(1) Reportable: YES / NO
(2) Of interest to other Judges: YES / NO
[3] Revised: YES / NO

Date: 11-09-2020

Signature:

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 96628/2015

In the matter between:

DUDUZILE BALENI	First Applicant
MAKATI NDOVELA	Second Applicant
MABHUDE DANCA	Third Applicant
GCINAMADLA MTHWA	Fourth Applicant
MDUMISENI DLAMINI	Fifth Applicant
MALIYEZA DENGE	Sixth Applicant
84 OTHERS LISTED IN ANNEXURE A	Seventh Applicant to
TO NOTICE OF MOTION	90th Applicants

and

REGIONAL MANAGER: EASTERN CAPE	
DEPARTMENT OF MINERAL RESOURCES	First Respondent
DEPUTY DIRECTOR GENERAL: MINERAL	
REGULATION – DEPARTMENT OF	
MINERAL RESOURCES	Second Respondent
DIRECTOR GENERAL –DEPARTMENT	
OF MINERAL RESOURCES	Third Respondent
MINISTER-DEPARTMENT OF	

MINERAL RESOURCES	Fourth Respondent
TRANSWORLD ENERGY AND MINERAL RESOURCES (SA) Pty Ltd	Fifth Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	*Amicus Curiae*

JUDGMENT

MAKHUBELE J

Introduction and relief sought

[1] The first applicant is the iNkosana and head of the Umgungundlovu community Council, which was established in terms of customary law. She brings this application in her personal capacity and as a representative of the community as well as in the public interest. The other applicants are members of the community. The standing of the first applicant to launch these proceedings was put to question by the fifth respondent ('TEM') in its answering affidavit, however this was not pursued in oral submissions.

[2] The applicants live and work on the land upon which minerals (titanium) was discovered. TEM made an application for a mining right in respect of these minerals. The applicants are interested and affected persons as contemplated in the Mineral and Petroleum Resources Development Act, No.28 of 2002 ('the MPRDA'). TEM accept this fact and has not raised any issues with regard to their rights in this regard.

[3] The application concerns the rights of the applicants to access the mining right application of TEM made in terms of section 22 of the MPRDA over land which they reside and work in.

[4] It is accepted by all parties that the applicants are entitled to access the documents for the proper exercise of their right to comment on and to object if they wish to and to participate in the application processes contemplated in the MPRDA.

[5] The first to fourth respondents are cited in their capacities as functionaries of the Department of Mineral Resources ('DMR') with various roles in the processing, acceptance and approval of mining rights applications. The first two mentioned functions are performed by the first respondent ('Regional Manager') on authority delegated by the Director General in terms of section 8 of the MPRDA.

[6] The relief sought in the Notice of Motion reads as follows:

> 1. *Declaring that interested and affected parties as contemplated by the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") are entitled by sections 10(1) and 22(4) of the MPRDA, on request to the relevant Regional Manager of the Department of Mineral Resources ("the Department"), to be furnished with a copy of an application for a mining right as contemplated by section 22 of the MPRDA, subject to the right of the applicant and/or the Department to redact financially sensitive aspects of the application.*
>
> 2. *The first respondent alternatively the second, third, and/or fourth respondent are ordered to:*
>
> *2.1 Provide the applicants with a copy of the application for a mining right filed by the fifth respondent with the Department of Mineral Resources on 3 March 2015. The application may be redacted to obscure information that is commercially sensitive and is not required by the applicants for the exercise of their rights under sections 10 and 22(4) of the Mineral and Petroleum Resources Act ("MPRDA").*
>
> *2.2 Furnish the application referred to in 2.1 to the applicants within 5 days of this order.*
>
> 3. *The first to fourth respondents are interdicted from:*
>
> *3.1 Awarding a mining right to the fifth respondent in respect of the application for a mining right referred to in 2.1 until that application has been furnished to the applicants and the processes for consultation, comment and objection contemplated in sections 10 and 22(4) of the MPRDA have been completed.*
>
> 4. *The costs of this application are to be paid, jointly and severally, by any respondents opposing it.*

[7] The first, second, third and fourth respondents are not opposing the application. On 26 May 2016 they filed a 'Notice to Abide' by the decision of the court. They also undertook not to make a final determination on the application for the mining right until finalization of the consultation process.

[8] TEM provided the applicant with the copy of the mining right application, excluding confidential information. This was however done after this application was issued and served.

[9] As a result of these developments, the applicants are not persisting with the relief sought in prayers 2 and 3.

[10] TEM is opposing the relief sought in prayer 1 and has filed an answering affidavit. Its view is that the relief sought has become academic because it has already provided a copy of the mining right application and the applicants have not indicated their unhappiness with the documents provided.

[11] On the merits of the relief sought in prayer 1, TEM contends that;

(a) even though it has voluntarily provided the documents, the applicants were not entitled to them as of right because sections 10 and 22 of the MRPDA do not confer such rights to an objector or interested and affected persons,

(b) the right to access information is governed by the Promotion of Access to Information Act, No. 2 of 2000 '(PAIA'); and

(c) the applicants must utilize the procedures in terms of PAIA, and if the complaint or problem is about the delays, section 15 makes provision for automatic access of documents.

[12] The Centre for Applied Legal Studies ('CALS') was admitted as an amicus curiae in terms of Rule 16A of the Uniform Rules of court on 08 February 2017 by order of Mali J.

[13] CALS, which needs no introduction, is a well-established and accredited law clinic. In its founding papers, it described itself as a member of the Access to Information Network whose primary objective is to advance the realization of the right of access to information for ordinary people in South Africa. It participates in programs related to upliftment of the lives of communities that are affected by the challenges related to lack of access to information, which in turn compromises their right to self-determination and sustainable development.

