapsed without a prayer for an extension of time in terms of section

[19] 3 of 2000.

[20] The Supreme Court of Appeal reasoned, inter alia, that the counter-application by Mrs Gouws was unnecessary. The relief she sought by means of that application followed as a matter of course in the process of determining the relief sought by Magnificent Mile in the main application. It then upheld the appeal.

9(1)(b), its prospecting right cannot be assailed. Relatedly, in the face of that right which continues to exist in fact,[21] no person may assert any right arising from the application for a prospecting right that had been lodged by Mr Gouws.

[18] Only the first respondent, Ms Celliers, who is the executor of Mrs Gouws' estate, is opposing the present application.

Jurisdiction and leave to appeal

[19] Does the question of transmissibility satisfy the jurisdictional basis set by section 167(3)(b)(ii) of the Constitution?[22] Although the principles governing the transmissibility of rights upon the death of the holder are settled,[23] the colouring by the MPRDA of the right at issue here introduces a uniqueness that renders the question of transmissibility arguable.[24] This is especially so because this issue involves more than just the question of transmissibility. It also involves the interpretation of some provisions of the MPRDA insofar as they bear relevance to transmissibility. I do not think there is a ready answer to the question. In any event, according to *Sishen* our constitutional jurisdiction is also engaged. In that matter Jafta J said:

[21] Compare *Oudekraal* above n 4 at para 29 and *Kirland* above n 5 at para 90.

[22] Section 167(3)(b) provides:

> "The Constitutional Court—
>
> …
>
> (b) may decide–
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court …"

[23] See Badenhorst "Ownership of Minerals in Situ in South Africa: Australian Darning to the Rescue" (2010) 127 *SALJ* 646 at 651. Also see *Agri SA* above n 2 at para 10.

[24] See *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 21- 44.

> "There can be no doubt that this case raises constitutional issues of importance. It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources."[25]

[20] Less than a year ago this Court grappled with the interpretation of item 8 of Schedule II to the MPRDA.[26] At the heart of the transmissibility question is that same item, but the context is different. That quite recently we dealt with item 8 and we are now having a repeat of that is indication enough that disputes of this nature – even if manifesting themselves in different forms – are not isolated incidents. That makes the question of transmissibility – raised as it is in the context of item 8 – of general public importance.[27]

[21] In the context of this case, the question of transmissibility is of some import, particularly because it relates to the MPRDA, an important transformative piece of legislation.[28] Magnificent Mile's argument has reasonable prospects of success. Thus the matter ought to be considered by this Court.[29]

[22] All this engages our jurisdiction under section 167(3)(b)(ii), as also our constitutional jurisdiction under section 167(3)(b)(i).

[23] The second prong of Magnificent Mile's submissions concerns legal argument pertaining to the review of administrative action. That is a quintessential constitutional issue.[30] These submissions are about the *Oudekraal* rule and the collateral or – as I will call it – defensive challenge. With regard to the *Oudekraal*

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[25] *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 37; and this was affirmed in *Aquila* above n 2 at para 35.

[26] *Aquila* above n 2 at para 5.

[27] *Paulsen* above n 24 at paras 25-8.

[28] See section 2(c) and (d) of the MPRDA.

[29] *Paulsen* above n 24 at paras 29-31.

[30] *Aquila* above n 2 at para 52.

rule, the question is whether it is applicable at all to the circumstances of this matter. Magnificent Mile's submissions have reasonable prospects of success and are of some import.

[24] Leave to appeal must be granted on both principal arguments.

Transmissibility

[25] Cowen says that "it is a general rule, true of most legal systems, that legal rights of a proprietary nature, that is to say rights which have a value, are normally transmissible on death to heirs and legatees".[31] Magnificent Mile has argued that the right that Mr Gouws enjoyed at the time of his death, after he had lodged his application for a prospecting right, was only a right to a decision. I disagree. His right was far more than that and it had value. To illustrate this, Ms Celliers' argument makes the following point. Assume that, for certain reasons, Mr Gouws opted not to exploit a valuable coal deposit beneath the surface of their farm, "banking" it for future use or for their children. Then came the MPRDA. Mr Gouws meticulously took steps towards applying for a prospecting right and, indeed, lodged an application within the deadline set by the MPRDA. All things being equal, Mr Gouws would be justified in expecting that he would be granted a prospecting right. Surely, concludes Ms Celliers' point, the new right would be of value to Mr Gouws and his family. I agree.

[26] This is buttressed by *Aquila*. Cameron J held:

> "During the one-year grace period, holders of unused old order rights enjoyed the same rights as before the MPRDA came into force. *In addition*, they enjoyed exclusivity to apply for new-order title. They had the sole right to apply for

[31] Cowen "Vested and Contingent Rights" (1949) 66 *SALJ* 404 at 416.

> prospecting or mining rights over the land over which they held unused old order rights."[32] (Emphasis added.)

[27] The "in addition" shows that there are two different rights; in addition to the exclusive right "to apply for new-order title", there is the old order right itself. This right was a limited real right.[33] It went hand in hand with a statutory personal right to acquire a new limited real right under the MPRDA. These facets of the right existed separately from the right that a holder of an unused old order right would then be entitled to after lodging an application for a right under the MPRDA; that is the right to a decision.

[28] *Agri SA* says mineral rights held before the MPRDA took effect "were in practice and in law treated as assets that could be sold, leased or used as security. They formed part of the holder's estate and could be bequeathed to an heir."[34] The rights referred to here were obviously of much greater potency and value than the unused old order right retained under the MPRDA. But attenuated and short-lived though the unused old order right may be, in many respects each of its manifestations is similar to the right that preceded it and which is preserved under item 8 of Schedule II. To that extent, it too is an asset of some importance and does have value.

[29] Did the unused old order right enjoyed by Mr Gouws suddenly evaporate once he lodged an application for a prospecting right with the result that, as Magnificent Mile contends, all that remained was a right to a decision? No. *Aquila* tells us that "until that application is disposed of, either way, the old-order right 'remains valid'

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[32] *Aquila* above n 2 at para 6.

[33] *Agri SA* above n 2 at para 9; see also Badenhorst and Mostert "Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property Clause: An Analysis in Two Parts" (2003) 3 *Stellenbosch Law Review* 377 at 384-5 referred to in footnote 17 of *Agri SA*; and Badenhorst "The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?" (2017) 134 *SALJ* 361 at 368-9.

[34] *Agri SA* above n 2 at para 10.

under item 8(3)".[35] And, as Ms Celliers argues, this right and what it may give rise to[36] are of value.

