IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED

[redacted]

DATE : 10/03/2022 LENYAI AJ

CASE NO:25764/2019

In the matter between :

GRACE MASUKU	First Applicant
MADIMATLE COMMUNITY	Second Applicant
KARA HERITAGE INSTITUTE	Third Applicant
CALFSHELF INVESTMENTS 171 (PTY) LTD	Fourth Applicant
CALFSHELF INVESTMENTS 172 (PTY) LTD	Fifth Applicant
CALFSHELF INVESTMENTS 173 (PTY) LTD	Sixth Applicant

and

MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL : DEPARTMENT OF MINERAL RESOURCES	Second Respondent
REGIONAL MINING DEVELOPMENT AND ENVIRONMENTAL COMMITTEE LIMPOPO REGION	Third Respondent
MOTJOLI RESOURCES (PTY) LTD	Fourth Respondent
MOTJOLI REAL ESTATE (PTY) LTD	Fifth Respondent
AQUILA STEEL (SOUTH AFRICA) (PTY) LTD	Sixth Respondent
AQUILA STEEL THABAZIMBI (SA) (PTY) LTD	Seventh Respondent
SOUTH AFRICAN HERITAGE RESOURCES AGENCY	Eighth Respondent
THE HEAD OF DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AND TOURISM, LIMPOPO PROVINCE	Ninth Respondent
MEMBER OF THE EXECUTIVE COMMITTEE: DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT, TOURISM, LIMPOPO PROVINCE	Tenth Respondent
MOTJOLI IRON ORE (PTY) LTD	Eleventh Respondent

JUDGMENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgement and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 10 March 2022.

LENYAI AJ

[1] This is an application wherein the applicants seek the review and setting aside of the following decisions taken by the first respondent , the Minister of Mineral Resources:

(a) the decision, taken on 25 April 2018, to award Aquila Steel (South Africa) Ltd, the sixth respondent, the mining right in terms of Section 23 (1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA);

(b) the decision, taken on 26 April 2018, to transfer the mining right granted to Aquila Steel (South Africa) (Pty) Ltd to the eleventh respondent, Motjoli Iron Ore (Pty) Ltd in terms of Section 11 of MPRDA;

[2] The applicants further seek an order declaring that the Waterberg District Municipality and the Mopani District Municipality are bio-critical and biodiversity

regions not suitable for mining and mining related activities in accordance with the Provincial Gazette No 2966 published on 4th January 2019.

[3] There are six applicants in this matter. The first applicant, Grace Makgotha Meki Masuku, is a social activist and environmentalist residing at Lekutung Section, Lesetlheng Village, Moruleng, Rustenburg.

[4] The second applicant, the Madimatle Community, is a community comprising of the Manaiwa, Mosuwe, Molwantwa and Moima families who fall under the definition of a community as defined in section 1 of the Restitution of Land Rights Act No 22 of 1994 as amended.

[5] The third applicant is the KARA Heritage Institution established in 1982 under the leadership of Dr Mathole Motshekga, for the purpose of restoring the African cultural heritage and building a nation of African communities and people, through its research, educational campaigns, enterprise development and advocacy.

[6] The fourth applicant is Calfshelf Investments 171 (PTY) LTD, a private company incorporated in terms of the company laws of South Africa with registration number 2007/019859/07. Fourth applicant is the registered owner of Portions 6 and 9 Buffelshoek, 446 KQ, Limpopo located 1.5 km from the Madimatle Mountain and Cave.

[7] The fifth applicant is Calfshelf Investments 172 (PTY) LTD, a private company incorporated in terms of the company laws of South Africa with registration number 2007/019866/07. Fourth applicant is the registered owner of Portion 6 Donkerpoort 488, Full Extent of Leopard Cave 715, Full Extent of Dassiesrand

447, Portions 10, 11, 12, 13, 14, 15, 16, and 17, of Buffelshoek 446, Limpopo located 1.50 km from the Madimatle Mountain and Cave.

[8] The sixth applicant is Calfshelf Investments 173 (PTY) LTD, a private company incorporated in terms of the company laws of South Africa with registration number 2007/019818/07. Sixth applicant is the registered owner of Portions 19, 20, 21, 22 and 23 Buffelshoek 446 KQ, Limpopo located 1.50 km from the Madimatle Mountain and Cave.

[9] There are eleven respondents in the matter. The first respondent is the Minister of Mineral Resources, cited in his official capacity as a member of cabinet vested with public authority and duty to oversee and implement the Mineral and Petroleum Resources Development Act (MPRDA).

[10] The Second respondent is the Director-General: Department of Mineral Resources, cited in his official capacity and exercises delegated authority in terms of section 103 of MPRDA.

[11] The third respondent is the Regional Mining Development and Environmental Committee Limpopo Region, established in terms of section 64 (10) of the MPRDA, responsible for making recommendations to the Minister amongst other things on granting of mineral rights and objections raised thereto, regard being had on environmental issues.

[12] The fourth respondent is Motjoli Resources (Pty) Ltd, a private company incorporated in terms of the company laws of South Africa. The fourth respondent wholly owns the fifth and eleventh respondents.

[13] The fifth respondent is Motjoli Real Estate (Pty) Ltd, a private company incorporated in terms of the company laws of South Africa, is the registered

owner of the mining property described as the remainder of the Farm Randstephne 455 KQ situated within the Thabazimbi Local Municipality in the Waterberg District Limpopo Province.

[14] The sixth respondent is Aquila Steel (South Africa) (Pty) Ltd, a private company incorporated in terms of the company laws of South Africa.

[15] The seventh respondent is Aquila Steel Thabazimbi (South Africa) (Pty) Ltd, a private company incorporated in terms of the company laws of South Africa.

[16] The eighth respondent is the South African Heritage Resources Agency, a statutory organisation established in terms of section 11 of the National Heritage Resources Act No 25 of 1999 as amended, responsible for amongst other things, the protection of South African's cultural heritage.

[17] The nineth respondent is the Head of Department of Economic Development Environmental and Tourism, Limpopo Provincial Government, responsible for implementing amongst other things, the National Environmental Management Act No 107 of 1998, as amended (NEMA) and other related legislation in the Limpopo province.

[18] The tenth respondent is the Member of the Executive Council for Economic Development, Environment and Tourism Limpopo Provincial Government, responsible for the implementation of amongst other things, the National Environmental Management Act No 107 of 1998, as amended (NEMA) and other related legislation in the Limpopo province.

[19] The eight, nineth and tenth respondents are not participating in this matter save for filing a record of their decision.

[20] The eleventh respondent is Motjoli Iron Ore Company (Pty) Ltd, a private company incorporated in terms of the company laws of South Africa, is the holder of the mining right which is the subject of this review.

[21] The applicants contend that this application involves the balancing of constitutional rights that the Minister ought to have considered prior to granting the mining right to the sixth respondent and subsequent transfer of the right to the eleventh respondent.

[22] The applicants further contend that the third respondent had initially declined to approve the mining right based on environmental issues but later reviewed its own decision and recommended the approval of the mining right. They aver that this application pivots on whether the first and second respondents exercised their discretion properly and lawfully when they approved the mining right.

[23] The mining right was originally granted to Aquila Steel, the sixth respondent on the 25th April 2018 and was ceded to Motjoli Iron Ore the eleventh respondent the next day on the 26th April 2018. The property over which the mining right was granted is home to the Maletse Mountain and the Gatkop Cave. The Mountain is informally known as Madimatle, being a name given to it by the local community. It is a Setswana name meaning beautiful blood in English. The Manaiwa family have their ancestral graves located on the Madimatle Mountain.

[24] The first, third and sixth applicants have jointly submitted an application to SAHRA, eighth respondent, nominating the property to be graded and protected as a grade 1 national heritage site.

