REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7883/2007
56189/2010

1/2/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted] 01.02.2017
SIGNATURE DATE

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED	1st Applicant
ARM MINING CONSORTIUM LIMITED	2nd Applicant
and	
MINISTER OF MINERAL RESOURCES	1st Respondent
DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES	2nd Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERAL RESOURCES	3rd Respondent

REGIONAL MANAGER, LIMPOPO REGION, DEPARTMENT OF MINERAL RESOURCES	4th Respondent
GENORAH RESOURCES (PTY) LTD	5th Respondent
NKWE PLATINUM (SOUTH AFRICA) (PTY) LTD	6th Respondent
INTERNATIONAL GOLDFIELDS LTD	7th Respondent
MORUTHANE BEN SEKHUKHUNE N.O.	8th Respondent
BAUBA A HLABIRWA MINING INVESTMENTS (PTY) LTD	9th Respondent
MYELETI MINING (PTY) LTD	10th Respondent
THE TRADITIONAL COUNCIL OF THE BENGWENYAMA-YA MASWATI COMMUNITY	11th Respondent
ROKA PHASA PHOKWANE TRADITIONAL COUNCIL	12th Respondent
MIRACLE UPON MIRACLE INVESTMENTS (PTYD) LTD	13th Respondent
NKWE PLATINUM LTD	14th Respondent

JUDGMENT

AC BASSON, J

Introduction

[1] The application before this court is interlocutory to two review applications in which the applicants seek to review rights granted by any of the 1st to 4th respondents (most notably the third respondent - the Deputy Director-General: Mineral Regulation, Department of Mineral Resources the - "DDG") under the Minerals and Petroleum Resources Development Act ("MPRDA")[1] over certain properties referred to in this application as the Modikwa Deeps Properties[2] to a number of parties (the 5th to 14th respondents). The two review applications are referred to in this judgment as the "Genorah" and "Bauba" review applications. The Genorah review application was launched in 2007 (case number: 7883/2007) and the Bauba review application in 2010 (case number: 56189/2010). The review record in the Genorah review application (albeit incomplete according to the applicants) has been provided. No record has yet been provided in the Bauba review application.

[2] At the commencement of the proceedings a draft order was handed up by the applicants. The order proposed by the applicants in the draft reads as follows:

> "1. The applications under case numbers 7883/2007 and 56189/2010 are consolidated.
>
> 2. The 2nd respondent is joined as the 5th respondent in the application under case number 56189/2010.
>
> 3. The 6th to 14th respondents are joined in as the 6th to 14th respondents in case number 7883/2007.
>
> 4. The applicants are granted leave to amend the notice of motion, in the application under case number 7883/2007.

---

[1] Act 28 of 2002.

[2] These properties are identified in the papers as the remaining extent of the farm Garatouw 282 KT, the farm Hoepakrantz 291 KT, portions 1 and 2 of the farm Nooitverwacht 324 KT, portion 1 and the remaining extent of the farm Eerste Geluk 322 KT, the farm De Kom 252 KT, the farm Zwemkloof 238 KT, the farm Grootvygenboom 284 KT, the farm Genokakop 285 KT, the farm Houtbosch 323 KT; Magisterial District of Sekhukhune.

5. The 2nd, 6th to14th respondents are granted leave to oppose the relief sought in the amended notice of motion.

6. The applicants are directed to deliver a complete copy of the papers in the consolidated application to any of the 2nd, 6th to 14th respondents who filed a notice to oppose the relief sought in the amended notice of motion.

7. The time periods provided for in rule 53 of the rules of court commence to run from the date of delivery of the papers contemplated in 6 above.

8. The issue whether the first applicant has exhausted its internal remedy of appeal is determined separately from the remaining issues in the consolidated applications.

9. The first applicant has exhausted its internal remedy of appeal in the consolidated applications under case numbers 7883/2007 and 56189/2010.

10. The 1st to 4th respondents are directed to file a rule 53 record in the application under 56189/2010.

11. The 1st to 4th respondents are interdicted from accepting or granting any applications for prospecting rights, mining rights or any other rights, permits or permissions under the MPRDA in respect of any minerals in, on or under the properties – De Kom 252 KT, remaining extent of the farm Garatouw 282 KT, Hoepakrantz 291 KT, Grootvygenboom 284 KT, Genokakop 285 KT, Houtbosch 323 KT, in the Magisterial District Sekhukhune, pending the final determination of the consolidated review applications.

12. The 5th and 14th respondents are interdicted from exercising any rights flowing from the mining right granted to them, in respect of the properties – remaining extent of the farm Garatouw 282 KT, Hoepakrantz 291 KT and De Kom 252 KT, in the Magisterial District Sekhukhune, pending the final determination of the consolidated review applications.

13. The 5th, 6th, 7th, 8th, 9th and 14th respondents are ordered to pay the applicants' costs jointly and severally."

The applicants

[3] The 1st applicant is Rustenburg Platinum Mines Limited ("RPM"). RPM is a subsidiary of Anglo American Platinum Limited (previously known as Anglo Platinum Limited). RPM is the 1st applicant in the application issued under case number 7883/2007 (the "main application") and the interlocutory application before this Court issued under case number 56189/2010 ("the interlocutory application"). The Genorah review application was instituted in 2007 in respect of certain decisions taken in August 2006 and thereafter by the DDG. It appears from the papers that since the review application was launched it has not progressed much beyond where it stood in 2007. As will be pointed out hereunder, almost a decade after the Genorah review application was instituted the applicants set down this interlocutory application in terms of which they seek various interlocutory relief including an interim interdict against the Genorah respondents pending the finalisation of the review application.

[4] The 2nd applicant is ARM Mining Consortium Limited ("ARM"). RPM and ARM (referred to as "the applicants" except where the context demands otherwise) have entered into an agreement in terms of which ARM will be the main applicant in the main and the interlocutory applications. RPM did not file substantive written submissions nor did it advance any oral argument at the hearing of this matter and aligned itself with the written and oral submissions advanced on behalf of RPM.

[5] In 2002 RPM and ARM entered into a joint venture to own and operate the Modikwa Platinum mine where platinum group minerals are mined. The mine is situated in the Limpopo Province. The applicants intend through the joint venture to expand mining at the Modikwa mine over the remaining Modikwa properties.

The State respondents

[6] The first four respondents are the Minister of Mineral Resources (the 1st respondent), the Director-General, Department of Mineral Resources (the 2nd respondent), the Deputy Director-General: Mineral Regulation, Department of Mineral Resources (the 3rd respondent – "the DDG") and the Regional Manager, Limpopo Region, Department of Mineral Resources (the 4th respondent). The 1st to 4th respondents are referred to in this judgment as "the State respondents". The state respondents do not oppose the relief sought in the notice of motion.

The Genorah respondents

[7] This (interlocutory) application is opposed by the 5th respondent (Genorah Resources (Pty) Ltd), the 6th respondent (Nkwe Platinum (South Africa) (Pty) Ltd), the 7th respondent (International Goldfields Ltd) and the 14th respondent (Nkwe Platinum Ltd). These respondents are referred to as the so-called "Genorah respondents". The Genorah respondents do not opposed the procedural relief sought in the draft order handed up to the Court but do oppose the relief sought in prayers 9, 11, 12 and 13 of the draft order. Genorah also seeks an order that the applicants pay its costs.

The Bauba respondents

[8] The 8th respondent (Moruthane Ben Sekhukhune N.O) and the 9th respondent (Bauba A Hlabirwa Mining Investments (Pty) Ltd) respondents are jointly referred to as "the Bauba respondents". The Bauba respondents also oppose the procedural relief sought by the applicants.

