**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
**JUDGMENT**

**Reportable**
Case No: 594/17

In the matter between:

| | |
|---|---|
| **THE EXECUTRIX OF THE ESTATE OF THE LATE JOSEPHINE TERBLANCHE GOUWS (CHARMAINE CELLIERS N.O.)** | **APPELLANT** |

and

| | |
|---|---|
| **MAGNIFICENT MILE TRADING 30 (PTY) LTD** | **FIRST RESPONDENT** |
| **MINISTER OF MINERAL RESOURCES** | **SECOND RESPONDENT** |
| **DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES** | **THIRD RESPONDENT** |
| **DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION: DEPARTMENT OF MINERAL RESOURCES** | **FOURTH RESPONDENT** |
| **ANNEKE DENISE LE ROUX N.O.** | **FIFTH RESPONDENT** |

**Neutral citation:** *Executor of the Estate of the Late Josephine Terblanche Gouws (Charmaine Celliers N.O.) v Magnificent Mile Trading 30 (Pty) Ltd & others* (594/17) [2018] ZASCA 91 (1 June 2018)

**Coram:** Shongwe ADP, Swain and Dambuza JJA, Plasket and Rogers AJJA

**Heard:** 11 May 2018

**Delivered:** 1 June 2018

**Summary:** Mineral and Petroleum Resources Development Act 28 of 2002 – application for conversion of unused old order mineral right to new order prospecting right – effect of death of applicant after application made but before decision taken – setting aside of grant of prospecting right in respect of a property other than property applied for – effect of setting aside is that original application still pending – application for mining right by another party not permissible.

---

**ORDER**

---

**On appeal from:** Gauteng Division, Pretoria (Fabricius J sitting as court of first instance):

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

2 The order of the court below and paragraph 2 of the costs order dated 28 June 2017 are set aside and replaced with the following order.

'(a) With the exception of the prayers set out in paragraphs 1, 2, 3, 5 and 6 of the applicant's amended notice of motion, the application is dismissed.

(b) The counter-application is granted and it is declared that:

(i) the applicant did not have the right or competency to apply for any right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 in respect of Portion 9 of the farm Driefontein 338, Registration Division J.S., Mpumalanga, district of Middelburg; and

(ii) The application for a prospecting right lodged by the late Mr Nicolaas Petrus Gouws in respect of the farm Driefontein, district of Middelburg is still pending a decision by the relevant authority.

(c) The applicant is directed to pay the fifth respondent's costs in respect of both the application and the counter-application, such costs to include the costs of two counsel.'

---

**JUDGMENT**

---

**Plasket AJA (Shongwe ADP, Swain and Dambuza JJA and Rogers AJA concurring)**

[1] The Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) changed fundamentally the way in which the country's mineral and petroleum resources are to be exploited.[1] The MPRDA's objects, specified in s 2,

[1] For comment on the changes brought about by the MPRDA see *Xstrata South Africa (Pty) Ltd & another v SFF Association* 2012 (5) SA 60 (SCA); [2012] ZASCA 20 para 1; *Agri South Africa v*

include the recognition of the 'internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic' and giving effect to the 'principle of the State's custodianship' of those resources. Added to that – and not surprisingly, given our history – the MPRDA also aims to promote 'equitable access to the nation's mineral and petroleum resources to all the people of South Africa' and to expand in a substantial and meaningful way 'opportunities for historically disadvantaged persons . . . to enter into and actively participate in the mineral and petroleum industries and to benefit from the nation's mineral and petroleum resources'.

[2] In order to achieve these objects, the MPRDA broke decisively with the regime previously in place for the exploitation of mineral and petroleum resources. Principally, it provided that the State is the custodian of all mineral and petroleum resources and that it may 'grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical cooperation permit, reconnaissance permit, exploration right and production right'. The MPRDA did, however, create a bridge of narrow span for a transition from the earlier system of mineral regulation to its new system. For instance, it allowed holders of 'unused old order' mineral rights in existence when the MPRDA came into effect (on 1 May 2004) to apply for their conversion into 'new order' rights subject to the condition that if such a holder did not apply for conversion of his or her right within one year of 1 May 2004, he or she lost the right, and it could be allocated to someone else.[2]

**This appeal**

[3] This appeal concerns an application brought by the late Mr Nicolaas Petrus Gouws (Mr Gouws) for the conversion of his unused old order mineral right to a new order prospecting right for coal in respect of his property, Portion 9 of the farm Driefontein 338 in the district of Middelburg, Mpumalanga; a competing application for a prospecting right in respect of the same property and the same mineral brought

---

*Minister of Minerals and Energy* 2013 (4) SA 1 (CC); [2013] ZACC 9 paras 25-26; *Minister of Mineral Resources & others v Sishen Iron Ore Co (Pty) Ltd & another* 2014 (2) SA 603 (CC); [2013] ZACC 45 paras 10-11.