[14] It sought to be admitted in the proceedings to assist the court with factual and legal submissions which are relevant to the dispute in this matter. The factual submissions are intended to demonstrate the low success rate of obtaining information requested through PAIA processes. In this regard it has submitted

reports on surveys conducted by Centre for Environmental Rights (CER) and also referred to international and legal trends in information disclosure and consultation.

The legal submissions relate to the constitutional interpretation of various statutory provisions as well as the PAIA Manual of the DMR.

Factual background and chronology

[15] The following background facts leading to the launching of this application appear from the parties' '*Joint Chronology'*.

[15.1] TEM applied for a mining right on 03 March 2015.

[15.2] The applicants wrote to the Regional Manager on 17 March 2015 and sought to ascertain whether the application was filed. They also requested a copy thereof.

[15.3] An Environmental Assessment Practitioner (EAP) appointed by TEM convened a meeting at Komkhulu on 08 April 2015. He confirmed that indeed TEM had made an application for a mining right.

[15.4] The Regional Manager replied to the applicants' letter on 13 April 2015 and confirmed that TEM had made the application for a mining right, which had already been accepted in terms of MPRDA and NEMA. He also assured the applicants that they must be consulted. He directed them to request a copy of the application directly from representatives of TEM, Ms Ntombela or its EAP, Mr Badenhorst or by making a request to the department in terms of the provisions of the Promotion of Access to Information Act, No 2 of 2000 (PAIA).

[15.5] Ms Ntombela replied on 15 April 2015 and advised the applicants that she was still taking instructions from TEM. The EAP replied on 15 April 2015 and advised the applicants that their request did not form part of what he was responsible for. He advised them to direct their request to the Port Elizabeth office of the DMR.

[15.6] The applicants' attorneys wrote to Ms Ntombela again on 01 May 2015 and made the same request for the application in anticipation of the consultation process that was being conducted by the EAP. She replied on 11 May 2015 and advised the applicants to make a request to the DMR in terms

of PAIA because their application was done through an online system called 'Samrad'.

[15.7] The applicants' attorneys wrote to the Regional Manager on 08 June 2015 and raised their objection to the proposed mining activities on the basis that it would disrupt their way of life. They also indicated that they had not received the notice of the mining right application in terms of section 10 of MPRDA and requested to be furnished with a copy, which they accepted could be redacted to protect sensitive information. A letter with a similar request was also directed to TEM on the same day (08 June 2015).

[15.8] The Regional Manager replied to the applicants' attorneys' letter on 23 June 2015. He informed them that the section 10 notice had been posted on the notice board at the DMR office and other copies were placed at Bizana Magistrate office. He also reiterated his previous advice that they should approach TEM for a copy of the application.

[15.9] They again wrote to Ms Ntombela on 02 July 2025 and attached the letter from the Regional Manager.

[15.10] They filed a formal objection to the mining right application on 15 July 2015 and forwarded a copy to Ms Ntombela, again making a request for the mining right application. She replied on 22 July 2015 and refused to provide the requested document.

[15.11] On 04 August 2015 they wrote to the regional Manager and informed him about TEM's refusal to provide them with a copy of the mining right application. They demanded that they be provided with a copy by no later than 21 August 2015.

[15.12] The community convened a meeting which was held on 19 November 2015 to decide on the way forward.

[15.13] The Notice of Motion is dated 30 November 2015.

[15.14] TEM forwarded a copy of the mining right application to applicants' attorneys on 05 February 2016. It filed an answering affidavit on 19 February 2016 and contended that the relief sought had been rendered moot and also disputed the applicant's entitlement to interdictory relief in prayer 3.

[15.15] The applicants became aware during July 2016 that TEM's majority shareholder, Mineral Resources Limited (MRC) had announced that it had

entered into a Memorandum of Understanding (MOU) to divest its 56% share in TEM and transfer it to its BEE partner, Keysha. The view of the applicants' attorneys was that these developments would necessitate an amendment of TEM's mining right application. They wrote to TEM to seek an undertaking that it would furnish the applicants with a copy of the amendment. TEM declined to give the undertaking sought.

[15.16] The applicants have sought leave to file a supplementary affidavit in terms of rule 6(5) (e). The purpose is to deal with the developments regarding a possible amendment of the mining right application in view of the altered shareholding in TEM.

[15.7] TEM has not filed an answer to this supplementary affidavit.

The issues for determination

[16] The issues have been summarized as follows in the *'Joint Practice Note'*

(a) whether the applicants are entitled to a copy of the fifth respondent's mining right application as of right in terms of section 10 and 22(4) of the MPRDA, and;

(b) whether the facts giving rise to this application, including the applicants' unanswered supplementary affidavit, render the relief academic'

The legislative framework

The MRPDA

[17] The Preamble reads:

'RECOGNISING that minerals and petroleum are non-renewable natural resources;

ACKNOWLEDGING that South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;

AFFIRMING the State's obligation to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development;
RECOGNISING the need to promote local and rural development and the social upliftment of communities affected by mining;

REAFFIRMING the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources;

BEING COMMITTED to eradicating all forms of discriminatory practices in the mineral and petroleum industries;

CONSIDERING the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination;

REAFFIRMING the State's commitment to guaranteeing security of tenure in respect of prospecting and mining operations; and

EMPHASISING the need to create an internationally competitive and efficient administrative and regulatory regime,

[18] The following definitions are relevant.

'owner' , in relation to the land owned by the State '*means the State together with the occupant thereof*…'

'sustainable development' means the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations; '

[19] The objects of the MPRDA appear from section 2 and amongst them is the following:

" 2(d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; '*

2(f) *promote employment and advance the social and economic welfare of all South Africans;*

2(h) *give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and*

2(i) *ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.*

[20] In terms of section 3 (1), minerals and petroleum resources are the common heritage of all the people of South Africa. The State is the custodian thereof for their benefit and 'may', through the Minister, '*grant, issue, refuse, control, administer and manage any'* mining right (section 3(2) (a)).

