CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/13
[2013] ZACC 48

In the matter between:

DENGETENGE HOLDINGS (PTY) LTD	Applicant
and	
SOUTHERN SPHERE MINING AND DEVELOPMENT COMPANY LTD	First Respondent
RHODIUM REEFS LTD	Second Respondent
MINISTER OF MINERALS AND ENERGY	Third Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERALS AND ENERGY	Fourth Respondent
REGIONAL MANAGER: MPUMALANGA REGION, DEPARTMENT OF MINERALS AND ENERGY	Fifth Respondent
REGIONAL MANAGER: LIMPOPO REGION, DEPARTMENT OF MINERALS AND ENERGY	Sixth Respondent
ABRINA 1998 (PTY) LTD	Seventh Respondent

Heard on : 15 August 2013

Decided on : 13 December 2013

JUDGMENT

ZONDO J (Mogoeng CJ concurring):

Introduction

[1] This is an application brought by Dengetenge Holdings (Pty) Ltd (Dengetenge) for leave to appeal against a decision of the Supreme Court of Appeal[1] dismissing its application for the condonation of the late delivery of its written heads of argument and for the reinstatement of its appeal (condonation) against a judgment and order of the North Gauteng High Court, Pretoria (High Court). Dengetenge also applies for leave to appeal directly to this Court. The decision of the High Court[2] against which Dengetenge seeks to appeal is an order reviewing and setting aside the grant of certain prospecting rights to it by the Minister of Mineral Resources (Minister) or the Deputy Director-General: Mining Regulation (DDG).

[2] Southern Sphere Mining and Development Company Limited (Southern Sphere) brought an application in the High Court for various orders against the Minister; the DDG; the Regional Manager: Mpumalanga (RM: Mpumalanga), Department of Mineral Resources; the Regional Manager: Limpopo (RM: Limpopo), Department of Mineral Resources; and three companies, namely, Rhodium Reefs Ltd

[1] The judgment of the Supreme Court of Appeal is reported as *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others* [2013] ZASCA 5.

[2] *Southern Sphere Mining and Development Company Limited v the Minister of Minerals and Energy of the Republic of South Africa and Others*, unreported judgment, case number 38976/2007.

(Rhodium), Abrina 1998 (Pty) Ltd (Abrina) and Dengetenge. It is not necessary to list all the various orders that Southern Sphere sought. It suffices to say that Southern Sphere sought an order reviewing and setting aside the grant of prospecting rights to Dengetenge and Abrina by the DDG as well as the rescission of an earlier order of the High Court that the Minister, or alternatively the DDG, grant certain prospecting rights to Rhodium.[3]

[3] The Minister, the DDG, the RM: Limpopo and the RM: Mpumalanga authorised the then DDG, Mr Rocha, to depose to an affidavit on their behalf. This he did, and placed before the Court the state respondents' version of how various decisions had been made. In that affidavit the Minister, the DDG and the two Regional Managers asked the High Court to decide the various claims and counter-claims. They also indicated which orders the court should grant and which ones not.

[4] Rhodium filed an answering affidavit in support of its opposition and made a conditional counter-application in terms of which it sought to have the grant of the prospecting right to Dengetenge reviewed and set aside on certain grounds if Southern Sphere's application to have it reviewed and set aside was unsuccessful. Abrina initially opposed Southern Sphere's application but later withdrew its opposition. Dengetenge also opposed Southern Sphere's application and filed an answering affidavit in opposition.

[3] The orders granted in favour of Rhodium which Southern Sphere sought to have rescinded were granted by the High Court on 6 December 2006.

Background[4]

[5] This matter relates to the right to prospect[5] for platinum metal group metals and minerals generally associated with them on two farms, namely Boschkloof 331 KT and Mooimeisjesfontein 363 KT. Both farms are situated in the Limpopo Province.

[6] In 1936 Boschkloof was subdivided into two portions, namely, Portion 1 and the Remaining Extent. In 1959 the Remaining Extent was further subdivided into two portions, one of which was called Portion 2. The reduced Remaining Extent continued to be called the Remaining Extent.

[7] All the properties currently fall within the jurisdiction of the RM: Limpopo in terms of the Mineral and Petroleum Resources Development Act[6] (MPRDA).

[8] For some years prior to the coming into operation of the Constitution,[7] Rhodium had been engaged in a prospecting project in the Steelpoort Valley. This project was known as the Kennedy's Vale Project. The project area comprised the southern parts of Boschkloof, the farm De Goedeverwachting, the farm Belvedere, certain portions of the

[4] In response to directions issued by the Chief Justice to the parties to deliver an agreed statement of facts, the first and second respondents, on the one hand, and the applicant, on the other, delivered two separate statements but there were limited differences between them. The background set out in this judgment is based largely on one of them but amendments were made to make sure that the facts included in this background were not in dispute.

[5] Section 17 of the Mineral and Petroleum Resources Development Act 28 of 2002 regulates the grant and duration of a prospecting right.

[6] 28 of 2002.

[7] This is a reference to the Constitution of the Republic of South Africa, 1996.

farm Tweefontein, and the farm Kennedy's Vale. At some point the farms Spitskop and Kalkfontein were also added to the project.

[9] Boschkloof is situated between the farms Kennedy's Vale and De Goedeverwachting. On the south-east boundary of Boschkloof is the farm Mooimeisjesfontein.

[10] When the Constitution came into operation, De Goedeverwachting and Boschkloof fell under the province of Limpopo whilst the remainder of the project farms fell under Mpumalanga. On 20 February 2002 the Director of Mineral Development[8] (DMD) for Limpopo transferred by way of delegation to the DMD for Mpumalanga jurisdiction in respect of the administration of mineral rights in respect of the farms Boschkloof and De Goedeverwachting.

[11] A prospecting permit was issued to Rhodium on 15 August 2001 in terms of section 6(4) of the Minerals Act,[9] the precursor to the MPRDA, in respect of the southern parts of Boschkloof. Rhodium's prospecting permit was renewed on 5 August 2002 effective until 18 July 2003. On 7 April 2003 Rhodium lodged its application for the renewal of its prospecting contract with the Department of Mineral

[8] Under the Minerals Act 50 of 1991, which was repealed by the MPRDA, there was provision for the Regional Director who was given certain powers. It would seem from a comparison of section 4 of the Minerals Act and section 8 of the MPRDA that the Regional Director was the equivalent of the Regional Manager under the MPRDA.

[9] Section 6 of the Minerals Act made provision for a prospecting permit to be issued by the Regional Director.

Resources (Department) in Mpumalanga. On 11 June 2003 Rhodium applied separately to the same functionary for the renewal of its prospecting permit.

[12] On 30 April 2004 the whole of South Africa was divided into regions for the purpose of the MPRDA. This was pursuant to the provisions of section 7 of the MPRDA.[10] The regions coincided with the nine provinces of the country. Regional Managers were appointed for the various regions. Thus, there was a Regional Manager: Limpopo, a Regional Manager: Mpumalanga, and so on.

[13] On 29 June 2004 the RM: Mpumalanga advised Rhodium in writing that its pending application would be dealt with under the MPRDA and called for certain information. In so doing the RM: Mpumalanga purported to act under Item 3(2) of Schedule II to the MPRDA.[11]

[14] Rhodium supplied the information requested by the RM: Mpumalanga who then acted in terms of section 16 of the MPRDA.[12] The RM: Mpumalanga submitted Rhodium's application to the Department. By letter dated 14 September 2005 the RM: Mpumalanga advised Rhodium that its application had been refused.

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[10] Section 7 of the MPRDA provides:

> "For the purposes of this Act the Minister must, by notice in the *Gazette*, divide the Republic, the sea as defined in section 1 of the Sea-shore Act, 1935 (Act No 21 of 1935), and the exclusive economic zone and continental shelf referred to in sections 7 and 8 respectively, of the Maritime Zones Act, 1994 (Act No 15 of 1994), into regions."

[11] Item 3(2) of Schedule II to the MPRDA reads as follows:

> "If any application contemplated in subitem (1) does not meet the requirements of this Act, the Regional Manager in whose region the land to which the application relates is situated must direct the applicant to submit the outstanding information within 120 days of such direction."

[12] Section 16 makes provision for an application for a prospecting right.

[15] By letter dated 20 September 2005 Rhodium advised the RM: Mpumalanga that it was considering making an application to court to have the decision to refuse its application reviewed and set aside. It also sought a written undertaking from the RM: Mpumalanga and the DDG that they would not process any third party applications pending the outcome of Rhodium's review application. The Department did not respond to the letter.

[16] Rhodium instituted an urgent application on 17 October 2005 to interdict the Minister and her delegate from granting any rights in terms of section 17 or 23[13] of the MPRDA in respect of the southern section of Boschkloof. It also sought to interdict the RM: Mpumalanga from accepting any applications in terms of section 16 or section 22 of the MPRDA also in respect of the southern portion of Boschkloof. The High Court granted that interdict on 26 October 2005[14] pending the finalisation of the

[13] Section 23 regulates the grant and duration of a mining right.

