IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)

Case No.: 3985/2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED **YES/NO** [redacted]

05 MAY 2025 — DATE
FOURIE AJ — SIGNATURE

In the application between:

MPILO AND ZEN HOLDINGS (PTY) LTD	**APPLICANT**
AND	
THE MINISTER OF MINERAL RESOURCES AND ENERGY **MR SAMSON GWEDE MANTASHE**	**FIRST RESPONDENT**
THE REGIONAL MANAGER OF THE FIRST **MR AUBREY TSHIVHANDEKANO**	**SECOND RESPONDENT**
THE MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT **MRS ANGELA THOKOZILE DIDIZA**	**THIRD RESPONDENT**
THE CHIEF DIRECTOR OF THE THIRD RESPONDENT **MS ZS SIHLANGU**	**FOURTH RESPONDENT**
CENTURION MINING COMPANY (PTY) LTD	**FIFTH RESPONDENT**

JUDGMENT

FOURIE AJ

INTRODUCTION:

[1] The Applicant in the current application makes an application under the auspices of the Promotion of Administrative Justice Act, 3 of 2000 (hereinafter "PAJA") to review and set aside certain decisions made by the First, Second, Third, and Fourth Respondents.

[2] The Applicant (hereinafter "Mpilo") further makes an application seeking to be given access to a specific property for purposes of mining thereon and seeks a declaratory order in respect of the validity, alternatively, the extension of a mining permit issued in favour of the Applicant on 25 January 2023.

[3] The First, Second, Third, and Fourth Respondents have all filed notices to abide by this Court's decision.

[4] The only party opposing the application is the Fifth Respondent (hereinafter "Centurion"), who seeks the application to be dismissed with costs.

[5] In his judgment dated 26 July 2023, which concerned an urgent interdict that was sought by the same Applicant against the same Respondents, Roelofse AJ stated that:

"The facts of this matter are un-complicated – the Law is not."

[6] I wish to expand upon the aforesaid statement largely because the Court, in evaluating the current application, was unfortunately not kept within the confines of a review application. It is notable that Advocate Alli, appearing for the Applicant, as well as Advocate Wesley SC, appearing together with his junior Advocate Basson, are extremely knowledgeable on mining rights and the applicable principles pertaining thereto.

[7] Although the underlying dispute between the respective parties might concern mining rights, the relief this Court is requested to pronounce upon is vested in administrative law and not mining law.

[8] In the current matter, the Court accordingly cautioned itself throughout not to attempt to usurp the functions of administrative agencies, all of the First, Second, Third and Fourth Respondents have important duties to fulfil and no doubt they all have the required knowledge and expertise to fulfil such duties with the necessary diligence required. The role of this Court is never to attempt to step into the shoes of any of the First, Second, Third and Fourth Respondents and to make expert decisions on their behalf, same would not be appropriate, and it can never be expected of any Court to have this level of expertise. If either Applicants or Respondents wish for the Courts to fulfil this role, they are mistaken.

[9] The only task of this Court is to ensure that the decisions taken by administrative agencies fall within the balance of reasonableness as required by the Constitution.

[10] In the matter of **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS [1]** the Constitutional Court emphasised that a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of Government and that a Court should take care not to assert functions of administrative agencies.

[11] Accordingly, the task of this Court faced with a review application ought to be significantly easier if the Court remains within the confines of a review application. The papers filed by both the Applicant and the Fifth Respondent, at least indirectly, and in some instances directly suggest that this Court ought to make pronouncements on certain rights of the respective parties. That is simply not the role of this Court in the current proceedings. I say so because one of the cornerstones of review applications is to exhaust internal processes before the courts are approached to resolve issues. The court will not be available to litigants who had other avenues but found the court a more convenient route to follow. The judiciary is under immense pressure and lacks the resources to deal with matters we ought not be dealing with.

[12] The role of this Court in these current proceedings is whether the actions or decisions taken by the First, Second, and Third Respondents constitute administrative action and flowing therefrom whether such administrative actions stand to be set aside or not. Flowing therefrom and if the Court finds that a setting aside is necessary the Court is then granted a wide discretion to grant an order that is just and equitable in terms of Section 8 of PAJA.

PRELIMINARY ISSUE:

[13] The Fifth Respondent filed its Answering Affidavit in the current application significantly out of time. A chronology of events indicates that the application was issued on 28 August 2023 and the Fifth Respondent's Answering Affidavit was filed on 28 February 2025.

[14] Centurion, in the body of its Answering Affidavit, seeks condonation for the late filing of the affidavit.

[15] Mpilo, in its Replying Affidavit, opposes the condonation for the late filing of the Answering Affidavit and seeks the Answering Affidavit filed by Centurion to be regarded as *pro non scripto*, requesting the matter to proceed as if unopposed.