[21] Whilst exercising the discretionary powers on behalf of the State, the Minister is enjoined to act '*within a framework of national environmental policy, norms and standards'* to ensure that there is a balance between the sustainable development of the minerals and petroleum resources and promotion of economic and social development (section 3(3).

[22] Section 4 is titled 'Interpretation of Act' and reads as follows:

> *(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.*
>
> *(2) In so far as the common law is inconsistent with this Act, this Act prevails.*

[23] Section 6 deals with 'Principles of Administrative Justice' in terms of the Promotion of Administrative Justice Act, 2000 Act No.3 of 2000 (PAJA) and provides, amongst other things, that any process conducted or decisions taken must be done *'within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness'* and must be '*in writing and accompanied by written reasons …'*

[24] Section 10 provides for '*consultation with interested and affected parties'* and reads as follows:

> *(1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager* ***must*** *in the prescribed manner-*
>
> > *(a)* ***make known*** *that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and*
> >
> > *(b)* ***call upon interested and affected*** *persons to submit their comments regarding the application within 30 days from the date of the notice.*
>
> *(2)* ***If a person objects*** *to the granting of a prospecting right, mining right or mining permit, the Regional Manager* ***must refer the objection*** *to the Regional Mining Development and Environmental Committee to* ***consider the objections and to advise the Minister thereon.*** (highlighted for

emphasis)

[25] The procedure for application of a mining right is prescribed in section 22. For present purposes, the relevant provision is subsection 4, which reads as follows:

> *(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-*
>
> > *(a) to submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from the date of the notice; and*
> >
> > *(b) to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.*

[26] In terms of section 23 the Minister is obliged to grant the application if the applicant has satisfied the requirements listed in subsection 1(a) to (h)**,** which are:

> (*1) Subject to subsection (4), the Minister **must** grant a mining right if-*
>
> > *(a) the mineral can be mined optimally in accordance with the mining work programme;*
> >
> > *(b) the applicant **has access to financial resources** and has the technical ability to conduct the proposed mining operation optimally;*
> >
> > *(c) the financing plan is compatible with the intended mining operation and the duration thereof;*
> >
> > *(d) **the mining will not result in unacceptable pollution, ecological degradation or damage to the environment** and an environmental authorisation is issued;*
> >
> > ***(e)** the applicant has **provided for the prescribed social and labour plan;***
> >
> > *(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);*
> >
> > *(g) the applicant is not in contravention of any provision of this Act;*

and

(h) the granting of such right will further the objects referred to in section 2(d) and (f) *and in accordance with the charter contemplated in section* ***100 and the prescribed social and labour plan.*** (highlighted for emphasis)

[27] Section 23 (2A) reads

'If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.'

MPRDA Regulations

[28] Regulation 3: '*Consultation with interested and affected persons'* reads as follows:

(1) The Regional Manager or designated agency, as the case may be, must make known by way of a notice, that an application contemplated in regulation 2, has been accepted in respect of the land or offshore area, as the case may be.

(2) The notice referred to in sub regulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.

(3) In addition to the notice referred to in sub regulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods -

(a) publication in the applicable Provincial Gazette;

(b) notice in the Magistrate's Court in the magisterial district applicable to the land in question; or

(c) advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated.

(4) A publication, notice or advertisement referred to in sub regulation (3) must include-

(a) an invitation to members of the public to submit comments in writing on or before a date specified in the publication, notice or advertisement, which date may not be earlier than 30 days from the date of such publication, notice or advertisement;

(b) the name and official title of the person to whom any comments must be sent or delivered; and

(c) the -

(i) work, postal and street address and, if available, an electronic mail address;

(ii) work telephone number; and

(iii) facsimile number, if any, of the person contemplated in paragraph (b).

[29] Regulation 10 prescribes the information that must be disclosed in a mining right application. 10(1) reads as follows:

(*1) An application for a mining right in terms of section 22(1) of the Act must be completed in the form of Form D contained in Annexure I and must contain-*

(a) the full particulars of the applicant;

(b) in the case of a company or closed corporation, documentary proof that the applicant has obtained the necessary authority to make the application in a representative capacity on behalf of the company or closed corporation, as the case may be;

(c) a plan contemplated in regulation 2(2) showing the land and mining area to which the application relates;

(d) the mineral or minerals for which the right is required:

(e) the period for which the right is required;

(f) a mining work programme contemplated in regulation 11;

(g) a social and labour plan contemplated in regulation 46;

(h) detailed documentary proof of the applicant's technical ability or access thereto to conduct the mining activities and to mitigate and rehabilitate relevant environmental impacts;

(i) documentary proof that the applicant has the ability to comply with relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);

(j) a description of how the applicant's technical ability will be provided by making use of in-house expertise, contractors and consultants on the proposed mining operation;

(k) budget and documentary proof of the applicant's financial ability or access thereto, which may include but is not limited to the following:

(i) Loan agreements entered into for the proposed mining operation;

(ii) a resolution by a company to provide for the finances required for the proposed mining operation; and

(iii) any other mechanism or scheme providing for the necessary finances for the proposed mining operation.

(l) a list of existing rights or a list of existing rights and permits, as the case may be held by the applicant, to be compiled in a table format that indicates the region and location with regard to the land name and the existing right or permit number for each mineral within the Republic; and

(m) a certified copy or copies of the title deed or deeds, where applicable, in respect of the land to which the application relates; and

(n) any other specific and additional information, data or documentation that the Minister may request in connection with the information submitted under paragraphs (a) to (m).

[30] Regulation 50 deals with the contents of an environmental impact assessment report.