[30] I am satisfied that the right enjoyed by Mr Gouws at the time of his death became an asset in his estate and was transmissible. But to whom? As this is not a central issue before us, I deal with it briefly.

[31] The concept of universal succession, in terms of which an heir immediately stepped into the shoes of the deceased and took over the assets and liabilities of the deceased,[37] is no longer part of our law.[38] What happens instead is that immediately after the grant of letters of executorship, the executor must take the deceased estate into her or his custody or under her or his control.[39] After the deceased's death, an heir acquires a vested right which entitles her or him to "payment, delivery or transfer of the property comprising the inheritance".[40] This right is enforceable only after the estate has become "distributable"[41] as envisaged in section 35(12) of the Administration of Estates Act.[42] Likewise, a legatee does not acquire ownership over

[35] *Aquila* above n 2 at para 72.

[36] It may give rise to a prospecting or mining right.

[37] Joubert "Wills and Succession" in *Law of South Africa* 2 ed (2009) vol 31 (*LAWSA*) at para 209.

[38] Id.

[39] Section 26(1) of the Administration of Estates Act 66 of 1965.

[40] *LAWSA* above n 37 at para 210.

[41] This word is used in section 35(13) of the Administration of Estates Act.

[42] In terms of section 35(12) an estate becomes distributable when a liquidation and distribution account has lain open for inspection in accordance with section 35(4) read with subsection (5) "and—

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period."

Of course, an heir or legatee may receive nothing if, after payment of the estate's liabilities, there are no assets or if the estate is insolvent. See *LAWSA* above n 37 para 210.

the legacy on the deceased's death.[43] She or he acquires a vested right which is enforceable against the executor when the estate is distributable.[44]

[32] So, in terms of section 26(1) of the Administration of Estates Act, Mr Gouws' transmissible old order right fell to be controlled by Ms Le Roux, the executor of the estate of Mr Gouws. Mrs Gouws, being the sole heir, thus had a vested right to take over this right when Mr Gouws' estate became distributable. I need not deal with what, in fact, eventually became of this right insofar as the administration of Mr Gouws' estate is concerned as we do not have details of the exact stages of the administration. And this is complicated by the interposition of Mrs Gouws' death. If not already resolved, all this is for resolution outside the confines of this litigation.

The Oudekraal rule and defensive challenge

[33] Ms Celliers opposes Magnificent Mile's case on the basis of the defensive challenge. Magnificent Mile persists in its High Court argument that the defensive challenge is but a PAJA review. As such – continues the argument – it is hit by the 180- day time limit. This is so because a period in excess of nine years had elapsed from the time Magnificent Mile's application for a prospecting right was granted, and Mrs Gouws did not apply for an extension of the time limit in terms of section 9(1) of PAJA. It will soon become apparent when I discuss the *Oudekraal* rule that it is not necessary to deal with this argument.

[34] Magnificent Mile argues that, as the defensive challenge has to fail, the decision to grant it a prospecting right must stand. This must be so even assuming that the grant was unlawful; it exists in fact and has legal consequences for as long as it has not been set aside. This, of course, is invoking the *Oudekraal* rule. According to Magnificent Mile, the effect of the *Oudekraal* rule is that, for as long as the

[43] *LAWSA* above n 37 at para 210.

[44] Id.

Magnificent Mile prospecting right has not been set aside, an award of a prospecting right to the Gouwses will be an exercise in futility. That is so because Magnificent Mile – as the holder of a prospecting right – has an exclusive right to apply for and be granted a mining right in respect of the coal deposit in Driefontein, Middelburg.[45]

[35] Let me consider the question whether the *Oudekraal* rule is applicable to this matter. An appropriate starting point is the English judgment in *Smith*[46] which was relied upon in *Oudekraal*. Briefly the matter concerned an appeal against a decision that had quashed the appellant's summons. The appellant issued summons against a Rural District Council, the clerk of that Council and a certain government Ministry for damages arising from the execution of a "compulsory purchase order"[47] that had allegedly been procured, issued and confirmed wrongfully and in bad faith. The summons was quashed on the bases that: paragraph 15 of the relevant part of the applicable statute provided for circumscribed grounds on which a compulsory purchase order could be challenged; the grounds relied upon by the appellant fell outside those circumscribed grounds; and paragraph 16 of the same part of the statute disallowed all challenges to compulsory purchase orders falling outside of the grounds set out in paragraph 15. In the House of Lords Lord Radcliffe said:

> "At one time the [appellant's] argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that consequently all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of

[45] Section 19(1)(b) of the MPRDA provides that the holder of a prospecting right has the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question.

[46] *Smith (Kathleen Rose) v East Elloe Rural DC* [1956] UKHL 2 (*Smith*).

[47] This appears to have been an expropriation.

> invalidity and to get it quashed or otherwise upset it will remain as effective for its ostensible purpose as the most impeccable of orders."[48]

[36] He concluded that Parliament had taken away the entitlement to quash compulsory purchase orders outside of paragraph 15 with the result that – even if unlawful – these orders remained effective.

[37] As it's often said, context is everything. In what context did this happen? That is to be found quite early on in his speech. He said:

> "The relief that the appellant seeks … depends wholly on her ability to establish that [the] compulsory purchase order . . . was invalid. I do not wish to beg any question by using the word 'invalid'. I mean that she has to show that in the eyes of the law this compulsory purchase order was not effective to confer upon the Rural District Council the authority to enter upon her land, *which they certainly would not have possessed without the making of the order*. It follows, therefore, that her action must stand or fall by her ability to question this compulsory purchase order in the legal proceedings."[49] (Emphasis added.)

[38] What we glean from this – and indeed from the earlier quotation – is that the principle the case enunciates is not only about the continued existence of an unlawful administrative act that has not been set aside, but also about the legal force of consequences that the act ordinarily gives rise to. Put differently, once a compulsory purchase order has been issued, a forced purchase of an individual's immovable property may take place validly. This, regardless of how unlawful the issuing of the compulsory purchase order might have been. Crucially, without the compulsory purchase order – valid or otherwise – no forced sale can take place. So, the forced sale – which is a "consequent act" – owes its existence to the earlier administrative act, the issuing of a compulsory purchase order.[50]

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[48] *Smith* above n 46 at p 17.

[49] Id at p 15.

[50] Compare *Aquila* above n 2 at para 101.

