**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. A 324/2016

Before: The Hon. Mr Justice Desai
The Hon. Mr Justice Binns-Ward
The Hon. Ms Justice Mantame

Date of appeal hearing: 30 January 2017
Date of judgment: 15 February 2017

In the matter between:

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| **SHANDUKA RESOURCES (PTY) LTD** | Appellant |
| and | |
| **WESTERN CAPE NICKEL MINING (PTY) LTD** | First Respondent |
| **REGIONAL MANAGER (WESTERN CAPE), DEPARTMENT OF MINERAL RESOURCES** | Second Respondent |
| **THE MINISTER OF MINERAL RESOURCES** | Third Respondent |
| **THE DEPUTY DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES** | Fourth Respondent |
| **HONDEKLOOF NICKEL (PTY) LTD** | Fifth Respondent |

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**JUDGMENT**

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**BINNS-WARD J (DESAI and MANTAME JJ concurring):**

[1] This appeal is from a judgment of Weinkove AJ sitting as a single judge at first instance. It was brought with the leave of the learned acting judge.

[2] The history is relatively complex, with a small host of characters having been involved in various roles in the three applications that came up for hearing together in the court of first instance. The description of the facts will be easier to follow if I

refer to the personalities that were involved by their names or positions, rather than by their respective roles as parties cited in the appeal. When convenient, the individually cited functionaries of the Department of Mineral Resources (the minister, the deputy director-general and the regional manager (Western Cape), respectively) will be referred to collectively as 'the Department' or 'the government parties'.

[3] The issue centrally in contention in the litigation was how the competition between the appellant, Shanduka Resources (Pty) Ltd (Shanduka), and the first respondent, Western Cape Nickel Mining (Pty) Ltd (WC Nickel), for recognition as the first-in-time applicant for prospecting rights in respect of nickel ore and various other minerals over Portion 2 of the farm Nuwefontein 6, Van Rhynsdorp, Western Cape should be determined. There was some dispute as to whether WC Nickel had effectively lodged an application, but both companies had been advised by the regional manager that their respective applications could not be accepted because the rights were already held by Hondekloof Nickel (Pty) Ltd (the fifth respondent, hereinafter referred to simply as 'Hondekloof').

[4] The regional manager was charged in terms of s 16 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) with deciding whether or not to accept the applications. Acceptance of an application for prospecting rights was the first step towards getting it ultimately referred to the minister, who would determine whether or not to grant it. It was common ground in argument that the regional manager's decisions in terms of s 16 of the Act constituted 'administrative action' within the meaning of the term in the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[5] On 9 September 2013, Shanduka obtained an order before Henney J in case no. 12625/2013 reviewing and setting aside the refusal by the regional manager[1] to receive its application for the prospecting rights. The order further directed the regional manager to accept and process Shanduka's application in terms of s 16 of the Act. Section 9 of the Act requires the regional manager to deal with such applications in the order in which they are received chronologically. The order obtained by Shanduka directed the regional manager to deal with the application as if it had been lodged on 11 March 2013.

[1] The regional manager is the second respondent in this appeal.

[6] The regional manager was the only respondent cited in case no. 12625/2013.[2] Despite service of the application by the sheriff on his office, the regional manager neglected to oppose it. This resulted in the review relief sought in Part B of the notion of motion being granted effectively by default. An order in term of Part A of the notice of motion, which had included a prayer for interim interdictory relief pending the determination of the judicial review, had been granted earlier (on 20 August 2013) before Salie-Samuels AJ; also in default of any opposition.

[7] On 17 December 2013, under case no. 20800/2013, the regional manager applied for the rescission of the aforementioned orders made under case 12625/2013 ('the rescission application'). Apart from explaining that the interdict and review applications had not been opposed because of a failure of the applicable administrative protocols in his office, the regional manager based his application for rescission on the allegation that he was precluded in terms of the Act from accepting Shanduka's application for prospecting rights because the rights in question had already (that is, prior to 11 March 2013) been granted to Hondekloof. The regional manager also raised questions about the legal propriety of the terms of certain provisions of the order directing him to 'accept' Shanduka's application, apparently regardless of whether or not the application was compliant with the requirements in terms of s 16(2) of the Act.[3]

[8] Shanduka opposed the rescission application and, in a counter-application, sought the judicial review and setting aside of the decisions in terms of which the prospecting rights ostensibly vested in Hondekloof. Shanduka contended that Hondekloof's prospecting rights had in fact lapsed by effluxion of time on 14 February 2013, and that their purported renewal in terms of a notarial deed

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[2] It is very arguable that Hondekloof should have been joined as a party to the application, but nothing turns on the point because Hondekloof, having been joined in the subsequent proceedings described later in this judgment, did not take the point and (so we were advised by counsel for WC Nickel on appeal, who had been briefed for both WC Nickel and Hondekloof in the court a quo) indicated that it abided the judgment of the court a quo. Hondekloof also took no active part in the appeal proceedings. Hondekloof appears to accept that its prospecting rights expired on 14 February 2013.

[3] As at 11 March 2013, s 16(2) of the Act had provided:

*The Regional Manager must accept an application for a prospecting right if-*

*(a) the requirements contemplated in subsection (1) are met; and*

*(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.*

(The provision was amended in terms of s. 12 (b) of Act 49 of 2008 with effect from 7 June 2013.)

executed later in 2013 had been legally incompetent. For the purposes of its counter-application, Shanduka joined the minister,[4] the deputy-director-general[5] and Hondekloof as additional respondents in the proceedings. Shanduka subsequently amended its notice of motion to claim an order dispensing it from having to avail of the internal remedy provided in terms of s 96 of the Act and, in terms of s 9 of PAJA, extending the period for the bringing of the review application.

