THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1109/2020

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED	**FIRST APPELLANT**
ARM MINING CONSORTIUM LIMITED	**SECOND APPELLANT**

and

THE REGIONAL MANAGER, LIMPOPO REGION, DEPARTMENT OF MINERAL RESOURCES (DMR)	**FIRST RESPONDENT**
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DMR	**SECOND RESPONDENT**
MINISTER OF MINERAL RESOURCES AND ENERGY	**THIRD RESPONDENT**
GENORAH RESOURCES (PTY) LIMITED	**FOURTH RESPONDENT**
DIRECTOR-GENERAL, DMR	**FIFTH RESPONDENT**
NKWE PLATINUM (SOUTH AFRICA) (PTY) LIMITED	**SIXTH RESPONDENT**
INTERNATIONAL GOLDFIELDS LIMITED	**SEVENTH RESPONDENT**

MORUTHANE BEN SEKHUKHUNE N O BAUBA A HLABIRWA MINING **EIGHTH RESPONDENT**

INVESTMENTS (PTY) LIMITED **NINTH RESPONDENT**

NKWE PLATINUM LIMITED **TENTH RESPONDENT**

Neutral citation: *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* (1109/2020) [2022] ZASCA 157 (18 November 2022)

Coram: DAMBUZA ADP and VAN DER MERWE, NICHOLLS and MBATHA JJA, and MEYER AJA

Heard: 1 March 2022

Delivered: 18 November 2022

Summary: Administrative Law – review of decisions of Regional Manager and Deputy Director General of the Department of Mineral resources and Energy.

Interpretation of provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) – refusal of application for prospecting right under s 17(2) of the MPRDA considered – a prospecting right is not a pre-requisite for a mining right under s 22 of the MPRDA.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J, sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel, which costs shall be paid by the second appellant.

JUDGMENT

Dambuza ADP (Van der Merwe, Nicholls and Mbatha JJA and Meyer AJA concurring)

Introduction

[1] In this appeal the second appellant seeks an order reviewing and setting aside seven decisions made by functionaries of the Department of Minerals and Energy (DMRE).[1] The decisions were challenged in an application for review brought by the first appellant, Rustenburg Platinum Mines Limited (RPM), a wholly owned subsidiary of Anglo Platinum Limited (Anglo Platinum), together with the second appellant, ARM Mining Consortium Limited (ARM). That application was dismissed by the Gauteng Division of the High Court, Pretoria, Kollapen J (high court).[2] This appeal, against the dismissal of the review application, is with the leave of the high court.

[1] When the review application was launched the Department was known as the Department of Mineral Resources (DMR). On 29 May 2019, the name was changed to Department of Mineral Resources and Energy DMRE).

[2] The separate applications by RPM and ARM challenging the granting of prospecting rights to Genorah and Bauba were consolidated in November 2014.

[2] The first contested decision was the acceptance, by the first respondent, DMRE's Regional Manager in the Limpopo Region (Regional Manager), of a prospecting application lodged by King Sekhukhune III and later ceded to the ninth respondent, Bauba A Hlabirwa Mining Investments (Pty) Limited (Bauba). The second was the acceptance, by the Regional Manager, of an application for a prospecting right by the fourth respondent, Genorah Resources (Pty) Ltd (Genorah), a Black Empowerment entity. The third decision was a refusal, by DMRE's Deputy Director-General, of RPM's application for a prospecting right. The fourth and fifth decisions were the granting of prospecting rights to King Sekhukhune and Genorah. The sixth decision was the renewal of the Bauba prospecting right. And the seventh was the granting of a mining right to Genorah.

Background

[3] The contested prospecting and mining rights related to eight farms cumulatively known as the Modikwa Deeps Properties which are located in the Magisterial District of Sekhukhune (Eastern Bushveld complex). The land is adjacent to the Modikwa Platinum Mine which was operated by RPM and ARM at the time of the events under consideration. It comprises rural farms known as De Kom 252 KT (De Kom), the remaining extent of the farms Garatouw 282 KT (Garatouw), Hoepakrantz 291 KT (Hoepakrantz), Portion 1 and the remaining extent of the farm Eerste Geluk 322 KT (Eerste Geluk), Zwemkloof 283 KT (Zwemkloof), Grootvygenboom 283 KT (Grootvygenboom), Genokakop 285 KT (Genokakop), Houtbosch 323 KT (Houtbosch), and Portions 1 and 2 of the farm Nooitverwacht 324 (Nooitverwacht).

[4] During the 1980's the Anglo American Platinum Corporation Group (Corporation Limited) concluded a number of agreements with the self-governing territory of Lebowa through the Lebowa Minerals Trust (LMT) as the holder of various mineral rights over land in the Limpopo Province. Flowing from these

agreements, Anglo Platinum and its subsidiaries conducted joint venture prospecting activities for platinum and related minerals over the land.