[14] The relevant terms of the interdict were as follows:

> "2. [S]ubject to 3 below:
>
> 2.1 the first respondent is hereby interdicted and restrained from granting any rights in terms of sections 17 and/or 23 of the [MPRDA] in respect of the portions of the remaining extent and portions 1 and 2 of the farm Boschkloof 331 KT, Mpumalanga Province which are the subject of the applicant's application dated 27 October 2004 for a prospecting right ('the properties'); and
>
> 2.2 the second respondent is hereby interdicted and restrained from granting any rights in terms of section 17 and/or 23 of the [MPRDA] in respect of the properties arising from any delegation effected in his favour by the first respondent;
>
> 2.3 the third respondent is interdicted and restrained from accepting any application in respect of the properties in terms of sections 16 and 22 of the [MPRDA].
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> 3. [T]he interdict set out in 2 above shall serve as a temporary interdict pending the final determination of review proceedings to be launched by the applicant against the respondents, seeking the review and setting aside of the decision in terms of

review proceedings which Rhodium intended launching. The interdict operated from 26 October 2005 until it was discharged by operation of law on 6 December 2006.

[17] Rhodium launched its review application in the High Court on 2 December 2005. There was no opposition from the state respondents. On 6 December 2006 the High Court granted Rhodium an order reviewing and setting aside the decision not to grant Rhodium's application for a prospecting right and directing the Minister and the DDG to grant and issue to Rhodium the prospecting right applied for in respect of the property.

[18] On 15 April 2005 Southern Sphere lodged an application for prospecting rights over Portions 1 and 2 and the Remaining Extent of Boschkloof and Portion 1 and the Remaining Extent of Mooimeisjesfontein. On 23 December 2005 the DDG refused Southern Sphere's application. Southern Sphere did not file a fresh application but merely rectified what the DDG had considered to be deficiencies in its application. This led to a reconsideration of the application. By letter dated 4 October 2006 the Department notified Southern Sphere that it had been granted a prospecting right over Portion 1 and the Remaining Extent of Boschkloof and Portion 1 and the Remaining Extent of Mooimeisjesfontein. The grant did not include Portion 2 of Boschkloof. The failure to include Portion 2 of Boschkloof was a typographical error.

> section 17 of the Act by the first and/or second respondents to refuse the applicant's application dated 27 October 2004 for a prospecting right in respect of the properties, on condition that such review proceedings shall be initiated within 30 days from the date hereof."

[19] On 7 February 2006 Dengetenge lodged an application with the RM: Mpumalanga, for prospecting rights over Portion 1 of Boschkloof and Portion 1 and the Remaining Extent of Mooimeisjesfontein. On 11 November 2006 a prospecting right over only Portion 1 of Boschkloof and the Remaining Extent of Mooimeisjesfontein was notarially executed in favour of Dengetenge. There was no explanation why Dengetenge was not awarded Portion 1 of Mooimeisjesfontein as applied for. By not responding to Rhodium's letter of 20 September 2005, the Department kept Rhodium unaware of the fact that Southern Sphere had lodged an application which was then pending.

[20] The Department did not tell Dengetenge or Southern Sphere that review proceedings were pending. So it was made impossible for Rhodium to give them notice to enable them to intervene in the proceedings.

[21] As a result of the Department's failure to inform Dengetenge or Southern Sphere of Rhodium's pending review proceedings, the High Court decided Rhodium's review application in the absence of Southern Sphere and Dengetenge. This made the confusion worse and the resolution of the issues more complex. No explanation was offered by the state respondents as to why they had acted in breach of the interdict granted in favour of Rhodium.

[22] In a letter dated 14 February 2007 to the RM: Limpopo and the RM: Mpumalanga, the attorney for Southern Sphere recorded that he had been told by an

official within the Department that prospecting rights over some of the portions of the properties had been granted to other persons in addition to Southern Sphere. It would appear that at that stage the identities of those parties were not revealed to Southern Sphere. Further correspondence ensued in which Southern Sphere learnt of the interdict and review orders.

[23] A meeting was called by the Department on 3 April 2007 which was attended by officials of the Department, Southern Sphere, Dengetenge and Abrina. Its purpose was to try and, in the words of the High Court judgment "unravel the mare's nest" created by the Department. Rhodium did not attend the meeting and it is not clear whether it was invited but did not attend or whether it was not invited. The Department appealed to those present to go away and try and to resolve the problem among themselves but nothing came out of the meeting.

[24] On 4 April 2007 Southern Sphere, through one of its shareholders, wrote a letter signed by one of Southern Sphere's directors, Mr Ward, to Dengetenge enclosing a copy of the interdict from which Mr Ward had inexplicably obliterated the case number, the name of the judge who had granted the interdict and the name of the applicant, namely, Rhodium. In the letter Mr Ward pointed out that the terms of the interdict operated to strip the grant of prospecting rights to Dengetenge of any validity. This proposition applied with equal force to Southern Sphere. By March 2007, Southern Sphere was aware of the interdict, review papers and the review order.

[25] By letter dated 17 August 2007 the Director-General (DG) of the Department conveyed to the attorneys for Southern Sphere the decision of the Minister in terms of section 103(4) of the MPRDA to withdraw the decision of the DDG to grant a prospecting right to Southern Sphere insofar as it overlapped with the right granted to Rhodium in respect of the properties. Before the High Court all counsel were in agreement that the decision in terms of section 103(4)(b)[15] was made by the Minister in an attempt to comply with the review order.

[26] The Department then granted rights to prospect for platinum to—

(a) Southern Sphere over the whole of Mooimeisjesfontein and Portion 1 and the Remaining Extent of Boschkloof, pursuant to an application lodged with the RM: Limpopo;

(b) Rhodium over the southern parts of Portion 1, Portion 2 and the Remaining Extent of Boschkloof, pursuant to an application lodged in terms of Item 3 of Schedule II of the MPRDA with the DMD for Mpumalanga and the court order mentioned below; and

(c) Dengetenge over Portion 1 of Boschkloof and the whole of Mooimeisjesfontein pursuant to an application lodged with the RM: Mpumalanga.[16]

[15] Section 103(4)(b) of the MPRDA reads as follows:

> "The Minister, Director-General, Regional Manager or officer may at any time . . . withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be: Provided that no existing rights of any person shall be affected by such withdrawal and amending of a decision."

[16] The wording in this paragraph is very similar to paragraph 61 of the High Court judgment because, in setting out findings of the High Court in their separate statements furnished to this Court, Southern Sphere and

[27] Rhodium's prospecting rights were granted following the review order of 6 December 2006 which directed the Department to grant them to Rhodium.

In the High Court[17]

[28] Southern Sphere launched its review application before the High Court on 17 August 2007. Southern Sphere did not lodge any appeal in terms of section 96 of the MPRDA before it launched its review application. This means that it launched its review application without exhausting its internal remedies. It is also did not apply to court for exemption from the obligation to exhaust internal remedies. Southern Sphere invoked the provisions of Rule 53[18] to obtain the record from the Department.

Rhodium, on the one hand, and Dengetenge, on the other, incorporated the whole of paragraph 61 of the High Court judgment.

[17] The wording in some sentences in [29] and [30] below is taken from the statements of findings made by the High Court which the parties delivered to this Court and they took the wording of those findings from the High Court judgment.

[18] In relevant part, Rule 53 of the Uniform Rules of Court reads as follows:

> "(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—
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> . . .
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> (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fourteen days of the receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.
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> . . .
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> (3) The registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause."

The record, comprising in all some 580 pages, was produced in two instalments and was an unwieldy and unchronological archive.

[29] All relevant parties before the High Court accepted that only one right to prospect for a particular mineral could lawfully be granted over any specific surface area under the MPRDA. They also accepted that, once it was established that one of the parties had been granted such a right to prospect earlier in time than any of the other competing rights contended for, the later grants of rights had to be invalid for that reason alone. This did not exclude the possibility that all the grants of rights were invalid for one reason or another.

[30] It was also accepted by all the parties that no application for a prospecting right could be validly accepted by a Regional Manager and that no application for a prospecting right could be granted by the Minister or her delegate during the period in which the interdict in favour of Rhodium was in operation.

[31] The matter came before Tuchten J. When the hearing began, counsel[19] for Dengetenge formally conceded that the grant of the prospecting right to Dengetenge had been unlawful because it was granted contrary to the provisions of the interdict. Here is how he made the announcement in court and the exchange between him and the court:

[19] The reference to counsel for Dengetenge in the High Court is a reference to counsel who appeared for Dengetenge in that court who was not the same counsel who appeared before us.

"[COUNSEL]: As the court pleases, My Lord. My Lord, the seventh respondent concedes that in so far as the relief is sought by the applicant in its notice of motion and by the fifth respondent in its counter application to review and set aside the decision to grant it a prospecting right . . . [intervened]

COURT: Grant whom a prospecting right?

[COUNSEL]: The seventh respondent My Lord.

COURT: Yes?

[COUNSEL]: It concedes that the grant of that right was unlawful.

COURT: That is quite an important concession.

[COUNSEL]: It is indeed My Lord.

