THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 278/10

NORGOLD INVESTMENTS (PTY) LTD	Appellant
and	
THE MINISTER OF MINERALS AND ENERGY OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE DIRECTOR GENERAL, MINERAL REGULATION, DEPARTMENT OF MINERALS AND ENERGY	Second Respondent
THE ACTING REGIONAL MANAGER, LIMPOPO REGION, DEPARTMENT OF MINERALS AND ENERGY	Third Respondent
THE REGIONAL MANAGER, MPUMALANGA REGION, DEPARTMENT OF MINERALS AND ENERGY	Fourth Respondent
RHODIUM REEFS LIMITED	Fifth Respondent
THE DEPUTY DIRECTOR GENERAL: MINERAL REGULATION	Sixth Respondent

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Neutral citation: *Norgold v The Minister of Minerals and Energy of the Republic of South Africa* (278/10) [2011] ZASCA 49 (30 March 2011)

CORAM: Navsa, Brand, Ponnan, Snyders JJA and Plasket AJA

HEARD: 15 March 2011

DELIVERED: 30 March 2011

SUMMARY: Conversion of prospecting right in terms of Mineral and Petroleum Resources Development Act 28 of 2002 – application lodged at wrong Regional Office – reached ultimate decision-maker – not fatal – served statutory purpose – renewal of prior permit in terms of the Minerals Act 50 of 1991 not formally done within prescribed period – held not to preclude subsequent conversion – implementation of decision by subordinate not impinging on its validity.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Phatudi J sitting as court of first instance).

The appeal is dismissed and the appellant is ordered to pay the costs of all the respondents, including, where applicable, the costs of two counsel.

JUDGMENT

NAVSA JA (Brand, Ponnan, Snyders JJA and Plasket AJA concurring)

[1] This appeal, directed against a decision of the North Gauteng High Court (Phatudi J), is the culmination of a battle for prospecting rights over Portion 1 and the Remainder of De Goedeverwachting 332KT, situated in the Magisterial District of Sekhukhune in the province of Limpopo (the property). The high court had dismissed an application by the appellant, Norgold Investments (Pty) Limited (Norgold), for an order reviewing and setting aside a decision of the fourth respondent, the Regional Manager, Mpumalanga, Department of Minerals and Energy, alternatively, the sixth respondent, the Deputy Director General, Mineral Regulation of the same department, to convert 'an old order prospecting right'[1] of the fifth respondent, Rhodium Reefs Limited (Rhodium), over the property, to one in terms of item 6 of Schedule 2 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act).[2] Norgold had also sought an order directing the third respondent, the Regional Manager, Limpopo (of the Department of Minerals and Energy) to accept its application for a prospecting right over the property in terms of s 16(1) of the Act. It also failed in that quest. Phatudi J ordered that Norgold pay the costs of all the respondents, including the costs of two counsel. The present appeal is before us with the leave of the court below.

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[1] Issued on 1 June 2001 in terms of s 6 of the repealed Minerals Act 50 of 1991. The permit entitled Rhodium to prospect for precious metals and base minerals found in mineralogical association with those precious metals.

[2] This Act came into operation on 1 May 2004.

[2] The application in the court below grew like Topsy, from a narrow focus to one that was dispersed and opportunistic. Norgold is a company that engages, inter alia, in exploration for and exploitation of mineral resources in South Africa. The initial foundation for the application in the court below, as appears from the founding affidavit of Mr Stephen Ward, a director of Norgold, was that the application by Rhodium in April 2005, for a conversion of its existing prospecting permit, purportedly in terms of item 6 of Schedule 2 of the Act (item 6), was lodged in Mpumalanga, whereas the appropriate region was Limpopo, where the property is located.