[2] *Pan African Mineral Development Company (Pty) Ltd & others v Aquila Steel (South Africa) (Pty) Ltd* [2018] 1 All SA 414 (SCA); [2017] ZASCA 165 para 12.

by Magnificent Mile Trading 30 (Pty) Ltd (Magnificent Mile); and the validity of these and a proliferation of other administrative decisions taken over a number of years thereafter. With a great deal of justification, counsel for the appellant, in the court below, described the administrative process as a 'veritable comedy of errors', and Fabricius J, the judge in the court below, observed that '[w]hatever could go wrong with the applications . . . did go wrong'.

[4] As Mr Gouws died after his application had been made but before it was decided, a central question that arises for decision in this appeal is whether a prospecting right may be granted to a deceased estate, or whether the death of Mr Gouws put an end to his application.

[5] In the court below, the North Gauteng Division of the High Court, Pretoria, Magnificent Mile brought an application to review and set aside a number of decisions taken by officials within the Department of Mineral Resources (the Department) in favour of Mr Gouws' deceased estate and that of his widow Ms Josephine Terblanche Gouws, as well as decisions adverse to it. Although the Minister, the Director-General and the Deputy Director-General: Mineral Regulation of the Department were cited as respondents, they played no part in the proceedings, and take no part in this appeal. Initially, the executor of the estate of the late Mr Gouws was cited as the fourth respondent and his widow and sole heir, Ms J T Gouws (Ms Gouws), was cited as the fifth respondent. On the death of Ms Gouws, she was substituted by the executor of her deceased estate, Ms Charmaine Celliers. The deceased estate of Ms Gouws opposed the relief sought by Magnificent Mile and also brought a counter-application of its own for declaratory relief.

[6] Fabricius J granted an order in terms of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8.1 of Magnificent Mile's amended notice of motion. A perusal of the order gives a good indication of the bureaucratic mayhem attendant upon Mr Gouws' application and its sequelae. The order read (to avoid confusion, I shall substitute the non-governmental parties' citations in the court below with their names):

'1. That Magnificent Mile is, in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) ("the PAJA"), hereby exempted from the obligation to exhaust its internal remedies in terms of section 96 of the Mineral and Petroleum Resources

Development Act, 2002 (Act 28 of 2002) ("the MPRDA") in relation to the review of the decisions referred to in paragraphs 2,3,5,6 hereof and the review of the Refusal Decision contemplated in paragraph 7 hereof;

2. That the following decisions of the third respondent ("DDG") be reviewed and set aside, namely:

2.1. The decision of the DDG dated 13 December 2005 to grant a prospecting right in favour of Nicolaas Petrus Gouws ("the Deceased") in respect of coal on portion 9 of Driefontein 338 JS situated in Wakkerstroom;

2.2. The decision of the DDG dated 9 November 2010 to grant a prospecting right in favour of the Deceased in respect of one half share of minerals on portion 9 of Driefontein 338 JS situated in Witbank;

2.3. The decision of the DDG dated 19 September 2011 to amend the power of attorney dated 9 November 2010 to rectify the magisterial district referred to therein to read "Middelburg".

3. That the decision of the first respondent to grant a prospecting right for coal in respect of portion 9 of the farm Driefontein 338 JS situated in Witbank to the Deceased on a date prior to 9 July 2013 be reviewed and set aside;

4. That the decisions referred to in paragraphs 2.1, 2.2 and 3 hereof be substituted by a decision, in terms of section 17(2) of the MPRDA, to refuse the application for a prospecting right by Nicolaas Petrus Gouws in respect of portion 9 of the farm Driefontein 338 JS;

5. That the execution and registration in the Mineral and Petroleum Titles Registration Office of the following prospecting rights be reviewed and set aside, alternatively, be declared to be unlawful and invalid, namely:

5.1. The prospecting right executed on 14 December 2010 in favour of Ms Gouws for one half share of the minerals on portion 9 of the farm Driefontein 338 JS situated in Middelburg; and

5.2. The prospecting right executed on 5 October 2011 in favour of Mr Gouws' executor for coal in respect of one half share of the minerals on portion 9 of the farm Driefontein 338 JS situated in Middelburg.