[9] Shanduka's counter-application elicited an application by WC Nickel – which is related to Hondekloof[6] – for leave to intervene as a respondent in the main application in case no. 20800/2013, and for certain substantive relief, namely –

(i) a declaratory order that *it* was entitled to be recognised as the applicant first-in-time for a new prospecting right over portion 2 of Nuwefontein 6 for nickel ore and certain other minerals and that the regional manager was obliged to accept and process the application for the prospecting rights that it had attempted to lodge on 22 February 2013 in priority to the application of any other party, including Shanduka; alternatively, an order declaring that Hondekloof was the holder of a valid prospecting right over the land;

(ii) an order rescinding the aforementioned orders in favour of Shanduka granted in case no. 12625/2013;[7] and

(iii) an order dismissing Shanduka's aforementioned counter-application in case no. 20800/2013.

WC Nickel's application was referred to as the 'intervening application'. The notice of motion in the intervening application is undated and it does not appear on the record when it was filed of record. It would seem from an acknowledgement of receipt by one of the respondent parties that service of the intervening application was effected in early September 2014. The supporting affidavit was deposed to on 29 August 2014.

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[4] The minister is the third respondent in this appeal.

[5] The deputy director-general is the fourth respondent in this appeal.

[6] Hondekloof's subsidiary, Western Cape Nickel Investments (Pty) Ltd, holds a 26% shareholding in WC Nickel (the remaining shares being owned by Scorpion Mineral Processing Coal Mining and Processing (Pty) Ltd). The deponent to the founding affidavit in WC Nickel's intervention application stated that the interests of the two companies were 'aligned'.

[7] See para. [5] above.

[10] Despite the questionable formulation of its prayer for leave to intervene and the doubtful appropriateness of it seeking the substantive relief described above in the manner in which it did,[8] it was accepted at the hearing before the court a quo that WC Nickel be admitted as a party in the proceedings and that the court could in the proceedings deal with the substantive relief that it sought.[9]

[11] Before the aforementioned applications came up for hearing before the court a quo, the Supreme Court of Appeal (SCA) handed down a judgment in an unrelated matter, *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation (Pty) Ltd* [2015] ZASCA 82, [2015] 3 All SA 408 (SCA), 2016 (1) SA 306. The judgment was delivered on 28 May 2015. The SCA's elucidation of the proper construction of the relevant provisions of the Act put it beyond doubt that Hondekloof's prospecting rights had indeed lapsed on 14 February 2013. The judgment made the Department realise that there was no merit in the view to which it had subscribed up to that stage that the prospecting rights continued to be held by Hondekloof. The regional manager therefore decided to withdraw the rescission application and sought to reach an agreement in that regard with Shanduka.

[12] The Department explained its altered position in an affidavit by its attorney, *jurat* 17 November 2015, filed of record on 25 November 2015 (the date on which the applications came up for hearing before the court a quo). The affidavit was omitted from the appeal record, but it was placed before us as an attachment to the heads of argument of counsel who appeared on behalf of the government parties at the hearing of the appeal. It was pointed out in the affidavit that the SCA's judgment in *Mawetse* had made it evident to the Department that it was no longer able to seek the rescission of the order made by Henney J or oppose the relief sought in Shanduka's counter-application predicated on the alleged legal non-existence of Hondekloof's prospecting rights.

[13] The Department recorded that it had advised Shanduka's attorneys by letter dated 4 November 2015 that having since located Shanduka's application for the

[8] The difficulties that the approach adopted by WC Nickel presented were broached in paragraphs 8 and 9 of the answering affidavit of Mr. G.M. van Aswegen, *jurat* 10 June 2015, delivered by Shanduka in response to the intervening application, to which WC Nickel gave an extensive response in reply. I do not find it necessary for present purposes to go into the detail.

[9] An order made by Van Staden AJ on 6 October 2014 admitted WC Nickel as the fifth respondent in case no. 20800/13 and directed that the relief sought in paras. 2-5 of the notice of motion in the intervening application would '*stand over for determination at the hearing of the main application*'.

prospecting right, which had been misfiled in the regional manager's office after it had been lodged, and determined that it was compliant with the prescribed requirements in order to be accepted in terms of s 16 of the Act, it had proposed an agreement with Shanduka in terms of which –

1. The Department would consent to the substantive relief sought in terms of Shanduka's aforementioned counter-application;

2. Shanduka would consent to the rescission of those paragraphs of the order made in case no. 12625/2013 that the Department regarded as legally improper;[10] and their substitution by reformulated provisions directing the regional manager to process Shanduka's application in accordance with the prescripts of the relevant provisions of the Act.

The letter had made it clear that the Department's ability to accept and process Shanduka's application would, however, be dependent on the court's determination of the intervening application by WC Nickel. The Department confirmed the position it held at that stage that it had not received an application from WC Nickel for prospecting rights in respect of portion 2 of Nuwefontein 6, and that therefore no application had been lodged that enjoyed chronological precedence over Shanduka's application.

[14] Shanduka's attorneys appear not to have responded to the aforementioned approach from the Department. The judgment of the court a quo records, however, that the government parties '[withdrew] *their participation in this matter and agree*[d] *to abide the decision of the Court*'. Accordingly, by the time the matter was argued before the court a quo, there was, to use the language of the government parties' counsel, no longer 'any *lis*' between Shanduka and the Department.

[15] The matters that fell for determination by the court a quo in the circumstances were those presented in terms of WC Nickel's intervening application, described in paragraph [9] above. If they were answered in WC Nickel's favour, Shanduka's application had to fail; if they were answered against it, Shanduka's counter-application should have been substantially upheld.

[10] See para. [7] above.

[16] It is therefore appropriate, before turning to the judgment of the court of first instance, first to consider the facts pertinent to the intervening application in some detail.

[17] WC Nickel was incorporated in 2013[11] for the purpose, amongst other matters, of undertaking the further exploration and development of what was called 'the Hondekloof Nickel Project'. This transpired in terms of a joint venture agreed upon between Scorpion Mineral Processing Coal Mining and Processing (Pty) Ltd (Scorpion) and Hondekloof's holding company, Lehumo Resources Ltd (Lehumo). WC Nickel was the vehicle through which the joint venture's business was to be conducted. The joint venture is reportedly governed by various 'definitive agreements' concluded between the relevant parties. Copies of those agreements were not included in the papers for reasons of commercial confidentiality. The establishment of the joint venture was documented in two memoranda of understanding. Copies of the memoranda were put in as attachments to the founding affidavit in WC Nickel's intervening application. The documents are dated 28 January 2013, and 20 June 2013, respectively.