COURT: So I had better make a careful note of it. Concedes that the grant . . . [indistinct]. You concede . . . [intervened]

[COUNSEL]: My Lord, in the . . . [intervened]

COURT: Excuse me. I want to just make sure that I have got it right. You concede that the grant of a prospecting right to the seventh respondent was unlawful?

[COUNSEL]: That is correct.

COURT: Seventh respondent is Dengetenge. Can we call it Dengetenge?

[COUNSEL]: As the court pleases, My Lord.

COURT: To make it easier for me. Yes?

[COUNSEL]: My Lord, as obviously will appear from my argument when I address Your Lordship, the basis of that concession is that the grant was in the face of an interdict.

. . .

[COUNSEL]: My Lord, where that leaves the seventh respondent, where that leaves Dengetenge, is that what we will be addressing Your Lordship on, is purely what the appropriate relief should be following, on consequent upon that concession. In other words, what is a just and equitable remedy following the setting aside of the right to it. And that is my submissions to Your Lordship will based on that. Obviously My Lord, I will make submissions on the rights that Southern Sphere the applicant has and the rights that Rhodium has as well. But in so far as Dengetenge goes My Lord, my submissions will be

limited to what is the just and equitable remedy in the circumstances.

COURT: Thank you."

[32] Tuchten J then proceeded to deal with the matter on the basis that Dengetenge was not opposing Southern Sphere's application, subject to submissions on a just and equitable remedy. He also heard counsel for Southern Sphere and counsel for Rhodium. Tuchten J did not deal with any contention that he should dismiss Southern Sphere's application because there was no exhaustion of internal remedies in terms of section 96[20] of the MPRDA because Dengetenge did not pursue that contention. However, he did deal with a contention by Rhodium that Southern Sphere had delayed unreasonably before instituting its review application. He rejected that contention. In terms of his judgment he set aside the grant of prospecting rights to Dengetenge. He also made other orders which are not relevant to the present matter. He did not accede to Dengetenge's request regarding a just and equitable remedy. The hearing took three days.

[33] On 17 June 2011 Dengetenge obtained leave from the High Court to appeal to the Supreme Court of Appeal against its decision to set aside the grant of prospecting rights to Dengetenge.

[20] Since all the references to section 96 in this judgment are references to section 96 of the MPRDA, I shall omit the reference to the MPRDA after references to the section.

In the Supreme Court of Appeal

[34] Dengetenge obtained two extensions of time before it lodged the appeal record. On 15 December 2011 it lodged the record with the Registrar of Supreme Court of Appeal. Dengetenge was required to deliver its heads of argument on or before 23 February 2012.[21]

[35] Dengetenge realised that it was not going to be able to meet the deadline. It sought the consent of the other parties for the late filing of its heads of argument by 13 April 2012. The State Attorney consented to the late filing of the heads of argument, despite the fact that the state respondents were not taking part in the appeal. Southern Sphere and Rhodium did not. Dengetenge then filed a substantive application for condonation with the Registrar of the Supreme Court of Appeal. That application reached the Registrar on 24 February 2012. By that time the appeal had already lapsed. The Registrar wrote Dengetenge a letter dated 2 March 2012 notifying it that its appeal had lapsed due to non-compliance with the Rules of the Supreme Court of Appeal.[22] This meant that an application for its reinstatement was required.

[36] On 8 March 2012 Southern Sphere's attorney wrote to Dengetenge's attorney and informed the latter that there was no need for his clients to respond to

[21] Rule 10(1) of the Rules of the Supreme Court of Appeal provides:

> "Unless the President otherwise directs—
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> (a) the appellant shall lodge with the registrar six copies of his or her main heads of argument within six weeks from the lodging of the record; and
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> (b) the respondent shall lodge with the registrar six copies of his or her main heads of argument within one month from the receipt of the appellant's heads of argument."

[22] Rule 10(2A)(a) of the Rules of the Supreme Court of Appeal provides: "If the appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse."

Dengetenge's application dated 23 February 2012 as the appeal had lapsed. Dengetenge's attorney did not reply to that letter. On 12 July 2012 Dengetenge served on Southern Sphere a copy of an application for condonation and for the reinstatement of the appeal. It subsequently re-served its application for condonation together with its heads of argument on 27 August 2012. This meant that Dengetenge's heads of argument were some six months late. In terms of the Rules of the Supreme Court of Appeal Southern Sphere and Rhodium had to file opposing affidavits within a month if they sought to oppose Dengetenge's application for condonation.[23] They filed their affidavits outside the 30-day period and thus, also, in breach of the Rules of the Supreme Court of Appeal. This means that they also required condonation in this regard.

[37] Southern Sphere and Rhodium said that, after the lapse of the appeal, the prospecting rights granted by the Minister to them had become effective. Southern Sphere said that it had commenced prospecting operations on the properties during March 2012. It said that it was obliged to do this in terms of section 19(2)(b)[24] of the MPRDA. Southern Sphere said that as at July 2012 it had incurred direct prospecting costs of approximately R6 million on the project. Rhodium stated that it had already expended in the region of R1,2 million. It also said that its projected costs for the compilation of its environmental impact assessment were R1,928 million. Rhodium

[23] Rule 6(3) of the Rules of the Supreme Court of Appeal provides: "Every affidavit in answer to an application for leave to appeal shall be lodged in triplicate within one month after service of the application on the respondent."

[24] Section 19(2)(b) of the MPRDA provides: "The holder of a prospecting right must commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective in terms of section 17(5) or such an extended period as the Minister may authorise".

said that, although not all of these costs had been incurred yet, the process had been commissioned and a portion thereof had been incurred. Rhodium said that the balance thereof would have had to be settled soon to ensure compliance with the requirements in the letter of acceptance of Rhodium's mining right application.

[38] Southern Sphere and Rhodium contended that the amounts would be placed at risk if Dengetenge were given the opportunity to re-instate the lapsed appeal. After Dengetenge's appeal had lapsed, they said that most of those costs had been incurred by them at a time when they believed that they had legal certainty and there had been no indication from Dengetenge that it intended seeking its re-instatement.

[39] Southern Sphere also stated that it had sold shares to investors in order to fund the prospecting operations. These shares were sold to both local and international investors on the basis that the appeal had lapsed. Shares were also sold to the local communities residing on the properties, representing some 32 000 people. Southern Sphere said that those people had very high expectations of being involved in the project's success. Southern Sphere said that it had taken it many years to establish a strong working relationship with the local communities. It said that if the project were placed on hold or otherwise delayed, the damage to community relations could be irreversible. Dengetenge did not dispute any of these allegations. The Supreme Court of Appeal held that they could not be disputed. It accepted that Southern Sphere and Rhodium had been severely prejudiced by Dengetenge's delay in prosecuting the appeal.

[40] The Supreme Court of Appeal accepted that there had been no or minimal inconvenience to it. It found that there were huge gaps in the chronological sequence advanced by Dengetenge.[25]

[41] The Supreme Court of Appeal took the view that Dengetenge's breach of its Rules was flagrant. It held that given this breach, coupled with the failure to advance an acceptable explanation, as also the very evident prejudice to Rhodium and Southern Sphere, it could well have been entitled to refuse the indulgence of condonation irrespective of the merits of the appeal. Nevertheless, it addressed the merits of the appeal in order to determine whether it should grant condonation. The Supreme Court of Appeal concluded that there could be no doubt that Dengetenge's counsel withdrew Dengetenge's opposition to Southern Sphere's application and Rhodium's counter-application. It held Dengetenge to the concession its counsel had made in the High Court. Nevertheless, the Court found that Dengetenge had no prospects, even without the concession. It dismissed Dengetenge's application for condonation and for the reinstatement of the appeal with costs including the costs of two counsel.[26]

[25] See Supreme Court of Appeal judgment above n 1 at paras 11 and 13.

[26] Id at para 19.

In this Court

Condonation

[42] Dengetenge failed to deliver its application for leave to appeal as well as its written submissions timeously. It brought applications for condonation. Counsel for Southern Sphere and Rhodium indicated that they did not oppose those applications. The period of delay was not excessive and there was no prejudice or inconvenience to any party or the Court. Accordingly, it is in the interests of justice that condonation be granted.

Jurisdiction

[43] Prior to 23 August 2013 this Court's jurisdiction was limited to deciding constitutional matters and issues connected with constitutional matters. However, on that day the Constitution Seventeenth Amendment Act of 2013 came into operation and conferred upon this Court general jurisdiction as well.[27] The parties presented their arguments on the footing that the jurisdiction of this Court applicable to this case is its jurisdiction as it was before 23 August 2013. Accordingly, I also propose to deal with the matter on the basis of that jurisdiction.

[44] In terms of section 167(3)(b)[28] of the Constitution, as it was before 23 August 2013, this Court's jurisdiction was limited to constitutional matters and issues connected with constitutional matters. In so far as Dengetenge seeks leave to

[27] The general jurisdiction is subject to the Court granting leave as required by section 167(b)(ii) of the Constitution.

[28] Section 167(3)(b) of the Constitution read as follows before 23 August 2013: "The Constitutional Court may decide only constitutional matters, and issues connected with decisions on constitutional matters".

appeal against the decision of the Supreme Court of Appeal refusing it condonation, it contends that that Court dealt with its application for condonation in a manner that gave rise to a reasonable perception that the Court was not impartial. That raises a constitutional issue because it is a constitutional requirement that, in deciding matters, courts must adjudicate impartially.[29] Accordingly, this Court has jurisdiction to deal with Dengetenge's application for leave to appeal against the decision of the Supreme Court of Appeal.

[45] Dengetenge also seeks leave to appeal against the decision of the High Court. There is no doubt that there is a constitutional issue in this matter. One of the applicant's contentions is that it was not competent for the High Court to entertain Southern Sphere's review application because Southern Sphere had failed to exhaust internal remedies as required by section 96[30] read with section 7[31] of the Promotion of Administrative Justice Act[32] (PAJA). This means that the applicant's contention in this regard is based upon a provision of the PAJA, a statute that was enacted to give effect to the Constitution. This raises a constitutional issue. Another contention advanced by Dengetenge is that the High Court should not have entertained Southern Sphere's application because Southern Sphere had delayed unreasonably in instituting its review application and had done so outside the 180 days prescribed by section 7 of

[29] Section 165(2) of the Constitution reads as follows: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." See also *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 12.

[30] Section 96 of the MPRDA is quoted in relevant part in [63] below.

[31] Section 7 of the Promotion of Administrative Justice Act 3 of 2000 is quoted in relevant part in [66] below.

[32] 3 of 2000.

the PAJA. As this contention is based on a provision of the PAJA, it, too, raises a constitutional issue. Accordingly, this Court has jurisdiction to entertain this matter.

Leave to appeal against the decision of the Supreme Court of Appeal

[46] This Court grants leave to appeal if it is in the interests of justice to grant leave. In this case the ground upon which Dengetenge attacks the decision of the Supreme Court of Appeal to refuse its application for condonation is that the Supreme Court of Appeal dealt with Dengetenge's condonation application in a manner that gave rise to a reasonable perception that it lacked impartiality. This is a complaint of a perception of bias on the part of the Supreme Court of Appeal. This was said on the basis that Southern Sphere and Rhodium had also failed to comply with the Rules of the Supreme Court of Appeal in filing their answering affidavits in support of their opposition to Dengetenge's condonation application but the Court had no problem with their condonation applications. Dengetenge points out that, in support of the Supreme Court of Appeal's decision to dismiss its application that Court relied upon the contents of Southern Sphere's and Rhodium's opposing affidavits for which it had not granted condonation.

[47] In *SARFU*[33] this Court said:

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative

[33] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (*SARFU*).

> proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."[34]

It formulated the test as follows:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."[35]

This Court then explained:

> "The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience."[36]

[48] I think that the answer to Dengetenge's complaint in this regard is that, to the extent that the Supreme Court of Appeal may have treated the condonation applications of the different parties differently, this was because Dengetenge's condonation application was opposed whereas the others were not. Dengetenge's non-compliance was much more extensive than Rhodium's and Southern Sphere's. Counsel for Dengetenge had informed the Supreme Court of Appeal that he was not opposing the grant of condonation to Southern Sphere and Rhodium whereas one of the other parties did not reciprocate in this regard and informed the Court that he was opposing Dengetenge's application for condonation.

[34] Id at para 35.

[35] Id at para 48.

[36] Id.

[49] The allegation of bias was made against Judges of the Supreme Court of Appeal. Such allegations are very serious when made against any judicial officer but, when they are made against a court of the standing of the Supreme Court of Appeal, they assume even greater seriousness. Making allegations of bias or the appearance of bias against judges when there are no reasonable grounds for such allegations must be viewed in a very serious light. This is because of the damage that such allegations are likely to cause to the confidence the public reposes in the Judiciary. They should not be made lightly. Applying the above test to the facts of this case, I am of the view that the complaint is devoid of any substance and should be dismissed. There are no reasonable grounds for any perception of partiality in the manner in which the Supreme Court of Appeal dealt with Dengetenge's application for condonation.

[50] As the above was the only ground upon which the decision of the Supreme Court of Appeal was attacked, I would dismiss Dengetenge's application for leave to appeal against that decision because the contention has no prospects of success.

[51] In *Mabaso*,[37] this Court held that "[u]nder rule 19, then, an applicant refused condonation by the [Supreme Court of Appeal] should ordinarily seek leave to appeal to this Court directly against the judgment of the High Court and not ordinarily seek leave to appeal against the judgment of the [Supreme Court of Appeal] refusing

[37] *Mabaso v Law Society, Northern Provinces, and Another* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC).

condonation".[38] There was, therefore, no need for Dengetenge to apply for leave to appeal against the decision of the Supreme Court of Appeal dismissing its application for condonation because it could simply have sought leave to appeal directly to this Court against the decision of the High Court. I now proceed to consider Dengetenge's application for leave to appeal against the decision of the High Court.

Leave to appeal against the decision of the High Court

[52] This Court grants leave to appeal if it is in the interests of justice to do so. The factors that it normally takes into account include the importance of the issues raised by the matter, the prospects of success and the public interest. In this regard the prospects of success, though important, are not decisive. I have identified above the constitutional issues that are raised by Dengetenge's application for leave to appeal against the decision of the High Court. The matter raises important issues for determination by this Court. One of the issues is whether, where a review applicant instituted a review application without exhausting the internal remedies in section 96(3) the court may hear the review application if the Minister has considered the decision sought to be reviewed and agrees with the review applicant that that decision should not have been made but requests the court to hear the review application and decide the matter. A decision of this Court on this issue is desirable and will affect other cases beyond the parties in the present case. Furthermore, what is at stake is the grant of prospecting rights which, no doubt, have huge monetary value. The contentions raised by Dengetenge are reasonably arguable. For that

[38] Id at para 24.

reason Dengetenge has reasonable prospects of success. In the circumstances I am of the view that it is in the interests of justice that leave to appeal against the decision of the High Court should be granted.

The appeal

[53] In considering Dengetenge's appeal, the first question to be considered is whether Dengetenge should be granted leave to withdraw the concession that its counsel made at the commencement of the proceedings in the High Court. Dengetenge's counsel submitted that Dengetenge's previous counsel had made a concession on a point of law and Dengetenge can withdraw that concession. I have quoted the relevant part of the transcript of the proceedings in the High Court which show how Dengetenge's previous counsel effectively withdrew Dengetenge's opposition to Southern Sphere's application and Rhodium's counter-application. I do not propose to repeat that here. I have also referred earlier to the prejudice that Southern Sphere and Rhodium said they would suffer if, in effect, Dengetenge was granted leave to reinstate its opposition.

[54] It is true that a concession made by counsel on a point of law may be withdrawn if the withdrawal does not cause any prejudice to the other party. However, in my view what counsel for Dengetenge did was not just to make a concession on a point of law. He effectively withdrew Dengetenge's opposition to the application. The Court needs to do justice to all the parties in this regard.

[55] The hearing in the High Court took place over three days. Counsel for Dengetenge withdrew Dengetenge's opposition on the first day of the hearing but had occasion to repeat it on the second day.

[56] The attorney for Dengetenge has said that he was not present in Court when his counsel made the concession. However, he attended Court on both the second and third days. There is no way that he could not have been aware by the end of the second day that his counsel had made such an important concession. In fact it is highly unlikely that counsel would have made such a concession without having discussed it with his instructing attorney.

[57] At any rate, after the hearing neither Dengetenge's attorney nor any of the officials of Dengetenge who had attended Court complained that Dengetenge's counsel had made this concession without a mandate. In fact, despite the fact that Tuchten J referred to this concession in his judgment, neither Dengetenge's attorney nor any official of Dengetenge reacted to the judgment in a manner that reflected that they had not known of this concession. It was only after many months when the matter was in the Supreme Court of Appeal that Dengetenge's attorney deposed to an affidavit in which he said that counsel had made that concession without authority. He failed to explain why that had never been raised before and was only being raised at that stage. In my view it has not been shown that counsel for Dengetenge had no authority to make the concession that he made. Furthermore, after the appeal had lapsed, Southern Sphere and Rhodium incurred huge expenses in preparations

necessary for exercising their prospecting rights which they might not have incurred if Dengetenge had acted with diligence and made sure that its appeal did not lapse.

[58] It would also be prejudicial to Rhodium if Dengetenge were granted leave to withdraw the concession because, when the matter was before the High Court, Rhodium was ready to move an application for it to be exempted from the obligation to exhaust internal remedies but had decided not to move that application after Dengetenge had effectively withdrawn its opposition.

[59] Dengetenge's withdrawal of its opposition meant that all the parties before the High Court were unanimous in asking the Court to be the one to decide the various competing claims. There was no party contending that there should have been or should be an exhaustion of internal remedies before the Court could decide the matter. The Court was entitled to give effect to the request that it be the one to decide all the claims and counter-claims. The High Court proceeded to adjudicate the various competing claims and brought about certainty among the parties. It would be unjust and inequitable to all the other parties to grant Dengetenge leave to in effect reinstate its opposition, particularly because, even at this stage, there can be no doubt that on the merits it was not entitled to be granted a prospecting right in breach of the interdict granted in favour of Rhodium.