6. That the decision of the DDG dated 17 July 2013 to grant consent in terms of section 11 of the MPRDA for the cession of a prospecting right in respect of portion 9 of the farm Driefontein 338 JS allegedly held by the Deceased to Ms Gouws be reviewed and set aside and that the said decision of the DDG be substituted by a decision in terms of which the applications for consent in terms of section 11 of the MPRDA to cede a prospecting right in respect of portion 9 of the farm Driefontein 338 JS allegedly held by the Deceased to Ms Gouws, be refused;

7. That the decision of the second respondent to refuse Magnificent Mile's application for a mining right for coal in respect of portion 9 of the farm Driefontein 338 JS ("the Refusal Decision") be reviewed and set aside;

8. That, the Refusal Decision be substituted by the following decision, namely, to:

8.1. grant to Magnificent Mile, in terms of section 23(1) of the MPRDA, a mining right in respect of portion 9 of the farm Driefontein 338 JS.'

In addition, an order was made directing the Minister to consider an application, when one was made, for the approval of an environmental authorisation in respect of Magnificent Mile's proposed mining operations. This was an amended form of the order sought in paragraph 8.2 of the amended notice of motion.

[7] Fabricius J dismissed the deceased estate's counter-application in which declaratory orders had been sought that:

'1. Magnificent Mile never had the right or competency to apply for any right under the Mineral and Petroleum Resources Development Act, 28 of 2002, in respect of the property described as Portion 9 of the Farm Driefontein 338, Registration Division J.S. Mpumalanga, District of Middelburg;

2. The application for a prospecting right by the said Magnificent Mile in respect of the said property is void *ab initio*, and so are all steps taken in consequence thereof;

3. The application for a prospecting right by Mr Gouws in respect of the said property was valid, and:

3.1. has been duly granted, alternatively;

3.2. is still pending, awaiting consideration by the Director-General of the Department of Mineral Resources or the correct official in the said Department.'

[8] Costs were reserved but later an order was made directing the Minister, Director-General and Deputy Director-General – the official respondents, as they were referred to by the parties – to pay the costs of the application and the estate to pay the costs of the counter-application. This appeal is before this court with the leave of Fabricius J.

[9] It is common cause between the parties that paragraphs 1, 2, 3, 5 and 6 of the order were correctly made. These are the orders that exempted Magnificent Mile from having to exhaust its internal remedies and that set aside the grant of a prospecting right to Mr Gouws in respect of a property called Driefontein in the Wakkerstroom district and the ill-conceived attempts to rectify this initial error. Mr

Louw who, together with Mr Kruger, appeared for the appellant, argued, however, that paragraphs 4, 7 and 8 should be set aside and so should the order dismissing the counter-application.

**The factual background**

[10] Mr Gouws owned the farm Driefontein in the district of Middelburg. Before the MPRDA came into force on 1 May 2004, he owned the mineral rights beneath the surface as a consequence of his ownership of the land.

[11] He knew that the mineral rights were valuable because he had previously conducted prospecting operations which had indicated the presence of a substantial coal deposit on the property. He decided not to exploit his mineral right at that stage but rather to wait for a more opportune time to do so.

[12] When it became apparent that the MPRDA would be passed into law and would introduce a dramatically different minerals regime, Mr Gouws decided that the time was ripe for him to make use of his mineral right so that he would not lose it. In order to do so, his son-in-law sought the partnership of people with experience in the mining industry. It is alleged that this was how Mr Martin Pretorius, a director of Magnificent Mile, came to know of the coal deposit below the surface of Driefontein, and motivated this company's competing application for a prospecting right.

[13] The MPRDA came into force on 1 May 2004. Mr Gouws applied for a prospecting right in respect of Driefontein on 29 April 2005, a day before the closing of the window period of one year created by item 8 of Schedule II of the MPRDA. On 3 May 2005, Magnificent Mile lodged its application for a prospecting right for coal in respect of Driefontein. Both applications were accepted by the Department, Mr Gouws' on 20 May 2005 and Magnificent Mile's on 31 May 2005.