[3] Norgold submitted that the provisions of the Act, which prescribe the regions in which applications should be lodged, either in terms of s 16 or item 6, are peremptory and that Rhodium's failure to comply was fatal. Additionally, Norgold contended that the Regional Manager, Mpumalanga lacked statutory authority to grant prospecting rights. According to Norgold, its application for prospecting rights over the property, in terms of s 16 of the Act, lodged on 3 April 2007 with the Regional Manager, Limpopo in whose region the property was located, met all the prescribed requirements. Consequently, *it* was entitled to be granted the prospecting rights and not Rhodium.

[4] It is necessary at this stage to have regard to the provisions, both of s 16(1) and item 6. Section 16(1) of the Act provides:

'(1) Any person who wishes to apply to the Minister for a prospecting right *must* lodge the application–

(a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.' (My emphasis.)

[5] Item 6 reads as follows:

'(1) Subject to subitems (2) and (8), any old order prospecting right in force immediately before this Act took effect continues in force for a period of two years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

(2) A holder of an old order prospecting right *must lodge* the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with–

(a) the prescribed particulars of the holder;

(b) a sketch plan or diagram depicting the prospecting area for which the conversion is required, which area may not be larger than the area for which he or she holds the old order prospecting right;

(c) the name of the mineral or group of minerals for which he or she holds the old order prospecting right;

(d) an affidavit verifying that the holder is conducting or has conducted prospecting operations immediately before this Act took effect on the area of that land to which the conversion relates and setting out the periods during which such prospecting operations were conducted and the results thereof;

(e) a statement setting out the period for which the prospecting right is required, substantiated by a prospecting work programme;

(f) information as to whether or not the old order prospecting right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mining Titles Office;

(g) a statement setting out the terms and conditions which apply to the old order prospecting right;

(h) the original title deed in respect of the land to which the old order prospecting right relates, or a certified copy thereof;

(i) the original old order right or a certified copy thereof; and

(j) all prospecting information and the results thereof to which the right relates.

(3) The Minister *must* convert the old order prospecting right into a prospecting right if the holder of the old order prospecting right–

(a) complies with the requirement of subitem (2);

(b) has conducted prospecting operations in respect of the right in question;

(c) indicates that he or she will continue to conduct such prospecting operations upon the conversion of such right;

(d) has an approved environmental management programme; and

(e) has paid the prescribed conversion fee.' (My emphasis.)

[6] It is common cause that the first respondent, the Minister of Minerals and Energy (the Minister), acting in terms of s 7 of the Act, determined by way of GN R 564, *GG* 26319, 30 April 2004 the regions in terms of which the Act would be administered. Furthermore, it is uncontested that the region in which the property is located falls within Limpopo and not Mpumalanga.

[7] The basis upon which Norgold's application was not accepted in Limpopo by the Regional Manager, Mpumalanga was because the prospecting rights for precious metals and base minerals had already been granted to Rhodium.

[8] I turn to describe how Norgold's case broadened. In a supplementary affidavit, filed a few months after the application had been lodged and after receipt of the record of proceedings pursuant to Uniform rule 53, Norgold, noting that no documentation appeared therein, contended additionally that the decisions sought to be impugned appeared to have been made arbitrarily and without good cause. A supplementary record was later filed, containing all the documents upon which the ultimate decision to grant prospecting rights was based, putting paid to that part of Norgold's case.

[9] Furthermore, Mr Ward, in his supplementary affidavit, referred to a telefax he had received from the Department of Minerals and Energy, in which appeared a list of delegations in terms of s 62 of the Minerals Act 50 of 1991 (the Minerals Act) that bears upon the Mpumalanga region. From the list of delegations it appears that the Director of Mineral Development in Limpopo had delegated the administration of the property to his Mpumalanga counterpart. It was contended on behalf of Norgold that the delegation was irrelevant and of no force and effect in relation to Rhodium's application for a conversion in terms of item 6. It was submitted that if indeed the Regional Manager for Mpumalanga had relied on the delegation, that, in itself would have rendered the acceptance of the application for the conversion *ultra vires* and the subsequent decision to grant prospecting rights null and void. It was contended that the delegation had not survived the appeal of the Minerals Act.

