IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 7883/2007 & 56189/2010

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

....

IN THE MATTER BETWEEN:-

RUSTENBURG PLATINUM MINES LIMITED	First Applicant
ARM MINING CONSORTIUM	Second Applicant

and

REGIONAL MANAGER, LIMPOPO REGION, DMR	First Respondent
DEPUTY DIRECTOR-GENERAL:	
MINERAL REGULATION, DEPARTMENT	
OF MINERAL RESOURCES	Second Respondent
MINISTER OF MINERAL RESOURCES LIMITED	Third Respondent
GENORAH RESOURCES (PTY) LTD	Fourth Respondent
DIRECTOR – GENERAL:	
DEPARTMENT OF MINERAL RESOURCES	Fifth Respondent

NKWE PLATINUM (SOUTH AFRICA) (PTY) LTD	Sixth Respondent
INTERNATIONAL GOLDFIELD LIMITED	Seventh Respondent
MORUTHANE BEN SEKHUKHUNE N.O	Eighth Respondent
BAUBA A HLABIRWA MINING INVESTMENTS (PTY) LTD	Ninth Respondent
NKWE PLATINUM LIMITED	Tenth Respondent
THE TRADITIONAL COUNCIL OF THE BENGWEYAMA-YA-MASWATI COMMUNITY	Eleventh Respondent
ROKA PHASHA PHOKWANE TRADITIONAL COUNCIL	Twelfth Respondent
MIRACLE UPON MIRACLE INVESTMENTS (PTY) LTD	Thirteenth Respondent
NKWE PLATINUM LTD	Fourteenth Respondent

JUDGMENT

Kollapen, J

Introduction

[1] South Africa enjoys what is regarded as an abundance of mineral wealth and in many respects the country has cemented its position as one of the largest exporters of mineral resources. There is little doubt that the exploitation of those resources has brought enormous wealth to many and has in many respects shaped the contours and the fault lines of the South Africa of today.

[2] The Constitutional Court described this trajectory in locating the place of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) in the matter of *Agri South Africa v Minister for Minerals and Energy*[1] as follows:-

> *"[80] The MPRDA abolished private ownership of minerals, based either on land ownership or the holding of severed real rights to the*

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

minerals, which existed under the mining law dispensation enacted prior to the Constitution. In its stead the MPRDA introduced a mineral law dispensation in terms of which the state became the custodian of mineral resources with the power to allow exploitative access to those resources to all the people of South Africa. In view of our history it can hardly be argued that the institutional change of legal regime is not just and equitable

....

[81] Previously, private owners of minerals had the power of competence to decide whether to exploit minerals they owned and to whom they could give their exploitation rights. It was an incident of ownership. Now the state has that power of competence by virtue of its custodianship of mineral resources under the MPRDA. It may not have acquired the right to exploit the minerals, but it has acquired the power to allocate and dispose of the exploitation rights. What private owners of minerals previously had in this regards, the state now has. It really seems as plain and simple as that to me. In my view, plain speaking is what the Constitution requires of us when the contested subject of property rights arises, as is the case here.

[82] Access to the generous mineral resources of South Africa has to a large extend, determined the course of this country's history. It is a history with many dimensions, but inescapably part of it is racial dispossession and capitalist development. Within that context there remain contested aspects, different histories. Fortunately, the Constitution and the MPRDA allow us to transcend that contested past. The former providing us with the means to deal with property contestation, and the latter giving concrete expression, in a particular way, to the use of that constitutional approach."

[3] Those resources, however, continue to remain valuable and even when the State as it does now holds the power to allocate and dispose of the exploitation rights in such resources, the contestation for such rights continues. This is such a case.

[4] The relief before the Court appears in the Consolidated Notice of Motion which in broad terms, seeks relief relative to the refusal by the State respondents to grant a prospecting right to the applicant as well as the grant by the State respondents of both prospecting and mining rights to some of the respondents in respect of the same properties. Thus, what initially were three separate reviews have been consolidated into a single application albeit that the merits of each review stand largely on their own.

The parties

[5] Both applicants are well-known mining companies. The first applicant is a wholly owned subsidiary of Anglo Platinum Mines Limited while the second applicant is a black owned company that has entered into a 50:50% joint venture agreement with the first applicant, to operate the Modikwa Platinum Mine in Sekhukhuneland.

[6] The first, second, third and fifth respondents are State respondents who are responsible for receiving, processing and deciding applications for prospecting and mining rights in terms of the MPRDA.

[7] Genorah Resources (Pty) Limited is the fourth respondent, Nkwe Platinum (South Africa) (Pty) Ltd the sixth respondent, International Goldfields Limited the seventh respondent and Nkwe Platinum Limited the tenth respondent and they will collectively be referred to herein as the Genorah respondents.

[8] The eigth respondent is Moruthane Ben Sekhukhune N.O and the ninth respondent, Bauba A Hlabira Mining Investments (pty) Limited, they will collectively be referred to as the Bauba respondents in this judgment.

The relief[2]

1. *"Reviewing and setting aside the decision of the second respondent (or any other officer of the Department of Mineral Resources) to **refuse,** in terms of section 17(2)(b)(i) and (iii) of the Mineral and Petroleum Resources Development Act 28 of*

[2] Vol 15, page 1421-1424 Court Bundles.

2001 ("MPRDA"), the first applicant's application for a prospecting right in respect of the Remaining Extent of the farm Garatouw 282 KT, the farm Hoepakrantz 291 KT, Portion 1 and Portion 2 of the farm Nooitverwacht 324 KT, Portion 1 and the remaining Extent of the farm Eerste Geluk 322 KT, the farm De Kom 252 KT, the farm Zwemkloof 283 KT, the farm Grootvygenboom 283 KT, the farm Genokakop 285 KT, and the farm Houtbosch 323 KT, all situated in the magisterial district of Sekhukhune ("the Modikwa Deep properties"); and

1.1 substituting for the said decision to refuse, a decision to grant the said application and/or directing the third respondent forthwith to issue a prospecting right to the first applicant;

1.2 <u>alternatively</u>, remitting the said application for reconsideration to the second or third respondent with a direction to give the applicants an opportunity to make representations and to consider all relevant facts before taking a decision in terms of section 17 (2) of the MPRDA.

2. In the <u>alternative</u> to prayer 2 above, declaring the provisions of section 17 (2)(b)(i) and (iii) of the MPRDA, as well as the decisions made in terms thereof and mentioned in paragraph 2 above, to be unconstitutional and invalid.

*3. Reviewing and setting aside the decision of the first respondent (or any other officer of the Department of Mineral Resources) to **accept**, in terms of section 16 (2) of the MPRDA, the fourth respondent's application for a prospecting right insofar as it relates to the Modikwa Deeps properties.*

*4. Reviewing and setting aside the decision of the second or third respondent (or any other officer of the Department of Mineral Resources) to **grant a prospecting right** to the fourth respondent in respect of one or more of the Modikwa Deeps properties mentioned prayer 2 above.*

*6. Reviewing and setting aside the decision of the first to third or fifth respondents (or any other officer of the Department of Mineral Resources) to **grant,** in terms of section 23 (1) of*

*MPRDA, a **mining** right to the fourth, sixth, seventh and / or tenth respondents in respect of one or more of the Modikwa Deeps properties mentioned in prayer 2 above;*

7. *Reviewing and setting aside the decisions of the third respondent (or any other officer of the Department of Mineral Resources) to consent to, and / or grant, an **amendment** in terms of section 102 of the MPRDA, to the prospecting right with registration number 256/2006 held by the eighth and / or ninth respondent, thereby incorporating one or more of the Modikwa Deeps properties mentioned in prayer 2 above into the area over which the prospecting right is held.*

8. *Reviewing and setting aside the decision of the first, second, third or fifth respondents (or any other officer of the Department of Mineral Resources) to **renew** in terms of section 18 (3) of the MPRDA, the prospecting right with registration number 256/2006, which had been granted to the eighth and / or ninth respondent in respect of one or more of the Modikwa Deeps properties mentioned in prayer 2 above.*

9. *On the basis that section 11 consent has already been granted by the third or fifth respondent, for the cession by the eighth respondent of Prospecting Right with registration number 256/2006 and / or the amended prospecting right, to the ninth respondent:*

9.1 *reviewing and setting aside the decision of the third respondent, alternatively the fifth respondent, to grant such consent; and*

9.2 *Directing the cancellation of any registration of such cession at the Mining and Petroleum Titles Registration Office ("**MPTRO**")*

10. *Directing the fifth respondent (or any other officer of the Department of Mineral Resources) to cancel, or cause the cancellation of the registration of any prospecting or mining rights, held by the fourth, sixth, seventh, eighth, ninth, and / or tenth respondents over Modikwa Deeps Properties, at the MPTRO.*

11. Directing the respondents jointly and severally to pay the cost of this application."

[9] The decisions under review will be referred to in this judgment as the refusal decision, the Genorah decisions and the Bauba decisions.