The remaining respondents

[9] The 10th respondent (Myeleti Mining (Pty) Ltd) did not file any heads of argument and does not appear to be before court. No relief is sought against the 11th respondent Traditional Council of the Bengwenyama-Ya-Maswati Community), the 12th respondent (Roka Phasha Phokwane Traditional Council) and 13th respondent (Miracle upon Miracle Investments (Pty) Ltd. These respondents are referred to as "the remaining respondents". They are cited because they are the holders of certain prospecting rights over the Modikwa properties granted to them by the 3rd respondent (the DDG) under the MPRDA.

[10] It appears from the papers that the applicants no longer pursue the relief in respect of the 3rd decision (see hereunder) as far as it relates to the granting of a prospecting right to Genorah over Eerstegeluk and Nooitverwacht in light of the fact that the Constitutional Court had set aside the granting of a prospecting right to Genorah over those properties referred in *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*.[3] The 7th decision in so far as it relates to the granting of a preferment prospecting right to the 11th, 12th and 13th respondents is also no longer pursued.

Nature of the relief sought

[11] As already pointed out, the relief sought in terms of prayers 1 to 7 and 10 of the draft order is largely procedural and is aimed at ensuring that the two reviews are ready to be argued. The applicants submitted that the consolidation application should be granted and that it makes sense that one reviewing Judge hear both review applications. It was further submitted that it also makes sense that certain parties be joined to the pending review applications. The Genorah respondents share this view. The Bauba respondents, however, also oppose the procedural relief sought.

[3] 2011 (4) SA 113 (CC).

[12] Prayer 8 seeks to separate the issue of whether RPM has exhausted its internal remedy of appeal from the remaining issues in the (to be consolidated) two review applications. It was further submitted on behalf of the applicants that not only should this issue be separated, but that this Court should also decide the issue. The Genorah respondents do not seem to oppose the separation of this issue but, as will be pointed out herein below, submitted that this issue cannot be entertained by this court as all the facts which would place this Court in a position to decide the issue have not been placed before the Court. The Bauba respondents are also opposed to a separation of the issue.

[13] Prayer 9 follows on prayer 8. In prayer 9 the applicants seek an order that RPM has in fact exhausted its internal remedies of appeal in respect of the various appeals that have been instituted against various decisions taken by some of the State respondents over the years and that they should therefore be allowed to proceed with the two review applications without having to await the outcome of the internal appeals.

[14] The relief now sought in prayer 9 is a departure from the relief initially sought on behalf of the applicants. Initially RPM sought an order to the effect that it be exempted from first exhausting its internal appeal remedies before proceeding with the review applications. At the commencement of this hearing the Court was informed that the applicants no longer persist with this prayer and that it now pursues an argument with reference to the provisions of PAJA that, in light of the fact that the State respondents have, for a period of 10 years taken no steps to decide any of the appeals, such failure to take a decision within a reasonable time effectively amounts to a dismissal of the appeals. The applicants submitted that this issue has to be decided now in light of the fact that the Constitutional Court in *Bengwenyama*[4] held that a court cannot entertain a review application until such time that the internal remedies have be exhausted against decisions by delegates of the Minister:

---

[4] *Supra*.

`"[49] In *Koyabe and Others v Minister for Home Affairs and Others (lawyers for Human Rights as Amicus Curiae)* this court emphasised the importance of internal remedies:

'[55] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

[56] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a fair procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.'

[50] Allowing an internal appeal under s 96 of the Act in the circumstances of this case will enhance the autonomy of the administrative process, and provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation. An internal appeal process will also allow the minister to develop guidelines for the proper application of the Act in future decisions.

[51] The reasoning in the *Global Pact Trading* and *Mofschaap Diamonds* cases in the Free State High Court relied on the analytical distinction between two forms of delegation made by Professor Wiechers in his work, *Administrative Law*, namely that between deconcentration and decentralisation. In particular, reliance was placed on the statement that in cases of deconcentration the delegatee acts in the name of the delegator and that in those cases the former's decision is regarded in law as that of the latter. That is of course correct as far as

> it goes, but it does not answer the question when and in what manner the minister as delegator may make the final decision in her own name. If it is the essence of delegation that final control remains with the delegator there appears to be no reason in principle why final control cannot be exercised by way of internal appeal. In such a case the conceptual difficulty of an appeal against the minister's own decision also disappears".

[15] Genorah did, however, take exception to the manner in which this application was moved and submitted that the relevant facts are not before court and in particular the fact by when the decision ought to have been taken and by when a decision became a non-decision for purposes of a final decision under PAJA so that the 180 days can start running for purposes of PAJA. The Genorah respondents indicated that they do not have the full set of documents in their possession and that whilst they do not in principle oppose the separation of the issue regarding the exhaustion of the internal remedies, this issue could only be decided once the full record had been filed.

[16] In prayer 11 the applicants seek an order interdicting the State respondents from accepting or grating any applications for various rights under the MPRDA in respect of certain properties identified in the draft order. The relief sought in this prayer does not affect the Genorah respondents but appears to affect the Bauba respondents although it was submitted on behalf of the applicants that the relief sought also does not affect the Bauba respondents in light of the fact that the Bauba respondents can continue with their prospecting activities.

[17] The relief sought in prayer 12 affects the Genorah respondents but not the Bauba respondents as the latter are not performing any mining activities. The applicants are seeking to interdict the Genorah respondents and Nkwe Platinum Ltd from exercising mining rights in respect of certain properties specified in the prayer pending the final determination of the (to be) consolidated review applications.

<u>Brief summary of the background facts relevant to the review applications</u>

[18] When the MPRDA became effective on 1 May 2004, RPM became the holder of an unused old order right as contemplated in Item 8 read with Item 1 of Schedule II to the MRPDA in respect of platinum group metals on the Modikwa Deep properties. (I will return to this issue herein below where I refer to the fact that the Bauba respondents are disputing whether RPM is indeed the holder of certain unused old order rights over certain Modikwa Deep properties.)

[19] In March 2004 RPM applied for a prospecting right over the Modikwe properties under the Minerals Act.[5]

[20] On 19 October 2004 RPM informed the Regional Manager of its intention to convert its old order right into a prospecting right under section 16 over the Modikwa Deep properties and submitted the necessary documentation under Item 3 of Schedule II of the MPRDA for purposes of an application for a new prospecting right in terms of section 16 of the MPRDA.

[21] On 24 August 2006 the DDG refused RMP's application for a prospecting right ("the original decision"). The reason given for the refusal was that "the granting of the [prospecting] right will result in the concentration of mineral resources in question under the control of the applicant and will also result in an exclusionary act".

[22] On 5 October 2006 RPM lodged an appeal in terms of section 96 of the MPRDA against the DDG's decision to refuse RPM's application. Nearly 10 year later, the State respondents have not taken a decision in respect of this appeal and RPM has taken no steps to compel any outcome in respect of this appeal.

[23] During the period August 2006 until July 2012, the DDG has granted various rights (including prospecting and/or mining rights) in respect of platinum group metals over some of the Modikwa Deep properties to (i) Genorah; (ii) Bauba, Absolute Holdings Limited and Mr Moruthane Ben Thulare ("Thulare") who has since passed away and is now represented by the 8th respondent (Mr

[5] Act 50 of 1991.

Sekhukhune *N.O.*) on behalf of the Bapedi Nation; (iii) Myeleti Minerals (Pty) Ltd. Fabricus, J found in *Myeleti Minerals (Pty) Ltd v Minister of Minerals and Energy and Others*[6] that the granting of the prospecting right to Genorah over Hoepakrantz was unlawful; (iv) Bengwenyama Minerals (Pty) Ltd; and (v) Roka Pasha.

[24] During the period August 2006 until July 2012 a total of 10 decisions were taken by the state respondents in respect of the Modikwa properties in terms of which various rights were granted to the Genorah and Bauba respondents (and some of the other respondents). The applicants have also launched various appeals against these decisions all of which are still pending. The last two appeals (against the 9th and 10th decisions were launched on 10 August 2012. (I will return to the issue of the appeals herein below.)