'The contents of an environmental impact assessment report must include the following:

(a) An assessment of the environment likely to be affected by the proposed mining operation, including cumulative environmental impacts;

(b) An assessment of the environment likely to be affected by the identified alternative land use or developments, including cumulative environmental impacts;

(c) ***An assessment of the nature, extent, duration, probability and significance of the identified potential environmental, social and cultural impacts of the proposed mining operation, including the cumulative environmental impacts;***

(d) ***A comparative assessment of the identified land use and development alternatives and their potential environmental, social and cultural impacts;***

(e) Determine the appropriate mitigatory measures for each significant impact of the proposed mining operation;

(f) ***Details of the engagement process of interested and affected persons followed during the course of the assessment and an indication of how the issues raised by interested and affected persons have been addressed;***

(g) Identify knowledge gaps and report on the adequacy of predictive methods, underlying assumptions and uncertainties encountered in compiling the required information;

(h) Description of the arrangements for monitoring and management of environmental impacts; and

(i) Inclusion of technical and supporting information as appendices, if any.

[31] Regulation 51: *'Environmental management programme'*

'An environmental management programme contemplated in section 39(1) of the Act must include the following:

(a) A description of the environmental objectives and specific goals for-

(i) mine closure;

(ii) the management of identified environmental impacts emanating from the proposed mining operation;

(iii) the socio-economic conditions as identified in the social and labour plan; and

(iv) historical and cultural aspects, if applicable;

(b) an outline of the implementation programme which must include -

(i) a description of the appropriate technical and management options chosen for each environmental impact, socio-economic condition and historical and cultural aspects for each phase of the mining operation;

(ii) action plans to achieve the objectives and specific goals contemplated in paragraph (a) which must include a time schedule of actions to be undertaken to implement mitigatory measures for the prevention, management and remediation of each environmental impact, socio-economic condition and historical and cultural aspects for each phase of the mining operation;

(iii) procedures for environmental related emergencies and remediation;

(iv) planned monitoring and environmental management programme performance assessment;

(v) financial provision in relation to the execution of the environmental management programme which must include-

(aa) the determination of the quantum of the financial provision contemplated in regulation 54; and

(bb) details of the method providing for financial provision contemplated in regulation 53;

(vi) an environmental awareness plan contemplated in section 39(3)(c) of the Act;

(vii) all supporting information and specialist reports that must be attached as appendices to the environmental management programme; and

(viii) an undertaking by the applicant to comply with the provisions of the Act and regulations thereto.

Constitution of the Republic of South Africa, 1996

[32] In terms of section 24: "*Everyone has the right-*

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[33] Section 32 provides that:

"(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state"

[34] Section 33 provides that:

(1) (Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2)Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3)National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

[35] Section 38 affords standing to any of the following persons to approach the High Court and seek appropriate relief, including a declaration of rights, when a right in the Bill of Rights has been infringed or threatened.

"(a) anyone acting on their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members"

National Environment Management Act, No.107 of 1998 ('NEMA')

[36] This is the legislative measure contemplated in s 24(b) of the Constitution. Its long title and preamble read:

ACT

To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for

coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.

Preamble

WHEREAS many inhabitants of South Africa live in an environment that is harmful to their health and well-being; everyone has the right to an environment that is not harmful to his or her health or well-being;

the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities;

inequality in the distribution of wealth and resources, and the resultant poverty, are among the important causes as well as the results of environmentally harmful practices; sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations; everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that- prevent pollution and ecological degradation; promote conservation; and

secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

the environment is a functional area of concurrent national and provincial legislative competence, and all spheres of government and all organs of state must co-operate with, consult and support one another;

AND WHEREAS it is desirable -

that the law develops a framework for integrating good environmental management into all development activities; that the law should promote certainty with regard to decision-making by organs of state on matters affecting the environment;

that the law should establish principles guiding the exercise of functions affecting the environment; that the law should ensure that organs of state maintain the principles guiding the exercise of functions affecting the environment;

that the law should establish procedures and institutions to facilitate and promote co-operative government and intergovernmental relations;

that the law should establish procedures and institutions to facilitate and promote public participation in environmental governance;

that the law should be enforced by the State and that the law should facilitate the enforcement of environmental laws by civil society; …"

[37] Section 2 of NEMA sets out the principles that govern the affairs of the organs of state which may significantly affect the environment. They serve as guidelines by reference to which any organ of state must exercise any function when taking decisions in terms of NEMA in interpretation, administration and its implementation and any other law concerned with the protection or management of the environment.

[38] In terms of section 2(2) environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

[39] Section 2(3) provides that (3) *"development must be socially, environmentally and economically sustainable.*

[40] The following are some of the relevant factors that must be taken into consideration for sustainable development in terms of section 2(4).

(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

(h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.

(i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

(j) The right of workers to refuse work that is harmful to human health or the environment and to be informed of dangers must be respected and protected.

(k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

[41] It is common cause that any activity that requires a mining right as contemplated in section 22 of MPRDA has been identified a listed activity in terms of section 24(2) and 24D that would require an environmental authorisation prior to is commencement.

[42] "*interested* and affected party", *includes-*

(a) any person, group of persons or organisation interested in or affected by such operation or activity…"

Promotion of Access to Information Act (PAIA)

[43] Section 9 lists the 'Objects of Act 'as follows:

(a) to give effect to the constitutional right of access to-

(i) any information held by the State; and

(ii) any information that is held by another person and that is required for the exercise or protection of any rights;

(b) to give effect to that right-

(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and

(ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;

(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of 'requester', allowing them, amongst others, to access information from private bodies upon compliance with the four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;

(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and

(e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone-

(i) to understand their rights in terms of this Act in order to exercise t
heir rights in relation to public and private bodies;

(ii) to understand the functions and operation of public bodies; and

(iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

[44] Paragraph (d) is indicative of the flexibility of the process of access to information. It depends on the purpose and urgency for which it is required.

Summary of submissions

Applicants

[45] On the proper interpretation of section 10 and 22(4) of MRPDA the applicants contend that these two sections mean that interested and affected parties or persons should obtain a copy of a mining right application automatically upon request from the Regional Manager to enable them to have meaningful consultations with TEM.