[10] For the sake of convenience the properties which are the subject matter of the various decisions under review are referred to collectively as the Modikwa Deep Properties (MDP), but reference will be made to the individual properties where this is necessary.

[11] The State respondents did not oppose any of the relief sought while the Genorah respondents (fourth, sixth, seventh and tenth respondents) oppose the relief sought in respect of the decision to refuse the grant of a prospecting rights to the applicants as well as the review of the decision in respect of the grant of a prospecting right and a mining right to it.

[12] The Bauba respondents also oppose the decision to review the refusal of the applicants application for a prospecting right as well as the decision to review the prospecting right granted to it as well as the amendment thereto.

The State Respondents

[13] While none of the State respondents have opposed the relief sought their conduct in this litigation falls considerably far short of the conduct expected of an organ of state in such matters. While it is perfectly open to those respondents to make an election of how they respond to the litigation, it must be noted that as the decision makers whose decisions are being subject to review, they have an obligation to the Court to at least ensure that a full and proper record of the decisions under attack and review are provided. This did not happen and even after an application to compel was brought an incomplete record was filed in respect of the Genorah decisions.

[14] In that record there appears to be alterations to dates when a prospecting right to the Genorah respondents was granted and when that was raised, as it properly was, one would have expected an explanation for that as well as an explanatory affidavit in

respect of the various matters raised. Ultimately the Court is called upon to exercise its review powers in terms of the Promotion of Administrative Justice Act[3] (PAJA) without the benefit of the decision maker's input except for an incomplete record.

[15] In the Bauba decision no record whatsoever was filed and this *lacuna* is not explained at all by the State respondents.

[16] In *Public Protector v South African Reserve Bank*[4] the Constitutional Court expressed the following view with regard to what is expected of public officers involved in litigation:

> *"[152] The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place full and fair account of the facts before a court.*
>
> *…*
>
> *[155] …A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. The need to hold government to the pain and duty of proper court process is sourced in the Constitution itself. This is because the Constitution regulates all public power and public officials are required to act in accordance with the law and the Constitution.*
>
> *[156] In a concurring judgment in Matatiele Municipality, Sachs J held that the constitutional injunction for our democratic government to be accountable, responsive and open implies that candour is required from government officials when they are before courts. This is also consistent with section 165(4) of the Constitution which requires organs of State to assist and protect the courts in order to ensure that they are effective."*

[3] Act 3 of 2000.
[4] [2019] ZACC 29.

[17] That remissness, however, cannot be allowed to operate to the prejudice of the other litigants in these proceedings. They have a constitutionally enshrined right which they exercised to bring their dispute before this Court for adjudication and the necessary and logical conclusion of the exercise of that right is the determination of this Court. Ultimately, the Court must work with the material and the evidence at its disposal and reach a decision. The parties further agreed that the matter be determined despite the deficient records.

[18] I make this observation in the hope that those responsible for the decisions which are the subject of this review and those organs of state who provide legal assistance to such functionaries will seriously reflect upon the reality that with the power that comes with exercising authority in a constitutional democracy comes the accountability for how that power is exercised. This case is a sad reflection of how that duty of accountability was spectacularly and consistently ignored to the detriment of the values that stand at the gateway of our Constitution.

The background facts

The refusal decision (in respect of the applicant's application for a prospecting right)

[19] The MPRDA commenced on the 1 May 2004, and at that date the first applicant (RPM) alleges that it held a number of unused old order rights (UOOR) in respect of and, over the following MDP properties:-

The R/E of the farm Garatouw 282 KT
The R/E of the farm Hoepekrantz 291 KT
De Kom 252 KT
Zwemkloof 283 KT
Grootvygenboom 283 KT
Genokakop 285 KT
Houtbosch 323 KT
Portions 1 and 2 of the farm Nooitverwacht 324

[20] As the holder of these UOO Rights, RPM had the exclusive right to apply for a prospecting right or a mining right under the MPRDA for a period of one year from

the date of the commencement of the MPRDA. The period was calculated as being from 1 May 2004 to 30 April 2005.

[21] RPM had lodged an application for a prospecting right in respect of some of the MDP on 16 March 2004, under the predecessor of the MPRDA, the Mineral Act[5].

[22] Given that the application of 16 March 2004 had not been finalised before the commencement of the MPRDA, it is the stance of the applicants' that it became a pending application under Item 3 (1) of Schedule II of the MPRDA and that the application would be dealt with as such.

[23] As at the 1 June 2004, Item 3 (1) of Schedule II provided as follows:-

> *(1) "Any application for a prospecting permit, mining authorisation, consent to prospect, consent to mine or permission to remove and dispose of any mineral lodged, but not finalised, in terms of section 6, 8 or 9 of the Minerals Act immediately before this Act took effect must be regarded as heaving been lodged in terms of section 13, 22, 27, 79 or 83 of this Act, as the case may be."*

[24] For the sake of completeness I make reference to Item 8(2) and 8(3) of Schedule II which deals with the exclusive right to apply on the part of the holder of an UOOR and the period of validity of such a right. They provide as follows:-

> *"(2) The Holder of an unused old order right has the exclusive right to apply for prospecting right, or a mining right as the case may be, in terms of this Act within the period referred to in the subitem (1).*
>
> *(3) An unused older order right in respect of which an application has been lodged within the period referred to in subitem (1) remains valid until such time as the application for a prospecting right or mining right, as the case may be, is granted and dealt with in terms of this act or is refused."*

[5] Act 50 of 1991 (Repealed).

[25] Bauba says Item 3 (1) of Schedule II of the MPRDA does not apply. Bauba submits that RPM incorrectly relies on its application for a prospecting permit under the old regime as being its application for a prospecting right under the MPRDA. In this regard Bauba submits that even if it could be demonstrated by RPM that an application was brought in terms of section 16 of the MPRDA and that it did hold the unused old rights to the Bauba properties, its alleged exclusive right to apply for the grant of a prospecting right does not afford it a preference over the BaPedi community in respect of minerals on the same property, as a result of section 104 of MPRDA.[6]

[26] On the 27 July 2005, the Regional Manager, Limpopo Region, Department of Mineral Resources (RM) confirmed in writing to RPM that its application complied with Section 16 (2) of the MPRDA. It was required from RPM to submit further documentation including reports on consultation with landowners and financial guarantees, all of which was done within the time periods provided for. All of this occurred by the 18 October 2005.

[27] On 11 September 2006, RPM received a letter signed by the Deputy Director General: Mineral Regulation in the Department of Minerals and Energy (the DDG) advising that its application for a prospecting right over the MDP properties had been refused. The letter is dated the 24 August 2006 and offers the following reason for the refusal:-

> *"Section 17(2)(b)(i) and (ii) as the granting of the right will result in the concentration of the mineral resources in question under the control of the applicant and will also result in an exclusionary act."*[7]

[28] In a memorandum (the RPM memo) prepared by staff of the Department of Mineral Resources setting out the background to the application as well as the assessment of the impact of granting the prospecting right that the RPM had applied for, there is

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[6] Section 104(1) of MPRDA: *"Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister."*

[7] Volume 7, page 611 of Court Bundles.

further reference to the reasoning of the State respondents in refusing the application. The following extracts are taken from that memorandum[8]:-

> *…*
>
> *"The applicant is a holder of an unused old order prospecting right by virtue of the Notarial Mineral Lease concluded with the Lebowa Mineral Trust. The properties applied form part of the Rustenburg Platinum Mines LTD/African Rainbow Minerals Joint Venture ' the JV' which operates the Modikwa Platinum Mine, situated in Sekhukhuneland, Limpopo Region. The JV is a 50:50% operation, managed by the African Rainbow Minerals ("ARM"). ARM is an empowerment company owned by Mr Patrice Motsepe.*
>
> *2.2 AN ASSESSEMENT OF THE IMPACT OF GRANTING A PROSPECTING RIGHT TO THE APPLICANT IN THIS INSTANCE:*
>
> *For purposes of this application it is important to draw the connection between RPM and Anglo Platinum, as the latter is the holding company of the applicant; so whenever reference is made to RPM's existing mineral resources and dominance in the PGM's sector such will be made in light of the fact that it is subsidiary of Anglo Platinum.*
>
> *RPM is the world's largest producer of platinum group metals both in terms of value and reserves. The potential impact of its application for a Prospecting Right on the farms under application should be viewed both from a project level and also from a regional and national perspective. The farms applied for are located adjacent to and immediately to the west RPM's current Mining Licence on the Modikwa Platinum mining operation. Modikwa consists of five adjoining farms: Maandagshoek 254 KT, Driekop 253 KT, Hendrikplaats 281 KT, Winterveld 293 KT and Onverwacht 292 KT covering an area of approximately 14, 313 hectares.*

[8] Page 256-261 of Court Bundles.