[10] Norgold also submitted that since the decision to convert Rhodium's old order rights had been taken by the sixth respondent, the Deputy Director General Mineral Regulation, and not by the appropriate decision-maker, the Minister, the decision by the former falls to be set aside.

[11] The case continued expanding. The facts set out in the next two paragraphs emerged mainly from the answering affidavit opposed to on behalf of the Minister and her officials and were seized upon by Norgold to found an entirely new case in its replying and subsequent affidavits.

[12] Rhodium held mineral rights over the property, due initially to a notarial cession of mineral rights dated 18 December 1989. Subsequently it held a prospecting permit issued on 2 June 2000 in terms of s 6 of the Minerals Act. That permit was valid until 1 June 2001. In terms of s 6 of the Minerals Act a prospecting permit is issued for a period of 12 months or such longer period as may be determined. Section 6(4) of that Act provided further that the holder of a prospecting permit may, 'from time to time, at least one month prior to the expiration of the period for which such permit has been issued or renewed, on written application to the Director: Mineral Development concerned and on payment of the prescribed application fee, obtain a renewal of such permit for a period of 12 months or such longer period as the Director: Mineral Development may determine if [the Director] is satisfied with the manner in which such holder rehabilitates surface disturbances caused by . . . prospecting operations on the land concerned'.

[13] The last application for renewal by Rhodium, in terms of s 6 of the Minerals Act, was made on 9 April 2003, well before the expiry date of the permit it then held, which was 1 June 2003. Rhodium had thus applied within the period specified in s 6(4) of the Minerals Act, referred to in the preceding paragraph, and complied with all the conditions for renewal. Put differently, Rhodium was entitled to have the permit renewed. Departmental officials delayed in processing the application. In April 2004 a permit for prospecting on the property was endorsed in favour of Rhodium for the year ending June 2005. Thus, for the period June 2003 up to April 2004 Rhodium continued prospecting without a permit having been formally issued. As stated above, Rhodium's application for conversion, lodged in April 2005 was approved on 14 January 2006

[14] Having been apprised of these facts Norgold sought to take advantage and establish an entirely new case in its replying affidavit. It contended that the purported conversion in terms of the new statutory regime was of no force and effect because the last valid permit had lapsed, notwithstanding the Department's irregular attempt to belatedly breathe life into it, and there could consequently be no valid conversion in terms of item 6.

[15] Not yet content, Norgold continued to broaden its case against Rhodium even further. In its replying affidavit, Norgold noted that for a conversion to take place in terms of item 6, an applicant had to show that it had in fact prospected on the property immediately before the Act took effect. It submitted that Rhodium was unable to demonstrate that it had done so when the Act came into operation. Put simply, Norgold's case in this regard was that a necessary jurisdictional fact for conversion was absent and on that basis alone the conversion was liable to be set aside.[3]

[16] Norgold did not stop there. It also contended for the first time in its replying affidavit that the property on which Rhodium was entitled to prospect under the old order rights, differed from the property which is the subject of the prospecting right granted in terms of the Act. That point was correctly not persisted in before us.

[17] In response to the ever-expanding case that it was required to meet Rhodium served a notice on Norgold, in terms of Uniform rule 6(11) read with 6(15), in which it indicated its intention to seek an order to strike out the new allegations in the latter's replying affidavit. Norgold in turn, filed an application for an order that its founding affidavit be supplemented by a further affidavit by Mr Ward. In what appears to be typical of an emerging new, but still limited, category of careless litigants, the following is stated by Mr Ward:

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[3]Item 6(2)(a), which appears in para 5 above, requires an applicant for conversion to supply an affidavit verifying that he or she is conducting or has conducted prospecting operations immediately before the Act took effect. Item 6(3)(b) obliges the Minister to convert the old order prospecting rights if certain conditions are met, including the requirement that an applicant 'has conducted prospecting operations' in respect of the right in question.

‘Were the fifth respondent to succeed in its application to strike out what it contends are “new” allegations, the applicant would be entitled to withdraw its application, tender costs and then bring a new application, this time including the “new” allegations sought to be struck out. That can hardly be a sensible approach to litigation.’