[5] In December 2000 three joint venture agreements were cancelled following negotiations with the third respondent, the Minister of Mineral Resources and Energy (Minister), who perceived them to result in a concentration of mineral rights in the hands of the ARM Group. At that time prospecting had already occurred on the properties to varying degrees, and mines had been established. The agreement with the Minister was that on cancellation of the joint venture agreements in respect of some of the Modikwa Deeps Properties, twelve mineral leases and two prospecting agreements would be concluded between the joint venture entities and the Minister. In respect of twelve properties, the rights of these entities would be limited to purchasing the platinum group and all associated metals and minerals mined on the properties for a certain period.

[6] With regard to the prospecting agreements, RPM and ARM would form a joint venture to prospect and operate platinum mining activities on a defined joint venture area. RPM was to contribute the old order rights which it held over the Modikwa Deeps Properties while ARM would contribute stipulated finance to the joint venture.

[7] In line with that agreement, on 16 March 2004 RPM applied for a prospecting permit for platinum metals and other minerals under s 6 of the Minerals Act 50 of 1991 (the Minerals Act). On 1 May 2004, before the Department had made a decision on RPM's prospecting permit application, the Minerals Act was repealed and replaced with the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which is still the applicable legislation in respect of mining activities. In a letter dated 21 June 2004, the Department advised RPM that because its application could not be finalized

before the MPRDA became effective, its application would be processed as a pending application in terms of Item 3(1) of Schedule II to the MPRDA. In terms of Item 3(1), applications for mineral rights made under ss 6, 8 and 9 of the Minerals Act that had not been finalised when the MPRDA came into effect, had to be regarded as having been lodged in terms of ss 13, 22, 27, 79 or 83 of the MPRDA. Subsequent to the MPRDA coming into effect, RPM submitted additional information as required thereunder.

[8] Bauba denies that when RPM lodged its application for a prospecting right on 16 March 2004 it was a holder of a permit to prospect and to mine for platinum group metals over the Modikwa Deeps Properties (which permit is referred to in the MPRDA as an unused old order right).[3] However, the Department does not deny that RPM was a holder of such a right flowing from the agreements reached with the Minister. In fact, the Department dealt with RPM as a holder of an unused old order right. As will be discussed more fully in the paragraphs that follow, as a holder of an unused old order right at the commencement of the MPRDA, RPM became entitled to a one-year period of exclusivity in relation to its application for a prospecting right.[4] This meant that during that one-year period no other application for a prospecting right over the relevant Modikwa Deeps Properties could be accepted and considered by the Department. That period of exclusivity expired on 30 April 2005.

[9] On 29 April 2005, before a decision on RPM's application was made by DMRE, King Sekhukhune Thulare, as the Kgosi of the Bapedi Community (King Sekhukhune III), lodged an application for a prospecting right over some of the

[3] Except over the property known as Nooitverwacht 324 KT.
[4] Item 8 of Schedule II to the MPRDA.

Modikwa Deeps Properties.[5] On 30 April 2005, a day after the lodgment of King Sekhukhune's application, the one year exclusivity period after the lodgment of RPM's application expired. On 12 May 2005, RPM addressed a letter to the Regional Manager inquiring about progress in its application. It also informed the Regional Manager that its application was made on the basis that if the prospecting right was granted it would seek consent under s 11 of the MPRDA, to have the right registered in favour of the Joint Venture between itself and ARM Mining Consortium Limited, the BEE group with which it was already operating the Modikwa Mine up-deep from the Modikwa Deeps Properties. In a letter dated 13 May 2005 addressed to King Sekhukhune III, the Regional Manager advised that his application (lodged on 29 April 2005) in respect of the Modikwa Deeps Properties would be 'placed on hold' pending the Minister's decision on applications that had already been accepted in respect of those properties.

[10] On 27 July 2005, the Regional Manager wrote to RPM confirming that its application had been accepted in terms of s 16(2) of the MPRDA. Thereafter RPM submitted further reports, including its report on consultations with the landowners, its Environmental Management Plan and financial guarantee.

[11] On 6 February 2006, Genorah lodged a prospecting right application in respect of five of the Modikwa Deeps Properties.[6] On 20 February 2006, this application was accepted by the Regional Manager and was duly processed. On 22 August 2006 the Deputy Director-General: Mineral Regulation (DDG) granted Genorah's application over three Modikwa Deeps Properties. This right related to De Kom, Garatouw, and Hoepakrantz. On 7 June 2006, Prospecting Right

[5] Grootvygenboom, Houtbosch and Genokakop, (The King also applied for a prospecting right over Dingaanskop 543 KS, Dsjate 249 KT, Fisantlaagte 506 KS, Hoogste Punt 290 KT, Indië 474 KS, Malekskraal 509 KT, Mecklenburg 112 KT, and Schoonoord 462 KS).

[6] Genorah's application was in respect of farms De Kom, Garatouw, Hoepakrantz, Nooitverwacht, and Eerste Geluk.

256/2006 granted in favour of the King Sekhukhune III was notarially executed. This right related to Dingaanskop 543 (Dingaanskop), Indie 474 KS (Indie), and Fisantlaagte 506 and not the three Modikwa Deeps Properties in respect of which King Sekhukhune III had applied for a prospecting right.

[12] On 7 July 2006, the Regional Manager recommended refusal of the RPM prospecting right application. On 3 August 2006, the Regional Manager recommended approval of Genorah's prospecting right application. From 22 to 28 August 2006, various functionaries of the Department approved the recommendation for approval of Genorah's application in respect of De Kom, Garatouw, and Hoepakrantz.