[39] A close look at *Oudekraal* yields similar results. There the approval by the provincial Administrator of the establishment of Oudekraal Township was held to be invalid. The reason was that the Administrator failed to take into account the existence on the land in issue of graves and kramats[51] which were of religious significance to the Islamic faith. This was information that should have been taken into account in the approval decision.[52] In addition the approval was "*ultra vires* for the reason that it permitted subdivisions and land use in criminal disregard of the graves and kramats. It would be impossible to avoid desecration or violation if one were to make a road over a grave site or to build over it."[53] Howie P and Nugent JA then held:

> "[T]he question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."[54]

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[51] "A kramat is the grave of somebody who, among adherents of the Islamic faith, is regarded as having attained, through conspicuous piety, 'an enlightened spiritual situation'. Such person having thus been a 'friend of God', the spirit of God is to be found at the site" (*Oudekraal* above n 4 at para 14).

[52] *Oudekraal* above n 4 at para 25.

[53] Id.

[54] Id at para 26.

[40] *Oudekraal* as well is, first, about the continued existence of an unlawful administrative act for as long as it has not been set aside by a court. Second, it too does focus on acts that are consequent upon an initial unlawful administrative act; that is acts whose validity – even if only for a while – depends on the existence of the initial act. *Oudekraal* continues:

> "Central to [Forsyth's] analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words '. . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'
>
> . . .
>
> [T]he proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."[55]

[41] In the instant matter the context is totally different. Mr Gouws held an unused old order right in terms of item 8(1) of Schedule II to the MPRDA the nature of which was primarily a limited real right with the other facets mentioned above. That right existed – *as a matter of law* – from 1 April 2004 to 30 April 2005. In terms of item 8(3) that right continued to exist – *as a matter of law* – after Mr Gouws had lodged an application for a prospecting right. It was to endure until that application had been

[55] Id at paras 29 and 31. For the work cited in the quote see Christopher Forsyth: "The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law" in Christopher Forsyth and Ivan Hare *Essays on Public Law in Honour of Sir William Wade QC* eds (Clarendon Press).

granted or refused.[56] That application was in respect of the whole of Driefontein, Middelburg. As I explained, this farm comprised two portions, each of which had a separate deed of transfer. We know that insofar as Mr Gouws' application is concerned, two purported grants were made. The first was in respect of Driefontein, Wakkerstroom. The second was in respect of only one of the two portions of Driefonten, Middelburg. None of these grants related to what Mr Gouws had applied for. That must mean his application is yet to be decided. That in turn means Mr Gouws' unused old order right continues to exist. And it was extant when Magnificent Mile applied for and was awarded a prospecting right. Based on *Aquila* that award was invalid. There this Court held:

> "Section 9 [of the MPRDA] read together with item 8(3) of Schedule II entails that an application competing with one by the holder of the old-order right falls into the queue behind it. In other words, the one-year exclusivity period does not bar other applications after its elapse, but it does confer priority of consideration and processing, simply because the old-order rights-holder's application was in first. This means that the old-order rights-holder obtains priority (though not exclusivity) for the disposal of its application, until the MPRDA right it seeks is granted and dealt with in terms of the MPRDA or is refused. Until that happens, no competing application for an MPRDA right may be processed."[57]

[42] Plainly the validity of Mr Gouws' right did not hinge on the Magnificent Mile award. Thus this is unlike "consequent" administrative acts that owe their existence to earlier unlawful administrative acts. Mr Gouws' right did not owe its existence to the unlawful award of a prospecting right to Magnificent Mile. It was a statutorily created limited real right that existed anteriorly to this unlawful award. At the risk of repetition, the existence of the Magnificent Mile award – albeit unlawful – was never necessary for the existence of Mr Gouws' right. To put it bluntly, the subsequent

[56] As I have held, that right was transmissible upon Mr Gouws' death.

[57] *Aquila* above n 2 at para 78.

invalid Magnificent Mile award has no bearing whatsoever on the existence and validity of Mr Gouws' right.

[43] To say the later unlawful Magnificent Mile award could effectively wipe out the pre-existing limited real right would be turning the *Oudekraal* rule on its head. *Oudekraal* says no more than that if you want to nullify, or even avert consequences that owe, or would owe, their existence to an initial unlawful administrative act, that initial act must be set aside. It is one thing to say – but for an unlawful administrative act – something would never have come about and that, once it has come about, it continues to exist for as long as the unlawful administrative act to which it owes its existence has not been set aside. It is quite another to say that an unlawful administrative act – through the simple facility of applying the *Oudekraal* rule – can have the effect of obliterating a pre-existing right which does not owe its existence to the unlawful administrative act. Indeed, *Smith*, *Oudekraal*, *Kirland* and all other related cases[58] do not suggest so.

[44] This must mean the right that was enjoyed by Mr Gouws which is transmissible through the succession chain (including after the death of Mrs Gouws, his sole heir) is still valid as decreed by item 8(3) of Schedule II to the MPRDA. As I have said, that in turn means the Magnificent Mile award is invalid. In truth, the "defensive challenge" instituted by Mrs Gouws was simply an assertion of a pre-existing right; it did not need to purport to be a review of the unlawful Magnificent Mile award. In any event, even if Mrs Gouws is taken at her word as having defensively challenged the Magnificent Mile award, my approach is not a validation of that challenge; it is simply a declaration of what is. A defensive challenge would have been necessary if Mr Gouws' right could not continue to exist in the face of the unlawful Magnificent Mile award. I have shown that that's not the case here.

[58] *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) at paras 87 and 95; *Merafong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) SA 211 (CC); 2017 (2) BCLR 182 (CC) at paras 43-4; and *Aquila* above n 2 at paras 91-102.

[45] As I have said, the *Oudekraal* rule is not only about instances where there is a consequent act whose existence depends on an earlier unlawful act. It applies to any situation where – for whatever reason – an extant administrative act is being disregarded without first being set aside. *Kirland* is one such instance. The purported withdrawal of an approval which I explain shortly was not consequent upon the prior approval. Does that make *Kirland* analogous or similar to the instant matter? No, *Kirland* is different.

[46] The Superintendent-General of the Eastern Cape Department of Health withdrew an approval that Kirland had already been granted to set up a private hospital. This withdrawal was a desktop exercise with no court process. Kirland's challenge was directed at that purported withdrawal of approval and a decision of the Eastern Cape MEC for Health to refuse an appeal against the withdrawal. So, the approval that was later withdrawn was – and had to be – at the heart of the challenge. There just could not be a withdrawal in the face of a standing approval. The *Oudekraal* rule tells us that the approval – albeit plainly granted unlawfully[59] – had to be set aside by a court.