[18] The attitude of offending litigants appears to be that their cases are better served by playing the victim. In the affidavit sought to be admitted by Norgold the new case made out in the replying affidavit is repeated with added details. Furthermore, a new twist was added. It was contended that Norgold’s application could only be rejected if its application had been in respect of the same minerals and on the same land in respect of which Rhodium had applied. It was submitted that Norgold had applied for prospecting rights for platinum group metals, nickel, copper, gold, vanadium and chrome whereas Rhodium in its conversion application had chosen to apply for prospecting rights for platinum group metals, nickel and copper. This last submission was without doubt rightly not persisted in before us. The idea of two prospecting parties on the same property competing over what parts of ore they might each have a right to ultimately mine for, is ludicrous.

[19] At one stage, the high court made an order following on which the Minister and her officials filed a supplementary record, which in turn led to Norgold filing a further affidavit, contemplated by the court order, repeating the foundations of its case, including what was set out initially and the new points subsequently taken. This led to further responses (contemplated in the court order) by the Minister and his officials and by Rhodium.

[20] At the outset before us, counsel for Norgold was constrained to concede that litigation ought not to be conducted in the manner described above.

[21] Having dealt with how the litigation unfolded, it is necessary to have regard to further necessary details to complete the background against which this appeal has to be decided.

[22] In its answering affidavit, Rhodium set out its prospecting history on the property. Prior to our new constitutional era, the property fell within the self-governing territory of Lebowa. Rhodium's operations on the property formed part of a larger prospecting project known as the Kennedy's Vale project, extending over a number of farms, primarily in the Mpumalanga province. The Kennedy's Vale project appears to have commenced in the early 1980's. The development of a shaft system on the farm Kennedy's Vale commenced in 1988. Later, it slowed down and was mothballed in October 1990 when the platinum price fell and it was deemed uneconomical. The planning had included parts of the property and another farm. In 1991 Impala Platinum Holdings (Implats) acquired a 38 per cent interest in Barplats, Rhodium's holding company. This was later increased to an 83 per cent holding. In 2000, Rhodium applied for prospecting permits in respect of all the farms comprising the Kennedy's Vale project. At that time, the property was within the Limpopo province. The boundary between Limpopo and Mpumalanga ran along the Steelpoort River, which constitutes the south-eastern boundary of the property and Boschkloof, which was another farm that formed part of the Kennedy's Vale project. Boschkloof and the property were situated in Limpopo whereas the remainder of the project farms fell within Mpumalanga.

[23] The applications for prospecting permits for Boschkloof and the property were lodged in the Northern region. The prospecting permit for the property was issued to Rhodium by the Director: Mineral Development of the Northern region in Polokwane on 2 June 2000. Rhodium applied for prospecting permits for the other farms which were part of the Kennedy's Vale project in Mpumalanga and they were all issued in that province.

[24] Because it straddled two provinces the administration of the project proved problematic, both from the perspective of Rhodium and the Department of Minerals and Energy. Following on discussions in 2000, involving the relevant high-ranking officials of the Department, the powers of the Director of the Limpopo Province were delegated to his/her counterpart in Mpumalanga, in terms of the then prevailing Minerals Act, which allowed a delegation of this kind. Accordingly Rhodium was advised by the Department

to lodge its applications for renewal in Mpumalanga. Rhodium complied. It was thus a case of administrative convenience that saw that practice developing and that led to the application for conversion being lodged in Mpumalanga, when the new statutory regime, which does not allow a delegation of powers between regional managers, came into operation.

[25] Conceding that the application was lodged at the wrong office, Rhodium's case is that since it is the Minister or her delegatee who adjudicates applications for conversions in terms of item 6, the region in which the application is lodged is not crucial. The designated office is for administrative convenience and serves a practical purpose, as the local office is the one most closely linked with the prospecting area and can be assumed to know the background and history and can be of assistance to the ultimate decision maker, the Minister, should the need arise.