[16] The starting point of the current evaluation into the granting of condonation is perhaps with this Court aligning itself with **MOSHONA J** in the matter of **S SAYED v THE HPSCA AND OTHERS (21310/2024) [2024] ZAGPPHC 905 (13 September 2024),** where the Court stated in its introduction that:

> *"Where a review application is not opposed, it does not automatically follow that a Court of review shall exercise its review powers in the absence of grounds of review being proven, simply because the application stands unopposed. Taking into account the Rule of Law and Separation of Powers, a Court of Law is not empowered, by demonstration of superior knowledge, to willy-nilly interfere with decisions of administrative tribunals. Adley, the English in Chief Constable of North Wales Police v Evans (1982) All ER 141 (HL) per Lord Brightman stated the following:*
>
> > *"A judicial review is concerned not with the rescission,* ***but with the decision-making process****. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing the abuse of power be itself guilty of usurping."****(own emphasis)***

[17] In all unopposed applications, the Court will, in any event, evaluate whether the Applicant has proven its case and has met the relevant threshold necessary in order to do so even in the absence of an opposition by a Respondent. Review applications are no different and even if the Court decides in matters such as this, not to grant condonation for the late filing of an Answering Affidavit the Court will not be a mere rubber stamp. The Court will properly evaluate, as it needs to do, whether the Application has made out a proper case.

[18] On 15 September 2023, Centurion already filed its Notice of Intention to Oppose. The next ten months up until July 2024 are simply explained by Centurion by stating that their previous legal representative failed to properly attend to the matter. A full explanation for this ten-month period is simply not provided.

[19] Only after no Answering Affidavit was delivered by Centurion and the matter was set down for hearing on the unopposed roll for 26 July 2024 did Centurion take action in respect of the matter.

[20] At the postponement of the matter, which was ordered at the costs of Centurion the Court made an Order as per Form B completed by the respective parties that Centurion would file its Answering Affidavit on or before 21 November 2024. This was already more than a year out of time and a more than lenient indulgence provided to the Fifth Respondent. The explanation following the postponement of the matter on 26 July 2024 as to why an Answering Affidavit was not filed timeously is similarly vague as Centurion attempts merely to state that their preferred counsel was not available to attend to the drawing of the Answering Affidavit.

[21] Our Courts have pronounced on many occasions on whether the unavailability of counsel can be utilised as an excuse not to adhere to the Rules of Court. Stated, it cannot.

[22] The greatest concern the Court has with the explanation offered by Centurion for the delay in filing its Answering Affidavit is found in paragraph 166 of its Answering Affidavit in that the legal representatives of Centurion evaluated the matter and commenced the drafting thereof only during January 2025. This is not the greatest concern the Court has, but rather during the drafting process the legal representatives of Centurion made a conscious election not to finalise the drafting of their Answering Affidavit up until a date and time after the mining permit of the Applicant had lapsed. The position might have been different if the *bona fide* actions of the legal representatives had led to the late filing of an Answering Affidavit filed at a stage when the mining permit had lapsed, but in the current matter Centurion's representatives knew that the mining permit would lapse on a specific date and made a conscious election, evidence which they themselves tendered, not to file the Answering Affidavit and to only file same once the mining permit has lapsed.

[23] The actions of the legal representatives of Centurion speak to a conscious and deliberately taken decision to provide the Fifth Respondent with a possible strategic advantage in the litigious process. By delaying the filing of an Answering Affidavit since 2023, when the Answering Affidavit was, in terms of the Rules of Court, due, Centurion managed to secure a trial date for the matter on a date after the mining permit of the Applicant had lapsed. Had Centurion filed its Answering Affidavit timeously in 2023, or not sought the postponement of the matter in July 2024 this matter would have been dealt with at a time when the mining permit of the Applicant had not yet lapsed.

[24] The Court further finds it difficult to accept that Centurion only realised the lapsing of the mining permit, the date thereof and the implications thereof in January 2025. The mining permit issued to the Applicant forms the crux of several previous litigious processes and the date on which the mining permit was issued and the date on which it would expire has been a known fact to the respective parties since the issuing of the permit and at the very least since Centurion appealed against the issuing of the permit to the Applicant.

[25] During the argument, Advocate Wesley SC, appearing on behalf of Centurion, correctly conceded that the late filing of the Answering Affidavit constitutes not only a significant delay in the filing of the Answering Affidavit but also necessarily has had the effect of significant prejudice towards the position of the Applicant.

[26] The prejudice suffered by the Applicant as a result of the late filing of the Answering Affidavit by Centurion is best displayed by the fact that Centurion themselves, as an introduction to their Answering Affidavit, take a *point in limine* that the mining permit of Mpilo has lapsed and that Mpilo has no *locus standi* in the matter.