[47] Likewise, *Merafong* is distinguishable. In its capacity as a water service authority under the Water Services Act[60] Merafong City Local Municipality (Merafong) introduced a substantial increase in tariffs for the supply of water. Acting in terms of section 8(4) of the Water Services Act, the Minister of Water Affairs and Forestry upheld an appeal by AngloGold Ashanti Limited against the increase. Shorn of detail that is not necessary for our purposes, what happened next is that – with the Minister's decision still extant – Merafong notified AngloGold Ashanti that failure to

[59] The Superintendent-General refused approval on the basis that there was an over-supply of private hospitals in the area concerned. Before this decision could be communicated to Kirland, the Superintendent-General was involved in a car accident and had to be away from work for a while. An Acting Superintendent-General – acting under extreme and improper pressure from the MEC for Health – granted approval. This purported grant is what was communicated to Kirland. It was on his return that the Superintendent-General purported to withdraw the "approval" instead of approaching court to have it set aside.

[60] 108 of 1997.

pay for water in accordance with Merafong's new tariffs would result in the water supply being cut off. There as well the Minister's decision to uphold the appeal was – and had to be – at the centre of the litigation that ensued: could the municipality go ahead with its "decision" to cut off the water supply even though the Minister's decision had not been set aside? Yet again, based on the *Oudekraal* rule, the answer was in the negative. Merafong succeeded only because the Court upheld its entitlement to raise a defensive challenge. But the Court remitted the merits of that challenge to the High Court.

[48] Contrasting these two cases with the instant matter, the effect of the declarator I am proposing is twofold: (a) *in law* Magnificent Mile's entitlement to a prospecting right only comes into play *after* Mr Gouws' application has been finalised; and (b) Mr Gouws' application must be dealt with on its merits, unaffected by the Magnificent Mile application or its purported grant. Put differently, the Magnificent Mile application does not feature at all in the consideration and decision of the Gouws application. It is simply a non-issue.

[49] But for the concurring judgment penned by my colleague, Jafta J, I would be ending here and proceeding to remedy. I must have some words in response.

The concurring judgment

[50] What appears to be at the heart of the concurring judgment's concerns is what the rule of law dictates.[61] The concurring judgment makes the point that it would be at variance with the rule of law to enforce unlawful administrative action.[62] It is true – as the concurring judgment says – that the Magnificent Mile award, which was made contrary to statutory prescripts, is inconsistent with the principle of legality, an incident of the rule of law.[63] It is also true that the supremacy clause of our

[61] See, for example, concurring judgment at [80].

[62] Id.

[63] Id.

Constitution[64] decrees that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Crucially though, the *Oudekraal* rule itself is informed by the rule of law.[65] Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule.

[51] It is for this reason that the rule of law does not countenance this. The *Oudekraal* rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside.[66] The operative words are that it exists "*in fact*". This does not seek to confer legal validity to the unlawful administrative act. Rather, it prevents self-help and guarantees orderly governance and administration. That this is about the rule of law is made plain by *Kirland*:

> "The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – *springs deeply from the rule of law*. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom*, '[t]he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.' For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help."[67] (Emphasis added.)

[64] Section 2 of the Constitution.

[65] *Kirland* above n 5 at para 103.

[66] *Oudekraal* above n 4 at para 26 and *Kirland* above n 5 at para 90.

[67] *Kirland* at para 103, quoting *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) at para 86. See also *Aquila* above n 2 at para 96.

[52] The concern of the concurring judgment that the effect of the *Oudekraal* rule is to enforce constitutionally invalid administrative action is ameliorated by the fact that the action is open to challenge through the court process. Until a court process has taken place, the rule of law must be maintained. The alternative of a free-for-all is simply not viable.

[53] I read the concurring judgment to say the rule that an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside needs to be qualified. It accepts the necessity of the rule. It says:

> "[W]e must acknowledge the principle that, just like laws, administrative actions are presumed to be valid until declared otherwise by a court of law. What this means is that any person who disregards such law or action does so at his or her own peril should it turn out that the law or action is valid."[68]

[54] But, says the concurring judgment, this presumption – like others – is rebuttable;[69] and "[i]n a case like the present where facts establish that the administrative action in question was illegal, it must be taken that the presumption has been rebutted".[70] It continues and says "[t]here can be no justification for treating what has been *proven* to be invalid as valid".[71] (Emphasis added) Although the focus of the concurring judgment is *Kirland*, I do not see how the view of that judgment in this regard cannot apply to *Oudekraal* as well. For that reason and to avoid confusion, I will continue to refer to the *Oudekraal* rule.

[55] I understand the qualification proposed by the concurring judgment to be that the rebuttal of the presumption may take place without any court process. My immediate practical, if not legal, difficulties are manifold. Who rebuts the

[68] Concurring judgment at [83].

[69] Id.

[70] Id.

[71] Id at [85].

presumption? Who – outside of a court process – determines that the invalidity of the administrative action has been proven and that, therefore, the presumption has been rebutted; and how do they do that? What if there is disagreement on whether the illegality has been proven? The approach of the concurring judgment has the potential of taking us to the very realm of uncertainty from which the *Oudekraal* rule removes us. It takes us to the real possibility of a free-for-all. *Kirland* tells us that ignoring irregular administrative action on the basis that it is a nullity "invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid."[72]

[56] An argument analogous to the qualification proposed by the concurring judgment was rejected in *Merafong*.[73] That argument is captured thus:

> "Merafong argued it should be permitted to raise a reactive challenge to AngloGold's attempt to enforce the Minister's ruling because there is a fundamental distinction between decisions that fall within the scope of powers with which a public official is clothed, but are merely wrongly taken, and those that are palpably and obviously beyond the powers of the decision maker. In the latter case, where a decision 'lacks the facial imprimatur of lawfulness', a person subject to the decision is entitled to ignore it until, as a matter of process, that decision is sought to be enforced against it. At that point the nullity of the decision may be raised as a defence. Counsel contended that decisions of this nature 'on their face fall beyond the ostensible scope of the powers conferred upon a public officer [and] have no validity and should be treated as such even though they have yet to be set aside on review'."[74]

[57] The Court held:

[72] *Kirland* above n 5 at para 103.

[73] *Merafong* above n 58.

[74] Id at para 50.