[13] On 24 August 2006 the second respondent, the Deputy Director-General: Mineral Regulation (DDG), refused RPM's application for a prospecting right in terms of s 17(2)*(b)*(i) of the MPRDA, following the Regional Manager's recommendation. The refusal letter read as follows:

'REFUSAL OF APPLICATION FOR A PROSPECTING RIGHT: THE MODIKWA DOWN-DEEPS PROPERTIES: THE FARMS DE KOM 252 KT, GARATOUW 282 KT, ZWEMKLOOF 283 KT, GROOTVYGENBOOM 284 KT, GENOKAKOP 285 KT, HOEPAKRANTZ 291 KT, HOUTBOSCH 323 KT, NOOITVERWACHT 324 KT AND EERSTE GELUK 327 KT; MAGISTERIAL DISTRICT OF SEKHUKHUNE

After careful consideration of your application for a new prospecting right, the Deputy Director-General: Mineral Regulation in terms of section 17(2) has, by virtue of powers delegated to him in terms of section 103(1) of the Mineral and Petroleum Resources Development Act, 2002 decided to refuse to grant a prospecting right in respect of the above mentioned properties for the following reasons:

- Section 17(2)(*b*)(i) and (iii) as the granting of the right will result in the concentration of the mineral resources in question under the control of the applicant and will also result in an exclusionary act.'

RPM received the letter on 11 September 2006.

[14] On 12 September 2006, Genorah's prospecting right was notarially executed. On 14 September 2006, the tenth respondent, Nkwe Platinum Limited (Nkwe), issued a media statement in which it announced that it had concluded an agreement with Genorah to acquire the latter's interest in the prospecting rights over two of the Modikwa Deeps Properties.[7] The agreement between Nkwe and Genorah for the acquisition of the latter's prospecting right was conditional upon the granting of the prospecting right in respect of the two properties to Genorah.

[15] On 29 September 2006, the Regional Manager granted the prospecting right applied for by King Sekhukhune III over the Modikwa Deeps Properties Genokakop and Grootvygenboom. On 4 October 2006, the Regional Manager wrote to the King advising of the grant to him of a prospecting right over Genokakop, Grootvygenboom, Schoonoord, Zwitzerland and Houtbosch.

[16] On 5 October 2006, RPM lodged an appeal with the Minister in terms of s 96 of the MPRDA against the refusal of its application for a prospecting right. On the same day its attorneys wrote to the Regional Manager alleging that the acceptance of Genorah's prospecting application was irregular as it happened prior to a decision on its (RPM's) application, and prior to expiry of the period determined in terms of the MPRDA for an internal appeal against the refusal of its application, and a (possible) court review. No response was received to this letter.

[17] On 5 March 2007, RPM launched the application for review of the refusal decision and the decision to accept Genorah's application. Thereafter negotiations were held between RPM and DMRE in an effort to have the dispute settled amicably. According to RPM, the DDG was unhappy with the institution

[7] Farms Garatouw 282 KT and De Kom 252 KT.

of the review proceedings. In November 2007, the Bapedi community resolved to cede its prospecting right to Bauba. On 19 December 2007, an amendment was effected on Prospecting Right 256/2006 (King Sekhukhune's right over Dingaanskop, Indie and Fisantlaagte) to include Genokakop and Grootvygenboom.

[18] While settlement negotiations in relation to the review application were underway, in February 2008 RPM became aware that a prospecting right was granted to Genorah in August 2006. Correspondence was exchanged between RPM and DMRE in relation to this matter. The DDG urged RPM to enter into settlement negotiations with Genorah, which it did. On 3 March 2008, the DDG consented to a cession of the prospecting right in terms of s 11(1) of the MPRDA from King Sekhukhune III to Bauba.[8] In terms of the cession, the prospecting right in respect of Genokakop and Grootvygenboom were ceded to Bauba. Negotiations between RPM and Genorah broke down in the same month.

[19] On 12 August 2008, the DDG, acting in terms of s 102 of the MPRDA, granted consent for the addition of Houtbosch onto Bauba's prospecting right. On 17 February 2010, RPM became aware from a media release, that a prospecting right had been granted to Bauba. According to RPM its attempts to ascertain the description of the properties in respect of which the right had been granted were unsuccessful. On 19 December 2008, an amendment was effected to the review application to add the grant of the Genorah prospecting right to the decisions that were to be reviewed. ARM intervened and was joined as a second applicant in RPM's review application.

[8] The King had since passed away in December 2006.

[20] On 22 April 2010, following the decision of this Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd and Others*,[9] RPM lodged an appeal to the Minister against the grant of a prospecting rights to Bauba and Genorah. In *Bengwenyama* this Court held that the internal appeal provided for in s 96 of the MPRDA must be exhausted as stipulated in s 96(3) before instituting review proceedings. On 28 April 2010, the variation by the DDG in respect of PR256/2006 to include Genokakop and Grootvygenboom, was notarially executed. On 4 May 2010, RPM obtained a copy of the notarial deed of amendment, and two days thereafter it amended its internal appeal to include the decision to amend PR256/2006.