[46] She further submitted that when interpreting a statute, courts must give effect to the spirit, purpose and object of the Bill of Rights and obligations derived from that. Court must prefer an interpretation that is consistent with the Constitution, and also one that best gives effect to the rights in the Bill of Rights. Furthermore, courts must prefer an interpretation that is consistent with the objects of the MRPDA and this obligation includes ensuring the holders of mining rights contribute towards the serving of economic development of the areas that they operate in.

[47] When these principles are applied, it clearly favour the applicants' interpretation and the reasons for this are firstly, that constitutional rights are implicated here, particularly the right to just administrative action relating to the notice

and consultation requirements. She referred to the Constitutional judgment in the matter of Bangwenyama Minerals Pty Ltd and Others v Genorah Resources (Pty Ltd and Others 2011 (4) SA 113 (CC**),** where the court, clarified the nature and obligation to consult. The purpose of consultation is to provide sufficient details to the landowners or occupiers to enable them to make informed decisions.

[48] On whether a request through PAIA is a requirement, Ms Webber submitted that the MRPDA sets out specific timelines for the exercise of the communities' rights which are incredibly truncated such that if the community was required to make an application to access the application they would simply not be able to exercise their rights to consultation.

[49] The application process, including internal appeal process itself is way beyond 30 days such that it is simply impossible to prepare and submit an objection all within 30 days.

[50] She submitted further that it may also be an issue of capacity in dealing with PAIA processes at the DMR. There might be a will to expedite the applications but they could simply lack the capacity with the number of applications they get.

[51] Therefore, it is also not an answer, as TEM contends in its supplementary heads of argument; to say that the DMR PAIA manual provides that the community will automatically get the mining rights application upon request.

[52] Furthermore, a PAIA manual is an internal document of the DMR and it can change at any time, and, in fact, DMR is required to publish a new document annually. It may be the case that right now the applicants are automatically entitled to the information under the DMR PAIA manual in question; however, there is no guarantee that it will be the same in a few months or a few years' time. Furthermore, internal documents cannot be used to interpret the Act.

[53] The list of new documents in the 2017 PAIA manual is not exhaustive and it does not include everything that the applicants would want from the mining right applicant. For example, documents relating to shareholding and ownership of the mining right are not included in the list of automatic access. The list does not include details of ownership and in particular, the ownership of historically disadvantaged South Africans this information would inform the community if they are included in the

shareholding structure or whether they will derive any benefit from the mining on their land.

[54] On the declaratory relief, she submitted that the applicants rely on two self-standing grounds. The first is section 38 of the Constitution, which provides that anyone may approach a court and allege that a right in the Bill of Rights has been infringed or threatened and the courts may then grant appropriate relief and that appropriate relief includes the declaration of rights.
The applicants have met the requirements.

[55] The second ground that the court can independently grant the declaratory order in this matter is section 21(c) of the Superior Court Act.

She referred to the matter of The SCA in the matter of Illovo Opportunities #11 v Illovo Junction Properties 2014 JDR 1889 SCA (at para 14) where it was held that the existence of dispute between the two parties is not a prerequisite for a declaratory order to be granted. The requirement is that there should simply be interested parties on whom the order will be binding. It is clear in this case that there are such parties.

[56] TEM carried out consultations with the applicants and their communities but this happened before the communities were given the mining rights application. TEM has refused to consult after giving the community the mining right application. It says that it has fulfilled its obligation to consult. It has also refused to give an undertaking that it will consult further.

[57] The impact of the declaratory order is that it will clarify the nature of the rights of the interested and affected parties and TEM's obligations.

[58] There will be an imminent amendment of the mining right application due to the changes in share allocation as indicate in the applicants' supplementary affidavit. It is highly likely that amendment will take place. There could be other amendments or a need to amend something or to seek an amendment right. For instance, DMR has indicated in one correspondence that the social labour plan that has been submitted is simply a draft plan and that TEM would still have to submit its final social and labour plan. There are other communities that will be impacted also even if an undertaking is given in relation to this amendment.

Amicus Curiae

[59] Counsel for the amicus, Ms Lekokotla, referred to the research reports of Centre for Environmental Rights**.** The research is based on tracked PAIA applications that were made to three departments, namely, the DMR, Water and sanitation and Environmental Affairs. In those three departments, there was a common problem, which was the low success rate of the PAIA applications. There was no timeous responses to the request and many other reasons, such as lack of staff capacity, their lack of understanding and inconsistency in applying the time periods and many other issues.

[60] What comes out from all of these reports is that as soon as there is no response within the stipulated time period, that is a deemed refusal. This confirms the applicants' contentions that it is impossible to comply with the 30 day period within which objections must be lodged given that most of the community members are uneducated and most of them do not have access to lawyers or anyone who can help them.

[61] The deemed refusal then automatically allows the parties to go for an internal appeal. All of these reports show that even on internal appeal stage, the biggest problem is that either the appeals are not properly or adequately attended to, secondly there are either no decisions or no timeous decisions or that there is lack of understanding of the issues. The result is that the communities would still be dissatisfied because they would still not have the relief that they need.

[62] Their next step then would be to approach the courts. This is a laborious process merely for exercising their rights to access the mining rights application. The reality is that most of the communities do not even have the resources to make these applications.

[63] On TEM's submission that these reports contain inadmissible hearsay evidence, the submission of the *amicus curiae's* is that if it (TEM) really wanted to dispute anything that is contained in these reports, it could have called its own experts to make their own contribution on exactly how the PAIA applications are dealt with in government departments, but they did not do so.

[64] Statistical evidence does not constitute hearsay and is admissible as evidence (Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp 2013 (1) BCLR 1 (CC)

[65] From the available statistics, out of the three departments DMR is the one that is consistently performing poorly in PAIA applications responses.

[66] The DMR PAIA Manual of 2014[1] that CALS had attached to its founding affidavit was amended or updated in 2017 as pointed out in TEM's supplementary heads of argument. CALS's submission was that the mining right application was indicated as part of the documents that should be disclosed in terms of section 15 of PAIA (automatic access).