> "If we were to sustain Merafong's argument that it was entitled to ignore the Minister's decision until it was sought to be enforced, this must extend to all cases of patent invalidity. This would suggest that an official may ignore a decision, taken under statutory power (*intra vires*), that is tainted by patently improper influence or corruption. But that is precisely what happened in *Kirland* – and the self-help argument was not countenanced. What is more, not only would what is or is not 'patently unlawful' be decided outside the courts, but there would be no rules on who gets to decide and how. If failure to review a disputed decision is defensible on the basis that the decision was considered patently unlawful, the rule of law immediately suffers. So the argument is not tenable."[75]

[58] In similar vein *Aquila* says "legal remedies are the province of the courts, and the courts alone".[76] And "no official is entitled to pronounce a decision a nullity without going to court".[77] Of course, this applies to private persons as well.

[59] The concurring judgment observes that "it is absurd to propose here that Mr Gouws should be denied the right to convert his old order mineral right on account of an illegal prospecting right awarded to Magnificent Mile". For the reasons that I give, the Magnificent Mile award cannot result in the Gouwses being denied their rights. So, what the concurring judgment says does not arise. There is simply no basis for denying the *prior and valid* right of the Gouwses which does not owe its existence to the later unlawful Magnificent Mile award. And the declarator puts everything beyond question.

[60] Lastly, *apropos* a statement in *Kirland* that says "invalid administrative action may not simply be ignored, but may be valid and effectual",[78] the concurring judgment says this defies logic. Although *Kirland* does say this, when viewed in the context of the judgment as a whole, *Kirland* says no more than that the invalid

[75] Id at para 54.

[76] *Aquila* above n 2 at para 96.

[77] Id.

[78] *Kirland* above n 5 at para 101.

administrative act must be *treated* as valid by the decision-maker and affected parties *until* it is reviewed in appropriate court proceedings. *Treating* the invalid act as valid does not invest it with legal validity.

[61] What I have said does not affect instances where a defensive challenge may be available.

Remedy

[62] What I have said about the validity and invalidity of the parties' competing claims is not determinative of the remedy that we must grant. What is are justice and equities in accordance with section 172(1)(b) of the Constitution.[79] In the circumstances of this case, what could possibly displace the legal entitlement of the Gouwses would be the extent to which Magnificent Mile acted on the unlawful award to it of a prospecting right. On its own say so, although it did drill some holes in the process of prospecting, its endeavours were greatly hampered by the Gouwses' resistance to prospecting activity. Indeed, the Supreme Court of Appeal held that prospecting was limited. Before us, Magnificent Mile takes issue with this factual finding. On the authority of *Makate* there is no basis for us to upset this finding.[80] That leaves us with little to tilt justice and equity in Magnificent Miles' favour. It is just and equitable to uphold the continued existence of the right that vested in Mr Gouws and to make a declarator accordingly.

[63] To put everything beyond question, it is necessary to make two more declarators. The first is that the application by Mr Gouws for a prospecting right is yet to be decided. The second is that the Magnificent Mile award is invalid.

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[79] Section 172(1)(b) provides:

> "When deciding a constitutional matter within its power, a court—
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> . . .
>
> (b) may make any order that is just and equitable . . ."

[80] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 37.

[64] Consequently, the appeal must fail. In so holding I must clarify that this is not an acceptance of the declarator by the Supreme Court of Appeal that Magnificent Mile did not have a right or competency to apply for any right in terms of the MPRDA in respect of Driefontein, Middelburg. *Aquila* has clarified that, beyond the exclusivity period that ended on 30 April 2005,[81] nothing precluded the lodgement of competing applications. However, in terms of the precedence laid down by section 9 of the MPRDA, competing applications would queue behind an application timeously lodged by the holder of an old order right.[82]

Costs

[65] After the hearing, directions were issued calling upon the government respondents to show cause why – despite their non-participation in the litigation – they should not bear the costs. Without doubt the root cause of the litigation that the parties found themselves embroiled in is the departmental bungling detailed above. In that context, the course adopted by Magnificent Mile is understandable. It seems to me it would be unjust for Magnificent Mile to be mulcted in costs whilst the government respondents have now conveniently disappeared.

[66] Although costs awards are purely discretionary, the Supreme Court of Appeal does not appear to have applied its mind to the considerations dealt with in the preceding paragraph. Its costs order against Magnificent Mile, which is not motivated at all, appears to have followed the general rule that the losing party pays the other side's costs. To my mind, the considerations I have dealt with are crucial. The Supreme Court of Appeal ought to have grappled with them. Therefore, this Court is at large to exercise its own discretion on the question of costs. And it comes to the conclusion that the government respondents must bear the first respondent's costs, including costs of two counsel, in all three Courts.

[81] This is in terms of item 8(2) read with (1) of Schedule II to the MPRDA.

[82] *Aquila* above n 2 at para 78.

Order

[67] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The order of the Supreme Court of Appeal is set aside.
4. It is declared that the unused old order right that the late Mr Nicolaas Petrus Gouws enjoyed during his lifetime is still valid in terms of item 8(3) of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (Act).
5. It is declared that the application for a prospecting right lodged by Mr Gouws on 29 April 2005 in terms of section 16(1) of the Act in respect of portion 9 of the farm Driefontein 338JS in the district of Middelburg, Mpumalanga is yet to be decided in terms of section 17 of the Act.
6. It is declared that the award of a prospecting right on 16 January 2006 to Magnificent Mile Trading 30 (Pty) Ltd in terms of section 17(1) of the Act in respect of portion 9 of the farm Driefontein 338JS in the district of Middelburg, Mpumalanga is invalid.
7. The application referred to in paragraph 5 must be decided within 30 days from the date of this order.
8. The second, third and fourth respondents must pay the first respondent's costs, including costs of two counsel, in this Court, the Supreme Court of Appeal and High Court.

JAFTA J:

Introduction

[68] The question whether a public official is bound to give effect to an unlawful administrative decision if the decision is not set aside in appropriate review

proceedings lies at the heart of this matter. The answer to this requires us to clarify the decision of this court in *Kirland*.[83] This decision has been construed by various courts to mean that an invalid administrative action remains in force until set aside in a formal review application.[84]

[69] In *Swart*[85] the majority in this Court stated:

> "[The Master's decision] must remain in force until such time as a proper application for review has been brought. This would be in line with the well-established principle that until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon it has binding effect merely because of its factual existence."[86]

[70] Apart from arguing that Mr Gouws' old order right was not transmitted into his estate, Magnificent Mile contended that it was granted a prospecting right on the relevant property before any rights were issued to Mr Gouws or his estate. That prospecting right, it submitted, conferred on it an exclusive right to apply for a mining right under section 19(1)(b) of the MPRDA.[87]

[71] When it was pointed out at the hearing that this argument proceeds from an incorrect assumption that the prospecting right was lawfully granted when it was in fact issued unlawfully because whilst Mr Gouws' application for converting the old

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[83] *Kirland* above n 5.