[27] If the mining permit has lapsed and if it has any effect on the Applicant then surely all the complained effects could only be as a result of the late filing of the Answering Affidavit of the Fifth Respondent.

[28] The effects of the late filing of the Answering Affidavit would also, given the nature of the matter and the significant impact such prejudice might have not be able to be wholly cured by an appropriate order as to costs.

[29] The application for condonation cannot merely be evaluated under the auspice of the Uniform Rules of Court and what was stated by Hefer JA in the matter of **UITENHAGE TRANSITIONAL LOCAL COUNCIL v SA REVENUE SERVICES [2]** finds application, where he said:

> *"Condonation is not to be had merely for the asking; a full, detailed, and accurate account of the cause of the delay and their effects must be furnished, so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration, and extent of any obstacle on which reliance is placed must be spelled out."*

[30] The non-compliance by Centurion is also a non-compliance with the Order of this Court on 26 July 2024 in which the Form B was incorporated. In terms of the Court Order, Centurion needed to file its Answering Affidavit by 21 November 2024. Cameron JA in the matter of **FAKIE N.O. v CCII SYSTEMS (PTY) LTD [3]** held that:

> *"It is a crime to unlawfully and intentionally disobey a Court Order..... A founding value of the Constitution requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."*

[31] Although dealing with the striking of a Defendant's defence, which in the current matter would amount approximately to the same step if the Answering Affidavit were not allowed, the Court in the matter of **WILSON v DIE AFRIKAANSE PERS PUBLIKASIES (EDMS) BPK [4]** held that:

"The striking out of a Defendant's defence is an extremely drastic step which has the consequence that the action goes forward to a trial as an undefended matter. In the case if the orders were granted, it would mean that a trial Court would eventually hear this action without reference to the justification which the Defendant has pleaded and which it might conceivably be in a position to establish by evidence. I am accordingly of the view that this very grave step will be resorted to only if the Court considers that a Defendant has deliberately and contemptuously disobeyed its order to furnish particulars."

[32] In the current matter, the Court states that the same principles ought to be applied to the late filing of Answering Affidavits.

[33] The Court ought to however also refer to the merits of the matter, as the principles pertaining to condonation necessitate an evaluation of the prospects of success of the Fifth Respondent and if the prospects of success are so great that it might cure any other deficiencies in their explanation or the extreme time delay, the pendulum in accepting the Answering Affidavit would swing in favour of the Fifth Respondent. Advocate Wesley SC appearing for Centurion correctly, upon engagement of the Court, conceded that if the case for the Respondent does not hold significant prospects of success to overcome the case of the Applicant, Centurion would not have met the threshold in respect of condonation being granted for the late filing of its Answering Affidavit.

[34] Irrespective of whether the Court finds in favour of Centurion in respect of the condoning of the late filing of the Answering Affidavit or not the Court can make an appropriate cost order to show its displeasure with the manner in which the matter was dealt with by Centurion seemingly to obtain a tactical advantage over the Applicant.

The interdict order of 26 July 2024

[35] As stated previously, a previous Order by Roelofse AJ in this Court was delivered on 26 July 2023 in respect of an interdict sought by the Applicant in essence halting all the mining operations at the Farm Camelot 320 JU (hereinafter the "Property"). The Court in the interim interdict application, although faced with a different legal proposition and a different test than in the current matter properly evaluated several of the underlying issues which this Court needs to evaluate also in the current review application.

[36] I am not of the intention of restating each and every finding as made by Roelofse AJ in the interim interdict application save to state that, for purposes of the current matter, not all the findings of Roelofse AJ are relevant and, where the findings of Roelofse AJ are relevant for purposes of the review application, those findings are correct. I cannot fault the reasoning or conclusions drawn by the court in the interim interdict application.

[37] This Court, in order to come to an appropriate order did not merely accept what was found by Roelofse AJ, as the court needed to ensure that the applicable finding by Roelofse AJ was not only made to meet the threshold of an interim interdict but that they would withstand the scrutiny of a review application.

[38] In the current matter for instance the Applicant needs to show that it has the necessary *locus standi* whereas in the interim interdict application, it needed to show that it had a *prima facie* right. This is but one of many examples of the differences between the respective evaluations, all of which I am not of the intention to repeat.