[25] The respondents on the other hand contend that the review application is directed against the two decisions to grant the mining right and subsequently transfer it. They are of the view that this is a rehash of the objections the applicants raised in various administrative adjudications why they think mining on the Madimatle Mountain would be a bad idea and should have upheld their objections.

[26] The respondents aver that the applicants have failed to appreciate that the standard on review is not whether the court would have made a different decision, but whether a reviewable irregularity had occurred.

[27] The respondents have raised several points *in limine* in their answering affidavits.

[28] The Fourth to seventh and eleven respondents (the Motjoli entities) raised a point *in limine* whether the court should entertain the application in circumstances where the applicants have not exercised their internal remedies.

[29] The Motjoli entities aver that the applicants seek that the decision of the first applicant (the minister) to grant a mining right to the fourth respondent be reviewed and set aside. They then further seek that the decision of the minister to transfer the mining right to the eleventh respondent be reviewed and set aside.

[30] The Motjoli entities contend that these decisions were not made by the minister but were rather made by the second respondent, the Director – General of the Department of Mineral Resources (DMR), by virtue of delegated powers conferred on him by the minister in terms of section 103 of MPRDA. Almost a year later, on the 19th April 2019, the applicants instituted the review application

without first exhausting their internal remedies in terms of Section 96(1) and (3) of the MPRDA as well as section 7(2)(a) and (c) of PAJA.

[31] The applicants aver in their founding affidavit that because of the delegation granted to the DG, the dubious decisions were actually those of the minister. They said that section 96 of MPRDA therefore does not apply to them because it does not provide for an appeal against the decisions of the minister.

[32] The respondents aver that this justification made by the applicants in their founding papers, is the real reason why they failed to lodge an appeal to the Minister.

[33] Section 96 of MPRDA deals with internal appeals :

"(1) *Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by an administrative decision in terms of this Act may appeal in the prescribed manner to –*

(a) the Director-General, if it is an administrative decision by a Regional Manager or an officer;

(b) The Minister, if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, (Act No 3 of 2000), apply to any court proceedings contemplated in this section."

[34] Further to the above section, Section 7 of the Promotion of Administrative Justice Act, (Act No 3 of 2000) (PAJA) states the procedure for judicial review as follows:

"(1) *Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later that 180 days after the date -*

(a) Subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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

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

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

……."

[35] In the matter of **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) para 44-45**, the Constitutional Court found that the appeal is available to the Minister from a decision of the Deputy Director- General exercising powers delegated by the minister under section 103 of MPRDA. The court held that the exercise of a delegated power is a decision by the delegate and not the delegator.

[36] Turning to the matter before me, it is common cause between the parties that the Director-General had delegated power conferred on him by the Minister in terms of Section 103 of MPRDA and the applicants abandoned this argument in their heads of argument.

[37] In the matter of **Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as *Amicus Curiae) [2009] ZACC23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC)***, the Constitutional Court emphasised the importance of internal remedies as follows:

"*Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanism, 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.*

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."

[38] The applicants further contend in their heads of argument that they had on numerous occasions requested not only the state respondents but also the Aquila Steel entities as well as the Motjoli entities, confirmation of the details pertaining to the mining right and the subsequent transfer thereof. In the replying affidavit the applicants state that they only got to know about the information per chance at a meeting convened by South African Heritage Resources Agency (SAHRA), the eight respondent. They further aver that the Aquila Steel entities as well as the Motjoli entities refused to provide them with the relevant information that would have enabled them to launch any appeal in terms of MPRDA. The applicants aver that the respondents did not assist by filling the Rule 53 record in a piecemeal fashion. The record was filed on three separate occasions being the 21st June 2019, 13th November 2019 and 4th September 2020. Only upon receipt of the final piece of the record did they have knowledge of the MEC's decision to grant Aquila Steel entities application

in terms of section 24G of NEMA. The applicants contend that given the time at which they knew about the decision, they could not have lodged an appeal against the MEC's decision. Similarly they aver that the contention of Aquila Steel and Motjoli entities that they failed to exhaust internal remedies in terms of section 96 of MPRDA is disingenuous as they withheld critical information from them.

[39] The respondents on the other hand aver that the argument is wrong in fact and in law, in that firstly, section 96 (1) does not require an applicant in an internal appeal to have a copy of the mining right or to have the full facts. All it requires is for an applicant to be aware of the administrative decision and then launch the appeal within 30 days of such awareness. The respondents further aver that to the extend **that** the applicants required further information regarding the decisions, they had remedies under the Promotion of Access to Information Act, No 2 of 2000.

[40] Secondly, the applicants' various versions are incorrect that they only "definitely" knew of the mining right when the Rule 53 record was filed, or at the earliest, when they were advised at a meeting with SAHRA on 27 February 2019, as stated in their heads of argument. The respondents aver that, the applicants' attorneys confirmed in a letter dated 26 February 2019 that the applicants obtained information from the Motjoli's website that Motjoli Iron Ore holds a mining right over the mining property, this letter was one of the annexures in the replying affidavit.

[41] Thirdly, the respondents aver that a mining right is a real right over a property which is registered in the mining titles registration office. Similar to the deeds

registry, the mining titles registration office is open for public scrutiny. Both the mining right and the cession of the mining right to Motjoli Iron Ore, were registered in the mining titles registration office.

[42] Fourthly, the respondents aver that in appropriate circumstances, the Minister may condone a failure to launch the internal appeal within the 30 day period set forth in section 96(1) of MPRDA. The applicants were aware that a decision had been made by the Director-General prior to launching the review, which is evidenced by the argument they made out in their founding papers that the decisions taken by the Director-General were actually, in law, those of the Minister.

[43] Lastly, the respondents aver that the applicants could not simply proceed to institute judicial review because they were out of time with the internal appeal in terms of MPRDA.

[44] In the context of mining law, the importance of exhausting internal remedies provided for in section 96 of the MPRDA was confirmed by the Constitutional Court in the matter of **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd 2014 (5) SA 138 (CC).** The court held at para 115 that it is compulsory for an aggrieved party to exhaust internal remedies before approaching a court for review unless such party is exempted from this duty by a competent court. At para 116 the court further held that:

"*A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to*

exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not distinguished."

[45] In my view the argument of the applicants cannot be sustained. Section 96(1) of MPRDA states that, any person whose rights or legitimate expectations have been adversely affected or who is aggrieved by any administrative decision may appeal within 30 days of becoming aware of such decision. The applicants became aware from the 26 February 2019 of the decisions of the Director-General which were granted on the 25th and 26th April 2018 respectively and elected not to launch an internal appeal against both decisions. The constitutional court in **Dengetenge supra**, has emphasised the importance of internal remedies in resolving complex factual issues so as to benefit from the structured involvement of a decision-maker with expertise in the field.

[46] Furthermore, the duty to exhaust internal remedies before launching a review application is not a mere formality which may be ignored by litigants. It is peremptory and failure to comply may render any judicial process premature with disastrous consequences for the affected parties.

[47] The applicants further contend in their heads of argument that Aquila did not have an environmental authorisation issued to them in terms of section 24G of the National Environmental Management Act No 107 of 1998 (NEMA) at the time they were granted the mining right, which rendered the granting of the mining right unlawful. They aver that Aquila had "*rightfully applied for an Environmental Authorisation and they were forewarned by the competent authority (LEDET) that they could not commence with the intended development of the mine until the Environmental Authorisation had been*

issued. The 2010 Environmental Impact Assessment Regulation , R543 and the listed activities and notices were always applicable. This informed the application that was made by Aquila Steel." (para 152-153 , 014-72)

[48] The applicants contend that what makes the situation worse insofar as the Environmental Authorisation is concerned , is that section 11 which deals with the transfer of mining rights states that transfer can only be granted in the event that the requirements of section 17 and 23 have been complied with. Section 23(1)(d) of MPRDA requires that there should be an Environmental Authorisation prior to the granting of a mining right and this was not the case when the transfer took place.

[49] The applicants further aver in their founding documents and heads of argument that when transfer took place, the One Environment System (OES) was in place and had been so for four years and it had to be complied with. The OES sought to streamline the application process so as to ensure that an applicant for mining rights did not have to comply with environmental processes controlled by separate governmental departments.

[50] The respondents on the other hand aver that the applicants' contention that an environmental authorisation had to be in place before the mining right could be issued and subsequently transferred is based on an incorrect appreciation of the transitional arrangements to the One Environmental System.

[51] To be able to unravel the conundrum between the parties it is prudent to explore the law before and after the One Environmental System came into force, being the 8th December 2014.

[52] The respondents contend that at the time when Aquila lodged its mining rights application (26 July 2013) two authorities regulated the activities related to mining that affected the environment, the Department of Mineral Resources (DMR) and the Department of Environmental Affairs. DMR which administers MPRDA had to assess the environmental impact that the mining activities would have on the mining property.

[53] Section 22 (4) of MPRDA reads as follows :

"If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) To conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39;(as it read before 8 December 2014) and

(b) To notify and consult with interested and affected parties within 180 days from the date of the notice. (as it read before 8 December 2014)

[54] DMR had to assess whether the mining by Aquila would not result in unacceptable pollution, ecological degradation or damage to the environment. In order to make the assessment, DMR had to consider Aquila's environmental impact assessment and environmental management programme. In terms of the MPRDA the Regional Manager had 14 days after accepting the application to notify Aquila to conduct an environmental impact assessment and to submit an environmental management programme for approval in terms of section 39 of MPRDA. The respondents aver that it is common cause between the parties the Regional Manager had notified Aquila on the 26th September 2013 to

conduct an assessment. This notification is contained in the Rule 53 Record, Volume 1.

[55] Section 39 of MPRDA has been repealed by section 33 of Act No 49 of 2008. However before 8 December 2014, the said section required that an applicant for a mining right conducts an environmental impact assessment and submit an environmental management programme within 180 days on which he or she is notified by the Regional Manager to do so. Section 39(3)(b) prescribed extensive requirements for the environmental impact assessment report and the environmental management programme, which included requirements to set out mitigation of any environmental harm or negative effects on the heritage estates.

[56] The respondents aver that Aquila Steel complied with the provisions of section 39 by providing an environmental management programme on the 10th October 2014 and further submitted a revised environmental management programme on the 11th July 2014.

[57] In terms of section 39(4), the Minister must approve an environmental management programme, if it complies with the requirements of the MPRDA, the applicant has made financial provision for the rehabilitation or management of negative environmental impacts and the applicant has the capacity or has provided for the capacity to rehabilitate and manage negative impacts on the environment. However although the mining right could be granted, it would not come into effect until the date on which the environmental management programme is approved .

[58] Section 39(5) permitted the Minister to call for additional information from the applicant and may direct that the environmental management programme or environmental management in question be adjusted in such a way that the Minister may require.

[59] Section 40 of MPRDA also repealed by 33 of Act No 49 of 2008,obliged the Minister to consult with any state department which administered any law relating to matters affecting the environment.

[60] Section 23 of the MPRDA deals with the granting and duration of a mining right:

"(1) *Subject to subsection (4), the Minister must grant a mining right if –*

(a) the mineral can be mined optimally in accordance with the mining work programme ;

(b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(c) the financing plan is compatible with the intended mining operation and the duration thereof;

(d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment (as it read before 8 December 2014)

(e) the applicant has provided for the prescribed social labour plan (as it read before 8 December 2014);

(f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act No 29 of 1996;

(g) the applicant is not in contravention of this Act; and

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

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26.

(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

(3) The Minister must, within 60 days of receipt of the application from the Regional Manager, refuse to grant a mining right if the application does not meet the requirements referred to in subsection (1). (as it read before 8 December 2014)

(4) If the Minister refuses a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.

(5) A mining right granted in terms of subsection (1) comes into effect on the effective date.

(6) A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions

and is valid for the period specified in the right, which period may not exceed 30 years.

[61] NEMA conferred extensive powers on the Department of Environmental Affairs to regulate activities which impacted on the environment. Up until 8th December 2014, section 24 of NEMA as read with the 2010 NEMA EIA Regulations regulated the position on activities which impacted on the environment. Section 24F(1)(a) of NEMA prohibited the commencement of listed activities in the absence of an environmental authorisation to do so.

[62] There is a significant debate whether before the advent of the One Environmental System on 8th December 2014, a holder of a prospecting or mining right was required to comply with both the extensive environmental requirements under MPRDA and also obtain and comply with environmental authorisations under NEMA or whether compliance with MPRDA's environmental provisions including obtaining the environmental management programme was sufficient. Different divisions of the High Court have come to different conclusions on the issue. **Global Environmental Trust v Tendele Coal Mining (Pty) Ltd [2019] 1 All SA176 (KZN) ; Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO [2017] 2 All SA 599 (WCC).**

[63] In the matter of **Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Centre for Environmental Rights and others as *amici curiae)[2021] 2 All SA 1 (SCA) para 1*,** the court in dismissing the appeal held that the appellants failed to plead essential facts demonstrating that Tendele was conducting listed activities that would require an environmental authorisation in

terms of NEMA. The court concluded that it was unnecessary to interpret the provisions of NEMA. The minority judgement concluded that holders of a prospecting or mining right had to comply with both MPRDA and NEMA, but it does not suggest that the grant of an environmental authorisation is a prerequisite for the grant of the mining right. Schippers JA held as follows at para 55, "*the requirement of an environmental authorisation does not take away or impair Tendele's mining right or EMP under the MPRDA.*"

[64] On 8th December 2014 the One Environmental System (OES) came into operation. The essence of the OES is that the prospecting, mining and exploration applications, production or activities incidental thereto would now be assessed under the requirements set by NEMA. Section 38A which replaced repealed sections 38 and 39 of MPRDA, states that the Minister of DMR is the responsible authority for implementing the environmental provisions of NEMA in respect to mining and that an environmental authorisation is a pre-condition to the granting of a mining right or permit, with the Minister responsible for the environment being the final appeal authority.

[65] In the matter of **Minister of Mineral Resources v Stern NO [2019] 3 All SA 684 (SCA) para 21**, the court described the changes as follows:

"*An agreement entered into between the Environment Minister, the Minerals Minister and the Minister responsible for water affairs, constituted a paradigm shift in respect of the management of environmental impacts of activities under the MPRD. The agreement was entitled the One Environment System. Its main import is set out in section 50A(2) of NEMA:*

'Agreement for the purpose of subsection (1) means the Agreement reached between the Minister, the Minister responsible for water affairs and the Minister responsible for mineral resources titled One Environmental System for the country with respect to mining, which entails –

(a) That all environmental related aspects would be regulated through one environmental system which is the principal Act and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act, 2002;

(b) That the Minister sets the regulatory framework and norms and standards, and that the Minister responsible for Mineral Resources will implement the provisions of the principal Act and the subordinate legislation as far as it relates to prospecting, exploration, mining or operations;

(c) That the Minister responsible for Mineral Resources will issue environmental authorisations in terms of the principal Act for prospecting, exploration, mining or operations, and that the Minister will be the appeal authority for these authorisations; and

(d) That the Minister, the Minister responsible for Mineral Resources and the Minister responsible for Water Affairs agree on fixed time frames for the consideration and issuing of the authorisations in their respective legislation and agree to synchronise the time frames.'