[67] The applicants require adequate and meaningful consultation. In the absence of some of the documents, they then find themselves unable to meaningfully interact with the mining company that wants the mining right in the property and also with the government departments. The community is not a by -stander in this whole process. They are the people who live in the land. They are the people who knows what is in the land and what they need for themselves. The community should never come after the effect. The documents have to be provided way before consultation time so that when they are consulted they must know what is in the application. This would amount to adequate and meaningful consultation. Their participation is linked to their right to sustainable development, which is provided for in the Constitution, NEMA and MRPDA.

[68] In terms of International and regional law, which are the African charters and the UN Charter in the main, the right to access to information is broader than it is under the MRPDA and or PAIA. The right is not only the right to access to information but it is rights to participation, self-determination and sustainable development.

[69] Section 39 of the Constitution mandates courts to have regards to international law and it permits the court to have regard to regional law.

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[1] It became clear during oral argument that the 'Completed application form' does not refer to all documents as suggested in CALS's affidavit. This is just a form, and then there are specific supporting documents. Even so, the list of documents that are subject to automatic access is not exhaustive and does not cover everything that the applicants would be entitled to taking into account their rights in terms of the relevant legislation. The fact of the matter is that the Manual is supposed to be reviewed and published annually.

[70] On costs, she submitted that there should be no cost against the Amicus Curiae because the submissions made were helpful and were different from what the other parties had submitted. Furthermore, the court has a discretion in terms of section 31 of NEMA not to award costs against unsuccessful litigants who have made efforts to obtain the relief sought and acting in the public interest or to protect the environment.

Fifth respondent (TEM)

[71] TEM does not dispute the fact that the applicants must be given access to the documents, but argues that the process by which they must get them is not provided for in the MRPDA.

[72] It is therefore contended on behalf of TEM that the legislation that gave effect to section 32 of the Constitution (right to access to information) is PAIA and the applicants should follow the procedures prescribed therein.

[73] TEM's contends further that the issues have become academic because it actually gave all the information that the applicants wanted in February 2016, even though there was no concession that they are entitled to it. The applicants did not request further information or indicate their unhappiness with what has already been provide.

[74] The 2014 DMR PAIA manual has been amended by the 2017 one. As matters stand now, everything indicated in Regulation 10, except for confidential information can be obtained by way of PAIA application.

[75] On the declaratory relief sought, Mr Lazarus submitted that there is no advantage to the applicants because what they wanted has already been provide. Furthermore, the matter has become academic because there are no longer live issues between the parties. He referred to the Supreme Court of appeal judgment in the matter of Minister of Justice and Others v Estate Stransham-Ford and Others 2017 (3) SA 152 where the lower court was criticised for entertaining the matter as a court of first instance because the action the right (to die in a manner of his own choosing) was a personal action, attached to him only and was extinguished when he died.

[76] TEM contends that if the legislature had intended to create an intention to create a specific principle of access to information other than what is provided for in PAIA this would have been expressly stated as it did in section 30 of the MPRDA which provides for disclosure of information or data submitted in terms of section 21, 28 and 29.

[77] According to TEM this matter requires the input of the government respondents and the court should have used its powers to compel them to make submissions because that is the route that the Constitutional Court takes if it wishes to have inputs of an organ of state. He referred to the matter of Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC).

[78] On costs, TEM conceded that the Biowatch principles on costs should apply on the Amicus Curiae. However, the applicants must pay the costs because they persisted with the application even though they were provided with the documents.

[77] In reply, Ms Webber persisted with the argument that there were still live disputes between the applicants and TEM, which arose after the latter raised issues about the possible amendment, which is necessitated by the change of shareholding. She also argued that the Stransham-Ford judgment is distinguishable because there was no public interest issues in that matter. On the PAIA manual, she also acknowledged that as an internal document it is subject to annual updates. However, the applicant cannot be expected to approach courts now and again to challenge it on the basis that certain documents have not been included in the list of voluntary access. The court must deal with the underlying issues now.

[78] The declaratory relief will have an advantage for the applicant because there are documents that the applicants are entitled to have but are not included in the list of automatic access in terms of the PAIA manual. For example, BEE arrangements, proof of consultations, ownership/shareholding, financial and technical competence.

[79] On costs; Ms Webber submitted that Biowatch principles apply and the applicants should not pay costs even if the application is not successful. However, TEM chose to oppose the relief sought even though there is no relief sought against it. The documents were provided after this application was filed. It must pay costs of the application. In this regard, the submission was that the Biowatch principle do not apply to it, and as such, it should bear the costs of the application.

Discussion and conclusion

[80] The right of interested parties to raise environmental objections as the basis for objecting to an application for a mining licence and their entitlement to be heard before a decision is made and the principle of sustainable development was affirmed in amongst others the matter of Director: Mineral Development, Gauteng Region, and another v Save the Vaal Environment and others 1999 (2) SA 709 (SCA) ('Save the Vaal judgment')

> *'[20] In the result, I am of the view that the audi-rule applies when application for a mining licence is made to the Director in terms of sec 9 of the Act. Such a hearing need not necessarily be a formal one, but interested parties should at least be notified of the application and be given an opportunity to raise their objections in writing. If necessary, a more formal procedure can then be initiated. Nothing in sec 9 or in the rest of the Act either expressly or by necessary implication excludes the application of the rule, and there are no considerations of public policy militating against its application. On the contrary, the application of the rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the Brundtland Report : World Commission on Environment and Development, Our Common Future, Oxford University Press 1987). Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns'.*

[81] The right to be heard and other principles related to consultation with interested and affected parties have been legislated as it appears from the quoted parts of various legislation above.