According to information contained in Anglo Platinum's (holding company of RPM) Annual report for 2005, published on 13 February 2006, the Modikwa Platinum Mine is still in a build–up phase and although production has increased the target levels of 240,000 tons per month have not been reached as yet. "The Merensky Reef and UG2 Reef both occur on these properties and are being systematically evaluated to provide data for Modikwa's development programmes." It is therefore fair to assume that the mineral resources reported for the Modikwa Mine do not represent the full potential of the project while at the same time the mine is not operating at target levels. It is my view that at targeted production levels of approximately 2.9 million tons per annum, the Modikwa Mining Licence contains sufficient resources for a potential life-of-mine exceeding 100 years. As stated above the farms applied for under this application are down-dip from the Modikwa Mining Licence and represents the deeper section of the Merensky Reef and UG2 Reef, mined from outcrop and at shallower depths on Modikwa lease area. Granting these farms the RPM will result in adding an additional approximately 150 m oz 4E, to depth of 1, 000 m to RPM's existiong mineral resource on the Modikwa Mining operation.

Based on the points listed below RPM's application for a prospecting right on the new/additional properties are not recommended due to the following:

The current Mining Licence on the Modikwa mine covers an area of 14, 313 hectares with substantial resources which is still in development;

The properties under the new application contain substantial resources which will double the current total covered by the Modikwa Mining Licence. The new properties are down-dip and to the west of current Modikwa mining lease. The resources on the Modikwa lease area will first have to be mined before the new area can be accessed. This could effectively "freeze" and "sterilize" the new properties for more than 100 years;

By awarding the new properties to RPM we would be simply be re-establishing and re-confirming the same situation of locking-up the area as was the case in the past and continue to entrench RPM's dominant position; this would further frustrate the introduction of new entrants to the industry as well as the creation of "equitable access" as set out in the Act;

It is further important to note that by awarding the new properties to a new entrant will not interfere with of disrupt RPM's current or future planning and mining operations along the 24 km strike length on the current Modikwa Mining Licence because it is down-dip and to the west of RPM's operations;

…

RPM's current projects on the Eastern Limb alone of the Bushveld Complex reveal a convincing scenario re your domineering position in the area. An analysis of the information published in Anglo Platinum's Annual Report for 2005 shows that it controls:

A strike length of approx. 86 km covering both the Merensky and UG2 Reef from outcrop;

A total resources of approximately 2.4 billion tons, containing more than 400 million ounces of 4PGE, accounting more than 75% of the known PGE resources in the Eastern Limb.

…

Awarding the properties under the new application to RPM (and therefore to Anglo Platinum) will certainly contradict the stated gaols of the MPRD Act, namely: "To promote equitable access of the nation's minerals and petroleum resources to all the people of South Africa and expand opportunities for HDSA's to enter the mineral industry and to benefit from the exploitation of the nation's mineral resources."

..

Anglo Platinum currently holds 17 (seventeen) old order mining rights in the name of its wholly owned subsidiaries and a further 4 (four) old order mining rights with a joint venture partners, more than all the other companies involved in South African PGM industry together. No other company come close to holding that number of rights and not a single

HDSA-controlled entity holds more than 5 (five) mining rights in PGM's sector, let alone in the areas with the best grades of PGM resources (ie Eastern or Western Bushveld).

The properties under application and their resource potential present a critical mass and an ideal opportunity to serve as a base for a company controlled by HDSA persons to successfully enter the South African PGM industry. In RPM/ Anglo Platinum's dominant position in South African and world PGM Industry, as summarised above, its application for the new properties cannot be supported and is consequently recommended for refusal."

[29] The memorandum concludes with a recommendation to the DDG to refuse the application based on Section 17 (2) (b) (ii) and (iii) of the MPRDA which recommendation the DDG accepted and acted upon.

[30] At the time Section 17(2) (b) (ii) and (iii) of the MPRDA read as follows:-

"(2) The Minister must refuse to grant a prospecting right if-

…

(b) the granting of such right will-

(i) result in an exclusionary act;

(ii) prevent fair competition; or

(iii) result in the concentration of the mineral resources in question under the control of the applicant."

[31] It is this refusal decision that the applicants seek to have reviewed, set aside and substituted on the basis *inter alia* that it was taken in bad faith, that the State respondents erred in law and in fact on placing reliance on Section 17 (2) of the MPRDA, that it was arbitrary and that irrelevant considerations were taken into account and relevant considerations ignored.

[32] For the sake of completeness the negotiations and agreements reached between RPM and the Minister of Mineral and Energy (the third respondent) in 2000, warrant some attention. RPM says that in December 2000, three joint venture agreements in

terms of which it and other companies within the Anglo American Platinum Group had the right to mine for platinum and associated metal in respect of some of the MDP properties were cancelled. They say further that the Minister negotiated the cancellation of the joint ventures and that the reasons that underpinned the cancellation of the joint ventures was that the Minister perceived the effect of the joint venture agreements to have been a concentration of mineral rights in the hands of those companies.

[33] RPM contends that given that the cancellation of the joint venture agreements was to achieve the purpose of avoiding concentration of mineral rights in the hands of the RPM and that the Minister acted in bad faith by refusing RPM's application for a prospecting right. This is a matter I will return to.

The Genorah decisions which are under review

[34] On 6 February 2006, Genorah Resources (Pty) (Ltd) (then known as Tropical Paradise Trading 421 (Pty) Ltd) applied for a prospecting right in respect of various MDP properties (De Kom, Garatouw, Hoepekrantz, Nooitverwacht and Eerste Geluk).

[35] That application was accepted by the RM on 20 February 2006, and the RM thereafter confirmed that the application complied with the requirements of Section 16 (4) of the MPRDA.

[36] On the 22 August 2006, the DDG approved the recommendation made to him by the RM and others and granted a prospecting right to Genorah in respect of the MDP properties, to which reference has been made and on the same day (22 August 2006) signed a power of attorney in favour of the RM to sign the prospecting right granted to Genorah.

[37] The record of proceedings contain a further report incorporating the recommendation and decision of the DDG referred to above which appears to be an identical copy of the report signed off by the DDG on the 22 August 2006, with the exception that the date of signature of the DDG appears to have been altered to reflect it as being 28 August 2006 and the date of the power of attorney in favour of the RM also appears

to have been altered to 28 August 2006. It is not clear from this report what the original date may have been before the alteration but in all the circumstances, the date of the 22 August 2006 (which is the date that appears on the other copy of the report) must have been the original date on the report and recommendation.

[38] There is no explanation by any of the State respondents why these otherwise identical reports bear different dates only in respect of the signature of the DDG and the power of attorney. It is the stance of the applicants that the date of approval of the Genorah application was amended to the 28 August (from the 22 August) in order to reflect that the grant to Genorah was effected after the refusal of the applicants application and not before it, as the date of the 22 August would suggest.

[39] On 10 February 2012, Genorah was granted a mining right over the properties De Kom, Hoepekrantz and Garatouw (as part of the MDP properties).

[40] The applicants challenge the decision by the State respondents to accept the Genorah application, to grant it a prospecting right and then ultimately to grant it a mining right, contending that the acceptance of and granting of the prospecting right to Genorah was premature and unlawful and that given that Genorah did not have a valid prospecting right on account of this the grant of a mining right to it was also unlawful and stood to be reviewed and set aside.

The granting of rights to the Bauba Respondents

[41] On 29 April 2005, Mr SR Thulare, representing and acting on behalf of the BaPedi nation, applied for a prospecting right over a number of properties which included three of the MDP properties, Genokakop, Grootvygenboom and Houtbosch. The opening paragraph of letter indicates that it is an application in terms of Section 104 of the MPRDA and that it is made by Mr Thulare for the benefit and on behalf of the BaPedi nation.

[42] On 13 May 2005, the RM informed Mr Thulare in writing that the application received on the 29 April 2005 was accepted for further processing but that the application could not be considered '*due to the fact that applications have already been accepted on these farms and are being processed by this office.*' The RM further

advised Mr Thulare that the application '*will therefore be placed on hold pending the decision of the Minister on the applications mentioned above.'*

[43] On 1 February 2006, the DME wrote to Mr Thulare advising him that a prospecting right had been awarded to him on behalf of the BaPedi nation in respect of the properties Fisant Laagte, Dingaanskopp and Indie subsequently a prospecting right was issued on the 7 June 2006. (None of these properties feature in the relief sought in these proceedings).

[44] On 29 September 2006, the DME granted a prospecting right in terms of Section 17 of the MPRDA in favour of Mr Thulare for and on behalf of the BaPedi nation in respect of the farms Zwitzerland, Genokakop and Grootvygenboom.

[45] In November 2007, the Royal Council of the BaPedi nation resolved to enter into a shareholders agreement in respect of the entity Bauba Hlabirwa Mining Investments (Pty) Ltd and to effect cession of the prospecting rights in favour of Bauba. The cession was approved by the DME on 3 March 2008 and this was effected in respect of the properties Dingaanskop, Indie, Fisant Laagte, Zwitzerland, Genokakop, Grootvygenboom , Schoonoord and Waterkop.

[46] On 12 August 2008, the DDG granted power of attorney to the RM to consent to add the farm Houtbosch to the prospecting right issued, amended and ceded to Bauba.

[47] On 6 June 2012 and following an application for its renewal, the DME renewed the prospecting right granted over the farms Genokakop and Grootvgenboom.