[25] In respect of the Genorah respondents, the DDG granted them a prospecting right in August 2006 (the 3rd decision) and in January 2012, the DDG granted them a mining right over some of the Modikwa Deep properties (the 8th decision). In 2007 RPM launched the Genorah review application in respect of certain decisions taken by the DDG in August 2006 and thereafter (under case number 7883/2007).

[26] A prospecting right was granted to Bauba in 2010 (the 4th decision). In July 2012 the DG consented to the cession of a prospecting right from Sekhukune to Bauba under section 11 of MPRDA (the 9th decision) and in 2012 the prospecting right held by Bauba was renewed under section 18(3) of the MPRDA (the 10th decision). The Bauba review application was launched in 2010.

[27] The gist of the two review applications is that the State respondents should not have accepted applications for prospecting rights, granted prospecting and/or mining rights, renewed prospecting rights or consented to a cession of prospecting rights to any of the 5th to 10th, 12th or 14th respondents, whilst RPM was the holder of the unused old order rights and in circumstances when it had

[6] Case no. 20326/2007 of 61/4/2010.

applied to convert those rights and lastly in circumstances when it had appealed against the refusal to convert those rights to a prospecting right over the Modikwa properties. In February 2015, the applicants withdrew their review application in as far as it concerned the 11th and 13th respondents.

Counter- application

[28] In 2014 Bauba filed a counter-application in the Bauba review for the dismissal of the review. Counsel on behalf of Bauba indicated that Bauba intends to set down the application for hearing. Two grounds are raised in this application for the dismissal: Firstly, the fact that no case is made out in the Bauba review application and secondly on the basis of the delay in the prosecution of the review application. More in particular, the point is made that the applicant has failed to prosecute the review application despite the fact that it had been issued more than 3 years ago.

The two interlocutory application

[29] In November 2011 the applicants launched an interlocutory application ("the first interlocutory application") on a semi-urgent basis in which similar relief to the relief sought in this application was sought. On 16 November 2011 soon after the application was launched, RPM and the Minister entered into settlement negotiations. A further discussion took place on 21 November 2011. On 21 November 2011 - as a result of these discussions - RPM withdrew the (first) interlocutory application without prejudice to the rights of RPM.

[30] Three years later in November 2014 the applicants launched a second (and similar) interlocutory application in which various interlocutory relief is sought as well as two interim interdicts. This application was set down for May 2016. This interlocutory application was therefore launched 10 years after the refusal of RPM's application (to convert their unused old order right into a prospecting right) and four years after Genorah had been granted a mining right. More in particular, the applicants are only now seeking to interdict Genorah from exercising its

mining right pending the final determination of RPM's review application. Similarly, some 6 years after Bauba was (first) granted a prospecting right the applicants approached this Court for an interim interdict to prevent the state respondents from granting, *inter alia*, mining rights pending the final determination of RPM's review application.

Interim interdicts: Prayers 11 and 12 of the draft order

[31] The applicants seek two interim interdicts: In terms of prayer 11 of the draft order the applicants seek an order interdicting the State respondents from granting any applications for various rights under the MPRDA most notably mining rights pending the final determination of the review applications. The order sought in this prayer affects the Bauba respondents but not the Genorah respondents.

[32] In terms of prayer 12 of the draft order the applicants seek an order interdicting the 5th and 14th respondents ("the Genorah respondents") from exercising the mining right granted to them in respect of certain of the Modikwa Deep properties pending the final determination of the review applications.

[33] It was submitted on behalf of both the Genorah and the Bauba respondents that, as a result of an inordinate delay by the applicants in approaching the court for interim relief pending the outcome of the final determination of the review applications, this Court should dismiss both applications.

[34] This submission is not without merit: RPM waited almost a decade after Genorah was granted a prospecting right (in August 2006) and four years after Genorah was granted a mining right (in January 2012) before approaching this Court for an interim order interdicting the Genorah respondents from exercising their mining rights pending the outcome of the review application. Since Genorah has been granted a prospecting right, the applicants stood by and did nothing to prevent the State respondents from grating Genorah a mining right. Over the course of a decade Genorah exercised the prospecting and mining rights granted to them under the MPRDA and incurred substantial legal and financial obligations.

[35] Although RPM did launch an interlocutory application in November 2011 on a semi-urgent basis, it was subsequently unconditionally withdrawn after settlement negotiations with the Minister. There is nothing on the papers to suggest that, at the time when the application was withdrawn, an undertaking was given to RPM by the State respondents that no mining rights would be granted to Genorah. It is, in my view, inconceivable that RPM could not have been aware of the real possibility that, at the time when the first interlocutory application was unconditionally withdrawn, Genorah, as a logical next step, would be granted a mining right and that the granting of a mining right would be a crucial game changer. In fact, little more than a month after the first interlocutory application was withdrawn, Genorah was granted a mining right.

[36] This is important in light of the fact that, once a mining right has been granted, the holder of such a right is obliged to commence with their mining operations as the failure to do so could mean that they forfeit their right. RPM must have been aware of this fact and must have considered in February 2012 that Genorah would start mining. Notwithstanding this crucial event, the applicants waited another three years before resurrecting the first interlocutory application. During this entire period, RPM stood by whilst Genorah engaged in mining activities whilst doing nothing to interdict Genorah from engaging in its mining activities as it is obliged to do: In terms of section 19(2)(b) and (c) of the MPRDA, Genorah had a statutory obligation to conduct prospecting operations. Since Genorah had been granted a mining right in February 2012 in terms of section 23 of the MPRDA, it has complied with its statutory obligations to commence and actively conduct mining operations as required by section 25(2)(b) and (c) of the MPRDA. In fact, when the mining right was granted to Genorah early in 2012, the applicants also did not approach the court in order to prevent Genorah from exercising this right. What the applicants wanted to interdict in November 2011 came about in January 2012 (the 8th decision).

[37] What compounds the significance of the delay in approaching this Court, is the fact that on 5 March 2012 during a meeting between RPM, the Minister and officials of the Department, the Minister informed RPM that Genorah and Nkwe

had been granted prospecting rights and as a result they had a legitimate expectation to be granted a mining right. At that time the Minister also informed the applicants that it is unlikely that she would overturn the decision to grant Genorah and Nkwe a mining right. She also informed RPM that if they were dissatisfied with her decision, the Department will see them in court. Fully aware of the fact that the Minister would not reconsider her position, RPM then lodged an appeal on 15 March 2012 (against the 8th decision).

[38] In July 2012 the DDG took the 9th and 10th decisions affecting the Bauba respondents and in August 2012 RPM lodged an appeal against these two decisions. Only a year later did RPM hold meetings with the DDG (on 25 July 2013, 15 November 2013 and 17 December 2013) and only a year later in November 2011 did the applicants launch the second interlocutory application.

[39] Between January 2012 (after Genorah was granted a mining right) and November 2014 – a period of 2 ½ years – apart from some attempts to settle the matter, nothing was done.

[40] The fact that the RPM had lodged appeals from time to time against the various decisions does not excuse the inordinate delay. In this regard section 96 of MPRDA expressly states that an appeal does not suspend an administrative decision taken under that Act. There was therefore no impediment to the applicants to pursue the appeal process and simultaneously seek the interdictory relief that they are only now doing. Also, the fact that the applicants were engaged in settlement negotiations in the intervening period, is of no assistance to the applicants in explaining the inordinate delay especially in light of the fact that, as far back as 5 March 2012, the Minister informed RPM that "she would consider the appeal in due course, but that it was unlikely that she would overturn the decision to grant Nkwe and Genora a mining right over the three farms concerned". The Minister also remarked that "the Department would have to see [the applicants] in court".