[14] On 9 November 2005, while his application was still pending, Mr Gouws died. On 13 December 2005, however, the Department granted a prospecting right for coal to Mr Gouws in respect of a farm called Driefontein in the Wakkerstroom district of Mpumalanga. At the same time, Magnificent Mile was granted a prospecting right

for coal in respect of Driefontein in the Middelburg district, the farm that Mr Gouws had owned.

[15] Not surprisingly, when Magnificent Mile sought to enter Driefontein and commence prospecting, it encountered the resistance of the Gouws family. This led to a stand-off between Magnificent Mile and the Gouws family and a parallel process on the part of officials within the Department to rectify the errors that had occurred. Although some prospecting was undertaken on Driefontein by Magnificent Mile, those operations appear to have been fairly limited. The prospecting right has now lapsed.[3] On 18 November 2009, Magnificent Mile applied for a mining right in respect of the coal on Driefontein.

[16] On 9 November 2010, the Department purported to amend the prospecting right that had been granted to Mr Gouws. It did so, first, by substituting 'Witbank' for 'Wakkerstroom' to describe the district in which Driefontein was situated. Secondly, the holder of the prospecting right was amended to reflect, not Mr Gouws, but 'The Beneficiary, Late Estate Nicolaas Petrus Gouws'. Thirdly, the prospecting right was said to be in respect of 'one half portion (a portion of portion 3)' of Driefontein. (This error occurred because Mr Gouws owned the farm by virtue of two title deeds, each in respect of a half share. The officials mistakenly had regard to only one of the title deeds in making the purported grant.) On 19 September 2011, a further attempt was made to rectify the situation: the power of attorney that had effected the amendment of 9 September 2009 was amended to reflect the magisterial district in which Driefontein was situated to be Middelburg.

[17] On 22 September 2011, Ms Gouws applied, in terms of s 11, for ministerial approval for the cession of the prospecting right to her. On 2 November 2011, the prospecting right was registered in the Mineral and Petroleum Titles Registration Office. Its holder was now described as Ms Gouws and it authorised prospecting in respect of 'one half share of minerals in Portion 9 (a portion of portion 3) of the farm Driefontein' in the Middelburg district.

---

[3] Magnificent Mile's purported prospecting right ran from 24 February 2006 to 24 February 2007. It was a condition of the grant that an application for extension in terms of s 18 be lodged not later than 60 days before expiry. Apart from the fact that Magnificent Mile's extension application was only lodged on 16 February 2007, an extension could in any event not have exceeded a further three years. See s 18(5).

[18] At about this time, an internal appeal was initiated by Magnificent Mile aimed at challenging the grant of the prospecting right to Mr Gouws and Ms Gouws. That process, which was opposed by Ms Gouws, was never concluded.

[19] On 10 April 2013, Magnificent Mile's application for a mining right was refused because of Mr Gouws' prior prospecting right. It lodged an internal appeal against that decision. This too was opposed by Ms Gouws. This process too was never completed.

[20] It was agreed between the parties, probably as a result of the comedy of errors that I have described, that it would be best to abandon the internal appeals and proceed to court for a definitive determination of their disputes. As a result, Magnificent Mile launched an application in terms of rule 53 of the uniform rules on 12 August 2013. Even then, problems of the Department's making continued to beset the proceedings: it took 18 months, an application to compel the Department to comply with its obligations to furnish the record and a contempt of court application before a record of sorts was available. On 25 August 2015, an amended notice of motion and supplementary founding affidavit were filed. On 22 October 2015, Ms Gouws filed her answering affidavit and counter-application.

**The legislation**

[21] The MPRDA made the State custodian of all of the country's mineral and petroleum resources but also empowered it, through the Minister of Mineral Resources, to grant rights to exploit minerals to individuals who applied for those rights. To that end, an administrative system was created for the consideration of applications for various types of rights as well as an internal appeals process. So, for instance, provision is made for applications for reconnaissance permission,[4] prospecting rights,[5] mining rights,[6] mining permits[7] and retention permits,[8] as well as

[4] Sections 13-15.
[5] Sections 16-20.
[6] Sections 22-25.
[7] Section 27.
[8] Sections 31-36.

for the duration of each type of right, their renewal and the rights and obligations that are imposed on their holders.