[18] As explained in WC Nickel's founding affidavit, the first memorandum of understanding contemplated that all of the prospecting rights held by Hondekloof (those in respect of portion 2 of Nuwefontein 6 and also in respect of a property called Matjeskloof 410 remainder – which is in the Northern Cape), as well as the geological information owned by Hondekloof as a consequence of drilling conducted by it on the aforementioned properties and on Nuwefontein Remainder and Klein Matjesfontein 2, portions 2 and 3, would be transferred to the contemplated operating company (WC Nickel). The first memorandum of understanding recorded that the shares in the operating company would be held as to 74% by a holding company owned by Scorpion and 26% by Hondekloof's (and thereby Lehumo's) subsidiary, Western Cape Nickel Investments (Pty) Ltd.[12] The signature of the first memorandum of understanding was followed by certain due diligence investigations.

[19] A consulting firm appointed by Scorpion to assist in the due diligence process ascertained (correctly) that Hondekloof's prospecting rights in respect of the

[11] The year in which the company was incorporated may be deduced from its registration number.

[12] See note 6 above.

Nuwefontein property were due to expire on 14 February 2013. As the extant rights had vested in Hondekloof pursuant to a renewal, in 2010, of the original grant in 2005, Hondekloof was precluded by the provisions of s 18(4) of the Act from further renewing the rights. The consulting firm therefore advised that WC Nickel should lodge a new application for the prospecting right immediately after the date of the expiry of Hondekloof's rights.

[20] The deponent to WC Nickel's founding affidavit, one Philpot, who is a director of the consulting firm, averred that he prepared such an application and that his co-director - one Goldsmith (who made a confirmatory affidavit) - attempted several times during the period of 14-22 February 2012 to upload the application online using the Department's dedicated software program (SAMRAD). (It is common ground between Shanduka and WC Nickel that the program is 'notoriously unstable and problematic'. Shanduka was also unable to upload its application when it endeavoured to do so in March 2013.) The uploading of the application (or at least the lodging of the application in an electronic format that could be uploaded) was essential for the purpose of achieving compliance with the prescribed requirements in terms of s 16(1) of the Act for the lodging of such applications.[13]

[21] Mr Goldsmith testified that he then travelled from Johannesburg to Cape Town to try to upload the application at the regional manager's office. This was also unsuccessful because of problems with the SAMRAD program. The official who was assisting Goldsmith in his attempt to upload the application contacted one Morné

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[13] Section 16(1) of the Act read as follows at the time (before its amendment with effect from 7 December 2014):

*Any person who wishes to apply to the Minister for a prospecting right must lodge the application-*

*(a) at the office of the Regional Manager in whose region the land is situated;*

*(b) in the prescribed manner; and*

*(c) together with the prescribed non-refundable application fee.*

In terms of reg. 2(1) of the Mineral and Petroleum Resources Development Regulations, '*An application for any permission, right or permit made in terms of the Act must be lodged by submitting an appropriate compatible electronic completed form contained in Annexure I, together with the prescribed Annexures in compatible electronic format with the Regional Manager in whose region the land is situated or to the designated agency, as the case may be-*

*(a) by hand;*

*(b) registered post; or*

*(c) electronically on the Department's official website address or the relevant address specified in the appropriate form*'. (Underlining supplied for highlighting purposes.)

(The '*form contained in Annexure I*' indicates, according to its tenor, that only a hardcopy application will be acceptable. There is therefore an apparent internal contradiction in the regulations. It is not necessary for the purpose of this judgment to decide how the practical difficulty presented by the contradiction should be addressed.)

Koen, who was the information systems manager at the regional manager's office for advice. Mr Koen, who was on leave at the time, telephonically advised that Goldsmith should leave both a hard copy of the application, as well as the compact disc on which a copy of it had been saved electronically, at Koen's office and he would attend to uploading the application when he returned to work in the following week.

[22] Upon his return to Johannesburg, Goldsmith sent an email to Koen on the morning of 25 February 2013 under the subject line '*Hondekllof* (sic) *prospecting right upload*'. The email, which was copied to Philpot, went as follows:

> Hi Morne
> Many thanks for all your assistance last Friday (22nd Feb) and allowing me to leave the hardcopy prospecting right application at your offices for upload. Can you please send me an acknowledgment when the application has been successfully uploaded?
> Many thanks
> Alan

Goldsmith received an email from Koen on 5 March 2013, under precisely the same subject line (spelling mistake included), stating: '*The application has been captured.*'

[23] Mr Goldsmith followed up with a further email on 7 March 2013 as follows:

> Hi Morne
> I am assuming we will receive an acceptance letter shortly for the Matjesfontein prospecting right application you uploaded for me. Is this a correct assumption?
> Kind regards
> Alan

Goldsmith wrote again to Koen by email on 20 March 2013:

> Hi Morne
> Can you please give me an update on the progress of the prospecting right application which you uploaded for me on Matjesfontein. Has an acceptance letter been issued, and if so, to where it was sent?
> Many thanks
> Alan

[24] Messrs Goldsmith and Philpot initially testified that the reference in the aforementioned emails to '*Matjesfontein*' was erroneous, implying that the application being referred to was in fact in respect of portion 2 of Nuwefontein 6. Koen, on the other hand, denies any knowledge of a hard copy of the application

having been left in his office and avers that the application that he uploaded electronically pertained to Klein Matjesfontein 2, portions 2 and 3 and Nuwefontein 6 remaining extent.

