THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 458/2024

In the matter between:

DE BEERS CONSOLIDATED MINES (PTY) LTD **APPELLANT**

and

REGIONAL MANAGER, LIMPOPO: THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY **FIRST RESPONDENT**

THE DIRECTOR-GENERAL: THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY **SECOND RESPONDENT**

THE MINISTER OF MINERAL RESOURCES AND ENERGY **THIRD RESPONDENT**

Neutral citation: *De Beers Consolidated Mines (Pty) Ltd v Regional Manager, Limpopo: The Department of Mineral Resources and Energy and Others* (458/2024) [2025] ZASCA 128 (10 September 2025)

Coram: SCHIPPERS, MOKGOHLOA and UNTERHALTER JJA and HENNEY and KUBUSHI AJJA

Heard: 3 September 2025

Delivered: 10 September 2025

Summary: Review – internal remedy – s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 – the competence of a court to refuse exemption from the obligation to exhaust internal remedies and engage its review jurisdiction.

ORDER

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

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraphs 1 and 2 of the high court's order are set aside and replaced with the following:

> 'The appellant is directed to exhaust the internal remedies provided by s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 and the matter is accordingly referred back to the third respondent, who is directed to consider and decide the applicant's internal appeal within 30 days of the grant of this order and to communicate his decision to the applicant within 10 days of it being taken.'

JUDGMENT

Unterhalter JA (Schippers and Mokgohloa JJA and Henney and Kubushi AJJA concurring):

[1] The appellant, De Beers Consolidated Mines (Pty) Ltd (DBCM), under a mining license granted to it by the Department of Minerals and Energy (the Department) operated an open-cast diamond mine, namely the Oaks Mine in Limpopo (the Mine), from 1998 to 2008. In November 2009, DBCM submitted a closure application for the Mine, as was required of it by the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act). Over a decade, correspondence was exchanged between the Department and DBCM concerning the closure plan for the Mine. In essence, the Department required the closure plan to include the obligation to backfill the pit, whereas DBCM resisted this requirement, in part, on the

basis that it formed no part of the Environmental Management Programme that had been approved by the Department.

[2] On 6 June 2020, the Department wrote to DBCM and adopted the position that DBCM's closure application would 'remain pending until the revised Closure Plan indicating how the pit will be backfilled is submitted to this Department'. In July 2020, DBCM lodged an internal appeal in terms of s 96 of the Act against the decision of the Regional Manager, Limpopo Region, of the Department (the Regional Manager), the first respondent in this appeal. The decision appealed against was framed in the following way: '[the] refusal to grant the application for a closure certificate lodged by DBCM on 3 November 2009 . . . unless the unlawful condition of backfilling the pit is met by DBCM . . .' (the Regional Manager's decision). In its appeal, DBCM sought, among others, orders setting aside the Regional Manager's decision and the granting of DBCM's closure application.

[3] Before its internal appeal was decided, DBCM brought a review in the high court. The relief it sought included the following: that DBCM be exempted from the obligation to exhaust any internal remedy, as provided for in s 7(2)*(c)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); a declarator that DBCM is not under any legal obligation to backfill the open pit at the Mine; setting aside the Regional Manager's decision; and directing the Minister of Mineral Resources and Energy (the Minister and third respondent in this appeal) to grant the closure application and issue a closure certificate.

[4] The review came before the high court. Khumalo J declined the exemption sought by DBCM, and proceeded to make the following order:

'1. The Applicant is ordered to exhaust the internal remedies, and the matter is sent back to the 3rd Respondent who is directed to consider and decide Applicant's internal appeal within 30 days of the grant of this order, having regard to this Court's judgement and to communicate his decision to DBCM within 10 days of it being taken;

2. The decision on the Appeal is to be taken in line with the legislative framework applicable in respect of the Closure Applications as it presently exists (that is per s 43 of the amended MPRDA).
3. The Applicant to pay the costs of the Application including the costs of two Counsel.'

[5] One of the grounds of review advanced by DBCM was that the Regional Manager's decision was vitiated by a material mistake of law. That mistake was the Regional Manager's misunderstanding that DBCM's closure application was regulated by the current provisions of the Act, and hence that the amendments to s 43 of the Act were of retrospective effect. I shall refer to this ground of review as the error of law. The error of law was also raised in DBCM's internal appeal.