Thus, the implementation of the One Environmental System would establish NEMA as the only environmental statute and the Environment Minister as the 'lead' minister."

[66] The OES was brought into force when the National Environmental Management Laws Amendment Act, 2014 came into force on 2nd September 2014 and was only implemented on 8th December 2014. This means that mining applications submitted after 8th December 2014 are regulated by the amended MPRDA. Section 22 (1) of the amended MPRDA now provides that:

"*any person who wishes to apply to the Minister for a mining right must simultaneously apply for an environmental authorisation".* Furthermore, [section 22(4)(a) of MPRDA now provides that, should the Regional Manager accept a mining application, the applicant must be notified to:

"*submit the relevant environmental reports, as required in terms of Chapter 5 of the National Environmental Management Act, 1998, within 180 days from date of the notice.*" In the past this section required submission of the environmental management programme under the now repealed section 39 of The MPRDA.

[67] Section 23 (1) (d) of the amended MPRDA now provides that the Minister must only grant the mining right if "*it will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued."*

[68] The introduction of the OES made provision for transitional arrangements for a seamless and efficient management of transactions that were already in the pipeline. These transitional arrangements are contained in both the MPRDA Amendment Act, 2008 and the NEMA Amendment Act , 2008.

[69] Section 12(7) of NEMA Amendment Act, 2008, which had been introduced into that Act by section 26 of the National Environmental Management Laws Amendment Act, 25 of 2015 with effect from 2nd June 2014 reads as follows:

> "*An application for a right or permit in relation to prospecting, exploration, mining or production in terms of the Mineral and Petroleum Resources Development Act, 2002 that is pending on the date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, must be dispensed of in terms of that Act as if that Act had not been amended.*"

[70] The date referred to in section 14(2)(b) of the National Environmental Management Amendment Act, 2008, is accepted as being the 8th December 2014. This line of reasoning was also adopted by the courts in the matters of **Mineral Sands supra.**

[71] Similarly a transitional provision was included in the 2014 Environmental Impact Assessment Regulations, which came into effect on 4th December 2014. Regulation 54(1) reads as follows :

> "*An application submitted in terms of the previous MPRDA regulations and which is pending when these regulations take effect must despite the repeal of those regulations be dispensed with in terms of those previous MPRDA regulations as if those previous MPRDA regulations were not repealed.*"

[72] The Interpretation Act, 33 of 1933 also provides assistance on this issue. Section 12(2)(c) provides that

> *"Where a law repeals any other law, then unless the contrary intention appears , the repeal shall not … affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or … affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced … as if the repealing law had not been passed.*

[73] Section 2(2) applies when one law repeals another. The Constitutional Court in the matter of **Chagi and Others v Special Investigation Unit 2009 (2) SA 1 (CC) para 31** has described the purpose of this section as controlling "*the consequences of the repeal of a law so as to ensure that the dislocation and unfairness that might follow upon the repeal would, if not altogether avoided, be kept to an absolute minimum."* The court further held at para 32, that section 12(2)(c) is concerned with amongst other things, rights accrued and liabilities incurred under the repealed law. It specifically provided that these rights and liabilities remain unaffected by the repeal of the law. In other words, they must be dealt with as if the law concerned had not been repealed.

[74] Turning to the matter before me the applicants contend that the granting of the mining right to Aquila Steel was unlawful in that it needed to be assessed in terms of the One Environmental System which came into force on the 8th December 2014.

[75] The respondents aver in the answering affidavit of the Motjoli entities that Aquila Steel's mining application had already been submitted and accepted by DMR

on 26th July 2013. The One Environmental System(OES) only came into operation on the 8th December 2014. The assessment of the mining application therefore could not be done in terms of the OES, the laws that were applicable and in force at the time of the mining application and acceptance by DMR are the ones that must be applied.

[76] It is settled law that applications which were pending when an amending enactment was implemented should be decided without regard to such enactment. At the time that the One Environmental System came into operation, Aquila Steel's mining application had already been submitted and accepted by the Regional Manager. The Regional Manager had already notified the Aquila to submit its environmental management programme.

[77] The MPRDA prior to the OES came into operation, did not require that the environmental authorisation had to be approved before an applicant could be granted a mining right. The requirement was that an environmental management programme had to be approved. Taking into consideration the MPRDA prior to the advent of the OES, the Interpretation Act, the Constitutional Court and Supreme Court of Appeal cases of **Tendele, Stern and Chagi**, the date the mining right was submitted and accepted, the Director-General was correct and within the law in assessing the mining application without taking into consideration the amended MPRDA and the OES. Section 23(1)(d) prior the OES, only provided that the Minister must grant a mining right if the mining will not result in unacceptable pollution, ecological degradation or damage to the environment. Furthermore the grant of the mining right in issue was made subject to the condition that Aquila Steel should comply with other laws prior to commencing with any mining activities.

[78] The respondents further aver that the applicants have not alleged any deficiencies in regard to the Regional Manager's decision to approve Aquila Steel's environmental management programme. The applicants have not challenged the decision to approve the environmental management programme in this review application. In my view this decision remains valid and binding until it is reviewed and set aside in a legally proper forum. This principle was clearly established in the **Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)** and further crystallised by the Constitutional court in the matter of **MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2016 (1) SA 481 (CC).**

[79] The applicants further contend that the Director-General failed to exercise his discretion properly, acted irrationally and unlawfully when he approved the mining right application which should have been refused because :

(a) Aquila Steel failed to consult adequately;

(b) REMDEC unlawfully reviewed and reversed its decision not to recommend approval of Aquila Steel's environmental management programme;

(c) The Director-General failed to consider the environmental and cultural significance of the mining property.

[80] The applicants in their heads of argument aver that :

(a) " *The volte face by the third respondent is inexplicable, unscientific and clearly nonsensical. It is submitted that the volte face was arbitrary and irrational. It also points to the fact that the ultimate decision to approve*

the mining application of Aquila Steel was equally irrational, biased and influenced by an error in law." (para 132, page 014-60)

(b) *" The land is not suitable for mining from an ecological, environmental, cultural and heritage perspective. Therefore, the decision to grant the mining right is irrational and unlawful, was merely influenced by an error in law and was not rationally connected to the purpose of the MPRDA, NEMA and the Constitution." . (* para 148, page 014-67)

(c) *" The decision is also not rationally connected to the information before the first and/or second and/or third respondents. These respondents ought to have realised that mining is not compatible with the properties. Therefore, on this score, the granting of the mining right falls to be reviewed and set aside." (* para 14, page 014-67)

[81] Our courts have set a high bar for a rationality review. Rationality basically means that a decision must be supported by the evidence and information before the administrator, as well as the reason given to it. It must be objectively capable of furthering the purpose for which the power was given and the purpose for which the decision was purportedly taken. (Prof C Hoexter : Administrative Law in South Africa, 2nd Ed : at p 340.)

[82] However, under PAJA, a low bar has been set for the rationality test. In the matter of **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims 2015 (3) BC;R 268 (CC) para 78**, the Constitutional Court explained the rationality test as follows :

" *Before considering the factual basis for the applicant's contentions, it is necessary to sound a note of caution. Our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of administrative decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts. And this is particularly so for rationality review under PAJA. Hoexter notes that*

> *"[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection - not a perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision … substantively incorrect."*

[83] The Constitutional Court has confirmed that a low threshold exists in the case of rationality outside of PAJA.

(a) The court held in the matter of **New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC) para**, that the rationality review is a "*differential" standard of review.*

(b) In the matter of **Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC) para 42**, the court held that the rationality standard " *by its very nature prescribes the lowest possible threshold".*

(c) In the matter of **Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 90**, the court held that a finding of irrationality is likely to be made rarely. A court cannot in the name of irrationality review, strike down a law merely because it disagrees with it or considers that it is inappropriate or unreasonable.