[48] It is these decisions in respect of the Bauba respondents that the applicant's challenge and seek to have reviewed and set aside.

[49] In advancing the case for the relief it seeks the applicants say that the relief ought to be granted as the conduct of the State respondents viewed collectively evidences bad faith on their part and the existence of such bad faith must have the effect of irreversibly tainting the decisions under review to such an extent that they fall to be set aside.

[50] The Genorah and Bauba respondents, in resisting the relief sought, and beyond the merits of the case advanced, contend that there has been such an unreasonable delay in instituting and prosecuting the reviews that the Court should exercise its discretion and dismiss the application on account of the unreasonable delay.

[51] I proceed to deal with the issues of bad faith and unreasonable delay.

The contentions in support of the bad faith argument

[52] Relying on the *dicta* in *Matatiele Municipality and Others v President of the Republic of South Africa and Others*[9], the applicants point to a number of instances upon which they rely to suggest that the particular conduct of the State respondents, provide evidence of bad faith in respect of individual decisions as well as the characterisation of their conduct collectively. They include that the negotiations facilitated by the Minister that resulted in the cancelation of the various joint venture agreements in December 2000, on the basis that there was a perception that it would lead to over concentration. Their view is that by implication the cancellation of the joint venture agreements would have resulted in the de-concentration desired by the Minister and therefore it would have constituted an act of bad faith for the Minister to thereafter and notwithstanding the conclusion of the cancellation agreements to place reliance on the over concentration argument provided for in Section 17 (2) of the MPRDA.

[53] In addition they argue that the 50:50 joint venture between the first and second applicant brought a majority black owned partner in the form of the second applicant into the joint venture and that despite this, its application was refused on the basis *inter alia* that it would result in the concentration of mineral resources under the control of RPM and would result in an exclusionary act.

[54] They therefore contend that the history of the matter going back to 2000 coupled with the application by a joint venture that had as its 50% partner a majority black

[9] 2006 (5) SA 47 (CC).

owned entity could never activate reliance on concentration and that the State respondents reliance on Section 17 (2) constitutes an act of bad faith.

[55] Leaving aside the merits of the reliance on the provisions of Section 17 (2), it can hardly be said that the conclusion of the cancelation agreements (at a time when the MPRDA was not even in force) could be dispositive of the concentration or exclusion argument. It is inconceivable that the Minister could as a consequence of such agreements be in future precluded from relying on Section 17 (2) in relation to RPM. Such an interpretation would probably fall outside the powers of the Minister and would in any event run counter to the duty of the Minister to give effect to some of the primary objects of the MPRDA which include[10]:-

> *"**Objects of the Act***
> ***2.** The objects of this Act are to-*
> **…**
> *(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;*
> *(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including woman and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."*

[56] In addition it is worth recalling what the correct approach to the interpretation of the MPRDA is as emphasised by Basson J *in Rustenburg Platinum Mines v Minister of Mineral Resource*[11] :-

> *"[61] I am in light of the aforegoing not persuaded that the applicants have demonstrated a basis to interfere with the over concentration consideration especially in light of the fact that the State has an obligation to ensure that mineral resources are distributed equitably for the benefit of the disadvantaged. The state must therefore ensure that*

[10] Section 2 of MPRDA.
[11] *Rustenburg Platinum Mines Limited and Another v Minister of Mineral Resources and others* (7883/2007; 56189/2010) [2017] ZAGPPHC 29 (1 February 2017).

the mineral right should not be sterilized. See in this regard: Minister of Mineral Resources and Others v Sishen Iron Ore CO (Pty) Ltd and Another.

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

[45] The promotion of equitable access by all South Africans to mineral resources, the expansion of opportunities for historically disadvantaged persons to enter the mining and petroleum industries, and the advancement of the social and economic welfare of all South Africans are cornerstones of that transformation. The state is obligated to advance the realisation of these goals. It is therefore vitally important to heed the provisions of s 4 when interpreting the MPRDA."

[57] The applicants argued that the State respondents inappropriately took into account the financial statements of Anglo Platinum in support of the over concentration argument when making the decision to refuse the prospecting right. Their view was that only RPM's financial statements should have been considered. Shortly after the refusal decision was made, the MPRDA was amended was amended by paragraph 13(i) of MPRDA Amendment Act[12]. In its amended format the new provisions are to the effect that the Minister must, within 30 days of receipt of the application from the RM, refuse to grant a prospecting right if:

"…the granting of such right will result in the concentration of the mineral resource in question under the control of the applicant and their

[12] Act 49 of 2008.

associated companies with the possible limitation of equitable access to mineral resources.

To suggest that even prior to the amendment of the MPRDA the State was precluded from having regard to the financial statements of both RPM as well as its holding company would have been tantamount to placing an impermissible, highly technical and unwarranted barrier in the over concentration enquiry and would defeat the objects of the MPRDA to which reference has been made.

[58] Thus even if the State respondents were wrong in their reliance on Section 17 (2) it cannot be said, in the absence of clear evidence that they acted in bad faith. In *Melton Medes Ltd and another v Securities and Investments Board*[13]

"The term 'bad faith' has a variety of meaning in different contexts. Thus in the field of administrative law, where the validity of a decision or act is challenged on this ground, it is sufficient that the power to decide or act has been exercised for the purpose otherwise than those for which the power was conferred or without regard to the relevant, or only the relevant, considerations. There is no necessary moral connotation. But in the context of the tort of misfeasance in public office (or, as it is sometimes called deliberate abuse of power) the term has a far more restricted meaning. A moral element is an essential ingredient. Lack of good faith connotes either (a) malice in the sense of personal spite or a desire to injure for improper reasons or (b) knowledge of absence of power to make the decision in question.

This hurdle in the way of a claimant is substantial, for the allegation of bad faith is (like that of fraud) one to be made only where there exists prima facie evidence justifying the allegation. If there is no reasonable evidence or grounds to support the allegation, a statement of claim making such an allegation will be struck out as an abuse of process."

[13] [1995] 3 All ER 880.

[59] In *Barnard v Minister of Justice, Constitutional Development and Correctional Services and another*[14], Keightley J stressed that allegations of bad faith must be supported by cogent evidence. In that case, Mr Barnard had alleged that when refusing his parole application the Minister of Justice acted in bad faith and with alleged political bias against him because some of the victims of his crimes were targets of the old apartheid regime. The learned judge stated:

> *"[63] It is common cause that at least some of Mr Barnard's offences were committed with a political objective. However, it does not follow as a necessary inference that in identifying the gaps listed in paragraphs 3.1 to 3.6 of the decision document the Minister was acting in bad faith and with a view to thwarting Mr Barnard's efforts to secure parole for political purposes. In the absence of actual evidence of this kind of motive on the Minister's part, such an inference would only be justifiable if there were no other reasonable explanation for the Minister having identified the gaps listed in the decision document, and recommending the steps outlined in paragraphs 3.1 to 3.6."*

Accepting and granting Bauba's application for a prospecting right.

[59] Bauba's application for a prospecting right was submitted on the 29 April 2005. RPM enjoyed the exclusive right to apply for a prospecting right at least until the 30 April 2005. On the assumption that the State respondents erred in accepting Bauba's application when they did, does such acceptance constitute an act of bad faith?

[60] This cannot be so if regard is had to the *dicta* in *Barnard supra* especially in the absence of any evidence of this kind of motive.

[61] In so far as the assertion that suggests that the application by Bauba was not an application in terms of Section 104 of the MPRDA is concerned, it is clear from the letter of application by Mr Thulare of the 29 April 2005, that it purported to be an application in terms of Section 104. In addition and at that time the MPRDA did not

[14] [2015] 4 All SA 648 (GP)

prescribe a particular format in terms of which applications in terms of Section 104 were to be submitted and the allegations of bad faith must equally be rejected in respect of the conduct of the State respondents.

Accepting and processing Genorah's application for a prospecting right during the period of exclusivity enjoyed by RPM

[62] The Genorah application for a prospecting right was submitted on 6 February 2006, accepted on 20 February 2006, and granted on the 22 August 2006 (although I have made reference to an identical copy of the grant Memo and Power of Attorney which purports to suggest that the grant was on the 28 August 2006). It is evident, whatever the date of grant may be, that the Genorah application was certainly accepted and processed outside of the 1 year period of exclusivity that RPM enjoyed but within the period when RPM's UOOR was still valid.

[63] RPM contends that the State respondents were precluded from accepting and processing Genorah's application during the period of validity of RPM's UOO Rights and that by doing so they demonstrated bad faith. This argument is not tenable. In *Aquila Steel (South Africa) (Pty) LTD v Mineral Resources and others*[15],the Constitutional Court dealt with the distinction between exclusivity and duration thereof as follows:-

> *"[68] The two are distinct, and item 8 treats them so. Holders of unused old-order rights are accorded the privilege of exclusivity. This confers the sole entitlement to apply for a new-order right over the property to which the unused old-order right relates. But they also get protected duration: item 8(3) specifies that the unused old-order right "remains valid" until the conversion application is disposed of. To conflate these two protections, or to tag the entailments of one onto the other, seems to me to misread the statute and to destabilise the protective balance it creates."*
>
> *…*

[15] 2019 (3) SA 621 (CC).