[25] Copies of a 'locality plan' showing the geographical position of the Klein Matjesfontein prospecting right area within the Western Cape Province and a survey diagram describing the land concerned as '*Property* [indecipherable number] *Klein Matjesfontein 2, portion 2, portion 3 and Nuwefontein 6 remaining extent*', were put in as attachments to the Department's answering papers in the intervening application in support of Koen's evidence. On their face, the attached documents purport to be part of an '*application for a prospecting right*' by Western Cape Nickel Mining (Pty) Ltd. The survey diagram bears the initials of someone who purported to be a director of WC Nickel above the date '*2013/02/20*'. It bears mention that the provision of a locality plan and survey diagram of the prospecting area is prescribed as part of any application for prospecting rights under the Act.[14]

[26] In reply, Philpot said that an application for prospecting rights in respect of Matjesfontein 2 had in fact also been submitted. He added that Goldsmith had, on reflection, after considering the Department's answering affidavit in the intervening application, concluded that he had not copied '*the file source code for the Hondekloof prospecting right (despite having offered to do so) onto a computer belonging to the DMR (as instructed to do so by Koen …) and only copied the source code for the Kleinmatjiesfontein prospecting right …*'. It was conceded that the references to Klein Matjesfontein in the email correspondence with Koen had therefore not been erroneous, as originally alleged. Goldsmith also said in reply that Ms Tsolo had informed him on 22 February 2013 that she could not accept the application in respect of Nuwefontein 6 because of what she considered to be Hondekloof's extant prospecting rights over the property. He appears, however, to have persisted in his claim to have nevertheless left a hard copy of the application at the Department's offices.

[27] Contemporaneously with the exchange of the aforementioned exchange of emails between Goldsmith and Koen, there were face to face exchanges between one Whittaker, another member of the consulting firm, and Ms Tsolo, who was acting as

[14] See reg. 2(2) and reg. 5(1)(c) of the Mineral and Petroleum Resources Development Regulations.

the regional manager at the time, about WC Nickel's wish to acquire the prospecting rights over portion 2 of Nuwefontein 6. Ms Tsolo informed Whittaker that the Department would not be able to accept any applications for the prospecting rights because, in the Department's view, they continued to be held by Hondekloof.

[28] It was apparent that Ms Tsolo's viewpoint was predicated on the opinion (notwithstanding that the renewal of Hondekloof's rights in 2010 had in point of fact been expressly limited to 14 February 2013) that the renewal granted in 2010 was for a three-year period (the maximum permitted in terms of s 18(4) of the Act) commencing only when the documents enabling the registration of the renewed rights in terms of the Mining Titles Registration Act 16 of 1967 had been executed. That Ms Tsolo's opinion reflected the understanding of the Department of the applicable legislation at that time is borne out by the position it adopted in the appeal in *Mawetse* supra, which was argued in May 2015.

[29] Mr Whittaker conveyed Ms Tsolo's view to Philpot. Philpot - anticipating the construction of the Act subsequently pronounced by the SCA in *Mawetse* - was not persuaded as to the correctness of the position adopted by Ms Tsolo. A meeting was consequently arranged with Ms Tsolo on 5 March 2013. WC Nickel's representatives came to the meeting armed with letters drafted by Scorpion's attorneys that were intended to be presented to Ms Tsolo. The purpose of presenting the letters was said to be to protect WC Nickel's right to be regarded as the first-in-time applicant for the prospecting rights that had been held by Hondekloof and to confirm that Hondekloof accepted that its rights had expired on 14 February 2013. Ms Tsolo stuck to her guns at the meeting and insisted that WC Nickel's application could not be accepted. She suggested that Hondekloof should rather expedite the submission of the necessary documents for registration of its title to be executed and undertook to facilitate the process.

[30] In the circumstances, WC Nickel's representatives did not hand over the letter in terms of which Hondekloof confirmed that it no longer held the rights. The letter (from Scorpion) that it did hand over (annexure 'HGP 15' to WC Nickel's founding affidavit) was addressed for Ms Tsolo's attention. It recorded that that WC Nickel had *attempted* to submit an application for the prospecting rights, but that the Department had declined to accept it on the grounds that a prospecting right for the same minerals had been previously granted and was pending notarial execution. The

letter set out WC Nickel's contention that the previously granted right had expired on 14 February 2013, alternatively 1 March 2013 and concluded with the request '*In all the circumstances, we therefore request that you formally accept the lodgement by us of this application and furnish us with a date-stamped receipt for same, confirming the date of lodgement, and thereafter deal with our application in accordance with the provisions of the* [Act]'.

[31] A handwritten endorsement by Ms Tsolo on the letter that was handed to her recorded her position as follows:

> Explained that the application cannot be accepted manually as there is a right that is granted but not yet issued.
>
> [Signature]
>
> 5/3/2013

It seems to me that Ms Tsolo's handwritten endorsement constituted an effective notification to WC Nickel within the meaning of s 16(3) of the Act that its application could not be accepted by virtue of the provisions of s 16(2)(b) of the Act.[15] Furthermore, it is hardly surprising in the circumstances that the Department was unable to locate a copy of the application in its possession when the matter became litigious because, assuming that it had been lodged, as alleged by Goldsmith, the Department would have been bound, in terms of s 16(3) of the Act as it read at the time, to return it to WC Nickel when the regional manager declined to accept it.[16] (WC Nickel's counsel accepted in their heads of argument that the application had been rejected when Ms Tsolo conveyed her inability to accept it during February 2013.)

[32] Mr Philpot averred that in the context of the Department's attitude as conveyed to them by Ms Tsolo, the joint venture parties were '*considerably confused as to how to take the matter forward*'. A further meeting was held with the regional manager and the Department's legal representative on 17 April 2013. The Department adhered to the position previously expressed by Ms Tsolo.

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[15] See note 3 above.

[16] Section 16(3) read as follows at the time (prior to its substitution in terms of s. 12 (c) of Act 49 of 2008, with effect from 7 June 2013):

*If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.*

[33] WC Nickel was placed in a dilemma. It appreciated that its choice lay between challenging the decision to decline to accept its application and proceeding in accordance with the Department's advice, that is by allowing Hondekloof to submit the documentation for the execution of the registration of the prospecting rights in its name for a further three years from the date of registration.[17] WC Nickel's assessment of the practicalities, more particularly its view of the desirability of maintaining good relations with the Department's officials, led it to decide on the latter course.