(d) In the matter of **Ronald Bobroff & Partners v De La Guerre 2014 (3) SA 134 (CC)**, the court held that rationality is " *a less stringent test than reasonableness".*

[84] Prior to the advent of the One Environmental System, the DMR was the only authority tasked with the assessment and approval of environmental impact assessment reports and environmental management programmes. In my view the Director-General and the Regional Manager are tasked by statute with making decisions on technical issues relating to mining and the environment and are possessed with the necessary specialised expertise to exercise their statutory obligations.

[85] The Supreme Court of Appeal has emphasised that the deference owed to the decisions of administrative bodies is important in cases in which the decision-maker has specialised expertise in a specific field. In the matter of **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another (32/2003, 40/2003) [2003] 2 All SA 616 (SCA) (16 May 2003) at para 53**, the court held that "*Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to*

have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds."

[86] This principle was crystalised by the Constitutional Court in the matter of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at para 48**, the court held " *Judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."*

[87] In the matter of **International Trade Administration Alliance Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) para 95**, the court held that " *Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power function by making a decision of their preference. That would frustrate the balance of power implied in the principle of the separation of powers. This primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the*

concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[88] Turning to the matter before me, the applicants require the court to find that the mining envisaged by the Motjoli entities will result in unacceptable pollution, ecological degradation or damage to the environment. My view is that this matter is highly technical and the court does not have the necessary skill and knowledge to determine the impact the mining would have on the environment. Review applications are not meant to determine whether a decision taken by the executive is correct on not, they are meant to determine whether there exists a reviewable irregularity by the executive who made the decision. The court must defer to the decisions of the second respondent (Director-General) and the third respondent (Regional Manager, REMDEC LIMPOPO REGION).

[89] The applicants further contend that Aquila Steel did not adequately consult with interested and affected persons. In their heads of argument they state that "*No consultation with any of abovementioned nominators [sic] prior to, during and subsequent to the first and second decisions took place."*

[90] The respondents aver in their heads of argument that they have adequately consulted with the interested parties prior to the granting of the mining right and the subsequent consent to the transfer thereof.

[91] Section 10 of the MPRDA provides that, the Regional Manager must within 14 days of accepting a mining right application, make known that an application for a mining right has been received in respect of a particular piece of land and call upon interested and affected persons to submit their comments regarding

the said application within 30 days from the date of the notice. If there is an objection to the granting of the mining right, the Regional Manager must refer the objection to REMDEC to consider the objections and to advise the Minister accordingly. The Motjoli entities aver in their answering affidavit that in the Rule 53 Record, the requirement in terms of section 10 was complied with by the placement of a notice of the acceptance of Aquila Steel's mining right application on the notice board and same was forwarded to the Magistrate's court in the Magisterial District of Thabazimbi. The notice in terms of section 10 is dated the 26th September 2013, gave details of the mining property and stated that comments in respect of the application should be sent in writing to the Regional Manager within 30 days of the date of the notice. The Motjoli entities in their answering affidavit aver that, in the Rule 53 Record there is evidence of letters from EB Nieuwoudt on behalf of the Rooiberg Bewaria addressed to the Regional Manager commenting on Aquila's mining right application. These letters are proof that the process in terms of section 10 was complied with. The applicants have not disputed this averment.

[92] Section 22 (4) of MPRDA provided, at the relevant time, that if the Regional Manager accepts an application for mining, the Regional Manager must, within 14 days, notify the applicant:

(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and

(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

[93] The Motjoli entities aver that the Regional Manager, in a letter dated the 26th September 2013 informed Aquila Steel that its mining right application had been accepted and required it to conduct its environmental impact assessment within 180 days from the date of the notice, that is by 26th March 2014. Aquila Steel also had to notify and consult with interested and affected parties. Following Aquila Steel's submission of its final environmental management programme on 11 July 2014, the applicants' attorneys lodged an objection with both the Regional Manager and Aquila Steel objecting to the mining right application as well as the environmental management programme.

[94] Regulations 50 and 51 of MPRDA prescribed the requirements for the environmental impact assessment report and the environmental management programme. Regulation 50(f) required the inclusion in the environmental impact assessment report of the details of the engagement process and an indication of how the issues raised by the interested parties and affected persons have been addressed. The Motjoli entities set out in their answering affidavit that Aquila Steel had complied with the Regulations 50 and 51. They aver that the applicants' allegations regarding insufficient consultation have no merit.

(a) The applicants allege in their supplementary affidavit that the landowners of surrounding properties were not provided with sufficient information, did not have sight of the environmental management programme before it was submitted and were not adequately consulted;

(b) The applicants further allege in in their replying affidavit that whatever public participation process carried out by Aquila Steel was not with regard to its mining right application;

(c) The applicants also allege that the Madimatle community was not properly consulted, most importantly in respect of the ancestral graves and that the Rule 53 record does not contain any evidence of communication with other organisations that would be affected by the mining.

[95] The Motjoli entities gave a detailed account of the consultation processes Aquila Steel engaged in their answering affidavit. They aver that on the 2nd October 2012, Aquila Steel informed interested and affected parties that it holds a prospecting right over the property and invited interested and affected parties to attend a public participation meeting on 10th November 2012 to discuss amongst other things the way forward regarding the current cultural use of the caves. They further aver that Aquila Steel conducted a preliminary environmental assessment and submitted its scoping report and environmental management programme to DMR on the 10th October 2013 for approval. DMR required Aquila Steel to revise the original environmental management programme, which was done on the 11th July 2014 and was approved on 18th July 2014.

[96] Aquila Steel had made an application in terms of section 22(4) of MPRDA, for an application for a mining right along with a water use licence, water management licence and environmental authorisation. Pursuant to a notice received from the Regional Manager, Aquila Steel sent a notice to interested

and affected parties of its application on the 15th October 2013. Aquila Steel compiled an extensive list of interested parties and affected parties and took extensive steps to bring the 15th October 2013 notice to the attention of all interested and affected parties by mailing it to 64 individuals, publishing it as a newspaper advertisement, issuing site notices for public viewing, to inform interested and affected parties that the mining right application had been lodged along with a water use licence, water management licence and environmental authorisation. The notice communicated the deadlines for specific tasks set by DMR, which included the submission of an environmental impact assessment report and an environmental management programme. It also provided details on how Aquila Steel could be contacted for any queries or comments in relation to the mining right application. On 12 November 2013, the Regional Manager requested Aquila Steel to submit a Heritage Impact Assessment Report as part of its environmental management programme that would show how no harm would be caused to the graves.

[97] On the 1st February 2014, Aquila Steel held the first of the public meetings for purposes of engaging with interested and affected parties, and 40 individuals honoured the invitation. On the 29th March 2014, interviews were held with traditional healers regarding their concerns with the envisaged mining activities. On the 2nd April 2014, the Regional Manager sent letters to the Department of Water Affairs, Department of Economic Development and Tourism, Department of Agriculture and the Principal Inspector: Limpopo Region, attaching a copy of Aquila Steel's environmental management programme for their comments as required by section 40 of the pre-amended MPRDA.

[98] Aquila Steel had appointed Shangoni Management Services (Pty) Ltd to act as the environmental assessment practitioner, whose responsibility would be to compile the environmental impact assessment report and environmental management programme. On the 6th May 2014, Shangoni sent a letter to the interested and affected parties indicating that Aquila Steel would distribute monthly progress reports, including a table which indicated the public participation meetings still to be held, and proceeded to do so.