[21] RPM argues that the variations effected to the King Sekhukhune III prospecting right 256/2006 to incorporate therein the Modikwa Deeps Properties are invalid because the Minister had not delegated to the DDG his authority to consent thereto. And even if there had been such delegation, the grant of new rights over these properties by way of variation was an impermissible circumvention of the requirements set in ss 16 and 17 of the MPRDA. On 29 September 2010 it instituted the application for review and setting aside of the amendment decisions.

[22] On 4 April 2011, Bauba lodged an application for renewal of its prospecting right. On 7 April 2011, RPM addressed a letter to the DDG, DG and the Minister seeking an undertaking that no further rights would be granted in respect of the Modikwa Deeps Properties until its internal appeal had been determined. On 6 July 2011 Bauba's prospecting right expired. On 11 September 2011, Genorah's prospecting right also expired. On 10 February 2012, a mining

[9] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd and Others* [2010] ZASCA 50; [2010] 3 All SA 577 (SCA).

right was granted to Genorah over De Kom, Garatouw, Hoepakrantz and Nooitverwacht. On 15 March 2012. RPM lodged an internal appeal against the grant of the Genorah mining right.

[23] The internal appeals remained pending for years until the high court (Basson J), in 2017, granted an order declaring, amongst other things, that RPM had exhausted its internal remedies of appeal in respect of the acceptance and refusal decisions. It should be noted that in terms of s 96(2)(*a*) of the MPRDA, the internal appeal did not suspend the decisions as the DDG did not specifically order suspension. The refusal and the grant of rights therefore continued to be effective. However, in terms of s 96(2)*(b)* subsequent applications for the same right on the same land were suspended pending the finalisation of the appeal.

[24] On 6 June 2012, Bauba's prospecting right over Genokakop and Grootvygenboom was renewed. On 10 August 2012, RPM lodged an internal appeal against that renewal decision. On 9 July 2015 Bauba applied for a mining right. Bauba's renewed prospecting right expired on 17 July 2015. On 27 August 2014, the addition of Houtbosch onto the Bauba prospecting right was notarised. On 23 November 2017, Bauba's mining right application was accepted by the Department. No decision had been made on that application when this appeal was heard.

Litigation history

The review application

[25] In the review application RPM set out the events that preceded its application for a prospecting right in 2004. It argued that its mineral leases and prospecting agreements in respect of the Modikwa Deeps Properties had been concluded in line with the agreements reached with the DDG (who had represented the LMT Trust). By refusing its application for a prospecting right

the Minister was acting in bad faith, and contrary to the agreements which had been concluded with her with the aim of avoiding a concentration of mineral rights in the hands of RPM.

[26] RPM maintained that in principle, the granting of a prospecting right would always have the effect of preventing or excluding others from obtaining the same right in respect of the same mineral and land. Similarly, the granting of such a right to an applicant who already holds a mining right in terms of the MPRDA theoretically resulted in a concentration of the mineral resource in question under the control of the approved applicant. It could never have been the intention of the legislature to impose a blanket bar to the granting of a prospecting right to a holder of a mining right. Consequently, the refusal was arbitrary and was taken without good cause. It therefore fell to be set aside under the provisions of ss 5(3), 6(2)(*e*)(*v*), and/or 6(2)(*h*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[27] In addition, the reference in s 17(2)(*b*)(iii) to concentration of mineral resources was 'perplexing' because at the time of considering the application it would be unknown whether there were any resources on the land. To avoid potential absurdities in the interpretation of s 17(2)(*b*)(i) and (iii), a qualified reading of the section was necessary – by interpreting s 17(2)(*b*)(iii) as intending to prohibit 'unreasonable' concentration of rights in the hands of a particular entity. In this case, because the DDG did not give adequate reasons for the refusal and did not apply a qualified meaning to the section, but merely regurgitated the provisions of the section, the refusal was arbitrary.

[28] RPM's central argument, however, was that, in any event, the clear transitional provisions of the MPRDA which provided security to a holder of old order rights should take precedence over the provisions of s 17(2)*(b)*. Because the

DDG had failed to interpret the provisions of s 17(2(*b*) to be subject to the clear and specific transitional provisions of the MPRDA, which provided special protection to a holder of an old order right in order to bring it within the provisions of the MPRDA, the refusal fell to be set aside under s 62(*d*) of PAJA.

[29] In line with this argument it was submitted that the acceptance of Bauba's application for a prospecting right by the Department, on 29 April 2005, prior to the expiry of its (RPM's) exclusivity period was unlawful. Furthermore, the acceptance of Genorah's application in February 2006, prior to determination of RPM's application was in breach of the provisions of s 16(2) of the MPRDA which prohibits the acceptance of a prospecting right where another entity holds a prospecting right, mining right, or mining permit in respect of the same mineral on the same land. The contention was that the applications by Genorah and Bauba should not have been accepted before a decision was made on RPM's application, and before the internal appeal and the court review had been finalised. Because both acts of acceptance were unlawful, all subsequent administrative action by the Department granting renewals and further rights to Bauba and Genorah were invalid.