[72] So the exclusivity item 8 confers is the privilege to apply under the MPRDA provisions for a new-order right. And until that application is disposed of, either way, the old-order right "remains valid" under item 8(3). What item 8 emphatically does not say is that the right to apply exclusively is preserved for so long as the old-order right remains valid. To import this into the provisions is to misperceive the delicacy of an intricate statutory scheme. The later amendment of section 16 by the insertion of subparagraph (2)(c) does not support the Supreme Court of Appeal's opposite conclusion. It is best neutral. It seems equal likely that the addition was inserted because the statute needed to be changed for the very reason that the existing wording meant something different.

…

[76] But, at the end of the grace year, the continued validity of the old-order right, pending conversation, does not bar others from standing in the line to apply for MPRDA rights over the same land. Section 9 bars their application from being processed only until that of the old-order rights holder has been processed. However, where applications by holders of the unused old-order right are not disposed of within the exclusivity year, other applicants become entitled to apply in terms of section 16, though their applications may be processed only in the order ordained by section 9.

[78] Section 9 read together with item 8(3) of Schedule II entails that an application competing with one by the holder of the old-order right falls into the queue behind it. In other words, the one-year exclusivity period does not bar other applications after its elapse, but it does confer priority of consideration and processing, simply because the old-order rights-holder's application was in first. This means that the old-order rights-holder obtains priority (though not exclusivity) for the disposal of its application, until the MPRDA right is it seeks granted and dealt with in terms of the MPRDA or is refused. Until that happens, no competing application for the MPRDA right may be processed. Yet once the grace

period ends, the MPRDA's requirements apply equally to all application, no matter where they are in the queue."

[64] There is thus no bar to the receipt and acceptance of another application after the period of exclusivity has passed but while the period of validity is still operational. This is what happened in this instance. Genorah's application was submitted and accepted after the expiry of the period of exclusivity. There can be no complaint about this.

[65] *Aquila* places a bar on the processing of competing applications until the applicant who held an UOOR has had its processed and decided upon. To that extent it must follow that the State respondents were barred from processing and deciding on Genorah's application during the validity period which is what they did. Whether in the absence of any other evidence such processing constitutes bad faith is another matter.

[66] Given the high bar set before a conclusion of bad faith can be arrived at, I am not satisfied that the premature processing of Genorah's application would constitute an act of bad faith as the applicants would suggest.

The alteration of dates on the approval of the Genorah application

[67] I have already traversed the facts relating to this part of the granting of Genorah's application and there is indeed no explanation from the State respondents for the alteration that was effected. It is difficult to accept that it was simply the correction of an error. The Court should not be required to speculate as to what happened. On the contrary there is a duty on the State respondents to explain the alterations and they have simply failed to do so. The only inference that can be drawn from the facts is that the State respondents sought to change the date of approval from the 22 August 2006 to the 28 August 2006, in order for the record to reflect that Genorah's application had been decided after the refusal of RPM's application on 24 August 2006. Doing that would have brought, at least the dates of refusal and approval of the two competing applications, in line with the priority that the MPRDA provides for in the processing of applications by the holders of UOOR.

[68] Even though it appears to be a clumsy and rather amateurish attempt to conceal the true state of affairs, it is nevertheless serious in that it sought to unjustifiably alter the records of the State respondents to reflect something other than the true state of affairs. This is not only dishonest but undermines the integrity of the State administration system.

[69] One wonders, but for the existence of the document reflecting the correct date of approval (22 August 2006), whether this dishonest manipulation of the records would have remained undetected with all the attendant consequences that go with it.

[70] That the changes of date was deliberate and thought out is difficult to refute and therefore it would in my view constitute an act of bad faith on the part of those involved. I caution to add that, it is not suggested that all of the State respondents were party to this act of bad faith. It is indeed not possible, in the absence of any explanation by the State respondents, to determine who was responsible for the alteration except that it must have been one or more official in the Department of Minerals.

[71] In considering the consequences of the finding of bad faith I have come to, it is necessary to distinguish whether the decision to award rights to Genorah was dome in bad faith or whether, as it appears to be the case, the bad faith attempt to alter dates was made after the decision was taken . For the reasons already given the Genorah decision would have been taken on the 22 August 2006. At that point, and even though the decision was taken while the validity of RPMs old order right still endured, there is nothing to suggest that the decision was taken in bad faith.

[72] The bad faith was in the main limited to the attempt to change the date of the decision rather than the decision itself and my view is that from this distinction it must follow that the decision of the 22 August 2006 cannot be regarded as being invalid on account of bad faith which would have subsequently emerged and which does not taint the merits of the decision itself.

The failure to provide a record or a proper and complete record and granting rights while negotiations were under way

[72] There are further complaints by the applicant's that the State respondents failure to provide a record in the Bauba decision and their failure to provide a complete record in the Genorah decision is indicative of bad faith.

[73] I have already remarked on the manner in which the State respondents have conducted themselves in this litigation and their lack of explanation and assistance to the Court and while that continues to remain deplorable, it does not go so far as to constitute bad faith, mindful that bad faith must evidence a particular state of mind which I cannot say in this respect is the only inference capable of being drawn.

[74] I make the same comments in respect of the complaint that rights were granted while negotiations were under way. In *Public Protector v South African Reserve Bank the Constitutional Court addressed an allegation of bad faith made against the Public Protector as follow:*

> *"[71] A proper starting point is in my view to remind ourselves of what the ordinary meaning of bad faith is. A dictionary meaning is '[i]ntent to deceive'. The meaning of bad faith or malicious intent is generally accepted as extending to fraudulent, dishonest or perverse conduct; it is know to extend to gross illegality. Here too the perverse, seriously dishonest or malicious conduct must link up, not merely with the seniority of the person of high office occupied, but also with the seriousness of the actual or reasonably foreseeable consequences of that conduct.*
>
> *[72] The correct approach to determining the existence of bad faith is therefore one that recognises that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that*

reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed."

[75] In conclusion on this aspect and while the conduct of the State respondents fall far short of what is expected of an organ of state I am unable to, except in the case of the Genorah alteration, to conclude there was overall bad faith which taints the process relating to all the decisions under review in their totality and therefore justifying the relief sought.

Unreasonable delay

[76] The Genorah and the Bauba respondents argue that these proceedings for judicial review have been characterised by undue delay on the part of the applicants and in this regard take the view that delay in instituting proceedings and delay in prosecuting proceedings, even though they may have their genesis in different parts of the law, should have the same effect.

[77] The following was said in *Opposition to Urban Tolling Alliance and others v South African National Roads Agency Limited and others*[16] :

"[41] After all is said and done, the stark reality remains that because of the delay in bringing the review application, five years had elapsed since the impugned decisions were taken, and that during those five years, things have happened that cannot be undone. The delay rule gives expression to the fact that there are circumstances in which it is contrary to the public interest to attempt to undo history. The clock cannot be turned back to when the toll roads were declared and I think it would be contrary to the interests of justice to attempt to do so."

[78] In *Mkhwanazi v Minister of Agriculture and Forestry, KwaZulu-Natal*[17], it was held that the reasoning underlining the principle that delays in instituting an application

[16] [2013] 4 All SA 639 (SCA).

may be fatal , must equally also apply to the prosecuting of such an application. That this is so is underpinned by the power of the High Court , both at common law but also in terms of Section 173 of the Constitution, to regulate its own process.

[79] In *Cassimjee v Minister Finance*[18] the Court held:

> *"[11] There are no hard and fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable and, third, the defendant must be seriously prejudiced thereby. Ultimately the enquiry will involve a close and careful examination of all the relevant circumstances, including, the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial."*

[80] The rationale for the delay rule largely accords with principles that advance the efficiency of the system of the administration of justice and for the allied need for holders of rights not to be prejudiced by unreasonable delays. That rationale was summarised by Brand JA in *Associated Institutions Pension Fund v Van Zyl*[19] as follows :-

> *[46]…It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a*

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[17] 1990 (4) SA 763 (D).
[18] 2014 (3) SA 198.

[19] 2005(2) SA 302 (SCA) 321

sense, delay would 'validate' the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1 at para [27]). The raison d'être of the rules is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Voorsittende, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:

(a) Was there an unreasonable delay?

(b) If so, should the delay in all the circumstances be condoned?

(See Wolgroeiers at 39C-D)

[48] The reasonableness or unreasonableness of a delay is entirely dependant on the facts and circumstances of any particular case (see eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E-F)."

[81] What the Court is then required to do is to analyse carefully the delay complained of and if there was a delay whether regard being had to the facts and circumstances as well as any explanation offered for the entire period of the delay, it ought to be considered as unreasonable.

[82] Even if the Court concludes that the delay is unreasonable it may still determine whether the unreasonable delay ought to be condoned or overlooked and questions

of prejudice and the consequences of setting aside the decisions in the light of the delay become relevant.