[34] Hondekloof thereafter proceeded to notarially register its renewed prospecting rights on 21 May 2013. The relevant deed had been notarially executed on 2 May 2013. On 19 June 2013, the deputy director-general issued what purported to be an amended renewal letter to Hondekloof. Its object appears to have been to deal with the termination date of 14 February 2013 given in the original notification of the renewal in 2010. The amended renewal purported to extend Hondekloof's prospecting rights '*for a period of three years from the date of execution*'.

[35] As mentioned, the joint venture parties executed a second memorandum of understanding in June 2013. The deponent to WC Nickel's founding affidavit stated that the purpose of the second memorandum was to record '*certain interim developments relating to Hondekloof's prospecting rights and the parties' commercial arrangements*'. WC Nickel, which had been incorporated by then, was a party to the second memorandum. It purported to record that Hondekloof held the prospecting rights over portion 2 of Nuwefontein 6, renewed on 2 May 2013 for a period of three years expiring on 1 May 2016. It also recorded the intention of the joint venture parties that Hondekloof's rights would be ceded and transferred to WC Nickel using the procedures provided in terms of s 11 of the Act.

[36] Shanduka alleged that the substantive relief sought by WC Nickel in the intervening application could not be granted because –

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[17] Mr. Philpot claimed that the Department's position was arguably supported by the terms of certain amendments to the Act in terms of Act 49 of 2008, which introduced a definition of '*effective date*' to mean '*the date on which the relevant permit is issued or the relevant right is executed*'. The amendment was brought into operation with effect from 7 June 2013. The facts in *Mawetse* supra, involved a renewal of rights that had been granted well before the amending legislation came into operation.

(i) it could not be found on the papers that the application that had been lodged by Goldsmith at the regional manager's office in February 2013 had been in respect of portion 2 of Nuwefontein 6, rather than some other property; and

(ii) even if the application that had been lodged had in fact pertained to Nuwefontein 6, the evidence showed that WC Nickel had subsequently abandoned it when it chose to accept that Hondekloof's allegedly renewed prospecting rights should be registered and to obtain cession thereof in terms of s 11 of the Act.

[37] In terms of paras. 1-3 of its order, the court a quo declared that Hondekloof's prospecting rights had expired on 14 February 2013 and reviewed and set aside any decisions made by the regional manager or the deputy director-general in favour of Hondekloof after that date on the mistaken assumption of the continued validity of such rights. No-one has taken issue on appeal with those provisions of the order.[18] The court a quo also declared, in paragraph 4 of the order, that WC Nickel was entitled to be recognised for the purposes of ss 9 and 16 of the Act as the first-in-time applicant for the prospecting rights over portion 2 of the farm Nuwefontein 6. In addition, it rescinded (in terms of para. 5 of its order) the abovementioned orders granted in favour of Shanduka on 20 August and 9 September 2013 under case no. 12625/2013 (and, notwithstanding that that application was not before it, even purported to dismiss it).

[38] Shanduka's appeal is directed at reversing the effect of the declaration that WC Nickel must be recognised as the first-in-time applicant for the prospecting rights and the rescission of the aforementioned order made by Henney J. The government parties are willing to abide the court a quo's decision on that question, but they instructed counsel to appear at the appeal because of their concern about what they contend to have been the inappropriate manner in which para. 4 of the order was worded. Paragraph 4 will of course fall away if the appeal by Shanduka is upheld. The paragraph reads as follows:

> 4. Declaring that in terms of the provisions of Section 16 read with Section 9 of [the Act]:

[18] Paragraphs 1 – 3 of the order made by the court a quo.

> 4.1 [WC Nickel] is entitled to be recognised and dealt with by the [regional manager] as the applicant first in time for a new prospecting right for nickel ore, copper ore, … in respect of portion 2 of the farm, Nuwefontein, 6, Vanrhynsdorp ("the new application"); and
>
> 4.2. The Regional Manager is obliged to accept and process the new application in priority to any other application by any other person for a prospecting right for the same minerals and land.

[39] The court a quo was bound to decide the matters before it on the papers in accordance with the rule in *Plascon-Evans*.[19] Accordingly, unless it were able to reject the evidence of the respondents as obviously untenable or far-fetched in respect of any fact genuinely in dispute on the papers, it was bound to decide the matter on the basis of the respondents' version of such facts.

[40] In respect of the declaration sought in the intervening application that WC Nickel was entitled to be recognised and dealt with as the first-in-time applicant for the prospecting rights, WC Nickel was the applicant and the government parties were respondents. Whilst the government parties' evidence about whether a hard copy of an application by WC Nickel had been received was equivocal,[20] the evidence of Koen that the electronic copy of the application that had been left by Goldsmith for him to upload pertained to a different property to portion 2 of Nuwefontein 6 was not only clear-cut, it was also supported in a number of corroborative aspects by other evidence. Goldsmith's emails referred to Matjesfontein, not Nuwefontein 6, and the locality map and survey diagram produced by the government parties bore out Koen's evidence that what he had dealt with related to an application submitted by WC Nickel in February 2013 for the prospecting rights on Klein Matjesfontein 2, not Nuwefontein 6. As mentioned, Goldsmith appears to have conceded in reply that he had left only the application in respect of Klein Matjesfontein for uploading.

[41] Mr Koen's evidence plainly placed WC Nickel's claim to have lodged an application in electronic format (as required by the regulations[21]) for the prospecting rights over portion 2 of Nuwefontein 6 in dispute. The court a quo, however, rejected

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[19] See *Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634E-635C.

[20] It was limited to Koen's averment that he had found no hard copy in his office when he returned from his leave. That was arguably insufficient to create a real dispute of fact in the face of Goldsmith's positive averment that he had left one there. The papers as a whole make it evident that it was not unknown for documents to go astray in the regional manager's office.