[30] It was also contended that the refusal decision fell to be set aside because the DDG failed to take into account numerous factors, including that the Modikwa Deeps Properties are situated adjacent to and 'down dip' from the Modikwa Platinum Mine on which RPM and ARM were already mining, which rendered them best suited to access the minerals on those properties.

[31] The respondents, on the other hand, contended that the delay by RPM in instituting and prosecuting the review applications (which were later consolidated) was fatal to the proceedings. The review application in relation to the refusal decision and the grant of the prospecting right to Genorah, which

decisions were taken in August 2006, was instituted in March 2007 (and amended in December 2008). By the time the application was heard the prospecting right had long lapsed and Genorah had been in possession of the mining right for eight years. It had concluded all prospecting activities, and subsequent thereto, had expended more than R1.2billion in the development of the Garatouw Platinum Mine in the exercise of its mining right. The review application challenging the 2008 amendment decisions that resulted in the Bauba prospecting right over the Modikwa Deeps Properties was initiated on 29 September 2010.

[32] The high court dismissed the consolidated review application based, in the main, on unreasonable delay in instituting and prosecuting the review proceedings. It found the delay to have been extraordinary and 'inexplicable'. It remarked that RPM and ARM could have been 'more efficient and decisive' in prosecuting the application. Although the Learned Judge found that the grant of the Genorah prospecting right was improper, he exercised his remedial discretion in favour of Genorah by declining to declare it unlawful and setting the decision aside.

On appeal

[33] The appeal was brought and prosecuted by ARM. The parties persisted in the arguments they had advanced in the high court. ARM highlighted that in refusing RPM's application for a prospecting right, the DDG ignored the fact that its joint venture partner (ARM), was a black company and a 100% shareholder in ARM Platinum which, in turn, held 83% in AMCL. The balance of the 17% shareholding was held by Mampudima and Matimatjatji communities residing near the Modikwa Deeps Properties. Against this background, the suggestion that granting a prospecting right to RPM would result in the concentration of mineral resources and limitation of equitable access to it was unfounded, it was argued.

[34] It was also submitted that the delay in prosecuting the application could not be attributed to any remissness on RPM's part. Instead it was the State respondents who caused the delay by refusing to provide documents and by disobeying court orders. It was also pointed out that both Genorah and Bauba delivered their answering papers more than two and six months out of time respectively. Furthermore, the appellants contended that they should not be punished because the respondents proceeded to expend huge expenditure on the mines when they knew of the challenges to the approval of their prospecting rights.

The Law

[35] In *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another*[10] the Constitutional Court set out succinctly the circumstances in which the MPRDA was passed and the objectives thereof. At paragraph 10 the Court said:

'In the discharge of its obligations to transform the mining industry, one of the major sectors of our economy, Parliament passed the MPRDA. As its preamble proclaims, the MPRDA was enacted in part to eradicate all forms of discriminatory practices in the mining and petroleum industries and to redress the inequalities of past racial discrimination. Pivotal to achieving these objectives was placing all mineral and petroleum resources in the hands of the nation as a whole and making the state the custodian of the resources on behalf of the nation. This is one of the fundamental changes brought about by the MPRDA. By vesting all mineral and petroleum resources in the nation, the MPRDA dispensed with the notion of mineral rights or rights to minerals which before 1 May 2004 were held by private persons.'

At paragraph 13 the Court held:

'In view of the fact that black people did not own land because of dispossession and legal instruments that prohibited ownership, drastic measures were necessary to open up

[10] *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* [2013] ZACC 45; 2014 (2) BCLR 212 (CC); 2014 (2) SA 603 (CC).

opportunities in the mining industry for the previously excluded majority. This became one of the primary objectives of the MPRDA.'

[36] These remarks by the Constitutional Court elucidate the purpose for which the MPRDA was enacted. An overview of the relevant provisions will be helpful for proper consideration of the contested decisions. The sections are set out below as they read when the contested decisions were made, prior to the commencement of the Mineral and Petroleum Resources Development Amendment Act, 49 of 2008, on 7 June 2013.[11]

[37] As a starting point s 2 of the MPRDA set out the following objectives of the Act; to:

'(a) recognize the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

(c) promote equitable access to the nation's mineral and petroleum resources;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

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

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(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

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

[11] Although the wording of some of the provisions of the Act changed pursuant to the amendment, the substance, structure and flow of the Act remains substantially the same post amendment.

[38] Chapter 3 of the Act regulated the administration of the MPRDA. In terms of s 7, the Republic and the sea were divided into regions. Each region had a regional manager designated by the Director-General to perform the functions assigned to him or her under the Act or any other law.[12] One such function was the processing of mineral and petroleum reconnaissance applications.

[39] Section 9 regulated the sequence in which multiple applications for the same mineral on the same land would be processed. If the Regional Manager received more than one application for a prospecting or mining right in respect of the same mineral and land on the same day, she had to regard the applications as having been received at the same time.[13] When processing the applications the Minister had to then give preference to applications from historically disadvantaged persons.[14] Applications received on different dates had to be dealt with in the order of receipt.[15]

[40] Sections 16 and 17 regulated the procedure and requirements for processing prospecting rights applications. In terms of s 16(1), applications had to be lodged in the office of the Regional Manager in whose region the land was located, in the prescribed manner, with the prescribed, non-refundable application fee. In terms of s 16(2), the Regional Manager had to accept an application for a prospecting right if –

'(a) the requirements contemplated in subsection (1) [were] met; and

(b) no other person [held] a prospecting right, mining right, mining permit or retention permit for the same mineral and land.'