[41] From the papers it appears that Genorah has incurred expenses exceeding R1.2 billion in respect of, *inter alia*, feasibility studies, engineering studies, environmental guarantees, prospecting costs and exploration costs. Furthermore, as a mining house itself, RPM must be fully aware of what is required of Genorah after the mining right had been granted and the financial exposure associated thereto. Genorah has further secured international partners who have committed to supply funding in excess of R5 billion required to embark upon the mining project and has also concluded an agreement with Eskom to undertake the construction of an electrical substation on the project. In addition, and importantly, Genorah has committed to a number of social and labour plans within the local community which has the effect of Genorah employing approximately 1 420 people over the years and with as much as 8 520 jobs created within the local and regional community over time.

[42] In RPM's replying affidavit the point is however made that the Genorah respondents have "knowingly incurred the expenses which they now complain of". This may be so but it does not excuse the inordinate delay in setting down the application for interdictory relief particularly in light of RPM's own view that the first interlocutory application was urgent in November 2011 only to later withdraw that application unconditionally. By doing so, the applicants have lulled the Genorah respondents into a false sense of security that the applicants would not be pursuing any interdictory relief against them. Moreover, as already pointed out, RMP must have been aware of the fact that, once a mining right has been granted, there rests a statutory obligation on the holder of such a right to carry out prospecting operations and mining operations under the MPRDA failing which such a right will be forfeited.

[43] Our courts have been consistent in their view that an application for an interdict *pendente lite* is, from its very nature, a special remedy. In this regard the court in *Juta Co Ltd v Legal And Financial Publishing Co (Pty) Ltd*,[7] in the context of a delay of merely four months held as follows:

---

[7] 1969 (4) SA 443 (C).

> "Relief *pendente lite* is a special remedy: it grants relief between the time of the order and the final determination of the dispute between the parties in order to avoid undue prejudice while proceedings are pending. In view of the long delay that has not been satisfactorily explained and the other points referred to, I am not prepared to allow the replying affidavits to be filed, and the application must accordingly be refused.
>
> This decision also has a bearing on the issue as to whether the Court should, in the circumstances, allow the applicant to proceed with the application for an interdict *pendente lite*. If one bears in mind the long delays for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict *pendente lite*, but even if it was the appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place."[8]

[44] In the context of review applications the courts have followed a similar approach where applicants did not diligently pursue a review to the extent that it could be argued the applicant had acquiesced to the result. See in this regard: *Botha v White*:[9]

> "[31] The doctrine of acquiescence is competent to halt cases where its application is necessary to attain just and equitable results. The test for inferred acquiescence is the impression created by the plaintiff or applicant on the defendant or respondent. It can be proved by some act, conduct or circumstances on the part of the plaintiff or applicant, for example, by the applicant's delay in taking action, so that the respondent is lulled into a false sense of security. Then, in such circumstances, the enforcement of a right would cause real inequity and the applicant's conduct would amount to unconscionable conduct. (See *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 608B - H.)"

---

[8] At 445 B-E
[9] 2004 (3) SA 184 (T)

[45] Where an applicant is challenging administrative action, our courts have been more pronounced in their view that such a challenge should be brought timeously and that the challenge should be diligently pursued to finality. The rationale for this view has been set out by the court in *Gqwetha v Transkei Development Corporation Ltd and others*[10] as follows:

> "[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 41E - F (my translation):
>
> 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - *interest reipublicae ut sit finis litium*. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'
>
> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (*Wolgroeiers Afslaers*, above, at 42C).

[10] 2006 (2) SA 603 (SCA).

See also in this regard: Prest C.B *Law and Practice of Interdicts*[11] where the author confirms this principle as follows:

> "The courts have exercised their discretion where delay has manifested itself, not only in the launching of interdict proceedings, but also interdict proceedings have been launched, are not pursued or pursued in a tardy manner."

[46] In light of the inordinate delay in bringing the application for *interim relief,* I am of the view that the application falls to be dismissed.

[47] Apart from the fact that the inordinate delay weighs heavily against the granting of the relief sought, I am also of the view that no case for an interim interdict has been made out by the applicants.

Requirements for an *interim* interdict

[48] The requirements for a final interdict are: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of similar protection by any other ordinary remedy.[12] Where an applicant seeks an interim interdict, the following requirements must be satisfied: (i) a *prima facie* right; (ii) a well-grounded apprehension of irreparable harm to the applicants if the interim relief is not granted and the applicants ultimately succeed in establishing their right; (iii) the balance of convenience favours the granting of interim relief; (iv) the absence of similar protection by any other ordinary remedy.[13]

Prima facie right

[49] In considering whether a *prima facie* right has been established, the court will consider the following:

---

[11] P 239
[12] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[13] *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382(D) at 383C-F and *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and another* 1973 (3) SA 685 (A) at 691D.

"From the Appellate Division cases to which I have referred I consider that the law which I must apply is that the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is '*prima facie* established though open to some doubt' that is enough. I do not think it necessary to decide whether the test of a 'reasonable prospect of success' applied by MALAN, J., is a proper paraphrase of the words of INNES, J.A.

If the phrase used were '*prima facie* case' what the Court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. *Prima facie* that has to be shown. The use of the phrase '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which *prima facie* establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would

> compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere.[14]"

[50] In respect of the Genorah respondents, the applicants are seeking to prevent them from exercising a mining right that they had acquired pursuant to an administrative decision taken by the state respondents. Should the *status quo* be preserved pending the outcome of the review application? Pertinent to answering this question is the question whether the applicants have sufficiently strong prospects of success in the review to set aside the mining right that was granted to Genorah. See in this regard: *Johannesburg Municipal Pension Fund and Others v City Of Johannesburg And Others* 2005 (6) SA 273 (W) where the court held as follows in respect of a *prima facie* right:

> "[8] ... There are different formulations of the approach to be taken in granting interim relief....In *Mariam v Minister of the Interior and Another* 1959 (1) SA 213 (T) Roper AJ (as he then was) accepted the traditional approach as set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) (but see *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688) and said, while dealing with the construction of the word 'hold' as used in specific legislation, that he did not have to make a final decision on the meaning of the word:
>
> 'I have merely to consider whether the applicant has made out a case sufficiently strong to apply the rule in the case of *Webster v Mitchell*; therefore when I express a view in regard to the interpretation in part of the statute, I am expressing a *prima facie* view; it would be impossible to express anything else. In view of the fact that this case will come to trial at some time, when the Court which tries the case will have to make a final decision as to the meaning of the phrase as set out by the Legislature, if I were to purport to give a final decision as to the meaning of any part of the Act, I would be taking upon myself to pre-judge the trial, and I certainly have no intention of doing so. It is sufficient to say that I have expressed my view upon the legal argument put before me . . . namely, that *prima facie* there is substance in the argument.'

---

[14] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

> ... Heher J in *Ferreira v Levin NO and* Others; *Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W) (1995 (4) BCLR 437) at 824I - 825D (SA) said that:
>
> '[T]he phrase "a *prima facie* case though open to some doubt" as an element of the justification for the grant of an interdict requires a preliminary assessment of the merits of the applicant's case.... The test enunciated in *American Cyanamid Company v Ethicon Ltd* [1975] 1 All ER 504 (HL) should be recognised as of equal validity with the "*prima facie* case though open to some doubt" test when deciding whether interim relief should be granted in constitutional cases.'
>
> The approach in *Cyanamid* is that the applicant for interim relief should show that 'the claim is not frivolous or vexatious; in other words that there is a serious question to be tried'. Heher J's conclusion is the following (at 832I - 833B):
>
> '1. A *prima facie* right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed as weak by the Judge hearing the interim application.
>
> 2. Provided there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.
>
> 3. The strength of one element may make up for the frailty of another.
>
> 4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts and coming to such conclusion as one may as to the probabilities where disputes exist."