[84] *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* [2017] ZASCA 177; 2018 (4) SA 71 (SCA); *Serengeti Rise Industries (Pty) Ltd v Aboobaker N.O.* [2017] ZASCA 79; 2017 (6) SA 581 (SCA); *South African Local Authorities Pension Fund v Msunduzi Municipality* [2015] ZASCA 172; 2016 (4) SA 403 (SCA) at para 35; and *Democratic Alliance v Minister of International Relations and Co-operation* 2018 (6) SA 109 (GP) at para 41.

[85] *Swart v Starbuck* [2017] ZACC 23; 2017 (5) SA 370 (CC); 2017 (10) BCLR 1325 (CC).

[86] Id at para 37. The following cases are cited as authority for this proposition: *Tasima* above n 58 at para 147; *Merafong* above n 58 at para 42; and *Kirland* above n 5 at paras 101-3.

[87] Section 19(1)(b) of the MPRDA provides:

> "[S]ubject 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".

order right was pending, it was not legal for the relevant functionary to grant Magnificent Mile's application for a prospecting right, a new argument was advanced. Relying on *Kirland* and other cases that followed it, it was submitted that for as long as the prospecting right issued to Magnificent Mile is not set aside in appropriate review proceedings it remains in force and that Magnificent Mile is entitled to be granted a mining right, based on that prospecting right. It is this argument that makes it necessary for us to reconsider *Kirland.*

[72] I have had the benefit of reading the judgment prepared by my colleague Madlanga J (first judgment). I agree that the old order right in respect of which Mr Gouws applied for conversion was transmitted into his estate upon his death. I also embrace the order prepared in the first judgment. However, I hold the view that it is not enough to address the argument advanced by Magnificent Mile on the enforcement of the invalid prospecting right by distinguishing this matter from *Kirland.*

[73] But I agree that *Oudekraal*[88] is not on point, for reasons comprehensively set out in the first judgment. I embrace its analysis of *Oudekraal* as it is in line with what the minority said in *Merafong*.[89]

[74] For a better understanding of the contention that even if the prospecting right was unlawfully issued it is enforceable until set aside by a court in review proceedings, it is necessary to recapitulate the facts. While Mr Gouws' application for conversion was pending, Magnificent Mile applied for and was granted a prospecting right in respect of the same farm that was the subject matter of Mr Gouws' application. This means that two applications were received by the relevant functionary for the granting of rights in respect of one property.

[88] *Oudekraal* above n 4.

[89] *Merafong* above n 58 at paras 119-127.

[75] In terms of item 8(1) of Schedule II to the MPRDA, within the first year of its coming into force, the MPRDA prohibited the functionary from accepting an application from Magnificent Mile or any other applicant. So, the first year was a period of exclusivity for Mr Gouws to convert his old order right.[90] Beyond that period, the functionary could accept other applications, but was precluded from determining them before deciding the earlier application by Mr Gouws lodged within the period of exclusivity.[91] Other applications would have to fall in line after that of Mr Gouws for determination after his had been decided.[92] Magnificent Mile's application was lodged after the expiry of the exclusivity period. But it could be decided only after Mr Gouws' had been determined. In error the functionary disregarded this prescribed order of finalising applications and awarded a prospecting right to Magnificent Mile before Mr Gouws' application had been decided. This, of course, was in contravention of the relevant statutory provisions. Consequently this prospecting right was unlawfully granted.

[76] The question that arises is whether, despite the unlawfulness, the prospecting right is enforceable for as long as it is not set aside in appropriate proceedings. The Constitution is a good point from which to begin this inquiry. Section 33 guarantees everyone the "right to administrative action that is lawful, reasonable and procedurally fair."[93] Significantly this provision imposes a duty on the state to give effect to this right.[94]

[77] Upon the lodgement of the application to convert, the rights guaranteed by section 33 were activated and the relevant functionary was under a duty to afford the Gouwses an administrative action that is lawful, reasonable and procedurally fair.

[90] See how this Court's judgment in *Aquila* above n 2 dealt with the exclusivity period at paras 67-72 and 75.

[91] Id at paras 75-79.

[92] Id.

[93] Section 33(1) of the Constitution.

[94] Section 33(3)(b) of the Constitution.

This obligation was triggered regardless of whether there was an existing decision or not.

[78] The issue is whether the relevant functionary was prohibited from granting the conversion asked on account of the unlawfully granted prospecting right to Magnificent Mile. Relying on the proposition that an invalid administrative action is binding and enforceable until set aside, Magnificent Mile contended that the functionary in question was not permitted to grant any rights to the Gouwses. Instead he or she was bound to issue a mining right to Magnificent Mile.

[79] The proposition invoked by Magnificent Mile was formulated by the High Court in *Merafong* in these words:

> "The Municipality has not in its papers sought to review or overturn the Minister's decision and thus based on the *Oudekraal* principle the Minister's decision stands until set aside by a court of law. The decision is therefore binding and enforceable and the municipality should abide by it."[95]

[80] This proposition is fundamentally flawed and here is why. An illegal administrative action like the prospecting right awarded to Magnificent Mile is inconsistent with the principle of legality which is an incident of the rule of law that forms part of the Constitution and therefore cannot be enforceable. In our law an invalid administrative action does not exist in the eyes of the law and as a result cannot be enforced. Therefore the law cannot enforce an action whose existence it does not recognise.

[81] Here there can be no denying that the prospecting right held by Magnificent Mile does not exist in law. It merely exists in fact as it has not been set aside by a court of law. Since an administrative action derives its force from its

[95] *Merafong* above n 58 at para 112.

validity, that prospecting right cannot be binding.[96] An invalid administrative action is unenforceable and not binding. This is because the Constitution says so.

[82] *Affordable Medicines Trust*[97] reminds us that conduct which is inconsistent with the Constitution is invalid:

> "Our constitutional democracy is founded on, among other values, the '[s]upremacy of the constitution and the rule of law.' The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.
>
> The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."[98]

[83] However, we must acknowledge the principle that, just like laws, administrative actions are presumed to be valid until declared otherwise by a court of law. What this means is that any person who disregards such law or action does so at his or her own peril should it turn out that the law or action is valid.[99] But the presumption like all presumptions is rebuttable. In a case like the present where facts

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[96] Id at para 107 and see also *Msunduzi Municipality* above n 84 at para 34.