[22] In order to ensure that the objects of the MPRDA, and particularly its transformational objects, are attained, the Minister retains control over the transfer of rights that have been granted: in terms of s 11, rights granted in terms of the MPRDA may not be 'ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister . . .'.

[23] In order to bridge the gap between the old order and the new, Schedule II of the MPRDA provides for transitional arrangements. These are particularly relevant to this matter as Mr Gouws was the holder of an unused old order right when the MPRDA came into force and had applied for its conversion.

[24] The Schedule contains its own set of objects in item 2. They are the protection of security of tenure in respect of prospecting and mining operations, affording the holders of old order rights the opportunity to comply with the new dispensation and promoting 'equitable access to the nation's mineral and petroleum resources'.

[25] In order to give effect to these objects – particularly the object of ensuring security of tenure – Schedule II deals with prospecting and mining applications that were pending when the MPRDA came into force, providing that they would continue as if brought in terms of the MPRDA;[9] exploration and production operations, providing for their continuation subject to an expiry date and for their conversion into new order rights;[10] and the continuation of old order prospecting and mining rights for limited periods within which the holders of those rights could apply for their conversion into new order rights.[11]

[26] Item 8 deals with the processing of unused old order rights. It provides:

'(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

[9] Item 3.
[10] Items 4 and 5.
[11] Items 6 and 7.

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

[27] Two key terms used in item 8 are defined in item 1. A 'holder' of an old order right is defined to mean 'the person to whom such right was or is deemed to have been granted or by whom it is held or is deemed to be held, or such person's successor in title before this Act came into effect'. An 'unused old order right' means 'any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect'. Table 3 includes in category 1 a mineral right under the common law.

## The issues

### *The effect of paragraphs 2, 3, 5 and 6 of the amended notice of motion*

[28] The grant and refusal of prospecting and mining rights in issue in this case constitute administrative action as that term is defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA): they are decisions of an administrative nature, taken by an organ of state exercising a public power in terms of which rights created and regulated by the MPRDA are either allocated or refused to persons, thereby having the potential to adversely affect rights and having a direct, external legal effect.[12] In *Minister of Mineral Resources & others v Mawetse*

[12] The PAJA, s 1. See the definitions of 'administrative action' and 'decision'. See too *Greys Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA); [2005] ZASCA 43 paras 21-24.

*(SA) Mining Corporation (Pty) Ltd*,[13] Majiedt JA held that 'the granting of a prospecting right, as is the case with all other rights under the MPRDA, is not contractual in nature but a unilateral administrative act by the Minister or her delegate in terms of their statutory powers under the MPRDA'.

[29] More than one ground of review justified the setting aside of the prospecting right granted to Mr Gouws on 13 December 2005, and the related chain of administrative actions that followed: the official who granted the prospecting right for a property other than the property applied for was not authorised by the MPRDA to do so[14] and he or she certainly acted irrationally in the sense that there was no rational connection between the decision taken and the information before the official;[15] when attempts were made to alter the terms of the prospecting right, once again, the officials concerned acted beyond their authority because they were, by then, *functus officio*;[16] and their attempts to rectify the problem resulted in a prospecting right that was void for vagueness.[17]

[30] In terms of the doctrine of objective invalidity, the setting aside of the irregular grant operates retrospectively.[18] Because of the defects that I have mentioned, the grant was always a nullity and, on its setting aside, was to be treated as never having existed – it was 'void from its inception' and never had legal force or effect.[19] This means that Mr Gouws' application for a prospecting right has never been decided. Subject to what I shall say about the effect of Mr Gouws' death on the application, it is still pending.

---

[13] *Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA); [2015] ZASCA 82 para 24. See too *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC); [2010] ZACC 26 para 61.
[14] The PAJA, s 6(2)(*a*)(i).
[15] The PAJA, s 6(2)(*f*)(ii)(cc).
[16] The PAJA, s 6(2)(*a*)(i).
[17] The PAJA, s 6(2)(*i*). See too *Minister of Health & another NO v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as amici curiae)* 2006 (2) SA 311 (CC); [2005] ZACC 14 para 246.
[18] *Ferreira v Levin NO; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC); [1995] ZACC 13 para 27.
[19] *Pikoli v President of the Republic of South Africa & others* 2010 (1) SA 400 (GNP) at 409C-D. See too Cora Hoexter *Administrative Law in South Africa* (2 ed) at 545-546.