[83] Against those principles it first becomes necessary to examine the complaint of delay and then determine whether it is reasonable or not and a joint chronology prepared by the parties provides a reliable source from which to chart the trajectory of the matter:-

83.1 11 September 2006, RPM become aware of the refusal decision;
83.2 March 2007, the review in respect of refusal decision launched;
83.3 December 2008, the review of decision to award right to Genorah included in relief sought;
83.4 May 2009, the order to compel is obtained for the record in the in the Genorah review is granted;
83.5 September 2009, the record in main refusal and Genorah decision delivered.

[84] The respondents complain that it took from March 2007 to September 2009, a period of over 2 years for the applicants to ensure the record was filed at least in respect of the main refusal and that this delay was unreasonable. While it appears that there were some negotiations during this time, it is however clear from the tenor of the applicants' affidavits that those negotiations did not appear to be seriously pursued nor did it receive regular feedback from the State respondents in respect of the negotiations.

[85] Under these circumstances there may well be merit in the contention that the applicants could have acted more expeditiously in obtaining the record.

[86] After the filing of the record it took a further 10 months for the applicants' to reconstruct the record (September 2009 to July 2010).

[87] During September 2010 the Bauba review application is launched.

[88] In November 2011, RPM launches an interlocutory application but it is withdrawn a month later on the basis that the DME would seek to bring about a settlement of the

MDP properties dispute. While there appears to have been some settlement discussions, nothing of substance appears to emerge and no further steps are taken to prosecute the reviews.

[89] During April 2014, the Bauba respondents bring an application to have the review against them dismissed.

[90] In November 2014, the applicant's bring a second interlocutory application, which is heard in May 2016 and judgment is delivered in February 2017.

[91] Between February 2017 and April 2019, there is the process to compile an order to produce the record and in April 2019 a supplementary founding affidavit is filed and further affidavits thereafter until the matter is ready for hearing.

[92] The respondents point out that it has taken some 14 years from the time of the refusal decisions for this matter to finally come to Court and that the periods of delay – separately as well as cumulatively are so excessive that they are unreasonable and in addition they point out that the applicants have not advanced a sufficient explanation for the delay.

[93] While there were negotiations held from time to time, they hardly cover the full timeline and in addition it does not appear that any of those negotiations were commenced with on the pre-condition that those who were granted rights would not take any steps in pursuit or furtherance of the rights they were granted.

[94] From the analysis of the time line it does appear that there were long periods where the inaction on the part of the applicants' was in fact unreasonable. I refer in particular to the period March 2007 to May 2009, the period from September 2010 when the Bauba review is launched to November 2014 when the second interlocutory is launched. All that effectively occurred in this time was the launch and the withdrawal of the first interlocutory in late 2011. It is a long period and coupled with the period between 2007 and 2009, is in excess of 5 years. There are also other short periods of delay to which reference has been made and the cumulative effect

of all of this is that some of the decisions that the applicant's seek to have reviewed and set aside were taken as far back as 2006.

[95] In her judgment of 1 February 2017, dismissing the application for interlocutory relief, Basson J said the following (albeit in the context of interlocutory relief):-

> *"[34] The submission is not without merit: RPM waited almost a decade after Genorah was granted a prospecting right (in August 2006) and years after Genorah was granted a mining right (in January 2012) before approaching this Court for an interim order interdicting the Genorah respondents from exercising their mining rights pending the outcome of the review application. Since Genorah has been granted a prospecting right, the applicants stood by and did nothing to prevent the State respondents from granting Genorah a mining right. Over the course of a decade Genorah exercised the prospecting rights granted to them under the MPRDA and incurred substantial legal and financial obligations.*
>
> *[35] Although RPM did launch an interlocutory application in November 20011 on a semi-urgent basis, it was subsequently unconditionally withdrawn after settlement negotiations with the Minister. There is nothing on the papers to suggest that, at the time when the application was withdrawn, an undertaking was given to RPM by the State respondents that no mining rights would be granted to Genorah. It is, in my view, inconceivable that RPM could not have been aware of the real possibility that, at the time when the first interlocutory application was unconditionally withdrawn, Genorah, as logical next step, would be granted a mining right and that the granting of a mining right would be a crucial game changer. In fact, little more than a month after the first interlocutory application was withdrawn, Genorah was granted a mining right.*
>
> *[36] This is important in light of the fact that, once a mining right has been granted, the holder of such a right is obliged to commence with*

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

[96] While those remarks were made in the context of interlocutory relief they have relevance in these proceedings when one has regard to both the delay as well as the prejudice to the respondents.

[97] The Genorah respondents have incurred expenses exceeding R1.2 billion rand pursuing their rights and in compliance with their statutory obligations to conduct prospecting operations as required by the MPRDA, they applied for and were granted a mining license in February 2012 and took steps to comply with the obligations imposed in terms of the mining licence. These are substantial measures taken over a number of years and at considerable cost and must be factored into the determination I am required to make. It must follow that the Genorah respondents acted in pursuance of the rights they were granted over a long period of time when the applicants' could and should have been more efficient and decisive in pursuing the relief they sought. As was pointed out by Basson J, RPM must have known in all of the time that had passed that both Genorah and Bauba would have acted, as they were obliged to do in law, to take steps to pursue the rights granted to them. It must

therefore follow that the delay in prosecuting the review has had consequences and both Genorah and Bauba would be severely prejudiced if there was to be a reversion to the status quo that existed prior to the taking of the decisions in respect of them which is the subject of this review.

[98] Although Bauba has not been granted a mining right, it too has expanded time, energy and resources (in excess of R32 million) in pursuing the prospecting right it was granted and is severely prejudiced by having to deal with a review some 14 years after the decision. Much time has passed and indeed much has happened in that time.

[99] Finally there is also the public interest in the finality of administrative decisions, which would seek to avoid setting aside administrative action after a long period of delay as to do so would impact on a number of acts that followed and were taken in pursuance of the administrative action. This is precisely what has occurred in these proceedings in terms of the actions taken on the strength of the rights awarded many years ago and which now finally come before this Court.

[100] In my view and for the reasons given, the unreasonable delay and the circumstances that were attendant upon it as well as the prejudice caused to the respondents if the delay was overlooked must mean that I should exercise my discretion in dismissing the relief sought on account of the unreasonable delay.

[101] I intend to do so but on the basis that I may be wrong in coming to that conclusion, I deal with the merits of the review hereunder.

The refusal decision

[102] The applicants also attack the merits of the refusal decision on various grounds and they include that :-

a) No proper reasons apart from placing reliance on Section 17 (2) where provided;
b) The procedure was unfair;
c) Irrelevant facts were taken into account when the application was considered;

d. Section 17(2) should have been restrictively interpreted;
e. The RPM/ARM joint venture could never factually trigger reliance on Section 17 (2).

I will deal with each of the above review grounds herein below.

a) No proper reasons apart from placing reliance on Section 17 (2) where provided

[103] The applicants contend that the refusal letter is cryptic to the extent that it simply restates the provisions of Section 17 (2) and therefore does not constitute proper reasons in the sense of them being informative and providing an explanation why the administrative action was taken. However, when one has regard to the explanatory memorandum prepared by the officials of the Department and which was also signed by the same DDG who signed the refusal letter, then it cannot be said that there was no explanation for the rationale for the refusal decision. That memorandum to which I have already made reference deals comprehensively with the reasons why the State respondents purported to place reliance on Section 17 (2).

[104] Thus even though the applicants may dispute the basis for reliance on Section 17 (2) they can hardly contend that the reasons advanced for the decision is cryptic or lacks an explanation for the basis upon which it was taken.

b) Procedural Fairness

[105] The applicants say that the State respondents, in advancing the argument of over concentration, relied on information contained in Anglo Platinum's 2005 Annual Report. They say that this report was not submitted as part of the applicants application and that if the State respondents intended to rely on the report, the applicants should have been given an opportunity to respond thereto and the failure by the State respondents to afford them such an opportunity deprived them of their right to procedural fairness.

[106] Hoexter says the following about the developments around procedural fairness in our law:-

> *"Fairness is a highly variable concept. In South African Law what makes a hearing "fair" has already depend on the circumstances, and*

that holds true today. Our courts are readily accept that fairness is not something that can be reduced to a one-size-fits-all formula. While placing emphasis on fundamentals such as notice of threatened action and an opportunity to make representations to the relevant administrator, they have refused to lay down rigid rules concerning the contend of fairness. Exactly how much notice is "adequate" notice? When will written representations suffice, and when will an oral hearing be necessary? The courts tend to answer questions like these on a case-by-case basis, having regard to factors such as complexity and seriousness of the case and the position of the complainant. Zulman JA summed things up neatly in Chairman, Board on Tariffs and Trade v Brenco Inc when he described the requirements of the audi principle as contextual and relative.