[12] Section 8 of the MPRDA.
[13] Section 9(1)*(a)*.
[14] Section 9(2).
[15] Section 9(1)*(b)*.

[41] As stated, when the MPRDA came into effect on 01 May 2004, a transitional, arrangement was provided in the Act. Apart from Item 3 of Schedule II to the Act, which kept applications that were pending under ss 6, 8, and 9 of the Minerals Act[16] alive, in addition, transitional arrangements were provided, under Items 8(1) and (2) of Schedule II, to protect the security of tenure and to give holders of old order rights opportunity to comply with the new Act. In terms thereof, an unused old order right[17] which was in force when the MPRDA came into effect, continued to be valid subject to the conditions under which it was acquired. The holder thereof was afforded an exclusive right for a period of a year from 1 May 2004, to apply for a prospecting right or a mining right as the case might be.

[42] Item 8 provided that:

'**Processing of unused old order rights**

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

(2) The holder of an unused old order right has the exclusive right to apply for a prospecting right or a mining right as the case may be, in terms of this Act within the period referred to in item (1).

(3) An unused old order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this Act or is refused.

(4) Subject to the subitems (2) and (3), an unused old order right ceases to exists upon the expiry of the period contemplated in subitem (1).'

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[16] Para 7 above

[17] In terms of s1 of Schedule II an 'old order right' meant 'an old order mining right, old order prospecting right or unused old order right as the case may be'.

[43] Once an application for a prospecting right was accepted as provided in s16(2), the Regional Manager had to notify the applicant, in writing, within 14 days, of the receipt of the application, if it did not comply with the requirements set in s 16(1).[18] Section 17(1) provided that the Minister had to grant the application within 30 days if:

'*(a)* the applicant [had] access to financial resources and [had] the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;

(b) the estimated expenditure [was] compatible with the proposed prospecting operation and duration of the prospecting work programme;

(c) the prospecting [would] not result in unacceptable pollution, ecological degradation or damage to the environment;

(d) the applicant [had] the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996); and

(e) the applicant [was] not in contravention of [the] Act.'

[44] On approval of the application, the holder of the prospecting right became entitled to an exclusive right to apply for renewal thereof in respect of the same mineral, on the same land.[19] It also had an exclusive right to remove and dispose of the minerals to which the right related when found during prospecting operations.[20] On the other hand, it was obliged to commence with the prospecting activities within 120 days from the date on which the prospecting right became effective or any extended period granted.[21] Prospecting operations had to be conducted continuously and actively in accordance with the prospecting work programme incorporated in the conditions of the prospecting right.[22]

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[18] Section 16(3).
[19] Section 19(1)*(a)* read together with s18.
[20] Section 19(1)*(c)* read together with s 20.
[21] Section 19(2)*(b).*
[22] S 19(2)*(c).*

[45] In terms of s 17(2) the Minister had to refuse an application for a prospecting right where:

'(a) the application [did] not meet all the requirements referred to in subsection(1);

(b) the granting of such right [would] –

(i) result in an exclusionary act;

(ii) prevent fair competition; or

(iii) result in the concentration of the mineral resources in question under the control of the applicant.'

A refusal had to be communicated to the applicant in writing within 30 days thereof, together with the reasons therefor.[23]

[46] Notably, after the amendment to the Act s 17(2) reads as follows:

'(2) The Minister must, within 30 days of receipt of the application from the Regional Manager, refuse to grant a prospecting right if —

(*a*) the application does not meet all the requirements referred to in subsection (1);

(*b*) the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant *and their associated companies with the possible limitation of equitable access to mineral resources.*' (Emphasis added)

[47] Sections 22 and 23 regulated the procedure and requirements in applications for, and granting of, mining rights. The prescribed procedure and approval requirements were substantially similar to those applicable to prospecting right applications.[24] Renewal of mining rights was regulated under s 24 in a procedure similar to renewal of prospecting rights.

[48] Prior to the amendment, alienation and encumbrance of prospecting and mining rights were restricted under s 11(1) of the Act as follows:

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[23] Section 17(3).

[24] Section 22 (1) & (2).

'A prospecting or mining right or an interest in any such right or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.'

Discussion

[49] Much of the argument on behalf of the appellants centered around the acceptance of the respondents' (Bauba and Genorah) prospecting rights applications and the effect thereof on the subsequent renewals, and the granting of Genorah's mining right. The respondents persisted in their contention that the appeal should be dismissed based only on the unreasonable delay in the prosecution of the review application.