***The effect of Mr Gouws' death***

[31] It was argued on behalf of Magnificent Mile that, in blunt terms, Mr Gouws' application died with him. The argument is based on the non-transferability of an unused old order right and the personal nature of that right.

[32] In order to address this issue, it is necessary to consider the nature of the right that accrues to a holder of an unused old order right when he or she applies for its conversion into a prospecting right or a mining right.

[33] It is correct that the holder of an unused old order right as at 30 April 2004 could not thereafter transfer it. That is implicit in the definition of a holder that I have already cited, and consistent with the scheme and purpose of the Schedule: for an old order right to endure, it had to be converted. Once that had occurred, the new order right could be transferred, but only with the approval of the Minister.[20] But, on the view I take, the transferability of either an unused old order right or a new order prospecting right are not relevant to the issue to be decided in this case.

[34] The holder of an unused old order right had a choice: he or she could do nothing, in which event the unused old order right would lapse a year after the coming into effect of the MPRDA, or he or she could apply for its conversion into a new order right, in terms of item 8.

[35] In an application in terms of item 8, the holder was given a preferential place in the queue – an 'exclusive right to apply for a prospecting right or mining right' during the period of one year commencing on 1 May 2004.[21] Once an application had been made within the window period, the unused old order right remained valid until the application was either granted or refused.[22] If the application was granted, the unused old order right was replaced with a prospecting right or mining right. If the application was refused, the holder lost the unused old order right.

---

[20] Section 11.
[21] Item 8(2).
[22] Item 8(3).

[36] It is clear from this analysis that the right that Mr Gouws enjoyed, when he applied for the conversion of his unused old order right into a prospecting right, was a right to a decision on his application. This was conceded by Magnificent Mile which described the right in the heads of argument as being 'in the nature of a right to lawful, reasonable and procedurally fair administrative action'. When Mr Gouws died, a decision had not been taken and, the defective decisions having now been set aside, one has still not been taken. In my view, the executor of Mr Gouws' estate was entitled to a decision. Her right arises not from any transfer of a right but by the fact that, on her appointment as executor, the right to deal with the 'aggregate of assets and liabilities' that is the estate of the deceased vested in her.[23] If the application is granted, it may then be necessary for the executor to seek the approval of the Minister for the transfer of the prospecting right to Mr Gouws' heirs, but that question need not be resolved now.

[37] I am aware that the estate of Mr Gouws was finalised some time ago and, I assume, the executor has been discharged. The estate was finalised, however, before there was clarity on the outstanding application. The Master can be approached to appoint an executor again to see through to finality the administration of this last aspect of Mr Gouws' estate.[24]

[38] The effect of my finding that the estate of Mr Gouws is entitled to a decision is that, in terms of item 8(3), the unused old order right remains valid until a decision is taken. That, in turn, means that the relief granted in terms of paragraph 4 of the amended notice of motion ought not to have been granted: an order refusing Mr Gouws' application for a prospecting right was not competent when, in fact, no decision had been taken.

***Magnificent Mile's application for a mining right***

[39] The fact that the application for the conversion of the unused old order right is still pending also has an effect on Magnificent Mile's review of the refusal of its application for a mining right in respect of Driefontein. Its application was refused on

---

[23] D Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010 ed) para 12.20.
[24] Meyerowitz note 23 para 11.10.

the basis that '[t]he right applied for comprises of land in respect of which rights for the same minerals have been granted in respect of an application received prior to your application in this regard'. I take this to mean that the Department took the view that the defective prospecting right which it tried to rectify in stages trumped Magnificent Mile's application.

[40] Now that the position has been clarified, it is clear that the relief sought in paragraphs 7 (the setting aside of the refusal of the mining right) and 8.1 (the granting of a mining right) of the amended notice of motion cannot be justified. The fact that the application for the conversion of Mr Gouws' unused old order right into a prospecting right is still pending renders it impermissible for a mining right to be granted to Magnificent Mile. Section 22(2)(*c*) of the MPRDA precludes a regional manager from accepting an application for a mining right if a 'prior application for a prospecting right . . . has been accepted for the same mineral and land and which remains to be granted or refused'. As a result, the mandamus directing the Minister to consider Magnificent Mile's application for an environmental authorisation in respect of its proposed mining operations must also be set aside.