Grounds for Review

[39] The grounds of review and the underlying dispute between Mpilo and Centurion are candidly set out by Mpilo in paragraphs 73 and 74 of its founding papers, where it states that:

> *"73. The Fifth Respondent is given the right to access the property and remove the tailings, and on the other hand, the Applicant has been awarded a permit specifically for purposes of mining the same tailings and doing with it as it pleases in respect of those very tailings that the Fifth Respondent was granted access to.*
>
> *74. To add insult to injury and despite proffering conflicting rights to the Applicant and Fifth Respondent, the Second Respondent makes a declaration of ownership regarding the tailings and then in the same breath unashamedly alleges that it bears no jurisdiction in respect of the very same tailings."*

[40] The aforesaid stems from the decisions made by the First, Second, Third and Fourth Respondents in, after providing a mining permit to the Applicant on 25 January 2023, and amidst an appeal lodged by Centurion against such mining permit, to declare Centurion to be the owners of a mining dump and granting Centurion access to the property for purposes of removing the mining dump.

[41] During the argument of the matter, it seemed as if the legal representatives of the respective parties wished for this Court to pronounce upon and to declare ownership of mining rights.

[42] Whilst this Court wholeheartedly agrees that the time has come for a final adjudication on whether any of the Applicant or Fifth Respondent holds any mining rights, to which degree and how they may be enforced, this Court is not such a forum until the other available remedies to the respective parties have not

yet been exhausted either to the satisfaction or the dissatisfaction of the respective parties.

[43] I accordingly only need to determine, currently, whether the complained-off action constitutes an administrative action, and if I agree that it does, whether in terms of Section 6 of PAJA, such administrative decision ought to be reviewed and set aside.

[44] Administrative action is defined in the Act as follows:

> *"**administrative action"** means any decision taken, or any failure to take a decision, by—*
>
> *(a) an organ of state, when—*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—*
>
> *(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;*

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

["administrative action" (gg) substituted by s 26 of Act 55 of 2003.]

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1);"

[45] An evaluation of the complained-off correspondence which the Applicant wishes to review and set aside leads the court to the decision I ultimately make.

[46] Without delving into an academic evaluation of the statutory definition of administrative action, it cannot seriously be contested by the parties that a decision was taken by an Organ of State that adversely affected the rights of any person which has a direct, external legal effect.

[47] The Court evaluated whether any internal remedies needed to be followed by the Applicant by the lodging of the current review. In this regard, I agree with Roelofse AJ that, whilst the decision constitutes administrative action, given that the decision emanated from acts of the Director-General which acts, as found by Roelofse AJ was *ultra vires*, those decisions did not amount to administrative decisions in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (hereinafter the "MPRDA") and as such an internal appeal process against such decisions would not need to be exhausted as stipulated in Section 96 of the MPRDA.

[48] The only further question is then, whether the matter falls inside the ambit of Section 6 of PAJA to be dealt with as such. The applicable section states as follows:

"6. Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision, where—

(a)

(i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b)

(i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period."

[49] In evaluating whether the threshold of Section 6(1) has been met and whether the Applicant has the required *locus standi* to make the application the parties have agreed that the Applicant's mining permit has, at the date of hearing of the matter lapsed due to a lapsation of time.

[50] The question remains whether the Applicant has the necessary *locus standi* to make the application. An evaluation of Section 6(1) of PAJA seems not to place a narrow description on who a person may be who could institute proceedings, and rightly so as it would in my opinion merely relate to any person who may be adversely affected by any administrative action. The parties cannot seriously contest in the current matter that the Applicant has been or may in future be adversely affected by the administrative action of the First, Second, Third, and Fourth Respondents. The administrative action, indeed, coupled with the actions of the Fifth Respondent ought not to close the doors of justice for the Applicant in the current matter.

[51] The Constitutional Court explained in the matter of **GIANT CONCERTS CC v RENALDO INVESTMENTS (PTY) LTD AND OTHERS [5]** that:

> *"Standing is not a standing of strictly defined concept and there is no magical formula for conferring it. It is a tool a Court employs to determine whether a litigant is entitled to claim its time, and then put the opposing litigant to trouble. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an Applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And there is a measure of pragmatism needed."*

[52] Taking into regard all the relevant aspects of the current matter, this Court finds that it would be inconceivable and unjust to declare on a technicality, even if that were the case, that the Applicant holds no *locus standi.*

[53] During the argument in respect of the matter, the Court evaluated Section 24(5) of the Mineral and Petroleum Resources Development Act, which in essence states that a mining right remains valid once an application for renewal of such a mining right is made. The current matter does not deal with a mining right but deals with a mining permit. The Court is, however, fortified in its previous view in finding that the Applicant has a necessary *locus standi* under circumstances where, although dealing with a mining permit, prior to the expiration of such a permit, the Applicant made an application for the renewal thereof. The MPRDA is silent on whether the automatic extension of rights also applies to mining permits, similar to mining rights. I am not of the intention of finding in the current matter that it ought to be dealt with similarity, but I am of the opinion that dealing with scenarios such as the current calls for a common sense and pragmatic approach and as such I find that the Applicant has the necessary *locus standi* in respect of the matter. The ancillary orders the court intends to make also lay to rest any contentions against the notion that the Applicant has the required *locus standi* in the current matter.