[99] The Regional Manager sent a letter to Aquila Steel on the 12th May 2014 setting out shortcomings of the environmental management programme and requested Aquila Steel to provide further information in terms of section 39(5) of MPRDA. The issues raised were the following :

(a) finalisation of pending specialised studies;

(b) procedures relating to emergencies and proposed remediation;

(c) measures to mitigate significant impacts of proposed activities and

(d) sufficient proof of public participation following consultation and full public participation with interested and affected parties.

Aquila Steel responded to the Regional Manager by requesting an extension in respect of resubmitting its amended environmental management programme as it would be necessary to hold further consultations with the community .

[100] The Motjoli entities aver in their answering affidavit that Aquila Steel convened a public participation meeting on the 31st May 2014, notice of this meeting having been widely distributed via emails to various individuals, newspaper advertisements and posted at site notices. Among those individuals who

attended the meeting were representatives from the Calfshelf entities and representatives from the applicants' attorneys. Two further public participation meetings were held on 12th June 2014, one at Itireleng Secondary School in Rooiberg, Thabazimbi (aimed at the Rooiberg community) and the other at Regorogile Community Hall , Regorogile, Thabazimbi(aimed at the Regorogile community). According to the registers various members of the Madimatle community attended and the presentations were made in both English and Setswana languages. The Rule 53 Record contains registers and minutes of this meeting and all the other meetings. On the 12th June 2014 an additional meeting was held with the traditional healers at the cave. On 11 July 2014 Aquila Steel submitted an amended environmental management programme to the Regional Manager which contained a table titled "*interested and affected parties. Response Table* " running into 70 pages and captured the comments and responses received from interested and affected parties until June 2014 on the mining project.

[101] On 30 August 2014 Aquila Steel held a further public participation meeting at the New Way Christian Church in Thabazimbi. In their answering Affidavit the Motjoli entities aver that the purpose of the meeting was to describe the process followed to date with regard to the proposed mining project as well as the way forward, and to provide a platform for interested and affected persons to raise comments and questions. From the minutes of the meeting, it appears that there were no questions on the mountain, the cave or the cultural heritage.

[102] On the 26th September 2014, the Regional Manager sent a letter to Aquila Steel to address the comment on the environmental management programme regarding the need for full public participation with the closest descendants of

the deceased buried in the graves. Aquila Steel engaged a consultant, PGS Heritage, to assist with the consultation with the descendants. On the 13th October 2014, representatives from Aquila Steel together with PGS Heritage, met with Mr Thomas Motloki who is the eldest member of the Motloki family at his home in Thabazimbi. The consultation centred around the issue of ancestral graves which are located on the mining property. Amongst other things discussed at the meeting, was the socio-cultural significance of the cave and the mountain. Mr Motloki said that the cave was used for ancestral rituals, mostly by the traditional healers. He knew of the natural springs on top of the mountain which he suggested were not used for any cultural practices or rituals. According to Mr Motloki the cultural practices or rituals at the cave started in the late 1970's.

[103] Furthermore, Aquila Steel held community meetings on the 4th November 2014 at the Regorogile Community Hall and Itireleng Secondary School, aimed at the Regorogile and Rooiberg communities as well as the farmworkers living and working on the farms in the surrounding areas. The Motjoli entities gave details of the minutes of these meetings in their answering affidavit, and the minutes clearly state that :

(a) the local residents wanted to ensure that they were part of the employment process;

(b) no questions were raised about the cultural and heritage value of the mountain, the only concern raised was with regard to the cave and the graves and

(c) the community saw benefits in the project as it promised job creation.

[104] On the 7th November 2014, PGS Heritage published its report on the consultative process with the descendants of the deceased buried in the graves on the mountain. The report addressed the consultation process carried out in October 2014 and recommended that the consultative process should only be seen as completed when the parties have reached a settlement on either the conservation of the graves or their relocation. Aquila Steel's representatives and the descendants met on the 11th December 2011, at which meeting Aquila Steel presented a proposed agreement regarding the conservation or relocation of the graves. There was no agreement reached on that day however the descendants made an undertaking to revert to Aquila Steel on the proposed agreement.

[105] The Constitutional Court in the matter of **Bengwenyama, supra,** made it clear that, in order to assess the adequacy of the public participation process, one needs to assess compliance with the applicable provisions of MPRDA. Taking into consideration the vast evidence of the extensive consultative processes that Aquila Steel engaged in with various interested and affected parties to the envisaged mining activities, I am convinced that there was more than adequate consultation that was conducted. The appellants' contestation that there was no consultation with interested and affected parties stands to be rejected by the court.

[106] Section 10 of MPRDA further requires that if a person objects to the granting of a mining right, the Regional Manager must refer the objection to REMDEC to

consider the objections and to advise the Minister accordingly thereon. The Regional Manager had received objections from the applicants on the 25 March 2015 which stated that Aquila Steel had flouted environmental laws in breach of section 23(1)(g) of the MPRDA, and for this reason alone the mining right ought to have been refused. They further indicated that that the mining would lead to an irremediable disturbance of sensitive ecosystems including endangered and threatened fauna and flora. The objections went on further to state that :

(a) the unlawful blasting and clearing activities during the unlawful construction of the road had already had adverse impact on the bat population and that mining activities would exacerbate that negative impact, as well as other endangered species;

(b) there were graves on the farm that Aquila Steel had failed to disclose in the EMP;

(c) there is a dolomite cave (Gatkop) and the Madimatle Mountain has spiritual and religious significance, which is being used for religious purposes and Aquila Steel failed to mention that in its EMP.

[107] The objections were forwarded to the third respondent (REMDEC), and after considering the objections took a decision on the 7th May 2015 to uphold the applicants' objection on the basis that Aquila Steel had failed to comply with Regulation 50(f) of the MPRDA as it had failed to submit proof and results of consultations with close descendants of the people buried in the graves. The applicants contend that REMDEC's decision further indicates that the ninth

respondent had objected to the application based on the fact that Aquila had failed to apply for an Environmental Authorisation authorising the listed activities in the EIA Regulations of 2010. REMDEC further decided on 28th July 2015 , that the mountain and the caves had been provisionally protected as a Grade 1 site by the eight respondent. The applicant (Aquila Steel), violated the terms of the prospecting right and the environmental authorisation, the objection should be upheld and the mining right should be refused.

[108] The applicants aver that these decisions were subsequently overturned on the 17th April 2018, which led to the mining right being approved. The applicants further aver that the geotechnical report commissioned around September 2020, militates against mining in the area having held that the Madimatle Mountain as a whole possesses heritage significance. The geotechnical report states that the mountain and the cave encompass a unique cultural landscape that should be protected. The applicants contend that the court has to take into consideration their constitutional rights including other healers, whose spirituality is closely connected to the mountain and the cave.

[109] The applicants rely on the matter of **Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (6) SA 4 (CC)**, where the court stated that:

"[44] *What is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable "economic and social development". Economic and social development is essential to the well-being of human beings. This court has recognised that socio-economic*

rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution. But the development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked. …"

[110] The court went on to state the following:

"[60] One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management – Bathopele. It requires all developments to be socially, economically and environmentally sustainable. Significantly for the present case, it requires that the social, economic and environmental impact of a proposed development be "considered , assessed and evaluated" and that any decision made "must be appropriate in the light of the consideration and assessment". This is understood by the requirement that the decision must take into account the interests, needs and values of all interested persons."

[61] Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development

which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions which will achieve a balance between environmental and socio-economic development considerations through the concept of sustainable development."