21 See note 13 above.

Koen's evidence and accepted that of Goldsmith. The only reasons given for that decision were that Koen's evidence concerning the non-receipt of the hard copy of the application had been a bare denial and that he had contradicted himself in his evidence. The nature of the contradiction was not identified. It may have been a reference to the fact that Koen had testified that he appreciated that the application could not be accepted because he was aware of the renewal of Hondekloof prospecting rights. There was no evidence, however, whether the purported renewal of Hondekloof's rights also pertained to Klein Matjesfontein. It was therefore unclear whether Koen was speaking about the renewal of Hondekloof's Nuwefontein rights or its Klein Matjesfontein rights (if any). If it was the former, then that would have afforded grounds to believe that he had contradicted himself because the renewal of the Nuwefontein 6 rights would have been irrelevant in determining whether or not to accept an application for the Klein Matjesfontein rights. In reply, WC Nickel appeared to allege that Goldsmith had also brought with him an application for the Klein Matjesfontein rights, but it is evident from the disbursements reflected on consulting firm's fee note that an application fee of R500 was paid, which could pertain to only one application. The receipt, which was put in evidence, does not give any particulars of the application to which the payment related. Another relevant feature was that the abovementioned letter to Ms Tsolo, dated 2 March 2013, drafted by Scorpion's attorneys, was worded to suggest that the application lodged by Goldsmith in respect of Nuwefontein 6 on 22 February 2013 had not been accepted, which, if correct, would make Goldsmith's claim to have left a hard copy of it for Koen puzzling to say the least; for what purpose would that have served? The facts are far from clear on the papers.

[42] The judge a quo failed to address the effect of the documentary evidence described above, which supported Koen's evidence that the electronic version of the application that he uploaded pertained to Klein Matjesfontein, not Nuwefontein 6. He also does not appear to have been astute to the fact that if the electronic version of the application left by Goldsmith pertained to Klein Matjesfontein, not Nuwefontein 6, as maintained by Koen, the regional manager may have been obliged to reject the application as non-compliant with the requirements of s 16 of the Act because the regulations appear (notwithstanding the contrary indication given on the prescribed

application form) to require an application to be in electronic format.[22] The judge also made no mention in his judgment of Goldsmith's reconsideration of his initial evidence, or of the effect of the content of Scorpion's letter to Ms Tsolo that was tabled at the meeting on 5 March 2013.

[43] On the view I take of the matter, however, it is unnecessary to determine what it was that Goldsmith left at the regional manager's office on 22 February 2013. I am prepared to assume in WC Nickel's favour (without so deciding) that Goldsmith left a hardcopy and an electronic copy of an application by WC Nickel for the right to prospect for nickel and the other indicated metals on portion 2 of Nuwefontein 6.[23] My view is founded on the fact that it is evident on the uncontested evidence that Ms Tsolo dealt with the matter on the basis that such an application had been lodged by WC Nickel. She informed WC Nickel's representatives at the meeting on 5 March 2013 that the application *could not be accepted*. She confirmed that intimation in writing by the handwritten endorsement described above. She did not contend that an application had not been lodged.

[44] The Act draws a distinction between the *lodging* of an application - and its consequent *receipt* by the regional manager - and the *acceptance* thereof.[24] Once an application has been lodged, the regional manager must decide whether or not to *accept* it. She is obliged to accept it if it complies with the qualifying criteria stipulated in s 16(2)(a)-(c), and she may not accept it if she finds that the application has not met all those criteria. In either event she must notify the applicant that the application has been accepted, alternatively that she cannot accept it. It is only an application that has been 'accepted' in the sense just explained that falls to be passed onto the Minister for consideration after the applicant has provided the information

[22] See note 13 above.

[23] It is at least arguable that lodging an application that does not comply with '*the prescribed manner*' is effective. Subsections (2)(a) and (3) of s 16 suggest that an application that has been lodged that does not comply with s 16(1)(b) would fall to be considered, but not accepted.

[24] In his heads of argument Shanduka's counsel sought to draw a distinction between the *lodging* of an application in terms of s 16 of the Act and its *receipt* in terms of s 9. I am not persuaded that there is a valid basis for such distinction. The lodging of an application in terms of s 16 results in its contemporaneous receipt. I therefore agree with the submission by WC Nickel's counsel that receipt for the purposes of the Act is the corollary of lodging. This is confirmed by the imposition, in terms of s 16, of an obligation on the regional manager to accept the application that has been lodged if it complies with the criteria in s 16(2), and to notify an applicant within 14 days of receiving it if the application cannot be accepted by reason of its failure to so comply. Accordingly, if a regional manager declines to process an application that has been lodged by reason of its failure to comply with the criteria in s 16(2), she is refusing to 'accept' the application within the meaning of the Act.

referred to in s 16(4)(a) and (b), which the regional manager is required to request from it after accepting the application.

[45] It is common ground that Ms Tsolo advised WC Nickel that she was unable to accept its application for prospecting rights on portion 2 of Nuwefontein 6 because the right was held by Hondekloof. It is plain that Ms Tsolo's action in so informing WC Nickel of the disqualification of its application was dispositive. It occurred before Shanduka even attempted to lodge its application, and, having regard to the wording of s 16(2) of the Act at the time,[25] the issue of an entitlement to first-in-time preference was not an issue.

[46] WC Nickel's remedy in the circumstances, if it wished to persist with its application for the prospecting rights, was to challenge the regional manager's decision to not accept the application. It could have done that either by way of an internal appeal in terms of s 96 of the Act, or, if it could show exceptional circumstances justifying such a course, it could have applied directly to court for a judicial review of the regional manager's decision not to accept the application. It did neither. It chose instead to accept that Hondekloof was possessed of the rights and supported the registration of the rights in Hondekloof's name. It subsequently engaged in a process directed at taking cession in terms of s 11 of the Act of what it was prepared to accept as being Hondekloof's prospecting rights.