[26] It is to be noted that with the revision of municipal boundaries in 2005 the entire project area now falls within the Limpopo Province and the Department has directed that when Rhodium is ready to proceed from prospecting to mining it should lodge its application for mining rights in Limpopo.

[27] Rhodium supplied the following relevant information in its answering affidavit: It conducted prospecting on various parts of the project area in terms of the prospecting permits and renewals. A three-dimensional seismic study which was an extremely expensive item of expenditure was conducted in respect of the project area. 116 holes were drilled totalling 78 300 metres with a further 8 014 metres drilled from 455 deflections. The information gathered and the assessments made enabled Rhodium to decide which parts of the project area were viable and which not. The geological data was valuable and of such a kind that it was classified in terms of the South African Code for the Reporting of Exploration Results, Mineral Resources and Mineral Reserves as inferred, indicated and measured minerals respectively. In respect of the property the resources were reported on all three bases.

[28] In 2004 Rhodium's ownership changed when Eastern Platinum obtained the majority shareholding. Importantly, that transaction was premised on the validity of the aforesaid prospecting rights, including those on the property and on the strength of prospecting data gleaned during prospecting operations.

[29] In its answering affidavit Rhodium stated unequivocally that after the application for conversion had been granted in 2006 further prospecting was conducted in various parts of the project area. During 2006 and early 2007 a drilling program was undertaken, comprising 38 315 metres of diamond core drilling over the northern part of the project area. That program cost in excess of R30 million computed as follows: R27 million to drilling, R1,6 million to the assay of drilling samples, R2,3 million to professional geological services, R2,6 million to seismic re-interpretation and R500 000 to topographic mapping. Approximately 9 000 metres were drilled on the property. The point is made that the 3D modelling treated the Kennedy's Vale project area as one entity. No individual farm or area was treated as such in the modelling. Documentation concerning ore reserves and resources was submitted to the Toronto Stock Exchange. The documentation includes all quantified resources for all the project farms and updated prior records as a result of prospecting work done during the last 18 months.

[30] Mr Jacinto Ferreira Dos Santos Rocha, the Deputy Director-General, Mineral Regulation is the sixth respondent. In his answering affidavit he is adamant that *he* made the decision to convert Rhodium's old order right in terms of item 6. In doing so he acted in terms of a delegation of powers to him by the Minister in terms of s 103 of the Act. He provided proof of the written delegation.

[31] That then is the background against which the application was decided in the court below. It is necessary to record that Rhodium had challenged Norgold's *locus standi* on the basis that at the time that the former applied to convert its old order right the latter had no interest in whether it was awarded

as it had not yet itself applied for a prospecting permit. In oral argument before us this point was rightly abandoned.

[32] The court below delivered a sparse judgment of 13 pages, the first two of which contained the order sought by Norgold. Phatudi J began with the primary substantive point raised by Norgold, namely, the effect of the application for conversion being lodged at the wrong office. He found that the delegation by the Regional Manager, Limpopo of his powers, to the Mpumalanga Regional Manager, was 'good for administration purposes that ensure good control and management of the prospecting projects' and held that the Regional Manager, Mpumalanga 'had jurisdiction to convert Rhodium's prospecting right'.

[33] The learned judge turned to the next question: whether a permit can be renewed after it had expired? He answered it as follows in para 18:

'Renewal simply means to make "new" of a thing that existed. A motor vehicle disc licence normally displayed on the front windshield may expire without being noticed by the owner or driver thereof. Such a licence may be renewed days or months after expiry date on the same terms and conditions upon fulfilment of the requirements for renewal.'

[34] The learned judge went on to find that even though the word 'must' is used in prescribing the office at which an application for conversion in terms of item 6 should be lodged, it was 'merely directory and not peremptory'. The court below went on to find that the Regional Manager, Limpopo, correctly applied the provisions of s 16 of the Act in refusing Norgold's application for a prospecting permit.