[6] The high court reasoned that the failure by DBCM to exhaust its internal remedy was 'a structural impediment to the determination of the substantive questions posed by the review' because no decision had yet been rendered that was subject to review. Hence, the high court refused DBCM's application to be exempted from the obligation to exhaust its internal remedy, as provided for in s 7(2)*(c)* of PAJA, and considered it 'prudent' for the matter to be remitted to the Minister. The high court, however, also decided that the amended s 43 of the Act regulated DBCM's closure application. By so doing, the high court also decided the error of law raised in the review. In consequence, the high court framed its order on the basis that the Minister's decision on appeal must be taken 'in line with the legislative framework in respect of the Closure Applications as it presently exists (that is per s 43 of the amended MPRDA)'. I shall refer to this portion of the order as the 'directory order'.

[7] DBCM sought leave to appeal. This application was dismissed by the high court. Leave was granted by this Court on a narrow point, framed as follows, in relevant part:

'. . .

3. The leave to appeal is limited to the following issues:

(1) The direction in paragraph 1 & 2 of the order dated 04 September 2023 that the 3rd respondent when considering and deciding the applicant's appeal, is to have regard to the

court's Judgement and specifically s 43 of the amended Mineral and Petroleum Resources Development Act 28 of 2002 as it presently exist.'

[8] DBCM's notice of appeal makes it plain that it does not appeal the order of the high court requiring DBCM to exhaust its internal remedy, and have the matter remitted to the Minister. The portion of the order that it does appeal is the directory order. The Regional Manager, the Director General of the Department (the second respondent) and the Minister oppose the appeal.

[9] The issue that arises is this: was it competent for the high court to decline DBCM's exemption application, and also decide one of the substantive grounds of review (the error of law), as a result of which it issued the directory order?

[10] Section 7(2) of PAJA reads as follows:

'**7 Procedure for judicial review**

(2)*(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

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

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

[11] It is plain that these provisions do not permit a court to exercise its power to review administrative action, unless any internal remedy provided in any other law has first been exhausted. That bar is subject to the grant by a court of an exemption from the obligation to exhaust any internal remedy. If the court grants the exemption, the bar is lifted, and the court may then entertain the review. As the matter was

succinctly put by the Constitutional Court in *Dengetenge*,[1] '. . . the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged'.

[12] The high court failed to observe what s 7(2) of PAJA requires. The high court decided the error of law ground of review and made the directory order. By so doing, the high court engaged its review jurisdiction. It was not competent to do so because, once the high court declined the exemption, the bar upon its review jurisdiction in s 7(2)*(a)* of PAJA remained. The power of the courts to review administrative action under PAJA is an important constitutional competence. The exercise of that competence is regulated by PAJA. Courts are required to exercise their jurisdiction within the limits of what the law permits. That is what the rule of law under the Constitution demands. Courts have a constitutional duty to determine the limit of their powers. DBCM's review was brought in terms of PAJA, and entertained by the high court as such. Once that is so, the high court could not engage the substantive merits of DBCM's review, much less decide the error of law ground, and give the directory order consequent upon such decision. Section 7(2)*(a)* precluded the high court from doing so.

[13] Section 7(2) of PAJA is thus binary in its application. Either the obligation to exhaust an internal remedy is excused by the court, or it is not. If it is not, then a litigant must exhaust its internal remedy, and until it does so, the court may not exercise its review jurisdiction. What a court may not do is to direct a party first to exhaust an internal remedy, but nevertheless venture upon the merits of the review.

[14] The high court's order requires the Minister to follow its directory order. It ties the hands of the Minister in coming to a decision on the internal appeal, rather than permitting the Minister to come to his own decision on the important question of the

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[1] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) at para 116.

legal regime of application to the closure application. And it has the entailment that should the review be pursued by DBCM, after the Minister has decided the internal appeal, the error of law ground would have become *res judicata.* These unfortunate consequences are precisely what adherence to s 7(2) of PAJA avoids.

[15] For these reasons the appeal must succeed. Since DBCM has not appealed the high court's remittal of the matter to the Minister that part of the high court's order remains. The directory component of the order must be excised.

[16] As to costs, these follow the result in the ordinary way. The respondents did not oppose the award of costs, including the costs of two counsel, should they not prevail.

[17] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraphs 1 and 2 of the high court's order are set aside and replaced with the following:

> 'The appellant is directed to exhaust the internal remedies provided by s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 and the matter is accordingly referred back to the third respondent, who is directed to consider and decide the applicant's internal appeal within 30 days of the grant of this order and to communicate his decision to the applicant within 10 days of it being taken.'

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D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellant:	C D A Loxton SC (with him A Milovanovic-Bitter and P J Daniell)
Instructed by:	Bowman Gilfillan Inc., Johannesburg McIntyre van der Post Attorneys, Bloemfontein
For the respondents:	C Gumbi (with him S Kunene)
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein.