REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

[redacted]

Date: 29 October 2024

CASE NO: 2024-061972

JAMENTS (PTY) LTD Applicant

and

NORTHERN COAL (PTY) LTD Respondent

JUDGMENT

DE VOS AJ

[1] The Minister of Mineral Resources and Energy decided, in terms of section 96 of the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), to suspend its previous decision to grant the respondent ("Northern Coal") consent in terms of section 102, to extend its mining area. Northern Coal launched urgent review proceedings seeking to set aside the Minister's decision to suspend its section 102 consent. The Court reviewed and set aside the Minister's suspension decision. The applicant ("Jaments") sought leave to appeal against the Court's order. The Court

dismissed the application for leave to appeal. These are the reasons for dismissing the leave to appeal.

[2] Jaments raised fifty grounds of appeal in its application for leave to appeal. Not all can be considered in depth and the Court deals with the core basis on which Jaments sought leave to appeal.

[3] Some context is required. Northern Coal mines coal on Farm Jagtlust in Mpumalanga. It has been doing so for years. In so doing, Northern Coal creates jobs for about 500 people. Northern Coal's mining on Farm Jagtlust could not sustain these jobs for much longer. To ward off retrenchment, and no doubt motivated by the sustainability of its business, Northern Coal resolved to expand its mining operations onto the neighbouring farm, Roetz. Northern Coal owns Roetz and had operated a prospecting license on Roetz for years. In order to extend is mining area, Northern Coal required the Minister's consent in terms of section 102 of the MPRDA to vary its existing mining right, over Jagltust, by extending the mining area, to include Roetz.

[4] Northern Coal applied to the Minister in terms of section 102, to extend the area of its mining right on the current mining area (Jagtlust), to include the neighbouring farm (Roetz). Section 102 permits the variation of a mining right "by extensions of the area covered by it". The Minister granted Northern Coal consent to extend its area of mining to include the neighbouring farm ("section 102 consent"). As a result of the section 102 consent, Northern Coal has been mining on the neighbouring farm and has been able to keep the retrenchments at bay.

[5] Jaments enters the arena by filing an application for a prospecting right on the neighbouring farm (Roetz) and its request to the Minister to suspend Northern Coal's section 102 consent.

[6] Central to this dispute is the timing of Jaments' application for a prospecting right. Jaments applied for the prospecting right on Roetz well after Northern Coal had applied for consent to vary the area in which it may mine to incorporate Roetz into its existing right over Jagtlust. However, the Minister took two years to make a decision on Northern Coal's section 102 consent application. It was during these two years, whilst Northern Coal was waiting for a decision from the Minister, that Jaments sought a prospecting right over Farm Roetz. There were two applications over the same

property: Northern Coal's section 102 application for a variation and Jaments' application for a prospecting right. Northern Coal's application for variation preceded Jaments' application.

[7] The Minister acceded to Jaments' application and suspended Northern Coal's section 102 consent ("suspension decision"). The effect of the suspension decision is that Northern Coal may no longer lawfully mine on the Farm Roetz.

[8] Northern Coal challenged the Minister's suspension decision. It raised several grounds of review on which it attacked the Minister's decision. The Court was persuaded by Northern Coal's challenge and urgently reviewed and set aside the Minister's suspension decision.

[9] Jaments defends the Minister's suspension decision and contends in the application for leave to appeal that another Court will uphold the Minister's suspension decision.

[10] To address the core of Jaments' application for leave to appeal requires a consideration of the Minister's decision. The Minister's reason is terse. The Minister's reason for suspending Northern Coal's consent and mining was that Jaments faced "potential prejudice". Jaments' prejudice is not named or identified. Nor is it, based on the Minister's express language, actual. The reason also contains an error of law: Jaments held no rights, none whatsoever, over the neighbouring land (Roetz). As it held no rights, Jaments could not be prejudiced.

[11] Worse, the Minister's reason for the suspension, the "potential prejudice" does not appear in Jaments' suspension application. The Minister's reason has to be based on the record which served before the Minister at the time of making the decision. The Court has been provided with the full record that served before the Minister before making the suspension decision. In this record the "potential prejudice" the Minister provides as a reason for the decision, does not appear. At the time the suspension decision was taken, there were no facts supporting the alleged financial prejudice which Jaments now before this Court claims it would suffer. On this basis as well, the Minister's decision is reviewable for being irrational and having taking irrelevant considerations into consideration. The Minister's decision, particularly its reason for the decision must be sourced in information which appeared before him at the time.

[12] The Court concludes that there is no prospect of Jaments succeeding in convincing an appellate Court that the Minister's decision to suspend Northern Coal's section 102 consent was administratively fair in circumstances where it is based on an unidentified potential prejudice which does not appear in the record which served before the Minister. Plainly, there was no basis for the Minister to conclude Jaments would suffer prejudice – as no such fact served before the Minister and no such conclusion could be drawn, as Jaments enjoyed no rights over the adjacent property. On this basis alone, Jaments' application for leave to appeal falls to be dismissed.

[13] Jaments' faces another hurdle: the proper interpretation of section 102 of the MPRDA. Northern Coal attacks the Minister's decision as it is at odds with section 102. In suspending the section 102 consent, the Minister erred in law for failing to properly construe the nature of an application in terms of section 102 of the MPRDA

[14] Section 102 deals with the extension of an existing mining right over the first property to include a second property. Jaments' interpretation of section 102 is that in order to extend the existing mining right enjoyed over the first property, to cover the second property, there must be a pre-existing right over the second property. Jaments interprets section 102 as requiring an existing right on the extended area. Jaments' central submission is that Northern Coal could only extend its existing mining right over Jaglust to include Roetz, if it had a pre-existing right over Roetz. Based on this interpretation, Jaments defends the Minister's decision to suspend the section 102 consent.

[15] Jaments reads in to section 102 that there must be a pre-existing right over the extended area – and that this is to be varied. There is nothing in the language of section 102 which demands an existing right over the adjacent/second property. In fact section 102 contemplates a variation of an existing right: the variation being to extend the area over which the right is enjoyed. The language of section 102 plainly does not require a pre-existing right on the extended area. Jaments' interpretation of section 102 not only unduly strains the language but reads in an entire clause and requirement which is not found in the statute.

[16] There is no requirement in either section 22 (relating to applications for mining rights) or section 102 of the MPRDA that an applicant for a mining right or an amendment/variation thereof must hold a prospecting right or any other right or permit

over the property which it intends to mine (i.e. the prospective mining area) before it may apply for or be granted a mining right or consent.

[17] Jaments' interpretation also mislocates what the variation attaches to: it attaches to the area not to the type of right on the extended property. Section 102, on its plain text, provides for the variation of the *area* over which a mining right is enjoyed. The variation section 102 offers relates to the *area* covered by the mining right. The variation in section 102 does not relate to converting an existing right on an extended area into a mining right. It is not the *type of right* over a property which section 102 varies, but the *area* over which an existing mining right may be exercised. As such, section 102 does not require that there be an existing right on the extended area – as the variation goes to the area covered by the existing mining right.

[18] Jaments contends that without this added, read-in requirement, section 102 may be open to abuse. At the hearing for leave to appeal the central thesis of Jaments' submissions was that an application for a mining right is more onerous than an application for the variation of an existing mining right. Therefore, someone may abuse the section 102 application to obtain the right to mine through an easier process than applying for a mining right. The submission was made for the first time in the application for leave to appeal and was not expanded on. Assuming this was true – without making this finding as it was not pleaded or argued with substantiation – it is not for the Court to read-in requirements where to do so would unduly strain the language of the legislation. To do so would be to extend into the realm of Parliament.

[19] In any event, Jaments' did not challenge the text of section 102 for permitting such alleged abuse or asked the court to interpret it in a manner that would prevent such alleged abuse. There is no prospect of Jaments convincing an appellate Court to alter section 102 to include a requirement which would unduly strain the language, particularly, in the absence a pleaded challenge to section 102. On this basis as well, the application for leave to appeal bears no prospects of success.

[20] Jaments would also, in addition to the above, have to persuade an appellate Court that its application for a prospecting right over Roetz took precedence over Northern Coal's application for a variation. There are no prospects of success in this regard as Jaments demands the principle first-in-time applies to its application for a right over the adjacent property and simultaneously demands that the principle not apply to

Northern Coal's variation application. The Court has set out that this would be at odds with principles of fair administrative action and the common law position of first-in-time-first-in-right which runs as a golden thread throughout the MPRDA.

[21] To be successful in an appeal, Jaments would have to persuade an appellate Court to apply the principle of first-in-time to only one party and not another and would be doing so absent a legislative basis for such an exclusion and in conflict with the common law position.

[22] Northern Coal submitted before this Court that the principle must find application as:

a) The first-in-time principle expressed by the maxim *qui prior est tempore potior est jure* is based in equity (*Wahloo Sand BK en Andere v Trustees , Hambly Park Trust en Andere* 2002 (2) SA 776 (SCA) at 788D)

b) Real rights are stronger than personal rights and in the event of a conflict between real rights, the maxim *qui prior est tempore potior est jure* applies (*Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) at 258BC)

c) The first-in-time principle is recognised throughout the MPRDA as the orderly basis on which the DMRE processes applications in respect of the same land and for the same mineral;

d) Section 6 of the MPRDA gives effect to the first-in-time principle in respect of other applications as a reasonable and procedurally fair manner in which to process all applications under the MPRDA;

e) Section 6 of the MPRDA is further subject to PAJA, including section 3(1) and 3(2)(a) thereof, which requires that administrative action must be procedurally fair and that a fair administrative procedure;

f) Interpreting section 102 in a manner that gives effect to the first-in- time principle accords with the Constitutional right to administrative justice and administrative action which is procedurally fair, the common law and the objects of the MPRDA, specifically:

   i) the promotion of equitable access to mineral resources;

   ii) the substantial and meaningful expansion of opportunities for historically disadvantaged persons such as Northern Coal;

iii) provides for security of tenure in respect of mining operations (such as Northern Coal's existing mining operations on the Farm Jagtlust); and

iv) ensures the continued contribution of Northern Coal to the socio-economic development of the area where it operates.

[23] In addition, this interpretation further avoids a gap in the legislative scheme and any absurdity or repugnancy in the MPRDA where, for some unknown reason, a later application takes precedence over Northern Coal's Section 102 Application. Such an assertion is insensible, unbusinesslike and would lead to chaos in the processing of applications.

[24] The Court is persuaded by this submissions. Jaments would have to overcome all these submissions in order to persuade an appellate Court that a later application for a prospecting right takes precedence over a section 102 application made years earlier. The Court concludes that there are no prospects of success in this regard.

[25] To compound this, the Court held that consent in terms of section 102 creates a mining right or alternatively a right akin to a mining right. As such, section 6 of the MPRDA finds application which expressly requires the application of the first-in-time-first-in-right principle. Jaments would have to convince a court of Appeal that the right conferred by section 102 to mine on an extended area is not a mining right or a right akin to a mining right. Jaments has provided no textual or jurisprudential basis to upset this finding.

[26] In addition, Jaments would have to do so in the face of the decision in *Rustenburg Platinum Mines Limited and Another v The Regional Manager, Limpopo Region, Department of Mineral Resources and Others* (1109/2020) [2022] ZASCA 157 where the Supreme Court of Appeal confirmed that a prospecting right is not a pre-requisite for a mining right (paragraph 54). *Rustenburg Platinum* held that a prospecting right – which Jaments claims over Roetz – is not a prerequisite for a mining right. Similarly a prospecting right is also not a pre-requisite for an application in terms of section 102 which seeks to vary a mining right to include another property in the mining area of that right. On this score as well, Jaments' application for leave to appeal bears no prospects of success.

[27] It is unclear where Jaments' sources the requirement that there must be a prospecting right over Roetz in order for Northern Coal to obtain section 102 consent. It cannot be sourced in section 102 of the MPRDA. It also would be incongruent to not require such a prospecting right – in general in order to mine – but then to do so in the context of a section 102 application. There are no reasonable prospects of success of Jaments convincing an appellate Court of its interpretation.

[28] As to the relief granted, this Court substituted the decision of the Minister with a decision of the Court. The Court had all the evidence which served before the Minister, there were no disputes of fact and no expert evidence or technical knowledge that was required to make the decision. It was purely an exercise of legal interpretation of section 102 of the MPRDA. It can hardly be contended that the Court is ill-suited to make a pronouncement on the purely textual interpretation of section 102 of the MPRDA and ought to have remitted this legal determination to be made by the Minister.

[29] In granting the relief, the Court exercised its discretion in favour of substituting the Minister's decision. In so doing, the Court exercised a discretion in the "true" sense *(Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 9). An appellate court is slow to interfere with such decision *(Trencon* paras 82-97). As stated by the Constitutional Court, per Moseneke DCJ, in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) at para 111 as quoted in paragraph 89 of *Trencon*:

> "Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making."

[30] Jaments would have to persuade an appellate Court that the appropriate relief is to remit an exercise in the interpretation of legislation to the Minister in circumstances where there is no dispute of fact or technical skill required. The prospects in this regard are poor. The prospects decrease where the Court enjoys a wide discretion, as it did

in this case. For these reasons, there is no reasonable prospect another Court would come to a different conclusion.

Costs

[31] Northern Coal has successfully defended against the application for leave to appeal. It is by virtue of the ordinary rule entitled to its costs. Jaments' sole submission to oppose the granting of costs is that the *Biowatch-rule* does not apply. It appears to the Court that Northern coal is entitled to its costs on the normal principle that the costs follow the result – even absent the application of the *Biowatch-rule*. Whether the *Biowatch-rule* applies or not – does not alter this position.

[32] The Court dismisses the application for leave to appeal with costs on scale C including the costs of two counsel. The reasons for granting costs on Scale C and the costs of two counsel is: the matter is complex, the history dense, the record rendered the application just shy of 2000 pages and the parties filed extensive and substantive submissions. The involvement of two counsel and on Scale C is justified also by the interaction of multiple applications for different rights within the MPDRA. This justifies costs of two counsel and on Scale C.

Order

[33] The Court orders:

a) The application for leave to appeal is dismissed with costs on scale C including the costs of two counsel.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

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	JL Verwey
Instructed by:	Briel Inc
Date of the hearing:	4 September 2024
Date of judgment:	29 October 2024