[54] Having found that the actions of the First, Second, Third, and Fourth Respondents constitute administrative action, and that the Applicant has the necessary *locus standi,* the Court can deal with the review and whether a review ought to be ordered.

[55] Central to this Court's reasoning in the current judgment are two crucial elements, which is not to say all the other elements, as evaluated, have been merely disregarded. It only means that these two elements dispose of the matter in a manner that would not influence further tribunals or Courts to make any ruling in favour of any of the parties.

[56] The Applicant's mining permit was granted on 25 January 2023.

[57] On 10 March 2023 the Fifth Respondent lodged an appeal against the granting of the mining right with the Director-General for the Department of the Department of Mineral Resources and Energy for the attention of the Chief Director.

[58] The appeal, the issues raised therein, the Applicant's answer thereto, and the Respondents' reply all mirror to a great extent the same arguments the parties advance in the current application.

[59] In essence, the appeal seeks that the mining permit of the Applicant be withdrawn based upon the rights to the mining dump which the Fifth Respondent wishes to enforce.

[60] The mentioned appeal has not yet been heard nor has the relevant structures had the opportunity of evaluating same in order to come to a conclusion, which conclusion, if same had been received, prior to the current application, would not have necessitated the current application as it would have provided the parties with the relevant legal certainty.

[61] Despite the appeal being lodged the Regional Manager for the Department of Mineral Resources and Energy on 9 May 2023 then took the administrative action complained of and declared the Fifth Respondent to be the owners of the dump by virtue of the fact that they are in possession of a claim licence for the property.

[62] Flowing from the aforesaid decision the administrative decision of 8 June 2023 followed wherein the same department stated not having jurisdiction over the dumps complained off on the property and flowing from which on 12 June 2023 the Department of Agriculture, Land Reform and Rural Development granted the Fifth Respondent access to the property for purposes of removing the tailings dump. All of the aforesaid administrative actions were taken either knowing of the appeal and the dispute existing between the respective parties alternatively taken without the necessary relevant facts that were necessary in order for them to take the administrative action they so did.

[63] The aforesaid brings the administrative action squarely within the ambit of Section 6(2)(c), (e)(iii), and or (e)(v), and or (e)(vi).

[64] Roelofse AJ in the interim interdict matter found that the Regional Manager of the DMRE was not empowered by the MPRDA to make a declaration over the ownership of the tailings. I agree that this in itself is grounds for the review application to succeed.

[65] The Fifth Respondent contends that the Regional Manager in the correspondence exchanged only expressed a view or an opinion. The aforesaid proposition cannot be accepted. The aforesaid is substantiated by the letter of the Department of Agriculture, Land Reform and Rural Development of 12 June 2023, which premised a further administrative decision on the administrative decision of the Regional Manager of 9 May 2023. Whether the Regional Manager intended his administrative action to be anything else than an administrative action remains lost in the mystery of the case, as he did not partake in the litigious process. The Court is accordingly only faced with the

proposition that a decision was taken by an Organ of State upon which another Organ of State took another decision.

[66] If any of the First, Second, Third, or Fourth Respondents did not believe they ought to or ought not to take such a decision that would constitute administrative action, they should have refrained in totality from engaging with the respective parties on those issues and should have refrained in totality from taking any administrative action. By taking administrative action their actions become open for review.

[67] For instance, if the Regionoal Manager as per his later letter wished to convey that he accepted the Fifth Respondent's position in respect of the Common Law, a crips answer to the respective parties stating that he does not have jurisdiction to deal with the matter would have sufficed rather than to make a determination standing opposite to the fact that he holds no jurisdiction to make any sort of decision in respect of the matter at hand.

[68] Without making a determination on the jurisdiction of the Regional Manager, if it was his contention that he did not have jurisdiction to adjudicate upon the matter he ought to have summarily suspended his involvement in the matter by informing the parties as such which would have left the parties with the sole recourse being the adjudication of the appeal on whether the Applicant's mining permit was validly granted or not and whether same ought to be withdrawn or not. The answer in that appeal would have clarified all the issues between the parties as the parties would have received, as they still can, an answer to which party holds which rights in respect of the mining dumps.

[69] In all aspects, the administrative action of the First, Second, Third, and Fourth Respondents have confused the issues to the point where neither the Applicant nor the Fifth Respondent have the right to deal at all with the property or the mine dumps. This is also not a desirable position as the mining dumps hold a value of more than R 200 000 000.00 (Two hundred million Rand).

RELIEF SOUGHT AND RELIEF GRANTED:

[70] The relief that this Court is sought to grant is Public Law remedies to be applied to pre-empt, correct or reverse an improper administrative action.