[35] Having decided the merits the court below nevertheless went on to deal with the *locus standi* point, which had been raised *in limine*, and held that Norgold lacked *locus standi* as it had no protectable interest at the time the application for conversion had been made by Rhodium.

[36] Phatudi J found it unnecessary to deal with Rhodium's application to strike out the new matter in Norgold's replying and further affidavits and 'the

hearsay that flow with it'. Ultimately, the court below dismissed Norgold's application in the terms set out at the commencement of this judgment.

Conclusions

[37] Before us the appeal was restricted to three main issues which will be dealt with in turn hereafter.

[38] The first question to be addressed is whether Rhodium's failure to lodge its application for conversion at the regional office in Limpopo rendered the conversion in terms of item 6 ineffective? It is necessary to have regard to the provisions of item 6 set out above and to consider the purpose they serve.

[39] Item 6(2) sets out the information and documentation that must accompany an application for conversion. It is a checklist for the ultimate designated decision-maker. Item 6(3) obliges the Minister to convert the old order permit if certain prescribed requirements are met and if the further conditions set out in item 6(3) are fulfilled. There can be no doubt that the regional office serves as a post-box for receipt of the application and the accompanying information. There is no discretion required to be exercised by the Regional Manager. His or her task is to send it onwards to the ultimate decision-maker. Item 6(2), insofar as it prescribes an office for receipt of the application is for the Department's administrative convenience, its ultimate purpose being to see to it that the application reaches the designated decision-maker.

[40] In my view the significance of the role of the Regional managers is exaggerated by Norgold in its heads of argument. Regional managers can, of course, be of assistance in verifying if the preconditions have been met, but they are not the ultimate decision-maker, nor do they exercise a discretion in that regard. Ironically, because of the history of administration of the project area, the wrong office in this case, the Mpumalanga regional office, was best placed to be of assistance.

[41] Section 103(1) of the Act provides for delegation and assignment in the following terms:

'The Minister may, subject to such conditions as he or she may impose, in writing delegate any power conferred on him or her by or under this Act, except a power to make regulations or deal with any appeal in terms of section 96, and may assign any duty so imposed upon him or her to the Director-General, the Regional Manager or any officer.'

[42] The sixth respondent, Mr Dos Santos Rocha, is an officer as defined in the Act.[4] He has provided proof of the written delegation of powers by the Minister. The application for conversion reached him and he made the decision sought to be impugned.

[43] In *Unlawful Occupiers, School Site v City of Johannesburg* [5] this court said the following:

'[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision has been achieved (see eg *Nkisimane and Others v Santam Insuarnce Co Ltd* 1978 (2) SA 430 (A) at 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para 13).'

See also *Moela v Shoniwe* 2005 (4) SA 357 (SCA) para 8.

[44] Even if one were to assume in favour of the appellant that item 6, insofar as it prescribes the regional office at which the application for conversion is to be lodged, is peremptory, the object of the Act was clearly achieved. The correct decision-maker received the application for conversion and made the decision. The first point must therefore be decided against the appellant.

[45] I turn to the next question, namely, whether the untimely formal renewal of the prior permit precluded its conversion in terms of item 6. The motor car licence disc analogy by the court below was inapposite and unhelpful. All the indications are that Rhodium met the conditions for renewal

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[4] Officer is defined in s 1 of the Act as follows:
' "officer" means any officer of the Department appointed under the Public Service Act, 1994 (Proclamation No. 103 of 1994).'

[5] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 22.

prescribed by s 6(4) of the Minerals Act. It had applied within the prescribed time and was entitled to a renewal. The laxity of departmental officials should not be laid at its door. More fundamentally, the decision to renew the permit was not taken on review. The decision to convert in terms of item 6 is currently being challenged.

[46] The decision to renew existed as a fact and it had legal consequences that cannot be overlooked. It cannot be suggested that the preconditions for renewal were not substantively met. For years after the permit had been renewed, Rhodium and others regulated their conduct and expended much money, effort and resources based on its validity. Even assuming that the decision to renew the permit was irregular, which is doubtful, Norgold's remedy was to have that decision set aside. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*[6] the following is said:

'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 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'.