[111] The respondents aver that REMDEC does not take decisions. It advices the Minister or in this case, the Director-General and the Regional Manager and makes recommendations. REMDEC cannot approve or refuse a mining right neither can it review its own decisions and it can also not be *functus officio.* The doctrine of *functus officio* only applies to final decisions of courts and other decision-makers, including administrators, and only once those final decisions have been communicated to the public. This principle was developed in the matter of **Firestone South Africa (Pty) Ltd v Genturico AG 1977 (4) SA 298 at 306 F-H**, confirmed by the Supreme Court of Appeal in the matter of **Retail Motor Industry Organisation v Minister of Water Affairs 2014 (3) SA 251 (SCA) paras 22-25** and crystallised by the Constitutional Court in the matter of **President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC).**

[112] Our courts have on numerous occasions held that the decision of an administrative decision-maker cannot be taken on review because they did not follow the advice or recommendation of a body tasked with an advisory function. **Association of Regional Magistrates of South Africa v President of the Republic of South Africa 2013 (7) BCLR 762 (CC)**.

[113] Various objections were lodged against Aquila Steel's application for a mining right in terms of section 10(2) of the MPRDA including objections by the applicants as indicated above in the judgement. The respondents aver that in terms of the Rule 53 Record, REMDEC held a meeting on the 13th November 2014 wherein they determined that "*since SAHRA has issued a provisional protection on both the Cave and the Mountain and [Aquila Steel had] violated the terms of the prospecting right and environmental authorisation ... the objection should be upheld until such time SAHRA advises otherwise.*" The respondents aver that the applicants in their supplementary affidavit incorrectly state that REMDEC recorded these matters. The DMR's sub-directorate Environmental Management Section recorded in August 2015 that REMDEC had, recommended refusal of the grant. They further recorded on 17th April 2018 a recommendation to the Regional Manager that Aquila Steel's Environmental Management Programme be considered.

[114] The respondents aver that by the time that the DMR's sub-directorate Environmental Management Section reconsidered its recommendation on the approval of Aquila Steel's Environmental Management Programme, the underlying nature of REMDEC's concerns had disappeared. REMDEC's finding in respect of Aquila's violation of the terms of its prospecting right and environmental authorisation had been deprived of practical significance and rendered the matter purely academic. Aquila Steel had addressed and corrected the violation through its application for retrospective authorisation of the commencement and continuation of the 2010 NEMA listed activities on 20 June 2014 and a subsequent amended environmental assessment report on

31 October 2014. The environmental authorisation was issued by LEDET on 20 November 2014 in terms of section 24G(2)(b) of NEMA.

[115] REMDEC's finding that the objection should be upheld was also based upon the fact that SAHRA had issued a provisional protection in respect of the cave and the mountain. This provisional protection had lapsed on 12th December 2014 and was also successfully appealed by Aquila Steel before the SAHRA Council on 16 May 2017. The matter was referred back to SAHRA for the process to commence afresh. As a result the matter has been referred to the Limpopo Heritage Agency as SAHRA found that the mining property was not of Grade 1 significance.

[116] The applicants raised various complaints regarding what they perceive to be irrational and arbitrary manner in which the mining right was granted. They contend that the cultural and religious significance of the mountain as well as the environmental effects of the mining on the property were not duly considered by the Director-General. He had the unenviable task of finding an adequate balance between the competing considerations of protection of the environment and the cultural and heritage resources, on the one hand, and economic development, equitable access to the economy and employment on the other hand. Acting on the advice of various functionaries, the Director-General determined that the balance may be achieved by granting the mining right subject to conditions to ensure sustainable development: excluding from the mining right various sensitive areas, including the cave and the areas on which there are graves and subject to extensive mitigation and rehabilitation of the environment as described in the environmental management programme. In my view there is extensive evidence that the Director-General had

considered all the available body of facts and information brought before him and his decision is supported by such evidence. The decision need not be the best or most efficient solution or one that the court or the applicants would prefer. I am not convinced that the applicants have succeeded in showing any reviewable irregularities on the part of the Director-General with regard to the decision he took.

[117] The applicants contend in their founding affidavit and heads of argument that the cave and the Madimatle mountain house the spirits of the local communities' ancestors whose lives were lost during the Mfecane wars against the Afrikaners. This belief makes the mining property a sacred historical, spiritual, cultural and religious heritage site for the applicants and the local community. In religious circles it is understood and accepted that the Madimatle mountain and the cave are geographically and spiritually linked. So steadfast was the belief and recognition of the significance of the Madimatle mountain and the cave that on 29th July 2014, the Traditional Healers Organisation , Mrs Masuku, KARA and the Calfshelf entities made application to SAHRA for provisional protection of the Madimatle mountain and the cave. They also made an application to declare the site a national Grade 1 site in terms of section 29 of NHRA.

[118] During November 2014, the Madimatle mountain and the cave were provisionally protected. Aquila Steel appealed the decision by SAHRA on the basis that the decision to grant the provisional protection was granted without first giving it an opportunity to make representations. The Aquila and Motjoli entities deny the assertion by the applicants on the basis of expert heritage,

historical and anthropological findings by various experts who found that the Madimatle mountain has no special spiritual or cultural significance.

[119] On 1st July 2015, Aquila Steel submitted written objections to the decision taken by SAHRA to provisionally protect the property as a Grade 1 heritage site. On 16th May 2017 the appeal was granted, directing that the process followed by SAHRA in providing provisional protection should start afresh as Aquila Steel was not afforded an opportunity to participate in the process and make representations to SAHRA prior to the decision to provisionally protect the site being made.

[120] It is my view that based on the principles set out above in the judgement, the court ought not to intrude into the sphere of the competent decision-maker, in this case SAHRA.

[121] The applicants in their heads of argument made allegations that the decisions of DMR were tainted by bias. The basis of these statements is the fact that Mr Moloi, the executive chairman of Motjoli Resources, is a former deputy director-general of DMR. The respondents aver that there is no factual basis or evidence for the insinuations of corruption or any other impropriety. In the matter of **Rustenburg Platinum Mines Limited v Regional Manager, Limpopo Region, DMR 2020 JDR 1470 (GP) paras 58-59**, the court held that allegations of bad faith must be supported by convincing evidence. In the matter before me, there is no evidence put before court of bias, ulterior purpose or bad faith.

[122] On 26th April 2018, the Director-General, by virtue of the powers delegated to him by the Minister in terms of section 103 of MPRDA, consented to the transfer of the mining right from Aquila Steel to Motjoli Iron Ore in terms of section 11 of

MPRDA. On 3rd August 2018, Aquila Steel ceded, assigned and transferred the rights and obligations with regard to the mining right to Motjoli Iron Ore. The deed of cession was registered in the Mineral and Petroleum Titles Registration Office on 8th November 2018.

[123] The applicants' contestation against the consent to the transfer of the mining right, is that the consent could not be granted before Motjoli Iron Ore had obtained the environmental authorisation. It is my view that this contestation is similar to the applicants' case against the grant of the mining right to Aquila Steel, which is based upon a misreading of the transitional provisions of MPRDA, Interpretation Act and NEMA as explicitly explained above in the judgement.

[124] Section 11 (1) and (2) of MPRDA specifically deal with the transferability and encumbrances of prospecting rights and mining rights.

Section 11 (1) "*A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.*

(2) *The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assign or the person to whom the right will be alienated or disposed of –*

(a) *is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and*

(b) *satisfies the requirements contemplated in section 17 or 23, as the case may be."*

[125] Turning to the matter before me, when Aquila Steel applied for the mining right, section 23(1) of MPRDA provided that for the grant of a mining right, "*the mining will not result in unacceptable pollution, ecological degradation or damage to the environment".* That issue was determined through the approval of the environmental management programme.

[126] However, by the time the Director-General consented to the transfer of the mining right to Motjoli Iron Ore, section 23(1)(d) provided as a condition for the grant of a mining right that "*the mining will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued".* The applicants contend that if a mining right was granted, that right could not be transferred because additional grant conditions were added by way of legislative amendments which were not applicable to the initial grant.

[127] On a proper reading of section 11(2) of MPRDA, the requirements are specific to attributes relating to the transferee of the right. The requirement focuses on whether the transferee of the mining right is capable of complying with the requirements of the mining right and whether the transferee meets the requirements set out in section 23 for holders of mineral rights. These

requirements include whether "*the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally,* whether "*the applicant has provided for the prescribed social and labour plan"* whether "*the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996)* and whether "*the applicant is not in contravention of any provision of this Act."*

[128] It is settled law that when a transferor alienates his/her property, whether corporeal or incorporeal, the transferee acquires all right, title and interest that the transferor had prior to the alienation. The transferee in the case of a transfer of a mining right does not have to be assessed afresh to determine whether they comply in terms of section 23 of MPRDA as those assessments were done when the mining right was initially granted to the transferor. Whatever rights and obligations that the transferor has will be transferred to the transferee on alienation of the mining right. In the matter of **Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd 2011 (6) SA 96 (GSJ) para 38**, the court held that the purpose of the consent requirement in section 11(1) is to ensure that the applicant under section 11 is capable of stepping into the shoes of the previous right holder and can "*sustain compliance with the requirements of section 23 of MPRDA."* The purpose is not to revisit the correctness of granting the mining right. Furthermore section 4(1) of MPRDA provides that "*When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects."*

[129] It is my respectful view that the applicants' interpretation of section 11,read with section 23 of MPRDA would place undue burden on the transferee and DMR

to repeat the whole application process for a mining right and must be rejected by the court.

[130] The applicants further seek an order declaring that the Waterberg District Municipality and the Mopani District Municipality are bio-critical and biodiversity regions not suitable for mining and mining related activities in accordance with the Provincial Gazette No 2966 published on 4th January 2019, as depicted in a map annexed hereto marked Annexure "(A), and also so declared by the Tenth Respondent.

[131] Section 21(1)(c) of the Superior Courts Act , 10 of 2013 governs the power of superior court to grant declaratory relief. It provides that :

"(1) *A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –*

...

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

[132] From a proper reading of the section it is clear that the exercise of the court's jurisdiction follows a two-legged enquiry : (a) the court must first determine and be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation and if so, (b) the court must decide whether the

case is a proper one for the exercise of its discretion. **Minister of Finance v Oakbay Investments (Pty) Ltd 2018 (3) SA 515 (GP) para 55.**

[133] The respondents aver that even if the applicants meet the first leg, they fail on the second. The factors taken into consideration under the second leg include

(a) the existence or absence of a dispute ;

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

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

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

(e) the practical significance of the order and

(f) the availability of other remedies.

[134] Section 40 of the National Environmental Management : Biodiversity Act 10 of 2004 (MEMBA), the MEC for Environmental Affairs in a Province may by notice in a Gazette determine a geographic region as a bio-region for the purposes of MEMBA if that region contains whole or several nested ecosystems and is characterised by its land forms, vegetation cover, human culture and history and publish a plan for the management of the biodiversity and the components of the biodiversity region.

[135] Section 41 states that:

"*A bioregional plan must –*

(a) Contain measure for the effective management of biodiversity and the components of biodiversity in the region;

(b) Provide for monitoring of the plan; and

(c) Be consistent with –

(i) The Act

(ii) The national environment management principles;

(iii) The national biodiversity framework; and

(iv) Any relevant international agreements binding on the Republic."

[136] The declaratory order sought by the applicants is based upon a determination by the MEC for Economic Development, Environment and Tourism, Limpopo. The applicants contend that the effect of the determination is that no mining activities should be conducted or permitted in the Waterberg Municipality.

[137] The determination does not prohibit mining. The executive summary of the bioregional plan published for these regions recognises that agriculture, wildlife and mining are important economic sectors in the region, with plans underway to expand the mining industry as part of the strategic integrated project along the Northern Mineral belt. The purpose of the bioregional plan according to the determination is to (i) *"to inform land-use planning, environmental assessments and authorisations … by a range if sectors whose policies and decisions impact on biodiversity* and (ii) to be used as "*a useful tool for addressing the need to take biodiversity into account in land-use planning and decision-making, in order to promote sustainable development.*

[138] It is my view that NEMBA does not create the power to declare an area a protected area. Similarly it does not create a power to authorise or prohibit

mining in such an area. Those powers flow from the Protected Areas Act, 57 of 2003, specifically section 48(2) thereof. Any declaration that an area is unsuitable for mining and mining related activities is governed by specific legislation administered by the Minister of Environmental Affairs within whose competence such declarations fall and for this court to make such declarations, would be an intrusion into the areas of competence of the Minister of Environmental Affairs. It would amount to the court usurping the powers of the Executive and infringing upon the constitutional democratic principle of the separation of powers.

[139] Furthermore, the declarator sought relates to both the Waterberg and the Mopani District Municipalities. Each of these municipalities comprises multiple local municipalities. For instance, the Waterberg District Municipality includes Bela-Bela Local Municipality, Lephalale Local Municipality, Modimolle-Mookgophong Local Municipality, Mogalakwena Local Municipality and Thabazimbi Local Municipality. Most importantly none of these municipalities have been cited in the application. The mining property is situated in the Waterberg District Municipality and does not concern the Mopani District Municipality. There is no basis in law for the court to consider granting any relief in respect of Mopani District Municipality as no persons whose rights or interests are based in the Mopani District Municipality have been cited in this application.

[140] With regard to the Waterberg District Municipality, the declarator is simply untenable. There are various established mines within this district and should this area be suddenly declared unsuitable for mining, it would cause

unimaginable confusion and irreparable destruction to the mining industry, the economy and the entire country.

[141] It is trite that a court should not make an order that may prejudice the rights of parties before it. **Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 651**. In this matter the declaratory relief sought by the applicants, would materially affect the rights of, many third parties who have not been cited, among others, different Organs of state, municipalities, businesses and communities in the areas mentioned in the declarator.

[142] Motjoli Iron Ore's mining right is subject to them complying with other relevant laws to enable them to conduct certain listed activities. They may need to apply for other authorisations to engage in various activities ancillary to mining. The applicants will have an opportunity should they elect to do so, to raise objections against those applications.

[143] With regard to the condonation for the filling of further affidavit by the respondents, the respondents aver that they had to file the further affidavit because they needed to address new material introduced by the applicants in their replying affidavit. I am of the view that this matter is complex and the court needed to consider all the relevant facts put before it. The applicants have not raised any issues of prejudice arising from the admission of the further affidavit. I am of the view that it is in the interests of justice to grant permission for the filing of the further affidavit.

[144] In the premises, the following order is made

This application is dismissed with costs

M.M.D. LENYAI

ACTING JUDGE OF THE HIGH COURT

of SOUTH AFRICA GAUTENG DIVISION,

PRETORIA

HEARD ON: 22 – 24 November 2021

FOR THE APPLICANTS: ADV. W.R MOKHARE SC

ADV. M. MAJOZI

INSTRUCTED BY: WERKSMANS INC, SANDTON

c/o KLAGSBRUIN EDELSTEIN BOSMAN DE VRIES,

PRETORIA

FOR THE FIRST and SECOND RESPONDENTS: ADV. K. PILLAY SC

ADV. L. GUMBI

INSTRUCTED BY : STATE ATTORNEY, PRETORIA

FOR THE FOURTH TO SEVENTH AND

ELEVENTH RESPONDENTS: ADV. D. SMIT

INSTRUCTED BY: WEBBER WENZEL ATTORNEYS, SANDTON

DATE OF JUDGMENT: 10 March 2022