***The counter-application***

[41] The appellant brought a counter-application, claiming it to be a collateral challenge. It claimed to bring the counter-application in terms of the principle of legality, rather than the PAJA, and asserted that because it was a collateral challenge, the delay rule did not apply.

[42] The court below dismissed the counter-application because it considered it to be, in substance, a review which ought to have been brought in terms of the PAJA, and particularly, within the 180 day period provided for in s 7(1).

[43] The relief sought in the counter-application consisted of three prayers for declaratory orders. The first was for an order declaring that Magnificent Mile 'never had the right or competency' to apply for any right in terms of the MPRDA in respect of Driefontein. The second was for an order declaring that its application for a prospecting right was 'void *ab initio*'. The third was for an order declaring that Mr

Gouws' application for a prospecting right in respect of Driefontein was valid and had either been granted or was pending.

[44] I find myself in disagreement with both the court below and the appellant as to the nature and basis of the relief claimed in the counter-application. First, it is not a collateral challenge. No public authority seeks to coerce the appellant into compliance with an unlawful administrative act.[25] Secondly, if it was intended as a review, it had to be brought in terms of the PAJA because it was reviewing administrative action as defined in s 1,[26] and if it was out of time, condonation had to be applied for.[27] Thirdly, however, I do not agree that it was a review. Rather, it seems to me, paragraphs 1 and 3 of the counter-application flow logically from the grant of paragraphs 2, 3, 5 and 6 of the amended notice of motion and the refusal of paragraphs 4, 7 and 8.1. To the extent that paragraph 2 of the counter-application seeks a declaratory concerning the prospecting right granted to Magnificent Mile, it is academic in the sense that that prospecting right has lapsed and has no bearing on the matter. The relief in the counter-application was probably sought unnecessarily, since the correct disposition of the relief sought by Magnificent Mile, together with the reasons for such disposition, would sufficiently determine the rights of the parties. But by no stretch of the imagination could Magnificent Mile be prejudiced by a 'late' counter-application which merely gave effect to the grounds on which Ms Gouws and her executor opposed the relief sought by Magnificent Mile itself.

[45] On the basis of the above, I am of the view that the court below erred in dismissing the counter-application with costs. I would grant prayers 1 and 3 (in amended form) along with costs.

**The order**

[46] I make the following order.

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

---

[25] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); [2004] ZASCA 48 para 32; *V & A Waterfront Properties (Pty) Ltd & another v Helicopter and Marine Services (Pty) Ltd & others* 2006 (1) SA 252 (SCA); [2005] ZASCA 87 para 10; Hoexter (note 19) at 549.

[26] *Minister of Home Affairs & another v Public Protector* [2018] ZASCA 15 para 28.

[27] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA); [2017] ZASCA 23 para 13.

2 The order of the court below and paragraph 2 of the costs order dated 28 June 2017 are set aside and replaced with the following order.

(a) With the exception of the prayers set out in paragraphs 1, 2, 3, 5 and 6 of the applicant's amended notice of motion, the application is dismissed.

(b) The counter-application is granted and it is declared that:

(i) the applicant did not have the right or competency to apply for any right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 in respect of Portion 9 of the farm Driefontein 338, Registration Division J.S., Mpumalanga, district of Middelburg; and

(ii) The application for a prospecting right lodged by the late Mr Nicolaas Petrus Gouws in respect of the farm Driefontein, district of Middelburg is still pending a decision by the relevant authority.

(c) The applicant is directed to pay the fifth respondent's costs in respect of both the application and the counter-application, such costs to include the costs of two counsel.

_____

C Plasket

Acting Judge of Appeal

APPEARANCES

| | |
|---|---|
| For appellant: | P F Louw SC and A N Kruger<br>Instructed by:<br>Johan Coetzee Incorporated, Emalahleni<br>Phatshoane Henney Attorneys, Bloemfontein |
| For first respondent | M A Wesley (heads of argument drafted by L J Bekker)<br>Instructed by:<br>Malan Scholes Attorneys, Johannesburg<br>Claude Reid Attorneys, Bloemfontein |