[50] There was indeed evidence of intermittent attempts at settlement negotiations between the RPM and DMRE's functionaries from 2006 to the end of 2013, to the extent that a draft settlement agreement was exchanged between the DDG and Mr Mukoka of RPM on 17 December 2013. It is also correct that the Department delayed, repeatedly, sometimes for long periods, in furnishing RPM with requested information and documents. In addition, the Regional Manager insisted that RPM enter into settlement negotiations with DMRE and Genorah, even after the review proceedings had been instituted. Moreover, RPM did not immediately become aware of and first had to verify the decisions that preferred Bauba and Genorah on the competing applications. The Department had to be compelled by court to furnish the information required to institute the proceedings. RPM only became aware after almost two years that the King's application had been approved.

[51] Nevertheless there were long periods of unexplained inaction by RPM after becoming aware of the Genorah approval decision and after the institution of the

review proceedings. Regarding the 10 month delay after becoming aware that the Genorah prospecting right had been granted, the only explanation was that the matter was taken up with the DDG who 'never reverted to RPM about the matter'.

[52] Having become aware in 2008 that prospecting rights were granted in 2006, the appellants must have been aware that, by that time only three years of the five-year lifespan of the rights remained. Importantly, under s19(2)*(b)* of the MPRDA, once Bauba and Genorah were granted prospecting rights they became obliged to commence with prospecting activities within 120 days from the date on which the rights became effective. The appellants therefore had to institute and prosecute their challenge to the relevant decisions diligently. Yet it was at Bauba's instance that there was progress in the prosecution of the review application after a long period of inaction. Bauba instituted an application for the dismissal of the review application. This led to ARM seeking the joinder that led to the consolidation of the separate review applications that had been instituted against Bauba and Genorah.

[53] The delays had the effect that by the time the application for review was heard by the high court the original and renewed prospecting rights had long expired. Genorah had secured a mining right and Bauba's application for a mining right was pending. All that was specified under s 22(2)(*b*) was that no application for a mining right could be accepted if some other person held a prospecting right, mining right, mining permit or retention permit for the same mineral and land. There was no evidence of a holder of any such right or permit when Genorah and Bauba applied for mining rights on the properties in question.

[54] Ultimately, a decision on the lawfulness of the applications for the prospecting rights granted, including the rights that were granted by way of variations, was of no practical effect. More so that a prospecting right was not a

pre-requisite for a mining right. Consequently it is not necessary to consider the appeal on the granting of the prospecting rights. It is important to note, however, that even if it were to be found that the granting of prospecting rights to Genorah and Bauba was unlawful that would not mean that a prospecting right should have been granted to the appellants. The refusal decision remains to be considered on its own merits. In the paragraphs that follow I confirm, on the merits, the lawfulness of the refusal of the appellants' application for a prospecting right. It is not necessary to reach any conclusion in this appeal on the effect of delays on the institution and prosecution of the review application.

The refusal of RPM'S application for a prospecting right.

[55] The high court found that the refusal decision was neither unfair nor irrational because of the reasons set out in the DDG's recommendations. It found that there was nothing improper about taking into consideration Anglo Platinum's 2005 annual report which was an accurate public document. A further finding was that the approach in s 17(2), prior to its amendment, was too restrictive and did not account for the objectives of the MPRDA. The pre-amendment s 17(2) had to be interpreted liberally to achieve these objectives, particularly the security of tenure which RPM enjoyed based old order right, it was held.

[56] Of relevance at this point is that before the amendment, s 17(2) did not extend the assessment of concentration of minerals to companies associated with an applicant for a prospecting right.[25] Possible limitation of equitable access to mineral resources was also not a specified consideration. Importantly, the Act had to be interpreted and applied to the facts of this case as it read before the amendments. Such interpretation, however, could not ignore the context and purpose for which the relevant provisions were enacted.

[25] See pragraphs 45 and 46 above.

[57] It is trite that context is fundamental in the interpretation of all written instruments. Statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. There is, inter alia, the context provided by the entire enactment. Furthermore, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates provides the context for the legislation.[26]

[58] Section 17 in its pre-amended form of the MPRDA must be interpreted to give effect to its objectives and purpose. I have already set out the objectives of s2 of the MPRDA.[27] They included, giving effect to the State's custodianship of the nation's mineral resources, the promotion of equitable access to such resources to all the people of South Africa, substantial and meaningful expansion of opportunities for historically disadvantaged persons to enter into and benefit from the nation's mineral and petroleum resources, and the promotion of economic growth and mineral and petroleum resources development in the Republic.[28]

[59] In *In Minister of Mineral Resources v Sishen*[29] the Constitutional Court said the following about the objectives of the MPRDA:

'The promotion of equitable access by all South Africans to mineral resources, the expansion of opportunities for historically disadvantaged persons to enter the mining and petroleum industries, and the advancement of the social and economic welfare of all South African are cornerstones of that transformation. The state is obligated to advance the realization of these goals. It is therefore vitally important to heed the provisions of s 4 when interpreting the MPRDA.

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[26] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) paras 16-17.
[27] See para 37 above
[28] Section 2*(b)(c)(d)(e) and (f)* of the MPRDA.
[29] *Minister of Mineral Resources v Sishen Iron* 2014 (2) SA 603 at 45-47.

This is not only because s 4 expressly says so, but also for the reason that the MPRDA was enacted to eradicate the inequality embedded in all spheres of life under the apartheid order. Equality is at the heart of our constitutional architecture. It is not only entrenched as a right in the Bill of Rights, but it is also one of the values on which our democratic order has been founded.