[97] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[98] Id at paras 48-9.

[99] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at paras 27-8.

establish that the administrative action in question was illegal, it must be taken that the presumption has been rebutted.

[84] Where the presumption is rebutted, it is not competent for a court to insist that an illegal action be followed only on the basis that the action concerned has not been set aside in appropriate review proceedings. The fact that a court may decline to set aside the illegal action in the absence of a formal application does not mean that it is valid and enforceable. What is illegal remains invalid and does not exist in law. That it exists at the level of fact does not mean that it may be enforced in law.

[85] The proposition that "administrative decisions must be treated as valid until set aside, even if actually invalid"[100] does not reflect the true position in our law. There can be no justification for treating what has been proven to be invalid as valid. Treating invalid administrative actions as valid is nothing else but a perversion of the law. It would mean that administrative action that is not recognised by the law is treated as if it is recognised. Jurisprudentially, it is absurd to propose that here Mr Gouws should be denied the right to convert his old order mineral right on account of an illegal prospecting right awarded to Magnificent Mile.

The Kirland principle

[86] The statement from *Kirland* which has given birth to the proposition that an invalid administrative action is enforceable until set aside on review is the following:

> "The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process."[101]

[100] *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200; 2016 JDR 1370 (SCA) at para 25.

[101] *Kirland* above n 5 at para 101.

[87] This statement was based on paragraph 26 of *Oudekraal* which is quoted as expressing the principle. Paragraph 26 of *Oudekraal* states:

> "For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. . . . But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."[102]

[88] A careful reading of paragraph 26 reveals that the statement made in *Kirland* is not an accurate reflection of what was stated in *Oudekraal*. Read in the proper context as set out in the first judgment here, what *Oudekraal* tells us is that in the case of consequent actions, an invalid earlier action may give rise to a valid consequent action. Therefore, unless set aside by a court in review proceedings, the earlier invalid action may not simply be overlooked by public officials.

[89] The inaccuracy in *Kirland*'s statement is to the effect that an invalid administrative action "may be valid and effectual". To say an invalid action may have legal consequences does not mean that the action itself has suddenly become valid. It remains invalid but since it continues to exist at the level of fact, the invalid action may give rise to legal consequences in circumstances like those identified in

[102] *Oudekraal* above n 4 at para 26.

Oudekraal. In that event it is the consequences that become legal and valid, not the administrative action which is the source of those consequences. Indeed to say an invalid action remains valid defies logic.

[90] But the statement in *Kirland* must be read together with what was said in paragraph 106 which states:

> "In summary: having failed to counter-apply during these proceedings, the Department must bring a review application to challenge the approval granted to Kirland, which remains valid until set aside. In those proceedings, the Department will no doubt explain its dilly-dallying by accounting for the long months before it acted. As respondent, Kirland will in turn be entitled to defend the decision, whether on the ground of its validity, or on the ground that it should not be set aside, even if it is invalid."[103]

[91] In that context it becomes apparent that the Court was addressing a different issue. The proposition that the approval remains valid until set aside was affirming the presumption that an administrative action is taken to be valid until set aside. This does not mean where, as in *Oudekraal* and here, the unlawfulness of the administrative action in question has been established to the satisfaction of the court, the presumption continues to operate in favour of validity. Proof of invalidity terminates the force of the presumption.

[92] To hold otherwise would mean that here the unlawful prospecting right granted to Magnificent Mile must be treated as valid until it is set aside. This in turn would mean that at the time Magnificent Mile submitted its application for a mining right, the relevant functionary should have treated that application, based as it was on an unlawful act, as giving Magnificent Mile an exclusive right to apply for a mining right under the MPRDA. This would have been impermissible because the mining right

[103] *Kirland* above n 5 at para 106.

was not consequent to the prospecting right in the sense envisaged in *Oudekraal*. The mining right does not depend on the prospecting right for its validity.

[93] Moreover, on its own, the unlawful prospecting right is simply unenforceable, regardless of the point that it exists at the level of fact. This is because as an invalid action, the prospecting right does not exist in law. Consequently the law cannot facilitate enforcement of an action whose existence it does not recognise. In addition, the principle laid down in *Kirland* to the effect that public officials may not ignore administrative actions which are considered invalid does no more than placing a duty on such officials to approach courts to have the actions in question set aside. It does not mean that if these officials fail to institute proceedings, the relevant actions become enforceable even if it is shown that they were invalid. At best those actions are presumed to be valid until proved otherwise.

[94] Therefore, reliance placed on *Kirland* here for the proposition that the prospecting right that was allocated to Magnificent Mile remains valid and binding until set aside, is misplaced. The true legal position is that since the prospecting right was unlawful, it could not be enforced.

[95] *Merafong* too does not help Magnificent Mile's cause, because this Court in that matter must be taken to have affirmed the presumption in favour of validity and nothing more. This is apparent from the following statement:

> "The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."[104]

[104] *Merafong* above n 58 at para 41.

[96] Notably, *Merafong* recognised a simple reality that the presumption of validity may not be triggered in some administrative actions. Where the presumption is not in operation, an invalid action is treated as such despite the fact that it is not set aside by a court. On this issue *Merafong* informs us:

> "*Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances."[105]

[97] The fact that the statement refers both to *Oudekraal* and *Kirland* illustrates beyond doubt that it is not restricted to matters where a collateral challenge has been raised. This is so because in *Kirland* there was no collateral challenge to the validity of the approval and yet *Merafong* tells us that *Kirland* too "recognised there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down".

[98] Of course the conclusion that the prospecting right here is not enforceable does not mean that an illegal decision may never be enforced. Exercising its just and equitable remedial powers, a court may order that an invalid decision shall continue to operate until the defect is remedied by a competent authority. This is normally achieved by suspending the declaration of invalidity which is usually done in order to avoid an injustice or serious disruption in the administration of government. In *Allpay 2* this Court held:

[105] Id at para 44.