[71] The setting aside of an administrative action may not properly remedy the matter and the Courts usually exercise the power to remit the matter for reconsideration by the administrator. This is affirmed as a general power in Section 8(1)(c)(i) of PAJA, and it is accepted that this is usually the prudent and proper cause. In general terms, this will suffice unless it is not sufficient to achieve a just and equitable remedy. Section 8(1)(c)(ii) of PAJA recognises the exceptional case where the Court may substitute or vary the administrative action or decision for that of the decision-maker/administrator.**[6]**

[72] The Constitutional Court has comprehensively dealt with the question of whether a substation order ought to be made in the matter of **TRENCON CONSTRUCTION (PTY) LTD v INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED AND ANOTHER [7],** where the Court held as follows:

> *""(1) Exceptional circumstances test*
>
> *[34] Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant "any order that is just and equitable".**[8]** In exceptional circumstances section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.*
>
> *[35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it*

would be just and equitable to grant an order of substitution.

[36] Long before the advent of PAJA, courts were called upon to determine circumstances in which granting an order of substitution would be appropriate. Those courts almost invariably considered the notion of fairness as enunciated in Livestock and the guidelines laid down in Johannesburg City Council.

[37] In Livestock, the Court percipiently held that –

> *'the Court has a discretion, to be exercised judicially upon consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.'**[9]***

[38] In Johannesburg City Council, the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the usual course in two circumstances:

> *"(i) Where the end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.*

(ii) *Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again."**[10]***

[39] *On a plain interpretation of Johannesburg City Council, the factors under the exceptional circumstances enquiry – like foregone conclusion, bias or incompetence – are independent. That is, if any factor is established on its own, it would be sufficient to justify an order of substitution. Indeed, this interpretation is also supported by subsequent case law.**[11]***

[40] *The Supreme Court of Appeal in Gauteng Gambling Board seems to have added another consideration, whether the court was in as good a position as the administrator to make the decision.**[12]** For this, it noted that the administrator is "best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision".**[13]** The Court also considered the broader notion of fairness in accordance with Livestock.**[14]** This notion seemed to colour the Court's analysis of whether, after the Court was satisfied that it was in as good a position as the administrator and a foregone conclusion was established, an order of substitution was the appropriate remedy.**[15]** In applying the notion, the Court's findings were also informed by how a party is prejudiced by delay and potential bias or the incompetence of an administrator if the matter were remitted.**[16]***

[41] *It is instructive that cases applying section 8(1)(c)(ii)(aa) of PAJA have embraced a similar approach to those that ordered substitution under the common law. However,*

because the section does not provide guidelines on what exceptional circumstances entail, it is of great import that the test for exceptional circumstances be revisited.

*[42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy.**[17]** Remittal is still almost always the prudent and proper course.*

[43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.

[44] It is unsurprising that this Court in Bato Star accepted Professor Hoexter's account of judicial deference as –

> *'a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate*

*corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'**[18]***

[45] Judicial deference, within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution. In Allpay II, Froneman J stated that -

'[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.

. . .

*Hence, the answer to the separation-of-powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency'.**[19]** (Footnote omitted.)*

[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that

each factor in the exceptional circumstances enquiry may be sufficient on its own to justify substitution. ***[20]*** *However, it is unclear from more recent case law whether these considerations are cumulative or discrete.****[21]***

[47] *To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight.****[22]*** *The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.*

[48] *A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may*

*concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.**[23]***

[49] *Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter".**[24]*** *Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.*

[50] *The distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and interdependent. However, there can never be a foregone conclusion unless a court is in as good a position as the administrator. The distinction can be understood as follows: even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions.**[25]***

[51] A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances, it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed. In other instances, delay may weigh more towards granting an order of substitution. This may arise where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay. In that instance, the delay occasioned by remittal may very well result in further prejudice to that party. Importantly, it may also negatively impact the public purse.

*[52] What must be stressed is that delay occasioned by the litigation process should not easily cloud a court's decision in reaching a just and equitable remedy. Sight must not be lost that litigation is a time-consuming process. More so, an appeal should ordinarily be decided on the facts that existed when the original decision was made.**[26]** Delay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances.*

[53] There are important reasons for this approach. Where a matter is appealed, delay is inevitable. Thus, assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases. This, they would do, with the hope that the time that has lapsed in the litigation process would be a basis for not granting a substitution

*order. Where a litigant wishes to raise delay on the basis of new evidence, that evidence must be adduced and admitted in accordance with legal principles applicable to the introduction of new evidence on appeal.**[27]** Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.*

[54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.

[55] In my view, this approach to the exceptional circumstances test accords with the flexibility embedded in the notion of what is just and equitable. It is, therefore, consonant with the Constitution while at the same time giving proper deference and consideration to an administrator."