[60] If Dengetenge had not withdrawn its opposition and the Minister had not made the request to the Court through Mr Rocha's affidavit that the Court decide the various

claims and counter-claims itself and the High Court had upheld Dengetenge's contention and either dismissed Southern Sphere's application and Rhodium's counter-application or postponed or stayed them, those parties would have been able to exhaust their internal remedies and later go back to Court to have the Court decide the claims if they still felt aggrieved after exhausting their internal remedies. However, since Dengetenge withdrew its opposition and the Minister requested the Court to be the one to make the decisions on these claims and the Court proceeded to decide the claims on their merits, it would be extremely unfair to now have that whole process reversed.

[61] I conclude that the concession must stand. This conclusion is sufficient to justify the dismissal of Dengetenge's appeal. However, even if Dengetenge was granted leave to reinstate its opposition or to withdraw its concession, for the reasons I set out below, I would still conclude that Dengetenge's appeal should be dismissed.

Dengetenge's contention on internal remedies

[62] There are two grounds upon which Dengetenge contended that the High Court should not have heard Southern Sphere's application. The one is that in terms of section 96(1) and (3), Southern Sphere was obliged to exhaust the internal remedies provided for in section 96 before it could apply to court for the review and setting aside of the grant of prospecting rights to Dengetenge. Dengetenge contended that, since Southern Sphere had applied to Court for a review without first exhausting the internal remedies in section 96, it was not competent for the High Court to hear the

matter. The other contention is that Southern Sphere delayed unreasonably in instituting its review application and instituted it after the expiry of the period of 180 days prescribed by section 7(1) of the PAJA. Accordingly, Dengetenge contended that the High Court should not have entertained the application and should have dismissed it on this ground as well.

[63] Section 96 provides:

> "**Internal appeal process and access to courts**
>
> (1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to—
>
> (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
>
> (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.
>
> . . .
>
> (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.
>
> (4) Sections 6, 7(1) and 8 of the [PAJA] apply to any court proceedings contemplated in this section."[39]

[64] Section 96(1) confers a right of appeal to either the Minister or the DG, as the case may be, upon any person whose rights or legitimate expectations have been materially and adversely affected, or who is aggrieved by any administrative decision made in terms of the MPRDA. Then section 96(3) precludes any person from

[39] Section 96 was amended by section 68 of the Minerals and Petroleum Resource Development Amendment Act 49 of 2008. As this amendment only came into effect in June 2013 it is not relevant for the purposes of this judgment, which concerns an application brought in August 2007.

applying to court for the review of an administrative decision contemplated in section 96(1) "until that person has exhausted his or her remedies in terms of that subsection."

[65] Section 96(4) provides that sections 6, 7(1) and 8[40] of the PAJA apply to any court proceedings contemplated in section 96. Section 96(4) does not expressly say that section 7(2) also applies to any court proceedings contemplated in section 96. However, section 7(1)(a), to which section 96(4) refers, includes the words "subject to subsection 2(c)" and, therefore, incorporates by reference the provisions of section 7(2)(c). Counsel for both Rhodium and Southern Sphere were agreed that section 7(2)(c) applies to section 96 because of the reference to section 7(1) and the further reference to section 7(2)(c) in section 7(1). I agree with their submission.

[66] Section 6(1) of the PAJA makes provision for any person to institute review proceedings in respect of administrative action. Section 6(2) and (3) sets out the grounds upon which an administrative decision may be reviewed. Section 7(1) and (2) reads as follows:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

[40] Section 8 of the PAJA empowers a court to make a just and equitable order in proceedings for judicial review.

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

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

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

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

[67] Section 7(2)(a) does not preclude any person from *applying* to court for the review of an administrative act unless the person has exhausted his or her internal remedies. It precludes a court from *reviewing* any administrative action in terms of the PAJA unless any internal remedy provided for in any other law has first been exhausted.

[68] I now deal with Dengetenge's contention. Dengetenge's contention raises the question whether it would have served any useful purpose for the High Court to insist that Southern Sphere exhaust internal remedies before it could hear the review application. The first answer is this. At some stage the state respondents delivered their reasons for the various decisions challenged in Southern Sphere's application and in Rhodium's counter-application. In respect of the decisions to grant Abrina and

Dengetenge prospecting rights, the state respondents, expressed the view that those rights could not have lawfully been granted to Abrina and Dengetenge. They also said that the grant of the prospecting rights to Dengetenge must have been an administrative oversight.

[69] The Minister and the DDG also indicated in the reasons that they intended to invoke section 103(4)(b)[41] of the MPRDA and to withdraw the decisions in terms of which prospecting rights had purportedly been granted to Abrina and Dengetenge. Accordingly, it can be said that, once the state respondents had filed the reasons or the record, the Minister's decision was clear. It was that the DDG should not have granted Abrina and Dengetenge prospecting rights and those decisions should be withdrawn in terms of section 103(4)(b) of the MPRDA. Once the Minister had taken this stance, it is not clear what decision Southern Sphere and Rhodium would have asked the Minister to make in the internal appeal if they lodged an internal appeal at that stage or if the Court required them to exhaust the internal remedies in section 96 before it could hear the review application. Therefore, no useful purpose would have been served by exhausting the internal remedies at that stage or by the court insisting on the exhaustion of internal remedies at the stage when the Minister and the DDG had made up their minds that they agreed with Southern Sphere and Rhodium that Dengetenge and Abrina should never have been granted the prospecting rights in question.

[41] See above n 15.

[70] Another answer to Dengetenge's contention is that the Minister waived the right to have the internal remedies exhausted first before the matter could be taken to court or could be heard by the court. The requirement in section 96(3) that internal remedies be exhausted before an applicant may apply to court for the review of an administrative action was enacted for the benefit of the Minister and the DG to enable them to examine administrative actions made in terms of the MPRDA before they could be subjected to judicial scrutiny so that, if they think that they should not have been made, they can withdraw or alter them.

[71] In response to Southern Sphere's application in the High Court, the Minister, the RM: Limpopo and the RM: Mpumalanga authorised the DDG, Mr Rocha, to depose to and file an affidavit in which these respondents explained the circumstances under which the various decisions that were being challenged in court had been taken as well as the reasons for those decisions. In his affidavit Mr Rocha in effect apologised on behalf of these respondents in so far as they made decisions in breach of the interdict that had been granted in favour of Rhodium. He pointed out that it was never the intention of any of these respondents to act in contempt of court.

[72] Mr Rocha's affidavit was deposed to on 16 July 2009. There had been a lot of delay in filing that affidavit. Mr Rocha explained the delay on the basis that there had been confusion and divergence of views within the Department and in the office of the State Attorney which was advising the state respondents on what the Department's attitude should be to Southern Sphere's application and to Rhodium's

counter-application. He said that the one view was that they should not oppose these applications. Another view was that the Minister should invoke the provisions of section 103(4)(b) of the MPRDA and withdraw the prospecting rights that had been granted to Southern Sphere, Dengetenge and Abrina in so far as they overlapped with the prospecting rights that had been granted or that were required by the order of court of 6 December 2006 to be granted to Rhodium. Indeed, the Minister had made a decision to this effect in regard to Southern Sphere which was conveyed to Southern Sphere on 17 August 2007.

[73] Mr Rocha said that the third view was that the state respondents should file an affidavit explaining their decisions, giving reasons for those decisions and ask the court to decide the various claims itself. The motivation for this option was that, if, for example, the Minister invoked section 103(4)(b) to withdraw the grant of prospecting rights, that decision could subsequently be challenged in court as well. The Minister and the other state respondents, according to Mr Rocha, took the view that it would be "more expedient and efficient for the entire matter to be resolved by means of appropriate orders granted by [the Court]." Mr Rocha says that, ultimately, it was decided that the state respondents should file an affidavit explaining how the various decisions were taken and ask the Court to be the one to decide the various claims.

[74] Mr Rocha said that it was "therefore, necessary for the state to indicate which of the different relief requested by the various parties it opposes and which relief it

supports." As one reads Mr Rocha's affidavit further, one discovers that in regard to all the parties in the matter who had disputes with one another about the grant or withdrawal of various rights, the state respondents indicated what relief they supported and which relief they opposed in regard to the various claims. For example, Mr Rocha said somewhere in his affidavit: "The state, in as much as it may be necessary, relies also upon the grounds advanced by [Rhodium] as to why the relief, proposed by [Rhodium], should be granted." Later on in his affidavit Mr Rocha said: "The view of the state is that [Southern Sphere] should be entitled to the prospecting rights over the northern parts of the relevant farm." Yet later on, Mr Rocha also said in his affidavit that:

> "The state concedes that the rights which the state purported to award to [Abrina] and [Dengetenge] could have been the result of an administrative oversight. . . . Upon reflection, the prospecting rights ought not to have been granted to [Abrina] and [Dengetenge]."