[82] This principles and (obiter remarks) in the Save the Vaal judgment were reiterated in the Constitutional Court judgment in the matter of Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others[2] at para [102]

[2] (2007 (6) SA 4 (CC) (7 June 2007)

[102] The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out. …'

[83] In the matter of Earthlife Africa (Cape Town) v Director –General: Department of Environmental Affairs and Tourism[3] , the court reviewed and set aside issuance of environmental authorisations where there has been lack of or insufficient public participation. It was held that failure to afford them an opportunity to comment on the final Environmental Impact Assessment report was procedurally unfair, even though they had commented on the draft.

[84] It is clear from a reading of all the relevant statutory provisions that persons in the position of the applicants cannot be treated like ordinary members of the public. In terms of the MPRDA, every South African is a beneficial owner of all minerals and have a right to access information for many reasons. However, the information that is in the mining right application is required for a specific purpose, by persons or group of persons in the position of the applicants. This purpose, is what makes the request for the information during the application process different from for example when it is required to determine whether, post facto the process, certain requirements have been met or to collate statistics with a view to influence policy changes.

[85] In Holomisa v Argus Newspapers Ltd, 1996 (2) SA 588 WLD, Cameron J held:

"The Court must determine the meaning and content of the right sought to be asserted. It must then assess whether rules, of the common law or otherwise, which protect the one right, curtail or infringe upon the enjoyment of the other. If so, it must determine whether, in the light of the constitutional scheme overall, and the relative

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[3] 2002 (3) SA 156 (C).

place of each competing right in it, that infringement can be justified under the limitations provision. At both stages, there will necessarily be an assessment of competing values". As Chakalson P stated in S v Makwanyane and Another, above at 436C-D (para 104):

> *"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for an open and democratic society based on freedom and equality', means that there is no absolute standard which can be established, but the application of those principles to particular circumstances can only be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question"*.

[86] The applicants, unlike the general public, will be affected by the environmental impacts of the mining operations and other than this, the MRPDA gives them specific socioeconomic rights in relation to these applications.

[87] This matter is not about the deficiencies in the PAIA manual of the DMR except for the complaint that the process is lengthy and following it may result in a failure to comment or object timeously. It also transpired during oral argument that there are documents that applicants would be entitled to but which do not form part of the category under 'automatic access'.

[88] What should be noted though is the fact that the process contemplated in the PAIA manual is as though the DMR does not know the identity of the interested and affected persons, hence the mechanical notices referred to in Regulation 3, which are posted in its own offices and publication in newspapers.

[89] Meaningful consultation entails discussion of ideas on an equal footing, considering the advantages and disadvantages of each course and making concessions where necessary.

[90] In terms of the definition of 'owner', they are in an equal position with the state. In fact, their inputs to the mining application are intended to inform the Minister whether the application meets all the prescribed requirements in in terms of the objects of the MPRDA and the necessary consultation processes.

[91] Therefore, in my view, the manner in which the applicants obtain a copy of the mining right should not be restricted to the request processes in terms of PAIA (DMR manual) because they are the persons who should deal directly with the issues that will ultimately determine the fate of the application.

[92] I would have thought that taking into account the developments in the various legislation, the persons in the position of the applicants would be entitled to a copy from the application as and when it is submitted to the Regional Manager, even before they ask for it. That is not the relief sought though.

[93] TEM contends that the matter has become moot, and as such there is no need for the relief (declaratory order). The reason for this submission is that it has already provided the mining right application, less the confidential information. This submission downplays the fact that the documents were provided after a long struggle, wherein the applicants had to be sent from pillar to post, with both the DMR and TEM refusing to take responsibility. It is only after this application was issued that TEM decided to relent and provide the documents.

[94] The DMR is not participating in these proceedings. It simply filed a 'Notice to abide'. Not even a courtesy explanatory affidavit to address the issues arising from its PAIA Manual. At the time certain documents that the applicant was entitled to were not available in the category of 'automatic access but they were in the 2017 version of the manual, which still does not contain an exhaustive list.

[95] In any event, the case for the applicants is that the relevant sections (10 and 22(4)), properly interpreted, mean that they are entitled to a copy on request from the Regional Manager and they do not have to go through the PAIA process, which is very long. I have already agreed with their understanding of these sections. The whole consultation process is intended to advance the objects of the MPRDA. The

applicants, as occupiers have a direct interest because they have rights which they are legally entitled to enforce.

[96] I agree with the submissions of counsel for the applicants that the matter of Minister of Justice v Estate Stransham-Ford is distinguishable. The distinction appears from the judgment. That matter was about the rights of the deceased to choose his dying method. In the matter before me the applicants' standing is not only derived from their individual rights as occupiers, but also as part of a community and in the public interest. The issues raised in this matter do not only affect them, but also future generations.

[97] In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (1) BCLR 39 (CC), it was held that the matter is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.[4] The court further highlighted that if a matter is moot as between the parties it does not necessarily constitute an absolute bar to its adjudication. The court has a discretion to consider whether any order it may make will have any practical effect on the parties or on others.[5]

[98] In Independent Electoral Commission v Langeberg Municipality 2001 (9) BCLR 883 (CC), the court found that there was no live controversy between the parties because the elections were already over and there was no any suggestion that any order the court would make might have any impact on the parties. The disputes between the parties were moot and given the future cases may inevitably present a different factual matrixes, the court accordingly held that 'no purpose would be served in resolving the dispute, neither was there any practical value in deciding the matter.'[6] Having made a comparative reference to s21A of the Supreme Courts Act 59 of 1959 and to a number of decisions made by the Constitution Court, in terms of which an appeal may be dismissed on the ground that the judgment or order sought will have no practical effect or result, the court reasoned that:

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[4] Par 21 fn 18.

[5] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC) par 9.

[6] Ibid, par 12.