[60] Given the context and objectives of the MPRDA I do not think the DDG acted improperly in considering the factors which RPM complains about. They were relevant for the determination that had to be made. In the recommendation, RPM's dominance in the platinum group mining sector was highlighted.[30] It was recorded that according to the Anglo Platinum (RPM's holding company) 2005 Annual Report the Modikwa Platinum Mine, which RPM owns and operates, had still not reached the target production levels of 240 000 tons per annum and therefore if granted to RPM, the prospecting right would not be immediately put to use to attain the objectives of the Act. The DDG's assessment was that the Modikwa Platinum Mine had 'potential life-of-mine resources' that would last for over 100 years (presumably from the time of the memorandum). She reasoned that granting the prospecting right applied for by RPM would result in 'an additional 150 m oz 4E, to a depth of 1000 m (approximately) to RPM's existing mineral resources on Modikwa Mining operation'. She stressed that:

'Awarding the properties under the new application to RPM (and therefore to Anglo Platinum) will certainly contradict the stated goals of the MPRD Act, namely: "To promote equitable access of the nation's minerals and petroleum resources to all the people of South Africa and to expand opportunities for HDSA's to enter the mineral industry and to benefit from the exploitation of the nation's mineral resources"'.

[61] The DDG reasoned that in granting the right applied for, the Department would be entrenching the same position of locking-up the area as was the case in the past. RPM's dominant position would continue to be entrenched, thereby frustrating the transformation objectives of the MPRDA. Her view, in other

[30] See para 14 above.

words, was that, if the prospecting right for the Modikwa Deeps Properties was granted to RPM, other potential miners, especially from the historically disadvantaged communities would be excluded from accessing the concerned market for a long period, whilst RPM still had vast amounts (potential life of mine resources of up to 100 years) of unmined platinum at the Modikwa Platinum Mine, and, either directly, or through related entities, already had considerable access to the minerals in question in the country. That reasoning and the decision reached was consistent with the purpose and objectives of the MPRDA.

[62] The DDG further referred to 17 old order mining rights held by Anglo Platinum in the name of its wholly owned subsidiaries, and a further four with its joint venture partners, which was more than all the other companies involved in the South African PGM industry combined. She considered that not a single historically disadvantaged entity held more than five mining rights in the Eastern Limb or Western Bushveld.

[63] Even though associated companies were not expressly included in s 17(2) prior to the amendment, there can be no dispute that they were always part of the composition of the applicant entity. Ignoring the extent of the benefit derived from that kind of association between companies would be contrary to the objectives and purpose of s 17(2) even as it read pre-amendment. It was a relevant factor in considering whether there would be concentration of the minerals in the hands of RPM.

[64] RPM did not dispute the correctness of the contents of the Anglo Platinum Annual Report. It also did not dispute that it (RPM) was a wholly owned subsidiary of Anglo Platinum, one of the largest mining companies in the country. On any reasonable approach this is the kind of information that is relevant in determining whether the granting of a prospecting and mining right accords with

the transformation objectives of the MPRDA. As it was submitted on behalf of Genorah, DMRE was obliged to consider this information once it came to the attention of the relevant functionaries. It was an integral part of the determination of the concentration of mineral rights as provided in s 17(2).

[65] The following reasoning by the Regional Manager gives even more insight into her approach in considering RPM's application:

'The properties under application and their resource potential present a critical mass and an ideal opportunity to serve as a base for a company controlled by HDSA persons to successfully enter the South African PGM Industry. In view of RPM/Anglo Platinum's dominant position in the South African and world PGM Industry . . . its application for the new properties cannot be supported. . .'

Again, this reasoning is consistent with the objectives of the MPRDA and in line with the principles of interpretation of legislation. On the other hand, the contention that the DDG ignored the fact that RPM would be going into a joint venture with a historically disadvantaged entity was not substantiated. That entity had been RPM's associate in the industry for some time and would have already benefited from that association.

[66] The refusal of the prospecting right to RPM can therefore not be faulted on the basis of the approach she took in applying the provisions of s17(2) of the MPRDA. It follows that there was no bar to granting a mining right to Genorah In the end, I cannot find that the result reached by the high court was incorrect. The following order is granted:

The appeal is dismissed with costs including the costs of two counsel, which costs shall be paid by the second appellant.

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N DAMBUZA
ACTING DEPUTY PRESIDENT

Appearances:

For 1st appellants:	M Seape
Instructed by:	Norton Rose Fullbright Inc, Sandton Webbers Attorneys, Bloemfontein
For 2nd appellants:	T Bruinders SC with E Webber
Instructed by:	Bowman Gilfillan Inc., Sandton McIntyre van der Post Attorneys, Bloemfontein
For 4th, 6th, 7th and 10th respondents:	B Leech SC with F Hobden
Instructed by:	Werkmans Attorneys, Sandton Matsepes Inc, Bloemfontein
For 8th and 9th respondents:	A Botha SC with A Saldulker
Instructed by:	Shaheed Dollie, Johannesburg Matsepes Inc, Bloemfontein