[51] In essence the applicants' case is that, because the DDG refused RPM's application to convert its old order right into a prospecting right and instead decided to accept Genorah's application for a prospecting right in circumstances where the state respondents were required by law to accept and convert the right, the applicants have a *prima facie* right to interim relief.

[52] As far as the granting of the mining right to Genorah is concerned there are, in my view, no prospects of success in reviewing the decision to grant the mining

right: The granting of a mining right is dependent on no more than the fact that a prospecting right was granted to Genorah. See in this regard sections 22(1) of the MPRDA read with Regulation 10 of the MPRDA Regulations. It is not required by these provisions that there must be a valid prospecting right as a necessary precondition to the application for a mining right.

[53] Furthermore, RPM will have to rely on the provisions of the Promotion of Administrative Justice Act[15] ("PAJA") in bringing the review. As a point of departure the applicants are obliged in terms of section 7(1) of PAJA to institute their review proceedings within 180 days of having become aware of the decision they seek to have set aside. In the case of Genorah the operative date would be the grant of the mining right to Genorah. Thereafter the applicants are required to prosecute the review diligently and without delay.

[54] I have already referred to the inordinate delays that preceded the launching of this interlocutory application. These delays are equally relevant in respect of the prosecution of the review applications.

[55] Apart from the delay, I am therefore not persuaded that the applicants have not, at the very least, established a *prima facie* right for the granting of an interdict against Genorah. (I will return to the prospects of success in reviewing the first decision hereinbelow.)

[56] In respect of Bauba, the same considerations apply. More particular it was submitted on behalf of the Bauba respondents that RPM has not demonstrated that it has unused old order rights in respect of the Bauba properties and that the high water mark of RPM's case is the contention that it had applied for a prospecting permit under the old Act and that such permit was not granted. Accordingly, it is submitting that, in terms of the transitional provisions and in particular Item 3 of Schedule II to the MPRDA, it is deemed to be an application for a prospecting right in terms of section 16 of the MPRDA. Apart from the fact that the Bauba respondents place in dispute RPM's entitlement to the claimed

[15] Act 3 of 2000.

unused old order rights (a point also raised in the interlocutory dismissal application yet to be decided), it was further submitted on behalf of the Bauba respondents that -at best for RPM (if RPM held such rights) - they only had the exclusive right to apply for a prospecting right in terms of the MPRDA within one year from1 May 2004 in terms of Item 8(2) of Schedule II and until such a process was concluded, the Bauba respondents were not entitled to be awarded a prospecting right. On behalf of the Bauba respondents it was further submitted that even if RPM could demonstrate its unused old order rights, those rights are not in respect of all minerals on the Bauba properties.

[57] More importantly are the submissions in respect of the reasonable prospects of overturning the decision to refuse RPM a prospecting right. In this regard it is important to bear in mind the historical and legislative context within which the decision was made to refuse the conversion of the unused old order right and the granting of a prospecting right to Bauba: The Constitutional Court in *Agri SA v Minister For Minerals and Energy*[16] contextualised the purpose of the MPDRA and especially with reference to unused old order rights, as follows:

> "[1] South Africa is not only a beauty to behold but also a geographically sizeable country and very rich in minerals. Regrettably, the architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry.
>
> [2] That legislative intervention was in the form of the Mineral and Petroleum Resources Development Act (MPRDA). Its commencement had the effect of freezing the ability to sell, lease or cede unused old order

[16] 2013 (4) SA 1 (CC) 1.

rights until they were converted into prospecting or mining rights with the written consent of the Minister for Minerals and Energy (Minister). It also had the deliberate and immediate effect of abolishing the entitlement to sterilise mineral rights, otherwise known as the entitlement not to sell or exploit minerals. This ought to come as no surprise in a country with a progressive Constitution, a high unemployment rate and a yawning gap between the rich and the poor which could be addressed partly through the optimal exploitation of its rich mineral and petroleum resources, to boost economic growth.

[3] The inability of mineral rights holders to sterilise those rights, sell, lease or cede them whenever they wanted to, as before, and the extinction, after the prescribed periods, of the hitherto permanent and exclusive rights to determine who would exploit the minerals, caused grave dissatisfaction, particularly among major landowners like the applicant's members. They believed that the commencement of the MPRDA had the immediate effect of expropriating mineral rights. Hence this application."

.....

"[24] At the epicentre of this application is the question whether Sebenza's mineral rights, enjoyed during the subsistence of the Minerals Act, were expropriated when the MPRDA took effect. Relevant provisions of the MPRDA

[25] On behalf of all the people of South Africa, the state is now the custodian of the mineral and petroleum resources of this country which is their common heritage. One of the objects of the MPRDA is to give effect to this principle by granting various kinds of rights to successful applicants. Prospecting, mining, exploration or production rights granted in this manner are regarded as limited real rights. Detailed provision is made for the grant, content and duration of the rights. If these rights are not appropriately exercised, they may be suspended or cancelled. Whenever the common law is inconsistent with the MPRDA, the latter prevails.

[26] According to its long title, the MPRDA was enacted to facilitate equitable access to and sustainable development of the nation's mineral and petroleum resources. This objective finds support from the Preamble which sets out a list of commitments which lie at the heart of the

MPRDA. They are, among others, the eradication of all forms of discriminatory practices in the mining sector. Also included is the undertaking to take measures to address the effects of the skewed distribution of economic benefits which took place during the apartheid era and the creation of a mining regime that is internationally competitive and efficient."

[52] Holders of unused old order rights who could not apply for the right to prospect or mine within the window period created by the MPRDA transitional provisions, or whose applications were unsuccessful, lost all their mineral rights permanently. In that event their loss was not merely confined to the extinction of the right to sterilise, the monopoly and the suspension of the right to sell or lease the mineral rights, but was also a total and permanent loss. Even if the mineral rights had been bought, as in the case of Sebenza, the possibility to recoup the purchase price or a portion of it was totally lost.

[66] What the MPRDA in effect did was to put an end to the: (i) ability to sterilise or not to exploit minerals; (ii) previously unfettered entitlement to sell, lease or cede the mineral right at any time; and (iii) mineral right or unused old order right for which a prospecting or mining right could not be acquired in terms of the transitional provisions. All this was however done within the context of Parliament, through the MPRDA, having painstakingly done everything reasonably possible to help the holders comply with the requirements so as to preserve their rights. And once the requirements were met, the rights could be disposed of or enjoyed under a much more secure tenure than ever before."

[58] See also *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*[17] where the court also referred to what he primary object of the MPRDA is:

"[3] Equality, together with dignity and freedom lie at the heart of the Constitution. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The

[17] *Supra.*

> Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land, and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources."

[59] On behalf of Bauba it was submitted that ARM and PRM do not intend mining now. What they intend to do is to mine at a later stage and for this purpose they have to sterilize the rights. It was further submitted that it should be borne in mind that in the present case, the Bauba community was dispossessed of their land as well as their mineral rights. The land was, however later restored and placed in trust. With reference to section 104 of the MPRDA it was submitted that the Bauba community therefore has a preference to be granted a prospecting right over the Bauba properties in light of what is contained in section 4 of the MPRDA and the objects in section 2 where it is confirmed that the object of the MPRDA is to -

> "(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
>
> (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
>
> (e) ...
>
> (f) promote employment and advance the social and economic welfare of all South Africans;"

[60] According to the Bauba respondents there is therefore no basis upon which the decision of the Minister should be upset particularly if regard is had to the imperative contained in section 104 of MPRDA: The Minister "must grant" the preferent right to the community if the conditions are complied with:

"(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the Minister.