> *'[11] This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.'*

[99] In Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (8) BCLR 785 (CC**)**, the Constitutional Court stated that *"mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it be decided. One consideration is whether the Court's order will have any practical effect on either the parties or others."*[7]

[100] In Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd 2014 (2) BCLR 212 (CC), the state applicants and Imperial Crown continued to seek leave to appeal against the review orders, which had become moot, even though the Supreme Court of Appeal had clearly dismissed the appeal against such orders on the basis that the matter has become moot and of no practical effect. The Constitutional Court summarised the position as follows: *"This court has made it clear that, when it is in the interests of justice to do so, it may hear and determine a dispute that has become moot. It may be so, if the parties agree that a court must resolve the dispute although it may not have a practical effect; or when the resolution of the dispute is in the public interest; or when the failure to decide the matter may spawn further prolonged and costly litigation."*[8]

[101] In Ramuhovhi (born Netshituka) and another v President of the Republic of South Africa and others (Women's Legal Trust as amicus curiae) 2017 JOL 37902 (LT), the court held that:

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[7] Par 32.

[8] Par 104.

> "[*19] The general principle determining whether a court will entertain a matter is that "courts will only act if the right remedy is sought by the right person in the right proceedings and circumstances." This principle extends to constitutional matters although "the Constitutional Court has recognised that even in cases which are technically moot as between the parties, the interests of justice may tip the balance in favour of entertaining a particular dispute." These constitute the principles of standing, ripeness and mootness and it is prudent for this Court to deal with these issues and to determine if the court should indeed entertain this matter as a constitutional issue." [Footnotes omitted].*

[102] The Full Court in the matter of Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd and Others v Director of the Financial Intelligence Centre 2018 (3) SA 515 (GP) reiterated the process and powers of a court to issue a declaratory order in terms of the provisions section 21(1) (c) of the Superior Courts Act 10 of 2013 which provides:

> *'(c) In its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'*

[103] The exercise of the Court's jurisdiction in terms of section 21(1) (c) follows a two-legged enquiry. The first one is that the Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, then proceed to the second stage, whether the case is a proper one for the exercise of its discretion.

[104] An applicant will succeed in the first requirement if he can establish that he has an interest in an existing, future or contingent right or obligation. There is no doubt that the applicants in the matter before me have satisfied the requirements in terms of the first leg of the enquiry. They have an interest in an existing, future or contingent right or obligation in relation to the land that forms the subject matter of the mining right application.

[105] With regard to the second leg of the enquiry, the Full Court referred to the authoritative book of Herbstein and van Winsen which outlines the factors , extrapolated from decided cases that the court must consider. They include:

(a) the existence or absence of a dispute;

(b) the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;

(c)whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;

(d) considerations of public policy, justice and convenience;

(e) the practical significance of the order; and

(f)] the availability of other remedies.

[106] That there should be a live controversy or dispute between the parties is not a requirement that is cast in stone as it appears from the authorities that I have already referred to above. The court still has a discretion.

[107] I am satisfied that the applicants have met the requirements on the second leg of the enquiry.

[108] Accordingly, the applicants are entitled to the relief sought in prayer 1 of the Notice of Motion.

[109] Costs: In the Biowatch judgment[9], Sachs J described constitutional litigation as follows;

"16. In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice

53. I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state

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[9] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009)

should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct."

[110] the state in the matter before me filed a 'Notice to abide' right from the outset and also gave an assurance that the mining right application will only be considered after conclusion of all consultation processes. Besides, I cannot say that DMR failed to fulfil its constitutional mandate in the absence of evidence in that regard. It does not appear from the facts before me that the issues in prayer 1 were raised before.

[111] The fifth respondent acknowledged that the applicants have not raised issues with the documents provided. Furthermore, it did not answer to the supplementary affidavit of the applicants with regard to issues that would entitle the latter to the amended mining right application as and when it happened or at least provide an undertaking that it would be provided.

[113] There is no apparent reason for the continued opposition that was mounted by the fifth respondent. The controversies around the PAIA manual of the DMR are issues that were really not relevant for the declaratory relief because the applicants' case was premised on the interpretation of sections 10 and 22 (4) of the MPRDA. The applicants are clear about the limitations of the PAIA as an instrument to enforce their rights and were certain that it is not a viable option.

[114] The statistical evidence brought by the Amicus Curiae actually served to confirm the applicants' anxieties and to foster their stance that their rights cannot be realized by following the PAIA processes.

[115] I would have ordered the DMR to pay the costs of this application, however, I am constrained by their stance to abide the decision of the court. The suggestion by the fifth respondent that they should have been called to explain certain things in the manual would only have earned them a cost order because even in their absence it is clear that following the PAIA processes only serves to delay the entire application process to the detriment of all the parties because not all relevant information is subject to automatic access.

[116] The fifth respondent must bear the costs of this application, including the costs of the Amicus Curiae.

Order;

[117] I make the following order;

[117.1] It is declared that interested and affected parties as contemplated by the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA") are entitled by sections 10(1) and 22(4) of the MPRDA, on request to the relevant Regional Manager of the Department of Mineral Resources ("the Department") , to be furnished with a copy of an application for a mining right as contemplated by section 22 of the MPRDA, subject to the right of the applicant and/or the Department to redact financially sensitive aspects of the application.

[117.2] The fifth respondent is ordered to pay the costs of both the applicants and the Amicus Curiae.

TAN MAKHUBELE J

Judge of the High court, Gauteng Division

APPEARANCES:

APPLICANTS:		**Emma Webber**
Instructed by:		Richard Spoor Inc Attorneys
	C/O	Brazington McConnell
		Hatfield
		PRETORIA

FIFTH RESPONDENT:		**Peter Lazarus SC**
		Iain Currie
Instructed by:		Prinsloo Inc Attorneys
	C/O	Venter & De Villiers
		Brooklyn
		PRETORIA

AMICUS CURIAE:		**Buhle Lekokotla**
		Karabo Van Heerden
Instructed by:		Centre for Applied Legal Studies
	C/O	Savage, Jooste & Adams Attorneys
		Nieuw Muckleneuk
		PRETORIA

No appearance for: **first, second, third and fourth respondents.**