(FOOTNOTES 8-27 are included as per the original judgement)

[73] Having regard to the facts of the matter, the need to empower the relevant administrators and the fact that the Court regards them to be experts in their field of law and best equipped to evaluate the history, underlying principles, and prevailing principles to the facts of the matter together with the fact that there exists a necessity for the current administrators in respect of the current matter to seriously grapple with the issues at hand before the legal conundrum is placed at the feet of the Court, this Court shall not pronouns finally on issues which it believes the administrators can and should resolve.

CONCLUSION:

[74] Despite the application meeting the threshold for the review application to succeed, the application calls for a commonsense approach into the resolution of significant important issues between two litigants.

[75] Equally as important for the litigants as the finding of this Court on the review and setting aside of the administrative action is the order the Court makes in order to rectify the position.

[76] The current matter is not one where the Court can merely set aside an administrative action. In the current matter the Court believes that exceptional circumstances exist which dictate that the Court provide directions to the relevant administrators guiding them to bring the current matter to just finalisation.

[77] The interest of justice dictates that the Court does not make any declaration on the ownership of the mining and tailing dumps. To make such a determination would circumvent the powers of the administrators and would nullify the pending appeal. Similarly, to grant any party access to the property for purposes of mining thereon, pending the reconsideration by the administrators and the finalisation of the appeal would also not be just or serve any purpose.

[78] The Applicant requested the Court to make a ruling that this Court ought to extend its mining permit alternatively that the time period contained on the permit be stayed pending the finalisation of this matter. To grant the aforesaid request the Court ought in essence to evoke the provisions of Section 8(1)(d) of PAJA which states that:

"8. Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;"

[79] To make such a ruling the just and equitable principle that has been the subject of much deliberation in our Courts needs to be applied.

[80] In the current matter the Court, when evaluating the total of the litigious process and indeed the actions of the Fifth Respondent that have caused prejudice to the Plaintiff in respect of the lapsing of its mining permit is justified at least to some degree to entertain the request of the Applicant. The Court shall entertain the Applicant's request without pronouncing on the validity of the mining permit, which shall remain the prerogative of the appeal tribunal. The Court is however willing to order that the mining permit issued in favour of the Applicant shall remain valid up until the conclusion of the appeal serving in the appeal tribunal and shall it be for such an appeal tribunal to make a just order on the extension of the mining permit past the hearing of the appeal. This Order is so made that the Applicant still has standing in respect of the appeal and to ensure that the appeal is not to be regarded as moot. In order to clarify any uncertainty, all the issues between the respective parties remain alive and are to be determined in the relevant and appropriate forums.

COSTS:

[81] The normal principle is that a successful litigant ought to be entitled to payment of his costs. Having regard to the confusion that was caused by the actions of the First, Second, Third, and Fourth Respondents in the current matter this might have been a matter where the Court could have stated each party to pay their own costs or to make the costs dependant on the outcome of the underlying appeal process. Given the actions of the Fifth Respondent, specifically in the manner in which their Answering Affidavit was delayed and the prejudicial effect thereof, I cannot, unfortunately, come to the aid of the Fifth Respondent in making no order as to costs.

[82] I find that the matter was indeed one of such a complex nature that it is deserving of costs being ordered on Scale C. The Respondents themselves utilised the services of a Senior and a Junior Advocate, and any other order in respect of costs would simply not be just.

ACCEPTANCE OF THE ANSWERING AFFIDAVIT:

[83] Although the Court persist with its displeasure and the effects of the late filing of the Answering Affidavit, which displeasure is shown not only in the cost Order that this Court makes, but also in the extraordinary protection the Order affords the Applicant, the issues as raised by the Fifth Respondent in their Answering Affidavit cannot be regarded as fatally flawed or malicious to the degree that it did not necessitate or help the Court to evaluate same in coming to a just conclusion in respect of the matter.

[84] Although reluctantly, the Court condones the late filing of the Answering Affidavit of the Fifth Respondent as the Court finds it just and equitable under the circumstances that, given the gravity of the matter at hand, all the parties are heard and the issues properly ventilated.

[85] The prejudice caused is cured by other avenues through the Order of this Court.

ORDER:

[86] For all the reasons stated, the Court grants the following Order:

1. The decision made by the First and Second Respondents on 9 May 2023 wherein they accepted the information provided by the Fifth Respondent to allegedly constitute proof of ownership of the tailings, alternatively base metal situated on the property more fully described as a portion of the remaining extent of the Farm Camelot 320 JU is reviewed and set aside.

2. The decision made by the First and Second Respondents on 8 June 2023 in a letter wherein they declared *inter alia* that they do not have jurisdiction over the tailings found on the property, irrespective of their reasoning for not having such jurisdiction is reviewed and set aside.