[75] The effect of Mr Rocha's affidavit was that, although the Minister had taken the view that Dengetenge could not lawfully have been granted the prospecting rights that it was granted, it was better that the Court decide all these competing claims and requested that the Court decide them. The Minister would have been aware that in terms of section 96(3) she could insist that Southern Sphere exhaust internal remedies before the Court could hear the review application but she chose the option of requesting the Court to decide the matter because "it appeared to be more expedient and efficient for the entire matter to be resolved by means of appropriate orders granted by [the Court]". The Minister even informed the Court which orders asked

for by Southern Sphere and Rhodium she supported or opposed. In my view the Minister waived the right to the exhaustion of internal remedies in terms of section 96.

[76] The conclusion reached by the majority of the House of Lords in *Kammins*[42] in relation to section 29(3) of the Landlord and Tenant Act, 1954 (LAT Act) is consistent with the view that the requirement of section 96(3) may be waived. In that case the appellants and the respondents were tenants and landlords respectively. That Act made provision for a tenant to request a new lease or tenancy from the landlord before the expiry of the existing lease. It also made provision under section 25 for the landlord, in response, to give notice of its opposition to a further tenancy if it was not agreeable to such a request. Thereafter, the tenant was required to make an application to the court in terms of section 29 for a new lease which the court had the power to grant in an appropriate case. The tenant's application for a new lease had to be made "not less than two nor more than four months after the giving of the landlord's notice under section 25 of the [LAT Act] or, as the case may be, after the making of the tenant's request for a new tenancy."

[77] Section 29(3) of the LAT Act was couched in the following terms:

> "No application under subsection (1) of section 24 of this Act shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 25 of this Act or, as the case may be, after the making of the tenant's request for a new tenancy."

[42] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 (HL) (*Kammins*).

It is necessary to quote the provisions of section 96(3) so as to compare them with the provisions of section 29(3). Section 96(3) reads:

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

[78] Section 29(3) and section 96(3) preclude the making of the applications contemplated in those sections without compliance with the prescribed conditions. In section 29(3) the condition was the making of the application within the periods stipulated in the LAT Act. In section 96(3) the condition is the exhaustion of internal remedies in section 96(1). Two features that are common to both section 29(3) and section 96(3) are that—

(a) in each provision the preclusion is couched in very clear language; and

(b) on the face of it each provision appears to admit of no exception to its preclusion.

[79] In *Kammins* the tenant failed to make its application "not less than two . . . months . . . after the making of [its] request for a new tenancy" as required by section 29(3) and, thus, failed to meet the prescribed condition. The tenant made the application less than two months after making its request for a new tenancy. It was, therefore, made too soon. For some time the landlord did not take the point that the tenant had failed to comply with the requirement that it could not make the application earlier than two months after its request for a new tenancy. The landlord only raised this point much later after it had taken various steps in the litigation process. The

tenant argued that the landlord had waived its right to object to the tenant's non-observance of section 29(3). The landlord argued that the terms of section 29(3) were peremptory and the non-observance by the tenant meant that the tenant's application was a nullity and no agreement or waiver could save it. The question that then arose for determination was whether the landlord could waive the requirement in section 29(3).

[80] The majority[43] concluded in separate speeches that the landlord could waive the requirement in section 29(3). The minority[44] took the view that the requirement could not be waived.

[81] It is necessary to refer to the reasons given in *Kammins* for the conclusion that a requirement expressed in terms as clear as those in section 29(3) of the LAT Act could be waived. Since the four Law Lords delivered different speeches, it will be necessary to look at each speech as the reasons were not the same. In support of the conclusion that the requirement in section 29(3) could be waived or that all the parties could agree differently and, speaking about statutory provisions that purport to preclude the institution of actions or the bringing of actions, Lord Reid said:

> "I would find it impossible to interpret these sections as preventing the court from dealing with a claim made out of time if both parties asked the court to do so. And in the sphere of limitation of actions there are many cases cited in this case by Sachs LJ where very strong words have not prevented the court from holding that the defendant has waived his right to object: such words as 'all actions shall be commenced within'

[43] Lord Reid, Lord Morris, Lord Pearson and Lord Diplock.

[44] The minority consisted of Viscount Dilhorne only.

> a certain time, 'no action shall lie or be instituted', 'no action shall be maintainable', 'no action shall be brought'. Moreover, as illustrated by a recent decision of this House in *Anisminic Ltd v Foreign Compensation Commission*, there is a well-established principle that any provision ousting the jurisdiction of the court must be construed strictly, and I would think that the same applies to a provision that the court is not to have jurisdiction if an application is made too soon."[45] (Footnotes omitted.)

[82] Lord Morris took the view that the requirement in section 29(3) was a procedural requirement – not one of jurisdiction – which could be waived. In regard to the requirements of section 29(3), Lord Morris pointed out that, in his view, the time limits in section 29(3) regulated procedure and provided for an orderly sequence of procedural steps. He said that a tenant who failed to comply with the requirement could find that the landlord would insist on the observance of the requirement. He then said:

> "But if a landlord agrees to waive the strict observance of a time stipulation I do not consider that the language of section 29 makes it obligatory on the court to hold that in spite of the landlord's agreement the court cannot and must not proceed."[46]

A little later Lord Morris also pointed out, as Lord Reid had done, that in relation to a statute providing that an action must be brought within a certain period—

> "it has always been recognised that words such as 'no action shall be brought' are generally speaking not words which compel the court to hold that it lacks jurisdiction even if the party sued does not wish to rely on the statutory defence."[47]

[45] *Kammins* above n 42 at 875c-e.

[46] Id at 877e-f.

[47] Id at 877f-g.

He held that the position was the same between a tenant and landlord in regard to section 29(3).

[83] Lord Pearson also sought to distinguish between statutory requirements that are jurisdictional "so that the court has no jurisdiction in any case to entertain an application made prematurely" and "requirements [that] are only procedural, so that the landlords have a right to ignore or object to a premature application but can waive their right".[48] He expressed the view that the requirement of section 29(3) was solely for the benefit of landlords and not for the benefit of other "suitors". He then concluded—

> "that the requirements of section 29(3) are only procedural, and consequently the landlords had a right to ignore or object to the tenants' premature application but could waive that right."[49]

[84] Lord Diplock thought that the division of opinion in the House of Lords and in the Court of Appeal in *Kammins*[50] reflected "competing approaches to the task of statutory construction – the literal and the purposive approach."[51] Lord Diplock also said:

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[48] Id at 888c-d.

[49] Id at 888d and 890a.

[50] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1969] 3 All ER 1268 (CA); [1969] 3 WLR 799.

[51] This view by Lord Diplock may well be supported by the fact that two further members of the majority in *Kammins*, namely, Lord Reid and Lord Pearson, adopted what, in my view, was in essence a purposive approach to construction in certain matters where the division of opinion was based upon literalism and purposivism. Lord Reid adopted the purposive approach as a minority in *Van der Lely NV v Bamfords Limited* [1963] RPC 61 (HL) (*Van der Lely*) and in *Rodi and Wienenberger AG v Henry Showell Ltd* [1969] RPC 367 (HL) (*Rodi*). In the latter case Lord Reid was joined by Lord Pearson in adopting a purposive approach against a majority that adopted a literalist approach. The features of Lord Reid's approach in his dissents in *Van der*

> "A conclusion that an exception was intended by Parliament, and what that exception was, can only be reached by using the purposive approach. This means answering the questions: what is the subject-matter of Part II of the [LAT Act]? What object in relation to that subject-matter did Parliament intend to achieve? What part in the achievement of that object was intended to be played by the prohibition in section 29(3)? Would it be inconsistent with achievement of that object if the prohibition were absolute? If so, what exception to or qualification of the prohibition is needed to make it consistent with that object?"[52]

[85] After considering the questions raised in the preceding passage in the context of the *Kammins* case, Lord Diplock also referred to the requirements of sections 25 and 26 of the LAT Act and said: "These requirements are clearly imposed solely for the benefit of that party to whom the notice is given, whether he be the landlord or the tenant."[53] A little later he went on to say:

> "[W]here in any Act which merely regulates the rights and obligations of private parties inter se, requirements to be complied with by one of those parties are imposed for the sole benefit of the other party, it would be inconsistent with their purpose if the party intended to be benefited were not entitled to dispense with the other party's compliance in circumstances where it was in his own interest to do so."[54]

[86] Lastly, Lord Diplock explained the position in the following terms:

> "On the purposive approach to statutory construction this is the reason why in a statute of this character *a procedural requirement imposed for the benefit or protection of one party alone is construed as subject to the implied exception that it*

Lely and in *Rodi* seem to be present in Lord Diplock's subsequent speech advocating purposive construction in *Catnic Components Limited and Another v Hill & Smith Limited* [1982] RPC 183 (HL).

[52] Id at 892c-d.

[53] Id.

[54] Id at 893a-b.

> *can be 'waived' by the party for whose benefit it is imposed even though the statute states the requirement in unqualified and unequivocal words.* . . . This is the construction which has been uniformly applied by the courts to the unqualified and unequivocal words in statutes of limitation which prohibit the bringing of legal proceedings after the lapse of a specified time. *The rule does not depend on the precise words of prohibition which are used. They vary from statute to statute. In themselves they contain no indication that any exception to the prohibition was intended at all.*"[55] (Emphasis added.)