[47] The court a quo approached the consequences of WC Nickel's failure to persist with its application for the prospecting rights to be awarded directly to it by asking the question whether WC Nickel could be said to have waived its alleged right to have its application for prospecting rights accepted. The learned judge may have approached the matter in that way as a result of the characterisation of the issue in argument by Shanduka's counsel. Whatever the reason for his approach, the judge concluded that WC Nickel had not waived its rights and that its application somehow remained open for acceptance notwithstanding the decision that had been made not to accept it. In my judgment, the characterisation of the question as one of waiver was misconceived, and the court a quo led itself into error by failing to recognise that. The court a quo's approach failed to address the dispositive effect of the regional manager's decision not to accept the application and the consequences of that

[25] See note 3 above.

decision in respect of WC Nickel's rights under the Act. WC Nickel did not waive any rights; it failed to exercise them by pursuing its remedies. Shanduka's use of the wrong label in its opposing papers did not affect the incidence of the law on the given facts.

[48] If it had wished to pursue its application in the face of the regional manager's decision not to accept it, WC Nickel would have been obliged to exercise its right of appeal in terms of s 96 of the Act within 30 days. Having failed to do so, it could ordinarily not have taken the regional manager's decision not to accept its application on judicial review. Section 7(2) of PAJA and the provisions of s 96(3) and (4) of the Act, required WC Nickel to exhaust its internal remedies under the Act[26] before taking any administrative decision under the Act on judicial review.

[49] The time frames prescribed in terms of the Act are also there for good purpose. On a proper construction of the legislation, WC Nickel was not entitled, in parity with the very reasons identified in the SCA's judgment in *Mawetse* (supra)[27], to sterilise the prospecting rights by inaction concerning its alleged position as first-in-time applicant for them. The time lines provided in terms of the Act are directed at promoting certainty and efficiency in respect of the exploration and exploitation of the country's mineral resources. WC Nickel's failure to exercise its remedies within the prescribed time periods resulted - subject to its ability to obtain exceptional relief in terms of ss 7(2)(c) and 9 of PAJA - in the forfeiture of its ability to pursue them.[28] Waiver was not the correct label to describe that effect. The result, being the lapsing of WC Nickel's right to challenge the regional manager's decision to refuse to accept its application, followed as a matter of law.

[50] The legal effect of the declarator in para. 4 of the order of the court a quo was to negate the decision of the regional manager not to accept WC Nickel's application. The effect was indistinguishable from that of an order reviewing and setting aside the decision. The relief that was afforded in terms of the declarator and attendant mandatory interdict was of the character that would ordinarily have been sought by

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[26] Internal remedies under the Act would not include negotiating a compromise outcome with the regional manager; see e.g. *New Adventure Shelf 122 (Pty) Ltd v Commissioner of the South African Revenue Service* [2016] ZAWCHC 9; [2016] 2 All SA 179 (WCC), at para. 26.

[27] At para. 20.

[28] Cf. *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Company Ltd and Others* [2013] ZACC 48, 2014 (3) BCLR 265 (CC), 2014 (5) SA 138, at paras.115-136.

way of an application in terms of s 6(1) of PAJA, with the declarator and interdict being sought as ancillary relief in terms of s 8. It is unnecessary to make a finding that WC Nickel was obliged to have applied formally in terms of PAJA for the review and setting aside of the decision not to accept its application. I leave that question open. Suffice it to say, however, that it could not avoid the effect of the applicable provisions of PAJA, which exhaustively regulate litigious challenges to administrative action in matters where no other specific statutory procedure has been provided, by formulating the relief that it sought in the form of a declaratory order coupled with a mandatory order, rather than a judicial review. More specifically, it could not sidestep the time bar provisions in s 7(1) of PAJA by framing its application in that way.

[51] The SCA's judgment in *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd and Others* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) held that the effect of s 7(1) of PAJA was that, absent an extension of time in terms of s 9 of that Act, a court has no authority to entertain a PAJA-regulated review application brought outside the 180-day outer limit.[29] Thus, even in the absence of a challenge based on the delay rule, the court a quo had no jurisdiction to entertain what is effectively a review challenge to administrative action when it is time barred in terms of PAJA.

[52] The intervening application was brought well outside the 180-day limit in terms of s 7(1) of PAJA, and there was no application in terms of s 9 of that Act to extend the period within which it might be entertained. The relief sought by WC Nickel was, moreover, not in the nature of a permissible collateral challenge that is not subject to the time bar in terms of PAJA. The court a quo was consequently precluded by law from entertaining WC Nickel's application for what, in substance, was PAJA-regulated judicial review relief.

[53] In view of the uncertainty on the evidence about whether or not the application had been lodged, I should add that the same principles would be applicable to the same effect if the court were to approach the matter on the assumption that the

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[29] At para. 26. See also *City of Cape Town v South African National Roads Agency Ltd and Others* [2015] ZAWCHC 135, 2015 (6) SA 535 (WCC), 2016 (1) BCLR 49, [2016] 1 All SA 99, at para. 16, and *New Adventure Shelf 122 (Pty) Ltd v Commissioner of the South African Revenue Service* supra, at para. 24.

administrative decision in issue was one by the regional manager declining to receive the application.

[54] The court a quo was bound to have had regard *mero motu* to the considerations concerning the WC Nickel's failure to exhaust its internal remedies or timeously seek review-related relief; cf. *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC), 2009 (1) BCLR 1, at para. 68. There were thus two self-standing bases in law on which the relief granted in terms of para. 4 of the order made in the court a quo should not have been afforded to WC Nickel.

[55] When confronted with the difficulties for WC Nickel's case that I have just described, its counsel sought to argue that the (unimpugned) orders by the court a quo reviewing and setting aside the decision of the Department to recognise and register the extended renewal of Hondekloof's prospecting rights had resulted in the regional manager's decision, based on the hypothesis of the existence of such rights in Hondekloof, to refuse to accept WC Nickel's application, falling away. The argument was predicated on counsel's understanding of the import of the *dicta* in *Oudekraal Estates (Pty) Ltd v City Of Cape Town and Others* [2004] ZASCA 48, [2004] 3 All SA 1 (SCA), 2004 (6) SA 222, at para. 31, and *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28, [2008] 3 All SA 245 (SCA), 2008 (4) SA 43, at para. 13. For the reasons that follow I consider that the argument was misconceived.