See also *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others*.[7]

[47] In *Camps Bay Ratepayers' Association & another v Harrison and the Municipality of the City of Cape Town*[8] the Constitutional Court, referring to the *Oudekraal* decision in this court with approval, said the following (para 62):

'[A]dministrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts this means that the approval of the February 2005 plans must be accepted as a fact. If the footprint issue was part of that approval, that decision must likewise be accepted as a fact unless and until it is validly challenged and set aside.'

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[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26.
[7] *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 28.
[8] *Camps Bay Ratepayers' Association & another v Harrison and the Municipality of the City of Cape Town* 2011 (2) BCLR 121 (CC).

[48] In *Harnaker v Minister of the Interior*[9] Corbett J, in dealing with the effect of delay in setting aside administrative decisions, said the following:

'In such a case the grounds of review might, for example be that the body had exceeded its powers. If this ground were substantiated, the review would establish that the proceedings and any act following therefrom were null and void. The application of the delay rule in such a case would prevent the aggrieved party from establishing such nullity. In a sense delay would therefore "validate" a nullity.'

[49] The Promotion of Administrative Justice Act 3 of 2000 prescribes a time limit for bringing applications for judicial review of administrative action.[10] This is in line with the common law delay rule. In *Associated Institutions Pension Fund & others v Van Zyl & others*[11] Brand JA said the following:

'The *raison d'être* of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41).'

[50] As stated above, there appears to be no substantive basis for challenging the renewal. Significantly, more than six years after the renewal in terms of the repealed Minerals Act and after many developments and actions in consequence, an application for review of that decision has still not been brought. In my view for all the reasons aforesaid the second point must also be decided against Norgold.

[51] I turn to the question whether there is any substance to Norgold's submission that Rhodium had not proved that it had conducted prospecting operations on the property and was thereby precluded from having its permit converted. Allied to this is the submission on behalf of Norgold that the person making the decision to convert the permit had been misled in this regard by

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[9] *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381B-C.

[10] Section 7(1) provides that proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies have been concluded or, where no such remedies exist, the date on which the person concerned was informed of the administrative action, became aware of it and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[11] *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46.

Rhodium ─ that it had in fact been prospecting at the time that the Act came into operation or when the application for conversion was made. Before us, it was submitted on behalf of Norgold, that there was at the very least a dispute of fact that ought to be referred to oral evidence.

[52] As pointed out above, the answering affidavit was explicit and detailed in its description of prospecting operations, both in respect of the Kennedy's Vale project as a whole and the property, designed to show its historical involvement on the property and its entitlement to conduct prospecting operations. The new case sought to be fashioned by Norgold in its replying affidavit was based on an unsubstantiated denial that Rhodium had indeed prospected on the farm. Norgold suggested that the documentation proved exploration by Rhodium's holding or associate companies and not by Rhodium itself. Norgold contended that prospecting in relation to Kennedy's Vale project ought to be considered distinctly from prospecting on the property. In its replying affidavit, Norgold quibbled with the statistics provided by Rhodium in respect of the number of holes that were drilled in furtherance of prospecting activity. It does not deny that a substantial amount of drilling had been done. Much of Norgold's case in respect of Rhodium's failure to conduct prospecting rights on the property is conjecture.

[53] The supplementary affidavits subsequently filed by Norgold were much in the same vein. Reliance was also placed on unsworn statements and hearsay evidence, the particulars of which it is not necessary to explore any further.

[54] It is trite that all the necessary allegations upon which an applicant's case is based must appear in his or her founding affidavit. A court will not usually allow an applicant to make out a completely different claim in his or her replying affidavit. A court does have a discretion to allow new matter in a replying affidavit and a distinction is usually drawn between a case in which new material is first brought to light by the applicant who knew of it at the time when his or her founding affidavit was prepared and a case in which facts alleged in a respondent's answering affidavit revealed the existence or

possible existence of a further ground for relief. In the latter case, a court would more readily incline to allow new matter in a replying affidavit but would then allow a fourth set of affidavits to be filed.[12] In the present case, however, Norgold had already filed a supplementary founding affidavit before Rhodium's answering affidavit, wherein reference was made to its prospecting operations as part of its description of its historical involvement on the property and with the Kennedy's Vale project. It had the record on which the decision to convert had been based and provided no explanation at all for why it had not raised this issue in its first supplementary affidavit.