> "Section 172(1)(b)(ii) [of the Constitution] provides that a court may, using its just and equitable remedial powers, make an order 'suspending the invalidity for any period and on any conditions, to allow the competent authority to correct the defect'. So this Court, under constitutional warrant, may suspend the declaration of invalidity of the contract until any new payment process is operational. During the period of suspension the contract remains operational and Cash Paymaster stays bound to its contractual and constitutional obligations. The continued operation of these contractual obligations thus finds its source in this Court's powers under section 172(1)(b)(ii). The Court's sanction will give any possible future breach by Cash Paymaster of these obligations a dimension beyond mere breach of contract."[106]

[99] But the present is not such a case. There are no reasons compelling that the illegal prospecting right be treated as if it was valid. To do so would not only be inconsistent with the Constitution but would also result in unfairness and injustice. The just and equitable remedial power is exercised sparingly to preserve and keep in operation an otherwise invalid conduct. This is done to avoid a greater harm which may result in other serious breaches of the Constitution.[107]

The declarator

[100] What remains for consideration is the propriety of the declaration that the prospecting right awarded to Magnificent Mile is invalid, without deciding the counter- application brought by Mrs Gouws. Having held that a collateral challenge was not available to Mrs Gouws and that her counter-application could not be entertained in view of statutory time limits, the Supreme Court of Appeal held:

[106] *Allpay Consolidated Investment Holdings (Pty) Limited v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay 2*) at para 63.

[107] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at paras 132-4 and 137.

> "The relief in the counter-application was probably sought unnecessarily, since the correct disposition of the relief sought by Magnificent Mile, together with the reasons for such disposition, would sufficiently determine the rights of the parties."[108]

[101] In the counter-application Mrs Gouws had sought three declaratory orders: the first was an order declaring that Magnificent Mile could not competently apply for a prospecting right under the MPRDA, in respect of the relevant farm; the second was a declaration that its application for a prospecting right was void *ab initio*; and the third was an order declaring that Mr Gouws' application for a prospecting right in respect of the same farm was valid and was still pending. Plasket AJA held that this relief flowed logically from the grant of the remedy sought by Magnificent Mile and therefore there was no need for a counter-application. Hence in upholding the appeal, he dismissed the application by Magnificent Mile and granted the relief sought under the counter- application.

[102] Whilst there is merit in the approach followed by the Supreme Court of Appeal here, the difficulty is that the approach is at variance with the one adopted by that Court in *Kirland*.[109] In that matter Kirland had sought on review an order setting aside the withdrawal of approval of its application to establish a private hospital and an order that reinstated the approval. Without launching a counter-application, the respondents in opposing the relief sought challenged the validity of the approval which Kirland sought to be reinstated. They placed facts before the review court which established beyond doubt that the approval in question was irregularly granted. Notably, the decision- maker herself gave details of the irregularities.

[103] The High Court rightly defined the issues as including the validity of the approval which Kirland sought to be reinstated and the propriety of the purported

[108] Supreme Court of Appeal judgment above n 9 at para 44.

[109] *MEC for Health, Eastern Cape v Kirland Investments* [2013] ZASCA 58; 2014 (3) SA 219 (SCA) (*Kirland* Supreme Court of Appeal judgment).

withdrawal. The High Court set aside the approval on the basis of the irregularities and also set aside the decision to withdraw it and the MEC's decision to uphold the withdrawal in an internal appeal.

[104] The MEC appealed to the Supreme Court of Appeal and Kirland cross-appealed against the order setting aside the approval. The Supreme Court of Appeal dismissed the MEC's appeal but upheld Kirland's cross-appeal. In upholding the cross-appeal Plasket AJA reasoned:

> "In paragraph 8 of the judgment of the court below, Makaula J spoke of Kirland Investments having sought the review of four decisions, including 'the ASG's [Acting Superintendent-General's] decision of 23 October 2007 approving the establishment application'. He then proceeded to find, at paragraph 27, that this decision (perhaps more correctly 'these decisions') was to be 'reviewed and set aside' because the [Acting Superintendent-General] had ignored the advisory committee's recommendations and had acted under dictation. Finally, he made orders reviewing and setting aside 'the decision of the Acting Superintendent-General dated 23 October 2007' and remitting 'the applicant's applications for establishment of private hospitals and unattached operating theatres in Port Elizabeth and Jeffreys Bay' to the Superintendent-General for reconsideration.
>
> Kirland Investments never applied for this relief. They would not have wanted to because the approvals that were granted by the [Acting Superintendent-General] were precisely what they had applied for. The MEC and Superintendent-General, on the other hand, never applied for the review and setting aside of the approvals and neither did they bring a counter-application to this effect. It is therefore clear that when Makaula J said that Kirland Investments had sought the setting aside of the [Acting Superintendent-General] decisions (and the consequential remittal order) he erred."[110]

[105] It is apparent from this statement that two reasons were advanced for upholding the cross-appeal. First, it was stated that Kirland did not ask for the setting aside of the approval and that the MEC did not bring a counter-application for that relief.

[110] Id at paras 25-6.

Second, the High Court had no jurisdiction, it was said, to set aside the approval in the absence of a counter-application.

[106] I think the Supreme Court of Appeal erred in *Kirland*. Like here, it was unnecessary for the MEC to bring a counter-application. The relief she sought flowed "logically" from the remedy asked for by Kirland to the effect that the approval be reinstated.

[107] The proposition that the High Court lacked jurisdiction too was in error. The High Court was seized with a review application by Kirland and that gave it jurisdiction to determine all issues which arose in that matter. Section 6(1) of PAJA does not require a separate application for review where there is one already before the court. The proceedings in which the High Court determined the validity of the approval in question were instituted in terms of section 6. Section 8 of PAJA confers a wide remedial power on the review court which includes the setting aside of an administrative decision if one of the grounds listed in section 6 is established.

[108] The guiding principle proclaimed by section 8 is that the remedy granted must be just and equitable. And the determination of justice and equity requires the court to consider and weigh the interests of the parties on both sides. In this regard *Millennium Waste Management* declares:

> "The question of relief remains for consideration. While acknowledging that there was no culpable delay on the part of the appellant to institute review proceedings, exercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of section 8 of PAJA which require that any order granted in matters such as this be just and equitable. This guideline involves a process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only.

> Furthermore, the section lists a range of remedies from which the court may choose a suitable one upon a consideration of all relevant facts."[111]

[109] In the circumstances I am satisfied that when the interests of Magnificent Mile are weighed against those of the Gouwses, it is just and equitable to grant a declarator on the prospecting right unlawfully given to Magnificent Mile. Procedurally, there can be no prejudice to Magnificent Mile because the right granted to it was unlawful. It can never be enforced. Nor can it prevent the relevant functionary from awarding a prospecting right that was applied for by Mr Gouws whose application is still pending.

[110] It is for these additional reasons and those set out in the first judgment that I support the order proposed in that judgment. Of course, I do not support those reasons in the first judgment that are responding to my judgment.

[111] *Millennium Waste Management (Pty) Limited v Chairperson Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) at para 22.

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