He then held that the requirement in section 29(3) could be waived by the landlord. I am also of the view that the requirement in section 96(3) that a person must exhaust internal remedies in terms of section 96(1) before he or she may apply to court for review of an administrative action under the MPRDA is a procedural requirement.

[87] The view that the requirement for the exhaustion of internal remedies in section 96(3) was enacted for the benefit of the Minister and the DG to afford them the opportunity of altering or withdrawing any administrative decision before it could be challenged in court if they think it should not have been made is consistent with what this Court said in *Koyabe.*[56] In that case this Court said:

> "Internal remedies are designed to *provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation*. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid."[57] (Footnote omitted and emphasis added.)

[55] Id at 893b-c.

[56] *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) (*Koyabe*).

[57] Id at para 35.

Since these provisions are there for the benefit of the Minister and the DG, those functionaries may waive the requirement in section 96(3) for the exhaustion of internal remedies by asking the court to be the one to decide the various competing claims instead of them making decisions in internal appeals under section 96(1).

[88] Dengetenge's contention can also be answered on the basis of the decision of this Court in *Bengwenyama*.[58] In *Bengwenyama* the community[59] which owned the land in respect of which it had applied to the Minister for a prospecting right but had been refused such right on the basis that that right had been granted to Genorah Resources (Pty) Ltd (Genorah) lodged an internal appeal in terms of section 96(1) of the MPRDA against the DDG's decision granting the prospecting right to Genorah. While waiting for the outcome of that appeal, the community brought an application to court to interdict Genorah from exercising the prospecting right pending the outcome of a review application that the community intended to institute to review and set aside the DDG's decision.

[89] In response to the internal appeal the Department wrote a letter dated 14 June 2007. In the letter it said that, since the matter was *sub judice*, the Minister was not in a position to decide the internal appeal and that the court should decide the matter. This is how the relevant part of the Department's letter read:

[58] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*).

[59] The Court referred to certain parties in the matter, namely the Bengwenyama-Ye-Maswati Tribal Council and the Trustees of the Bengwenyama-Ye-Maswati Trust, as "the community".

> "You are hereby advised that since this matter is now *sub judice*, the Minister will not be in a position to decide on your appeal in this matter. The fact that a right has already been granted to Genorah also poses a legal challenge in deciding on the appeal, and it is therefore the view of this Department that this matter should be decided by means of a review."[60]

[90] Subsequently Bengwenyama Minerals, the first applicant, and the community launched review proceedings in the High Court to have the grant of a prospecting right to Genorah reviewed and set aside. The High Court dismissed that application. An appeal to the Supreme Court of Appeal met with the same fate. The matter then came before this Court. This Court, through Froneman J who wrote for a unanimous court, said that there was—

> "no indication that . . . anything other than a review of the original decision would bring the Department to change that decision to award prospecting rights to Genorah. In effect the Department advised Bengwenyama Minerals and the community *to seek a review and not to prosecute their appeal*."[61] (Emphasis added.)

This Court also held that the import of the letter of 14 June 2007 "was that the internal appeal had been 'concluded' in the sense required by [section 7(1)(a) of the PAJA]."[62]

[91] It can be concluded from this Court's judgment in *Bengwenyama* that a litigant has no obligation to exhaust internal remedies to appeal in terms of section 96 where the Department makes it clear that the matter should rather be decided by the Court or

[60] Quoted in *Bengwenyama* above n 58 at para 58.

[61] Id.

[62] Id at para 59. Section 7(1)(a) of the PAJA requires a judicial review to be instituted without an unreasonable delay and not later than 180 days after the date on which internal remedies "have been concluded".

where the Department requests the non-prosecution or non-exhaustion of the internal remedy. In the present case, too, in my view the Minister's request was in effect a request that there be no exhaustion of internal remedies in terms of section 96.

[92] This Court said in *Bengwenyama* that, through its letter of 14 June 2007, the Department had in effect advised Bengwenyama Minerals and the community not to prosecute their internal appeal. Although in *Bengwenyama* this occurred in circumstances where an internal appeal had been lodged but the outcome thereof had not been announced, that does not mean that the principle does not apply or cannot apply where the Department adopts the same stance before an appeal is lodged. Nor does it mean that the principle cannot apply where no internal appeal was lodged before a review application was instituted and this stance was taken by the Minister after the review application had been launched.

[93] In my view, if the Department informs a litigant that the matter should rather be decided by the court, it does not matter whether this is before or after the institution of the review proceedings. That stance removes the obligation on the litigant to exhaust the internal remedies if the stance is indicated before review proceedings are instituted or cures the defect if the stance is indicated after the applicant has already instituted a review application without exhausting the internal remedies. That is what happened in the present case before the hearing in the High Court. Consequently, the High Court was entitled to hear Southern Sphere's application and Rhodium's

counter-application without requiring them first to exhaust internal remedies in terms of section 96.

[94] I do not understand the decision of the Supreme Court of Appeal in *Nichol*[63] and the decision of this Court in *Koyabe* to be authority for the proposition that, when a functionary empowered to make a decision on internal remedies requests that the issue be decided by the court, the court may not decide the matter even though both the functionary and the review applicant want the court to decide the matter itself. That question was not before any of those courts in those cases, but, in my view, it was before this Court in *Bengwenyama* and this Court decided the issue.

[95] This Court held in effect in *Bengwenyama* that, once the Department had taken that stance, there is no obligation upon the litigant thereafter to exhaust internal remedies or to pursue internal remedies. It also did not consider that that situation was one which required the litigant to apply to court for exemption from the obligation to exhaust internal remedies. In my view this Court was correct in both respects. There are cases where there is no longer any obligation upon a litigant to exhaust internal remedies because he or she has been relieved of that obligation. That is a case such as *Bengwenyama* and the present case. There are cases where the obligation is still there but there are exceptional circumstances which, together with the interests of justice, justify that the court should grant an applicant an exemption from that obligation. The present case is not such a case. In the present case, by the time the matter was heard

[63] *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) (*Nichol*).

by the High Court Southern Sphere no longer had an obligation to exhaust internal remedies.

Dengetenge's contention on the delay

[96] Dengetenge has also contended that that the High Court should have dismissed Southern Sphere's application as well as Rhodium's counter-application because they were both brought after an unreasonable delay and at any rate outside the 180 days prescribed by section 7(1), which reads:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Dengetenge's attack is premised upon section 7(1)(b).

[97] In its answering affidavit in the High Court, Dengetenge said in paragraph 15.1 and 15.2:

> "[Southern Sphere] is vague about when and in what circumstances it became aware of the prospecting rights granted to Dengetenge. For the reasons elaborated on below it appears that [Southern Sphere] was aware of the prospecting rights granted to Dengetenge well before March 2007.

> I respectfully submit that the applicant might reasonably have been expected to have become aware of the grant of the prospecting right after the prospecting right was notarially executed on 11 November 2006 and/or registered in the Mineral and Petroleum Titles Registration Office, Pretoria on 28 November 2006 under registration number 618/2006 (PR). In this regard I attach a copy of the page indicating the registration of Dengetenge's right marked 'MN1'."

[98] Later, in its answering affidavit Dengetenge said:

> "[Southern Sphere] failed to institute proceedings within 180 days of the date when it became aware or might reasonably have been expected to have become aware of the decisions and the reasons therefor and failed to institute the proceedings without unreasonable delay. In this regard [Southern Sphere] has not provided any explanation for the delay in bringing the application in so far as Dengetenge's rights are concerned."

Elsewhere in Dengetenge's answering affidavit it is stated that it "appears that prior to December 2006 [Southern Sphere] was aware of the rights already granted to Dengetenge." Later, Mr Nengenda, the deponent to Dengetenge's answering affidavit, said:

> "I confirm that on 26 February 2006 a representative of Dengetenge phoned Mr Ward and informed him that a prospecting right had been granted to Dengetenge in respect of the properties. Mr Ward was well aware of this at the time. I deny that it was claimed that Dengetenge owned portions of the properties or mineral rights relating thereto."

The reference to 2006 in this passage must be a mistake. The correct year has to be 2007.

[99] The 180 days prescribed by section 7(1) as the outside limit within which a litigant should institute a review application is calculated on the basis of (a) or (b) to subsection (1). Section 7(1)(a) provides for the date from which the period must be calculated in a case where internal remedies have been exhausted. Obviously, it does not apply where internal remedies do not exist or where they exist but were not exhausted. The case where no internal remedies exist is governed by section 7(1)(b). In the latter case the date is given as the date "on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[100] Southern Sphere must have been aware of the decision granting Dengetenge the prospecting right at some stage in March 2007. It is not enough to know when Southern Sphere became aware that Dengetenge had been granted prospecting rights for purposes of computing the 180-day period. One needs to know more than simply the date when the decision was made to grant Dengetenge prospecting rights because, to bring a review application, one must also know the circumstances under which the decision was taken and the reasons for such a decision. Southern Sphere also needed to have sight of Dengetenge's application for a prospecting right.

[101] On Southern Sphere's case it only got to know the identity of Dengetenge as one of the entities which had been granted prospecting rights in about March or April 2007 but, by the time that it launched its review application on 17 August 2007,

it still did not know the circumstances under which Dengetenge had been granted the prospecting right nor did it have the reasons. The record which was said to contain the reasons for all the decisions that were being challenged was filed with the Registrar on 11 March 2008.