[56] The relevant passage in the judgment in *Oudekraal* actually extends from para. 26. The court endorsed the analysis by Professor Christopher Forsyth in his essay '*"The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law*' [30] in respect of the debate about the appropriateness of the differential characterisation of administrative decisions as either 'void' or 'voidable' on account of their legal invalidity. Dealing with the status of a decision made on the assumption by a second actor of the validity of an antecedent decision by a first actor, Forsyth opined that '[t]*he crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act*'. Applying that approach to the question whether the City of Cape Town was entitled, on the basis of its contention that the proclamation of the Oudekraal township had been

[30] Published in *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth and Ivan Hare (eds), Clarendon Press.

invalid, to disregard an unlawfully approved subdivision when called upon by the landowner to consider an application for the provision of services, the court held at para. 31 that '[t]*he proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court*'. The decision to proclaim the township – an act quite discrete from the antecedent approval of the subdivision - did not require the Administrator to enquire into the legal validity of the antecedent decisions concerning the approval of the township, the acceptance of the general plan by the surveyor-general and its registration by the registrar of deeds. The factual existence of those decisions was sufficient foundation for the validity of the decision to make the proclamation. The proclamation fell to be regarded as valid until and unless the subdivision approval were set aside. But if the approval of the subdivision were to be set aside as legally invalid, the consequent decisions would fall with it because they could only have legal effect if the initial decision, which was their legal foundation, survived unimpugned.

[57] The passage in *Seale* relied upon by WC Nickel's counsel did no more than confirm that axiom. Cloete JA, writing for the court, stated '*I think it is clear from Oudekraal, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent*'.

[58] The regional manager's decision not to accept WC Nickel's application was squarely and entirely founded in the provisions of s 16 of the Act. They were the legal foundation for the exercise of the decision-making power. What triggered the exercise by the regional manager of her decision-making powers under that provision was the lodging by WC Nickel of its application. The exercise of the decision-making power was not founded on any antecedent administrative decision. The regional manager's apprehension of the effect of a prior determination by the minister of an application by a third party, such as Hondekloof, could, and indeed did, affect her determination whether to accept the application or not. But such antecedent decision was not the legal foundation for the exercise by her of her statutory power.

The prior award of prospecting rights to Hondekloof, was not a legal *sine qua non* for the exercise by the regional manager of her decision-making powers in terms of s 16. The supposed possession of the prospecting rights by Hondekloof was merely a fact (amongst several others) that the regional manager was required to take into account in how she exercised the power, not its legal foundation. By contrast, the legal foundation of the administrator's decision to proclaim the Oudekraal township was the prior approval of the relevant subdivision; without a subdivisional approval, there would be no township to proclaim.

[59] The refusal to accept the application on the ground that Hondekloof was still possessed of the prospecting rights was palpably wrong, but nonetheless legally dispositive of WC Nickel's application. A subsequent determination at the instance of a third party, like Shanduka, that demonstrated that the regional manager had misconceived the status of Hondekloof's rights when she decided not to accept WC Nickel's application would not void her decision. It would merely demonstrate that in the legal exercise of her decision-making power, the regional manager may have arrived at an incorrect result. As discussed, the Act provides, in s 96, an appeal remedy to applicants who are aggrieved by incorrect decisions.

[60] By timeously challenging the decision in an appropriate manner, WC Nickel would have kept its application alive provisionally. When it failed to do so, the disposal of its application became final and beyond challenge. Any subsequent determination of the validity or invalidity of an administrative decision that had been informative of the regional manager's decision not to accept its application would not have the effect of resuscitating the application, or altering its determination. The second actor principle discussed in *Oudekraal* and *Seale* at the places cited by counsel has no bearing whatsoever in the given circumstances.

[61] In the result it is clear that the court a quo erred in granting the relief set out in paragraph 4 of its order and there was also no proper basis for its decision to accede to WC Nickel's application to rescind the orders granted in favour of Shanduka in case no. 12625/2013. The appeal must therefore be upheld. The government parties' counsel indicated, fairly, I think, that no order should be made in respect of their costs in the appeal.

[62] In the event of its appeal succeeding, Shanduka sought, amongst other relief, an order directing the regional manager to comply with the order made by Henney J in case no. 12625/2013. That does not appear to be necessary, or appropriate. The regional manager withdrew his application for the rescission of that order and in the order to be made on appeal WC Nickel's application for its rescission will be dismissed. The Department has indicated that it is willing to proceed with the acceptance of Shanduka's application for prospecting rights subject only to the removal of the obstacle potentially posed by WC Nickel's intervening application. The order to be made on appeal will remove that obstacle. The order made by Henney J remains of full force and effect, and amenable to enforcement in the same manner as any other court order. Making an order to direct compliance with it would be a supererogation.

[63] The following order is made:

1. The appeal is upheld.
2. The first respondent shall be liable for payment of the appellant's costs of suit in the appeal.
3. The second, third and fourth respondents shall bear their own costs in the appeal.
4. Paragraphs 4, 5, 6 and 8 of the order made by the court a quo on 1 December 2015 are set aside and replaced with the following:
    i. The withdrawal by the applicant in the application in case no. 20800/2013 (the regional manager: Department of Mineral Resources (Western Cape)) for the rescission of the orders in case no. 12625/2013 made on 20 August and 9 September 2013, respectively, is noted.
    ii. The regional manager: Department of Mineral Resources (Western Cape) is ordered to pay the respondent's (Shanduka Mineral Resources (Pty) Ltd) costs of suit in the rescission application.
    iii. The application by the applicant in the intervening application in case no. 20800/2013 (Western Cape Nickel Mining (Pty) Ltd) for the relief

set out in paragraphs 2-5 of its notice of motion in the intervening application is dismissed with costs.

**A.G. BINNS-WARD**
**Judge of the High Court**

I agree. It is so ordered.

**S. DESAI**
**Judge of the High Court**

I agree.

**B.P. MANTAME**
**Judge of the High Court**

## APPEARANCES

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|---|---|
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