(2) The Minister must grant such preferent right if the community can prove that-

(a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;

(b) the community submits a development plan, indicating the manner in which such right is going to be exercised;

(c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and

(d) the community has access to technical and financial *resources to exercise such right."*

[61] I am in light of the aforegoing not persuaded that the applicants have demonstrated a basis to interfere with the over concentration consideration especially in light of the fact that the State has an obligation to ensure that mineral resources are distributed equitably for the benefit of the disadvantaged. The state must therefore ensure that the mineral rights should not be sterilized. See in this regard: *Minister of Mineral Resources and Others v Sishen Iron Ore CO (Pty) Ltd And Another*:[18]

"[44] A few observations arise from the reading of s 2. The first is that transformation of the mining and petroleum industries could not be achieved without abolishing private ownership of mineral rights and vesting the resources in the nation as a whole, and giving the state a free hand in allocating rights to exploit those resources. If this were not done, any attempts to transform the industry would have failed. By placing the mineral wealth of the country in the hands of the state, parliament acted in accordance with an internationally accepted practice.

[45] 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

[18] 2014 (2) SA 603 (CC)

> advancement of the social and economic welfare of all South Africans are cornerstones of that transformation. The state is obligated to advance the realisation of these goals. It is therefore vitally important to heed the provisions of s 4 when interpreting the MPRDA."

[62] I am therefore in agreement with the submission that there are no prospects of success in overturning the original decision to refuse RPM a prospecting right and granting a prospecting right to the Bauba respondents.

Irreparable harm

[63] Irreparable harm is defined as the loss of property in circumstances where its recovery is impossible or improbable.[56]

[64] On behalf of the applicants it was submitted that they would suffer irreparable harm if the relief sought is not granted.

[65] On behalf of Genorah it was submitted that even if the applicants cannot now benefit from their unused old order rights which have not been converted into a prospecting right, this does not constitute irreparable harm: All that it means is that their possible rights – if there are successful in the review application – are deferred until the review court pronounces in their favour.

[66] The Bauba respondents submitted that RPM's failure to diligently proceed with the Bauba application has prejudiced Bauba, including the Bapedi community particularly in that the Bauba respondents have by virtue of the prospecting right granted to it (and its subsequent renewal) spent an amount of approximately R32,806,486.00 on exploration and legal costs of the Southern, Northern and Central Clusters. Had the Bauba application been diligently pursued and without delay, the matter would have been resolved by now. Furthermore, if the interdict is now granted, the Bauba respondents will suffer irreparable harm in that the state respondents will be prevented from considering or granting a renewal application for Bauba's prospecting right. Absent a renewal, Bauba will be obliged to conduct the pre-feasibility study, economic study and submit a mine plan.

However, even if such a plan is submitted, the applicants seek to interdict the State respondents from granting a mining right.

[67] I am in light of the aforegoing not persuaded that the applicants have succeeded in establishing the requirement of irreparable harm for purposes of obtaining the relief sought *vis à vis* the Genorah and Bauba respondents. If the order is granted it will result in irremediable harm to the Bauba respondents who will lose their prospecting rights which will result in a significant loss not only of the funds expended but in investor confidence.

Balance of convenience

[68] In respect of the balance of convenience the court will weigh up the balance of convenience against the relevant strengths and weaknesses of the applicants' case.[19] See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton*:[20]

> "The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities;"
>
> "Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts."[21]

[69] More in particular, a court is required to weigh the prejudice to the applicants if the interim interdict is refused against the prejudice to the Genorah and/or the Bauba respondents if it is granted.

---

[19] *Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N) especially at 383C - G.
[20] 1973 (3) SA 685 (A) at 691F.
[21] *See Swissborough Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279 (T) at 324D-F quoting *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A.

[70] I am not persuaded that as far as the Genorah and Bauba respondents are concerned that the applicants have established that the balance of convenience favours them. Both respondents have incurred significant costs in pursuing their rights as they are statutorily obliged to do. Genorah in particular has made significant investments in respect of the employment of labour and the creation of job opportunities in the community. These are considerations that cannot be ignored. The fact that these significant investments have been made over the course of a number of years whilst the applicants stood by, can also not be ignored.

[71] In light of the above and in light of the delays caused by RPM and the dilatory steps which have been taken to prevent the finalisation of this matter the orders sought in the draft order in prayers 11 and 12 are refused.

[72] I will now briefly turn to the remaining orders sought by the applicants.

Consolidation application: Prayer 1of the draft order

[73] The applicants seek an order that the Genorah and Bauba review applications be consolidated. This application is opposed by the Bauba respondents but not by the Genorah respondents. As already pointed out, the Genorah respondents are in agreement with the submission that it makes sense that one Judge hears both reviews.

[74] A court has a wide discretion to permit the consolidation of actions under Rule 11 of the Uniform Rules.[22] A court has a similar discretion in respect of review applications by virtue of Rule 6(14) of the Rules.

[75] In exercising its discretion in this regard the court will be inclined to grant a consolidation - (i) on grounds of convenience which includes the convenience of the court and the parties; (ii) to avoid a multiplicity of actions and where there is a danger of having the same questions tried twice with possibly different results;

---

23. *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd* 2002 (5) SA 101 (W) at 118.

(iii) to save costs. In *New Zealand Insurance Co Ltd v Stone* and *Others*[23] the court explains what should be considered by a court:

> "In such an application for consolidation the Court, it would seem, has a discretion whether or not to order consolidation, but in exercising that discretion the Court will not order a consolidation of trials unless satisfied that such a course is favoured by the balance of convenience and that there is no possibility of prejudice being suffered by any party. By prejudice in this context it seems to me is meant substantial prejudice sufficient to cause the Court to refuse a consolidation of actions, even though the balance of convenience would favour it. The authorities also appear to establish that the *onus* is upon the party applying to Court for a consolidation to satisfy the Court upon these points".

[76] In considering the balance of convenience the court will be more likely to grant a consolidation if the prejudice that will be suffered by the applicant would be greater if the consolidation is not granted than the prejudice suffered by a respondent if the consolidation is granted.[24]

[77] On behalf of the applicants it was submitted that it is convenient to consolidate the Genorah and Bauba reviews for the following reasons:

(i) The Genorah review relates to the 1st, 2nd, 3rd and 8th decisions and will also relate to the 6th and 7th decisions after the amendment of the notice of motion although the applicants no longer pursue relief relating to the 6th and 7th decisions the properties that are the subject matter of the Genorah review decisions are De Kom 252 KT, Garatouw 282 and Hoepakrantz 291 KT.

(ii) The Bauba review relates to the 4th, 5th, 9th and 10th decisions. The properties that are the subject of the Bauba review are De Kom 252 KT, Garatouw 282 KT, Zwemkloof 238 KT, Grootvygenboom 284 KT, Genokakop 285 KT and Houtbosch 323 KT, Nooitverwacht 324 KT.

---

[23] 1963 (3) SA 63 (C) at 69A – C.
[24] See *Mpotsha v Road Accident Fund* 2000 (4) SA 696 (C)

(iii) The applicants and State respondents in both reviews are the same.

(iv) Both reviews arise from the fact that RPM was the holder of the old order rights, which it had applied to be converted into a new order right under the MPRDA but which was refused by the State respondents.

(v) In both reviews, a court must decide whether the decision refusing to convert RPM's old order rights should be set aside on review and whether the subsequent granting of MPRDA rights to some of the respondents (most notably the Genorah and Bauba respondents) should be set aside on review.

[78] I am, despite the objections on behalf of the Bauba respondents satisfied that the issues in the Genorah review (with particular reference to the grounds of review raised in both applications) are sufficiently similar to warrant this Court to exercises a discretion in favour of a consolidation. I am not persuaded that the Bauba respondents will suffer prejudice if the consolidation is allowed. More in particular, any decision taken by a review court in the Genorah application regarding the refusal by the State respondents to convert RPM's old order right and the subsequent granting of a mineral right to the Genorah respondents may have a profound impact on the outcome of the Bauba review application. The question whether the refusal to convert RPM's old order right should be reviewed and set aside will feature prominently in both reviews and should therefore conveniently be decided by the same Judge to avoid having the same question tried twice with possibly different results.