[55] The new case sought to be introduced by Norgold in its replying and further affidavits is opportunistic and not based on any admissible evidence. As stated above, it is conjecture and mainly based on vague assumptions and hearsay evidence. The application to strike out those offending parts of the replying affidavit which fall within this category ought to have been dealt with by the court below in favour of Rhodium. In any event, Rhodium's assertions about its prospecting activities are unequivocal and substantiated and there is nothing to suggest that its statements in this regard lack credibility or that there is a genuine dispute of fact on this aspect. As stated above, the court below, in my view, ought to have struck out the offending parts of Norgold's replying affidavit leaving Rhodium's allegations about its prospecting activities completely unchallenged. For the purposes of this appeal those allegations are disregarded. It follows that this third question should also be decided in Rhodium's favour.

[56] Considering the conclusions set out above, it is clear that the Regional Manager, Limpopo Province, was correct to reject Norgold's application for a prospecting permit. The Regional Manager is obliged to accept an application for a prospecting permit in terms of s 16(2) of the Act only if the requirements of s 16(1) are met and if 'no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land'. Thus the application to review a 'decision' by him is liable to be dismissed.

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[12]See D E van Loggerenberg, P B J Farlam *Erasmus Superior Court Practice* (2009) B1-45 to B1-46 and the authorities there cited.

[57] Once it is accepted that the sixth respondent in fact made the decision and did so on the basis of a proper delegation of powers it follows that the Regional Manager, Mpumalanga fell out of the picture and served no other purpose than receiving the application and sending it on for final decision. The application to review the decision by him must also accordingly fail.

[58] It was submitted on behalf of Norgold that since the Regional Manager, Mpumalanga signed the notarial prospecting right, he should be regarded as the person who granted the conversion in terms of item 6 and not the sixth respondent. In *Nelson Mandela Metropolitan Municipality & others v Greyvenhouw CC & others* 2004 (2) SA 81 (SECLD) para 50 the following is stated by Plasket AJ:

'Non-discretionary decisions ─ such as giving effect to a discretionary decision ─ would not defeat the purpose of the rule. *Baxter* states the position thus:

"Powers which involve little or no discretion ─ so-called "purely mechanical" powers ─ are usually delegable. Since there is no choice involved nothing is lost if the power is exercised by a subordinate. The same may be said where the person designated by the legislation directs his personal attention to those elements of the power which involve discretion and then, having made a decision, leaves its implementation to someone else." '

[59] What is set out in the dictum in the preceding paragraph is precisely what occurred in the present case. The sixth respondent took the decision to convert and left it to the Regional Manager, Mpumalanga to implement. In any event, it is not the document of implementation that was challenged but it is the decision to convert the old order prospecting, which is the subject of the present litigation.

[60] One final aspect requires brief attention. A more comprehensive judgment by the court below might well have dissuaded the present appeal, which it is clear is entirely without merit.

[61] In light of the above, the following order is made:

The appeal is dismissed and the appellant is ordered to pay the costs of all the respondents, including, where applicable, the costs of two counsel.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	C D A Loxton SC O Mooki Instructed by Werksmans Inc c/o Brazington Shepperson & McConnell Hatfield Symington & De Kok Bloemfontein
For 1st – 4th & 6th Respondents:	M S M Brassey SC Instructed by The State Attorney Pretoria The State Attorney Bloemfontein
For 5th Respondent:	G L Grobler SC L Bekker Instructed by Tabacks Attorneys c/o Edelstein Bosman Pretoria McIntyre & Van der Post Bloemfontein