3. The decision made by the Third and Fourth Respondents on 23 May 2023 in a letter wherein they granted the Fifth Respondent access to the property for purposes of removing the tailings situated on the property is reviewed and set aside.

4. The decision made by the Third and Fourth Respondent on 12 June 2023 in a letter wherein they indicated that access to the property will be given to the Fifth Respondent is reviewed and set aside.

5. The decisions in Orders 1, 2, 3, and 4 by the respective administrators are remitted back to the said administrators with the following directions:

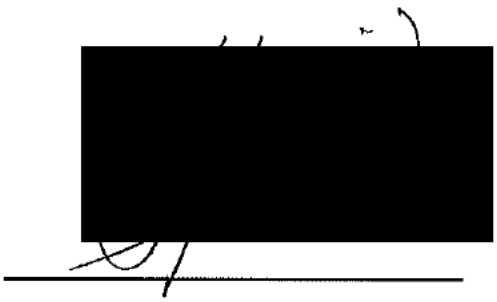
    5.1. The administrators shall only reconsider the decisions once the appeal as lodged by the Fifth Respondent against the decision of the Regional Manager, Mpumalanga Region, Department of Mineral Resources and Energy to grant an application for a mining permit in terms of the Section 27 of the MPRDA to the Applicant, dated 10 March 2023 has been finalised and adjudicated upon.

    5.2. All the parties being involved in the appeal, *supra* shall ensure that the appeal is set down and finalised within four (4) months of this Order.

    5.3. At the conclusion of the appeal, the First, Second, Third, and Fourth Respondents as administrators shall be informed of the outcome of the appeal and the findings of the appeal tribunal and shall reconsider the administrative action set aside in the current order and take the appropriate administrative action thereon.

6. The Applicant's mining permit shall not lapse and shall remain valid and enforceable up until the finalisation of the appeal, *supra* at which appeal the validity and/or the extension of such mining permit shall be ruled upon.

7. The Fifth Respondent is ordered to pay the Applicant's costs of the application on a party and party scale, Scale C.



H F FOURIE AJ
ACTING JUDGE OF HIGH COURT, MBOMBELA

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Judgment reserved on: 17 APRIL 2025
Date of delivery: 05 MAY 2025

[1.] 2004 (4) SA 490 (CC)

[2.] 2004 (1) SA 292 (SCA)

[3.] [2006] ZASCA 52 at paragraph 6

[4.] 1971 (3) SA 455 (T)

[5.] 2013 (3) BCLR 251 (CC)

[6.] Muduviwa and Others v Minister of Home Affairs and Another [2023] ZAGPPHC 2285 at paragraph 69.

[7.] 2025 (5) SA 245 (CC)

[8.] See section 8(1) of PAJA above n 13.

[9.] Livestock above n 29 at 349G.

[10.] Johannesburg City Council above n 30 at 76D-G.

[11.] Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board and Others [2010] ZAFSHC 33 at paras 53-4 and Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at para 109F.

[12.] Gauteng Gambling Board v Silver Star Development Limited and Others 2005 (4) SA 67 (SCA) (Gauteng Gambling Board) at para 39, where the Court held that—

"the court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter."

[13.] Id at para 29.

[14.] Id at para 28. See also Livestock above at 29 at 349G.

[15.] Gauteng Gambling Board above n 34 at paras 39 and 40.

[16.] Id at para 40.

[17.] Section 8(1) of PAJA above n 13.

[18.] Bato Star above n 25 at para 46. See Hoexter "The Future of Judicial Review in South African Administrative Law" (2000) 117 SALJ 484 at 501-2.

[19.] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 42 and 45.

[20.] See [36] to [39].

[21.] Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC) at paras 33-9; Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another [2014] ZAGPJHC 194 at para 25; Nucon Roads and Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: N.W. Province and Others [2014] ZANWHC 19 at paras 32, 41 and 44; and Reizis NO v MEC for the Department of Sport, Arts, Culture and Recreation and Others [2013] ZAFSHC 20 at paras 33-4.

[22.] It should be emphasised that the exceptional circumstances enquiry only arises in the context of the appropriate remedy to be granted as per section 8(1) of PAJA. Thus, it is only after the unlawfulness of the award has been established pursuant to section 6 of PAJA that the remedy, and therefore the exceptional circumstances enquiry, arises.

[23.] Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) and Hutchinson v Grobler NO and Others 1990 (2) SA 117 (T) at 157B-E.

[24.] Johannesburg City Council above n 30 at 76D-H.

[25.] Bato Star above n 25 at para 48.

[26.] Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 35, where it was held:

"In general, a court of appeal, when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards."

[27.] Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 42-3.