…

The flexible approach is upheld in the provisions of s 3 of the PAJA, which mirror the principles of the common law in a number of respects. In particular, section 3(2)(a) expressly recognises that a fair procedure "depends on the circumstances of each case". Section 3(2)(b) of the Act sets out the minimum requirements of fairness broadly, using open-ended terminology that allows for variation in interpretation in different contexts. For example, the precise form of the first ingredient – a "reasonable opportunity to make representations" – could vary widely from case to case. Fairness might require a full scale oral hearing in a disciplinary setting; but in another context, merely filing a form might qualify as a reasonable opportunity to make representations. Indeed, as will be seen in what follows, the variability of fairness goes even further than this."

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[107] The Annual Report to which reference is made is a public document that was produced and disseminated by Anglo Platinum. I do not understand the applicants to say that the report is inaccurate. What they in essence say is that the information relating to Anglo and its ownership of mineral resources in the area in question is not relevant to RPM as they are separate legal entities and that it was incorrect to conflate them for the purpose of justifying reliance on Section 17 (2). I have already

dealt with this issue and concluded that it would be artificial to place a barrier for the purposes of Section 17(2) between RPM and Anglo Platinum.

[108] I am not satisfied that the requirements of procedural fairness would have triggered an obligation on the part of the State respondents to inform RPM that they sought to rely on the Anglo Platinum 2005 Annual Report given the public nature of the Report and that the correctness of its contents do not appear to be in dispute .

c) Was the information concerning Anglo Platinum irrelevant to RPM's application?

[109] RPMs stance is that the State respondents were only required to look at RPM and their joint venture partner (the second applicant) in determining the question of over-concentration or exclusion and that it was impermissible and constituted a reviewable irregularity for the State respondents to have regard to, as they did, the ownership of mineral resources by Anglo Platinum.

[110] While the amended Section 17 (2) of the MPRDA now expressly provides that the concentration of resources in the applicant and its associated companies may be considered, the applicants' suggest that prior to the amendment of the section it would have been impermissible to have regard to the position of the companies associated with the applicant.

[111] I am not sure if such a restrictive approach is warranted. It would in the factual determination of whether there was concentration, regard as insulated and irrelevant, the holding of mineral resources by an entity that was in law a separate legal entity from the applicant but in substance not only part of the same grouping and structure, but the holding company of the RPM. It is difficult to conceive of a more distinct feature in the DNA of a company then to have regard to its holding company. The applicants resist such an approach.

[112] The approach the applicant's seek to take would lose sight of the objects of the MPRDA, in particular the need to promote equitable access to the nation's mineral and petroleum resources.

[113] It was therefore not only permissible but in my view necessary for the State respondents in giving effect to the MPRDA and in interpreting Section 17 (2) to have regard to what the broad objects of the Act are.

[114] Anglo Platinum is the holding company of RPM and to ignore Anglo Platinum's mineral resources in RPM's application and only focussing on RPM and its joint venture partner in dealing with the Section 17 (2) question would be incredibly technical, ignore the objects of the MPRDA and run the risk of arriving at an outcome that is diametrically opposed to what the MPRDA seeks to achieve.

d) Section 17(2) should have been restrictively interpreted

[115] RPM argues that since it was the holder of UOO Rights, Section 17 (2) was required to be interpreted restrictively so as to avoid the undue limiting of RPM's right to property and therefore the question should not have been whether RPM or Anglo held other UOO Rights but rather whether the grant of the new order right applied for, resulted in over concentration or exclusion.

[116] Again, if one has regard to the objects of the MPRDA such a restrictive interpretation is not warranted. The MPRDA was never intended to be a vehicle to preserve and protect old-order rights. It recognised them in providing preference for how the holders of such rights would be treated procedurally and provided an order of preference for their processing. It could never be said that the need to protect those old-order rights in substance should inform the proper interpretation of Section 17 (2) and in particular justify a restrictive interpretation of the Section.

[117] Subsequently, I find that there is no merit in this argument.

e) The RPM/ARM joint venture could never factually trigger reliance on Section 17 (2)

[118] It was argued for the applicants that the joint venture that comprises RPM and ARM (a majority black owned entity with community involvement and ownership) could never fall foul of Section 17 (2) because it in fact gives effect to and advances empowerment and the equitable allocation of mineral resources. The applicants suggest that under these circumstances a joint venture of this kind that constitutes the coming together of RPM and ARM can under no circumstances lead to an over

concentration of resources in the hands of RPM. Simply put the argument goes that where there is a genuine empowerment partner there cannot be over-concentration.

[119] While there was no suggestion that the joint venture between RPM and ARM was anything other than a genuine joint venture, it cannot follow that the existence of such a joint venture will always be dispositive of the over–concentration or exclusion argument. There may be instances, depending on the parties and their profile, where a joint venture may well exclude any conclusion of over-concentration or exclusion. On the other hand, it is also possible for a joint venture to both advance empowerment but also lead to over concentration and the proper approach to Section 17 (2) would be to look at the facts that to relate to each applicant and to conduct the Section 17 (2) inquiry on a case by case basis.

[120] To do otherwise and as RPM suggests to hold that a genuine joint venture can never result in over concentration is technical and formalistic and in theory could mean that an entity that already has considerable resources concentrated within it, will always avoid the attention of Section 17 (2), simply because it has a genuine empowerment partner in a joint venture. That cannot be correct because in those situations there is the real risk of over concentration and it cannot be said that somehow the over concentration will be ameliorated by the empowerment component of the joint venture.

[121] The enquiry that Section 17 (2) contemplates, is that it is obligatory for the Minister to refuse a prospecting right if it will result in the concentration of the mineral resources in question. That enquiry is an important one that seeks to advance the objectives of the MPRDA and the transformation of the sector. It cannot simply be bypassed by the inclusion of an empowerment partner in a joint venture.

[122] For all these reasons the challenge to the refusal decision has no merit and must fail.

The grant of a prospecting right and a mining right to Genorah

[123] It is clear from the papers and in particular the Memorandum that preceded the refusal decision in respect of the application by RPM, that Genorah's application for a prospecting right was lodged on 6 February 2006 (after the exclusivity period) and

that it was granted on the 22 August 2006 (despite the attempt to amend the date to the 28 August 2006).

[124] While the submission of Genorah's application after the exclusivity period but within the period of the validity of RPM 's UOO Right was permissible, *Aquila* is clear that Section 9 of the MPRDA would have served to bar the processing of Genorah's application for a prospecting right until that of RPM's was processed. It is clear given the date of approval of Genorah's application that the processing of that application (leaving aside the date when it was granted) would have occurred in violation of Section 9 and at a time when RPMs UOO Right still remained valid.

[125] Under those circumstances and on the timeline of the processing of Genorah's application for a prospecting right, there would have been a reviewable irregularity in both the processing and the granting of the processing right during 2006 and if regard is had to the *dicta* in *Aquila* the grant of a prospecting right to Genorah would have been invalid.

[126] That decision, however, even though it was challenged was never set aside and in *Aquila* the Court at paragraph 95 expressed itself as follows on what had become known as the *Kirland/Oudekraal doctrine* :-

> *"[95] But what the Kirland/Oudekraal doctrine does not do is to fossilise constitutionality invalid administrative action as indefinitely effective. For rule of law reasons and for good administration, the principle puts a provisional halt to determining invalidity without bringing the process to an irreversible end. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands."*

[127] Genorah's prospecting right expired on the 11 September 2011, and it was granted a mining right over some of the MDP properties on 10 February 2012. On the timeline it must follow that even though the processing and the granting of Genorah's prospecting right was invalid, at the time when it applied for and was granted a

mining right there were, at least no procedural impediments that stood in its way. By that date RPM's application for a prospecting right had long been refused.

[128] It was argued by the applicants that if the grant of a prospecting right to Genorah was invalid then any subsequent grant of a mining right to Genorah would also be invalid as the grant of the mining right was dependant on the valid granting of a prospecting right . This cannot be so for a number of reasons:-

a) At the time the mining right was granted to Genorah there was no order of invalidity in respect of the prospecting right of Genorah and all things being equal, the prospecting right remained valid until it was properly set aside. To that end it is not correct when RPM submit that the State respondents were prohibited from accepting an application for a mining right from Genorah in 2010, as it was the unlawful holder of a prospecting right. It was never open to the State respondents to resort to bureaucratic self help and to determine that Genorah was the unlawful holder of a prospecting right. Until the grant of a prospecting right to Genorah was set aside, its prospecting right was valid.
b) The impediment that would have existed with regard to the grant of a prospecting right to Genorah (RPM's prior application) had long since gone, by the time the mining right was granted to Genorah.

The Court was faced with a similar challenge in *Aquila* where despite finding that the grant of a prospecting right to *Aquila* was invalid, it found that by the time a mining right was granted to *Aquila* the cause of the invalidity had been removed and the grant of the mining right was deemed to be valid. There was no question of considering the invalid grant of a prospecting right as being fatal to the grant of any subsequent right.

[129] That reasoning must apply with even greater force in these circumstances as in *Aquila* it was the Court, by its order that removed the impediment, whereas in this matter the impediment, if there was one, was simply removed when RPMs application for a prospecting rights was correctly refused in August 2006. Further, RPM failed to take any steps against Genorah after it was granted the prospecting right. Had it done so successfully it would have ensured that RPM's appeal on the

refusal of its prospecting right could run its course whilst the prospecting right granted to Genorah could have been placed on hold.