[79] In the event the order is granted consolidating the applications under case numbers 7883/2007 and 56189/2010

Joinder application: Prayer 2 and 3 of the draft order

[80] Rule 10(3) (which is made applicable to applications by virtue of Rule 6(14) of the Rules) permits the joinder of respondents if the questions between them and the applicants depend upon the determination of substantially the same question of

law or fact which, if such defendants were sued separately, would arise in each separate application. Furthermore, where there is a reasonable risk of overlapping factual issues, courts would be more inclined to exercise their discretion to join parties under Rule 10(3) because it is convenient and because it avoids the risk of conflicting decisions on the same factual issues.[25]

[81] On behalf of the applicants it was submitted that the DG should be joined in the Bauba review in light of the fact that he has a direct and substantial interest in that application (prayer 2 of the draft order).

[82] In respect of the proposed order in prayer 3, it was submitted that the 6th to 14th respondents should be joined in the Genorah review because they are necessary parties in the Genorah review because they have a direct and substantial interest in the issues in the Genorah review and their rights may be affected by a judgment in the Genorah review. According to the applicants they must be joined and convenience or discretion do not arise in the question whether they should be joined.[26] It was also submitted that the questions between the respondents and RPM include the question whether in the face of RPM's application to convert its old order rights to an MPRDA right and in the face of an appeal against the refusal to grant the application, the state respondents should have granted MPRDA rights to the 5th to 14th respondents.

[83] I have already referred to the fact that the State respondents do not oppose the relief sought in prayer 2 of the draft order and in light of the submissions on behalf of the applicants I can see no reason why the DG should not be joined as a respondent as the DG has a substantial interest in that application.

[84] As far as the joinder of the 6th to 14th respondents in the Genorah review application is concerned, I can equally see no reason why the order should not be granted. Firstly, the Genorah applicants do not oppose the application and secondly, having regard to the papers, these respondents are directly interested

---

[25] *Dendy v University of Witwatersrand* 2005 (5) SA 357 (W) at 387A – B.
[26] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (AD) at 659.

in the Genorah review and their rights may be affected by a judgment in the Genorah review.

Leave to amend/oppose: Prayers 4 and 5 of the draft order

[85] In prayer 4 of the draft order the applicants seek to amend the notice of motion in the Genorah review. The Genorah respondents do not object to the amendment sought provided that the amended notice of motion must reflect the current position and that the amendment should also take into account the relief sought in this draft order.

[86] Presently the order in paragraph 5 seeks to introduce the relief related to the 7th decision subject to a decision by the Constitutional Court in a matter concerned with the rights of the 11th respondent under MPRDA. I have already referred to the decision of the Constitutional court in *Bengwenyama*[27] where the Constitutional Court set aside the decision to award prospecting rights to Genorah. The relief sought against the 11th respondent has accordingly been withdrawn and the relief sought in prayer 5 has now fallen away.

[87] The order in prayer 6 of the amended notice of motion seeks to introduce the relief related to the 8th decision and the order in prayer 7 seeks to introduce the relief related to the 10th decision.

[88] It was submitted on behalf of the applicants that the order sought in prayers 6 and 7 will lead to a proper ventilation of the issues on review. It was further submitted that it is in the interests of justice to allow the relief related to the 8th and 10th decisions to be included in the notice of motion because it relates to the same properties that are the subject of the other decisions that are under review.

[89] It was further submitted that should leave to amend the notice of motion be granted, the 6th to 14th respondents who will be cited in the amended notice and who are joined in the Genorah review, should be given leave to oppose.

---

[27] *Supra.*

[90] Courts have a discretion to permit amendments to pleadings (including notices of motion) - (i) where that can be done without prejudice to the other party; or (ii) where it results in prejudice, the prejudice can be cured by an order for costs or by some or other suitable order such as a postponement;[28] or (iii) if that leads to a proper ventilation of the dispute between the parties;[29] and/or (iv) if that advances good order and administration of justice in the matter.[30]

[91] I have considered the application and I can see no reason why the order sought in prayer 4 should not be granted with the proviso that the applicants amend the notice of motions with due regard to the orders granted in this application and the recent events. Granting the amendment will lead to a proper ventilation of the disputes between the parties in the Genorah review application.

[92] Although it is strictly not necessary to grant the relief sought in prayer 5 of the proposed draft order as the respondents who have been joined have the right to oppose any relief sought against them as a consequence of the orders joining them, I have nonetheless included this prayer as part of my order.

Delivery of papers: Prayers 6 and 7

[93] In prayer 6 of the proposed draft order the applicants seek an order that the applicant be directed to deliver a complete copy of the papers in the consolidated application to any of the 2nd, 6th to 14th respondents who oppose the relief sought in the amended notice of motion.

[94] I can see no reason why this order should not be granted. I can also see no reason why the order in terms of prayer 7 of the draft order providing that the time periods provided for in rule 53 of the rules of court commence to run from the date of delivery of the papers contemplated in prayer 6, should not be granted.

---

[28] *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) at [8].
[29] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638A.
[30] *Bankorp Ltd v Anderson-Morshead* 1997 (1) SA 251 (W) at 253D.

Separation: Prayers 8 and 9 of the draft order

[95] The applicants seek an order separating the question whether they have exhausted their appeal remedies under the MPRDA from the remaining issue in the consolidated review applications (prayer 8) and that this Court decide this question. The Genorah respondents do not oppose the separation of the issue but submitted that this Court cannot decide the issue in light of the fact that not all the facts which are necessary for this Court to decide the issue, are before the Court.

[96] Rule 33(4) of the rules of Court is aimed at facilitating the convenience and expeditious disposal of a question of law or fact separately from any other question pending before the court.

[97] The question before this Court is one which can, and in my view should, conveniently be decided separately as the outcome of such a decision may well be dispositive of the pending review applications. In this regard I have considered requirements of convenience which includes facility, ease, expedience, appropriateness and fairness to all the parties including to the court. I have also considered whether it would be advantageous or disadvantageous to the parties and the proper conduct of the proceedings to separate the issue concerned. Despite protestations on behalf of the Genorah and Bauba respondents, I am of the view that sufficient facts are before the Court to decide the question whether or not the applicants have exhausted their internal appeal remedies under the MPRDA. I will revert to this issue herein below.

[98] In terms of section 7 of PAJA, a party may not bring an administrative review before a party has exhausted its internal remedies under the MPRDA. Section 96(3) of MPRDA likewise provides that a person may not launch a review prior to exhausting the internal remedies provided for by MPRDA. The rationale for this

principle is set out by the Constitutional Court in *Koyabe and others v Minister for Home Affairs and others (Lawyers for Human Rights as Amicus Curiae)*:[31]

> "[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In *Bato Star*, O'Regan J held that -
>
> 'a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.'
>
> Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards."

[31] 2010 (4) SA 327 (CC).

[99] In the founding affidavit the applicants initially sought an order separating the issue of whether RPM must be "exempted" from first exhausting its internal appeal remedies before approaching this Court with a review of the decisions against which various appeals have been lodged. The applicants now seem to have abandoned the application for an exemption in favour of an application that this Court grants an order that RPM has in fact exhausted their internal appeal remedies (prayer 9 of the draft order). This new approach is not canvassed in the papers and was in fact raised for the first time at the commencement of the hearing and in a further set of heads of argument handed to the Court. It appears that the applicants have now reconsidered their legal position and that they have decided to abandon their application to be exempted from exhausting their internal appeal remedies in favour of an order that RPM has in fact exhausted its internal appeal remedies.

[100] Should it be decided that RPM has in fact exhausted their internal remedies, the two reviews may be set down for hearing on their merits. However, should the Court decide that RPM has not exhausted their internal remedies, then the merits of the two reviews cannot be decided and the review applications must await the outcome of the appeals.