[130] The applicants advance other review grounds as well in respect of the decision to grant a mining right to Genorah and they include:-

i) the decision was procedurally unfair in that the State respondents had failed to give notice to RPM of their intention to take such a decision knowing such decision would affect RPMs rights. There is no merit in this contention. By then RPM's application had been refused, it had no rights that warranted protection but even if it did there was no obligation on the part of the State respondents to have given RPM prior notice of the intention to award a mining right to Genorah;

ii) the decision was taken in bad faith given that RPM's internal appeal against the refusal decision was still pending. While it is a matter of some concern that the internal appeal was never determined, the fact that it has remained pending, was not a bar to the grant of a mining right to Genorah. RPM in any event took no steps (by way of *mandamus*) to compel the State respondents to deal with its appeal;

iii) the documents in support of the application for a mining right are fatally deficient in so far as they relate to a social and labour plan. This matter comes before this Court on the basis of an incomplete record. While the State respondents have been sadly remiss in complying with their obligations to file a full record, the applicants have been willing to have the matter heard on the basis of an incomplete record. To that extent it becomes difficult, if not impossible to determine an issue that relates to the lack of supporting documents on the back of an incomplete record and in the face of Genorah's assertion that it submitted all the necessary supporting documents.

[131] In light of all these reasons, I conclude that the applicants have not made out a case for the setting aside of the decision to grant a mining right to Genorah.

The granting of rights to the Bauba Respondents

[132] The applicants argue that the submission of a prospecting right application by Mr Thulare on behalf of the BaPedi nation was unlawful, as it was made within the period of exclusivity enjoyed by RPM and that only RPM was entitled to apply for a prospecting right during that period of exclusivity.

[133] The application by Mr Thulare was submitted during the afternoon of Friday 29 April 2005. By letter dated 13 May 2005, the RM advises Mr Thulare as follows:-

a) that the application was indeed received on the 29 April 2005;
b) that the application was accepted on the 13 May 2005 (*'I have accepted it today'*) only in respect of the non MDP properties;
c) that the application cannot be considered at this stage due to the fact that applications have already been accepted on these farms and are being processed;
d) that the application is therefore being placed on hold pending the decision of the Minister on the other applications.

The applicant's submit that the submission of the application on 29 April 2005, was unlawful and therefore fatal to the rest of the process and that what was required was a new application after the period of exclusivity. It is so that the submission of the application was premature but Mr Thulare was in fact informed by the RM on 13 May 2005 (after the expiration of the period of exclusivity) that the application had been placed on hold and that its processing would be held over. He was never advised that a new application was required given that his application was premature and it does appear that if regard is had to *Aquila*, then the acceptance of his application and the processing thereof all occurred outside of the period of exclusivity as well as outside of the the period of validity of RPM UOO Rights. Thus on this point the only issue is whether the premature submission of the application (by one working day) was fatal to the application and its subsequent trajectory. While the MPRDA does indeed create clear time frames of exclusivity and while it is necessary to respect and protect those time frames in so far as they seek to give preference to the holders of UOO Rights in making applications and having those applications processed and decided, at the end of the day the facts and the context remain important.

[134] In dealing with the application by Mr Thulare, the RM was clear that it would not be processed until the Minister had decided the prior received applications. This is clear and unambiguous recognition of the ongoing validity of the UOO Rights of RPM and its preference in the processing of its application.

[135] The acceptance of Mr Thulare's application also occurred outside the period of exclusivity and certainly in that time the State respondents were not barred by Section 9 from accepting the application of Mr Thulare.

[136] Finally, Section 12 of the MPRDA provides for assistance to historically disadvantaged applicants such as would be the case with Mr Thulare and if the State respondents were of the view that his application was fatally defective due to it being premature by one day, he should have been advised of that and provided with the necessary assistance in submitting a compliant application.

[137] This did not occur and the lodgement of the application prematurely could hardly be said to have worked to the prejudice of RPM or any other holder of an UOOR. To visit it with the consequence of legal fatality and to have all other acts arising from it visited with the same consequence would elevate form well over substance and would introduce such procedural rigidity into the process that it may well threaten the achievement of the transformative and equitable objectives of the MPRDA.

[138] In reaching this conclusion I am not suggesting that non-compliance with the MPRDA should as a matter of course be condoned. I reach the conclusion in the context of the particular and unique facts of the matter on hand and in the light of my conclusion that the non-compliance was minor in nature, that it did not operate to the prejudice of any other applicants, that in all other respects there was compliance with the MPRDA and that the interests of justice would not be served by visiting the non-compliance with the consequence of legal fatality.

[139] The applicant's advance further grounds on which they seek to challenge the grant of rights to the Baubu respondents and they include that the application by Mr Thulare was not a Section 104 application and was never treated as such by the State respondents. Both the letter of application as well as the Form B application

indicate that the application was submitted in terms of Section 104 which prior to its amendment in 2008 read as follows:-

> *"(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the Minister.*
> *(2) The Minister must grant such preferent right if the community can prove that-*
> *(a) the right shall be used to contribute towards the development and social upliftment of the community concerned;*
> *(b) the community submits a development plan, indicating the manner in which the right is going to be exercised;*
> *(c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and*
> *(d) the community has access the technical and financial resources to exercise such right."*

[140] There was no prescribed format that had to be followed in submitting the application and the letter and form clearly indicate that it was a Section 104 application.

[141] The applicants further challenged the grant of rights to the Bauba respondents on the grounds that there was no proof provided in the application of access to technical and financial resources as required by Section 104 (2) (d).

[142] The letter in support of the Bauba application refers to various documents in support of the application and it includes under C thereof details and documentary proof of technical and financial competence. The document titled Prospecting Work Programme submitted by Mr Thulare also deals with this and provides the CV's of the experts who were identified to assist with the programme, the costs of the programme and a letter from Absa Bank with regard to those costs.

[143] There is simply no merit in the submission that there was no proof provided of the technical and financial resources required to access any right granted.

[144] The applicants further allege that there was no proof that there was an application for a prospecting right submitted by Baubu after the 30 April 2005, in respect of the properties Genokakop. Grootvygenboom and Houtbosch.

[145] I have already dealt with this point when dealing with the consequence of the premature submission of the 29 April 2005 application and I need not say no more on, it except to point out that in the letter dated 13 May 2005 to Mr Thulare, the Regional Manager makes specific reference to the applications for a prospecting right in respect of the above properties in conveying to Mr Thulare that that part of the application was being held in abeyance.

[146] For the reasons already given there would have been no need for Mr Thulare to have submitted a new identical application after 30 April 2005 additional to the one submitted on 29 April 2005.

[147] The applicants seek to argue that since there was no application for a prospecting right (on the basis that the 29 April 2005 application was a nullity) there could have been no rights granted arising out of that application and therefore all subsequent granting of rights based on the foundation of the 29 April 2005 application stand to be set aside. This argument has already been dealt with and in the finding that even though the 29 April 2005 application was premature, it did not constitute a nullity and that the State respondents were entitled to treat it as a valid application and accept it and process it as such after the period of exclusivity had expired – which is what they did.

[148] Finally, the applicants suggest bad faith on the part of the State respondents in granting rights to the Bauba at a time when they would have known that the refusal decision was being challenged.

[149] While it is so that the refusal decision was being challenged, that challenge did not in the absence of an interdict to that effect, preclude the State respondents from considering and making decisions on other applications. To suggest that the State respondents were precluded from acting until the finalisation of the challenge (some

14 years later) would have the chilling effect of paralysing the machinery of the State in discharging its obligations whenever there was a legal challenge. Of course it would have been a different matter if the State respondents had been interdicted from granting any further rights pending the outcome of the challenge to the refusal decision. There was however no such interdict granted.

[150] In the circumstances and for the reasons given the relief sought in the consolidated notice of motion incorporating the refusal decision, the grant of rights to the Genorah respondents and the grant of rights to the Bauba respondents must be refused.

Order

I make the following order:-

a) The applications are dismissed.

b) The applicants jointly and severally, the one paying to the other to be absolved are ordered to pay the costs of the:-

i) The fourth , sixth , seventh and tenth respondents (Genorah) which costs are to include the costs of two counsel;

ii) The eighth and ninth respondents (Bauba) which costs are to include the costs of two counsel.

NJ. KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES:

Second applicant:	TJ BRUINDERS SC
	ADV E WEBBER
Instructed by:	BOWMAN GILFILIAN INC
Fourth, sixth , seventh and tenth respondents:	BRUCE LEECH SC
	ADV FRANCES HOBDEN

Instructed by:	WERKSMAN ATTORNEYS
Eight and ninth respondents:	AC BOTHA SC ADV SALDULKER
Instructed by:	SHADEEN DOLLIE INC
DATE OF HEARING:	**4 & 5 May 2020**
DATE OF JUDGMENT:	**10 July 2020**