[101] On behalf of the applicants it was submitted that the applicants have in fact exhausted their internal remedies for the following reasons: In terms of section 96(1) of the MPRDA a party has a right of appeal to either the Minister or the DG (as the case may be) in circumstances where a person's rights or legitimate expectations have materially or adversely been affected. In terms of section 96(3) of the MPRDA a person may not apply to a court for the review of such an administrative decision (as contemplated by section 96(1) of the MPRDA) until that person has exhausted the internal remedies provided for by the MPRDA. In terms of section 96(4) of the MPRDA it is contemplated that sections 6, 7(1), 7(2) and 8 of PAJA will apply to any review of an administrative action under section

96 of the MPRDA.[32] In terms of section 6 of PAJA such a review should be brought within a reasonable time.

[102] Section 6 of PAJA requires that administrative decisions must be taken within a reasonable time and with reference to the decision in *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*,[33] it was submitted that the failure to determine appeals within a reasonable time amounts to a decision to dismiss the appeal because administrative decision is defined to include the "failure to take a decision". Because the State respondents have failed to take decisions in any one of the 10 appeals lodged between 2006 and 2012 it meant, so it was submitted, that the applicants have exhausted their internal remedies.

[103] What is before the Court is the fact (and it is not in dispute) that over a period commencing in 2006 up until 2012 various appeals have been lodged and still no decision has been taken in respect of any of these appeals. What is also before the Court is the fact that as far back as 12 March 2012, the Minister has indicated to the applicants that she would not reverse her decision in terms of which a mining right was granted to the Genorah Respondents

[104] On the facts before the Court I have no hesitation to find that there was an unreasonable delay in taking a decision in respect of the various appeals. The applicants are not asking this Court to substitute the decision of the functionaries and usurp the functions of the administrative authority and I do not intend to do so. However, I am of the view that in light of the extraordinary delay in taking a decision in each of the decisions sufficient exceptional circumstances exist warranting this Court to conclude that the applicants have exhausted their internal remedies and that consequently they should be able to pursue their

---

[32] In this regard the Constitutional Court in *Dengetenge Holdings (Pty) Ltd Vv Southern Sphere Mining and Development Co Ltd and Others* 2014 (5) SA 138 (CC) held as follows: "[66] Section 96(4) provides that ss 6, 7(1) and 8 of PAJA apply to any court proceedings contemplated in s 96. Section 96(4) does not expressly say that s 7(2) also applies to any court proceedings contemplated in s 96. However, s 7(1)*(a)*, to which s 96(4) refers, includes the words 'subject to subsection 2*(c)*' and, therefore, incorporates by reference the provisions of s 7(2)*(c)*. Counsel for both Rhodium and Southern Sphere were agreed that s 7(2)*(c)* applies to s 96 because of the reference to s 7(1) and the further reference to s 7(2)*(c)* in s 7(1). I agree with their submission.

[33] 2014 (3) SA 481 (CC) at [93].

review applications should they wish to do so. There rests a duty on an administrative official to take decisions within a reasonable time: An authority cannot refuse or fail to make a decision. See in general in this regard: *Mashilane Community and another v Mnister for Agriculture and Land Affairs and others*:[34]

> "[23] The judicial review of an administrative action comprising a failure to take a decision is not novel. De Ville, in *Judicial Review of Administrative Action in South Africa*, commenting on section 6(2)(g), reminds us that at common law where there is a duty on an administrative authority to perform some or other action, the authority cannot refuse or fail to do so. A refusal or failure to act affords the person affected, the opportunity to bring an application for a mandanus to force the authority to act. Our courts recognise that where power is granted to a public authority to take a decision, such authority is obliged to do so and should a decision fail to emanate within the prescribed period or within a reasonable period, its actions would constitute unlawful administrative action and be subject to review. PAJA at section 6(2)(g) therefore enunciates the common law duty of an administrator to take a decision within a reasonable time. [24] Currie and Klaaren in *The Promotion of Administrative Justice Act Benchbook* recognise that failure to take action or to take a decision is at common law in itself a ground for review.
>
> "This position is formalised and considerably clarified in the Act, where s 6(2)(g) and 6(3) together create a statutory ground for unreasonable delay. The standards for this ground of review are laid out in s 6(3) in terms of two grounds for review: unreasonable delay in expiry of a period for taking a decision, provided for in s 6(3)(a) and s 6(3)(b) respectively. The unreasonable delay ground of review is applicable where an administrator has a duty to take a decision, but there is no law prescribing the period in which the decision must be taken. If the administrator has failed to take the decision, this ground of review may be asserted. The effect of s 3(a) is to read a requirement of reasonableness into empowering provisions that do not explicitly provide a time period for the taking of a decision...".

[34] 2005 JDR 0402 (LCC).

> [25] Hoexter and Lister, in commenting on the statutory ground of unreasonable delay created and formalized at section 6(2)(g) and 6(3) together, aptly state:
> "The ground of unreasonable delay is a statutory addition that will be welcomed by anyone who has experienced the frustration of waiting for a government department to act. Because it has been made explicit and thus more accessible, the ground is likely to be used far more often than its common law ancestors".

Costs

[105] In respect of costs I am of the view that no reason exists why the applicants should not pay the respondents costs especially in view of the dismissal of the two applications for *interim relief*.

Order

[106] In the event the following order is made:

"1. The applications under case numbers 7883/2007 and 56189/2010 are consolidated.

2. The 2nd respondent is joined as the 5th respondent in the application under case number 56189/2010.

3. The 6th to 14th respondents are joined in as the 6th to 14th respondents in case number 7883/2007.

4. The applicants are granted leave to amend the notice of motion in the application under case number 7883/2007.

5. The 2nd, 6th to 14th respondents are granted leave to oppose the relief sought in the amended notice of motion.

6. The applicants are directed to deliver a complete copy of the papers in the consolidated application to any of the 2nd, 6th to 14th respondents who file a notice to oppose the relief sought in the amended notice of motion.

7. The time periods provided for in rule 53 of the rules of court commence to run from the date of delivery of the papers contemplated in 6 above.

8. The issue whether the first applicant has exhausted its internal remedy of appeal is determined separately from the remaining issues in the consolidated applications.

9. The first applicant has exhausted its internal remedy of appeal in the consolidated applications under case numbers 7883/2007 and 56189/2010.

10. The 1st to 4th respondents are directed to file a rule 53 record in the application under 56189/2010.

11. The application to interdict the 1st to 4th respondents from accepting or granting any applications for prospecting rights, mining rights or any other rights permits or permissions under the MPRDA in respect of any minerals in, on or under the properties – De Kom 252 KT, remaining extent of the farm Garatouw 282 KT, Hoepakrantz 291 KT, Grootvygenboom 284 KT, Genokakop 285 KT, Houtbosch 323 KT, in the Magisterial District Sekhukhune, pending the final determination of the consolidated review applications, is dismissed.

12. The application to interdict the 5th and 14th respondents from exercising any rights flowing from the mining right granted to them, in respect of the properties – remaining extent of the farm Garatouw 282 KT, Hoepakrantz 291 KT and De Kom 252 KT, in the Magisterial

District Sekhukhune, pending the final determination of the consolidated review applications, is dismissed.

13. The applicants jointly and severally are ordered to pay the costs of the 5th, 6th, 7th, 8th and 14th respondents.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the 1st and 2nd applicants	: Advocate T J Bruinders SC with Advocate M D Stubbs and Advocate M R Musandiwa
For the 5th, 6th, 7th and 12th respondents (the Genorah respondents)	: Advocte B Leech SC with Advocate J Babamia
Instructed by	: Werksmans Attorneys
For the 8th and 9th respondents (the Bauba respondents)	: Advocate A Botha with Advocte A Saldulker
Instructed by:	Tinus Slabber & Associates c/o Friedland Hart Solomon & Nicolson