[102] In a further supplementary founding affidavit deposed to by one of Southern Sphere's directors, Mr Ward on 21 July 2008, it was said:

> "[I]t is virtually impossible for [Southern Sphere] to deal with [the Department] having awarded rights to Dengetenge and Abrina under circumstances where the [Department] has failed to furnish any reasons in relation to its decisions to grant a prospecting right to each of Dengetenge and Abrina, but has instead said that the Minister will revoke those prospecting rights."

Later Mr Ward said:

> "[T]hat [Southern Sphere] should have to litigate in this manner is grossly prejudicial to its rights both under the [PAJA] as well as its rights under the Uniform Rules of Court."

[103] In its answering affidavit Dengetenge did not challenge any of this. It simply noted that Southern Sphere "elected to bring its application to review and set aside Dengetenge's rights in circumstances where it admits that 'it is virtually impossible for [Southern Sphere] to deal with the [Department's] having awarded rights to Dengetenge . . . under circumstances where the [Department] has failed to furnish any reasons in relation to its decisions to grant a prospecting right'".

[104] If it is accepted, as Dengetenge accepted, that Southern Sphere did not even have the DDG's reasons for the decision to grant Dengetenge a prospecting right when it instituted the review proceedings, then it cannot reasonably be said that Southern Sphere instituted the review proceedings outside the 180 days. There is also no suggestion that Southern Sphere acted less than diligently in trying to obtain the DDG's reasons for the decision to grant Dengetenge prospecting rights.

[105] It seems to me that what the High Court said in rejecting criticism against Southern Sphere for the delay between when it had learnt of Rhodium's interdict and review order and when it instituted the review application applies with equal force to Dengetenge's contention that Southern Sphere delayed unreasonably. The High Court, inter alia, said:

> "I do not think that criticism is justified. I have found it very difficult to arrive at what I hope is a coherent narrative of the relevant facts. I would have found the task almost impossible if it had not been for the chronology prepared by the lawyers for the parties and the assistance I received from counsel. When the lawyers for Southern Sphere drew the application they had neither the record nor any meaningful chronology. Many of the relevant facts were outside the knowledge of Southern Sphere. It must have been very difficult to set many of the facts of which they were aware into the correct context. Southern Sphere cannot be faulted for the time it took to bring the application."[64]

[106] Before us counsel for Dengetenge did not advance any grounds upon which it could be said that the High Court erred in reaching this conclusion. I can see no basis

[64] High Court judgment above n 2 at para 57.

upon which to interfere with it and I consider that it is justified. In *Bengwenyama* this Court had regard to the "apparent confusion about the availability of an internal appeal"[65] and said that it "would have considered that there was no unreasonable delay in bringing the proceedings even if no internal appeal existed in terms of section 96 of the [MPRDA]."[66] In the present case there was a lot of confusion about many things for a long time including whether other parties had been granted prospecting rights, their identities, the identity of the properties in respect of which such parties may have been granted prospecting rights, the reasons for such decisions and the circumstances under which they had been granted such rights. I would say that that confusion militates against a finding that Southern Sphere delayed unreasonably in bringing its review application.

[107] In the circumstances I conclude that Dengetenge has failed to show that Southern Sphere instituted the review application after an unreasonable delay or after the lapse of the period of 180 days prescribed by section 7(1) of the PAJA.

[108] The appeal must fail. As to costs, it seems to me that, for all intents and purposes, this is a commercial matter in which case costs should follow the result.

Order

[109] The following order is made:

[65] *Bengwenyama* above n 58 at para 59.

[66] Id. Footnote omitted.

1. The applicant's failure to deliver its application for leave to appeal and written submissions timeously is condoned.
2. Leave to appeal against the decision of the Supreme Court of Appeal on condonation is refused.
3. Leave to appeal against the decision of the North Gauteng High Court, Pretoria is granted.
4. The appeal against the decision of the North Gauteng High Court, Pretoria is dismissed with costs, such costs to include the costs of two counsel.

JAFTA J (Moseneke DCJ, Madlanga J, Mhlantla AJ, Nkabinde J and Skweyiya J concurring):

[110] I have had the opportunity to read the judgment of my Colleague Zondo J (main judgment). I agree that leave to appeal against the judgment of the Supreme Court of Appeal must be dismissed. Dengetenge has failed to show that that Court has exercised its discretion improperly when it refused to grant it condonation. Nor has Dengetenge established a reasonable perception of bias on the part of that Court in dealing with its application for condonation.

[111] However, this finding, as the main judgment holds, correctly so in my respectful view, does not preclude Dengetenge from seeking leave to appeal against the judgment of the High Court. This is so because the Supreme Court of Appeal did not determine the merits of the appeal. Instead, it disposed of the matter on

condonation. Accordingly, the judgment of the Supreme Court of Appeal does not stand in the way of Dengetenge challenging the merits of the High Court's judgment.[67]

[112] I also agree that since this application was lodged and heard before the Constitution Seventeenth Amendment came into force, it ought to be considered with reference to the standard that was then applicable to applications for leave. In terms of that standard, an applicant must show that the matter raises a constitutional issue and that the interests of justice favour the grant of leave. I agree further that a constitutional issue has been established.

[113] Therefore I concur in the order proposed in the main judgment but for different reasons. Consequently, it is necessary to set out my reasons for the concurrence.

[114] Although Dengetenge had withdrawn its opposition to the present proceedings in the High Court, it does not follow that all the defences it raised fell away. Two of those defences relate to compliance with statutory requirements contained in section 96 of MPRDA and section 7 of PAJA. The first is that Southern Sphere had, in violation of these sections, instituted review proceedings in the High Court without first exhausting internal remedies provided for in the MPRDA. The second is that the review application was instituted after a period of 180 days had lapsed, calculated from the date Southern Sphere became aware of the impugned decision.

[67] *Mabaso* above n 37.

Duty to exhaust internal remedies

[115] At common law, a party aggrieved by an administrative decision was not generally obliged to exhaust internal remedies before approaching a court on review. Where internal remedies are provided for, the choice was that of the aggrieved party either to pursue those remedies before going to a court of law or to proceed straight to seek the review of the offending decision in court. The promulgation of PAJA has changed all this. It is now compulsory for an aggrieved party to exhaust internal remedies before approaching a court for review, unless such party is exempted from this duty by a competent court.[68]

[116] The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish "exceptional circumstances".[69] Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged.

[68] Id section 7(2).

[69] Id section 7(2)(c).

[117] This is the law as pronounced in decisions of the Supreme Court of Appeal and this Court. In *Nichol*,[70] the Supreme Court of Appeal construed section 7 of PAJA and proclaimed:

> "*It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c).* Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interests of justice that the exemption be given."[71] (Footnote omitted and emphasis added.)

[118] This dictum accords with the text of section 7 of PAJA. Section 7(2) of PAJA provides:

> "(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), *a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice." (Emphasis added.)

[119] In clear and peremptory terms, section 7(2) prohibits courts from reviewing "an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted". Where, as in this case, there is a provision for

[70] *Nichol* above n 63.

[71] Id at para 15.

internal remedies, the section imposes an obligation on the court to satisfy itself that such remedies have been exhausted. If the court is not satisfied, it must decline to adjudicate the matter until the applicant has either exhausted internal remedies or is granted an exemption. Since PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c). This is apparent from the terms of section 7(2)(a) which begins with the words "[s]ubject to paragraph (c)".

[120] Section 7(2)(c) empowers a court to grant an exemption from the duty of exhausting internal remedies if, as observed by the Supreme Court of Appeal in *Nichol*, two pre-conditions are established. These are exceptional circumstances and the interests of justice.

[121] The meaning assigned to section 7 by the Supreme Court of Appeal in *Nichol* was endorsed by this Court in *Koyabe*.[72] In that case, this Court said:

> "Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted. However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. . . . Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action."[73] (Footnotes omitted.)

[72] *Koyabe* above n 56.

[73] Id at para 34.

[122] This Court proceeded to underscore the importance of internal remedies; that the failure to exhaust them renders an approach to a court on review premature; and that the pursuit of these remedies enhances procedural fairness. In this regard, the Court said:

> "Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
>
> First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action."[74]

[123] It cannot be gainsaid that section 96 of the MPRDA provides for and obliges a party aggrieved by any decision taken in terms of the MPRDA first to exhaust internal remedies before seeking a court review. Section 96(3) provides:

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

[74] Id at paras 35-6.

[124] This provision forbids parties such as Southern Sphere, from applying for the review of decisions taken in terms of the MPRDA until they have exhausted the internal remedies. It is common cause that Southern Sphere sought the review of decisions taken in terms of the MPRDA. It asked for orders:

(a) setting aside the decision by the Regional Manager: Mpumalanga to accept Rhodium's application for a prospecting right;

(b) setting aside the decision to grant Abrina prospecting rights;

(c) setting aside the decision to award prospecting rights to Dengetenge; and

(d) reviewing and setting aside the refusal to grant Southern Sphere a prospecting right.

[125] All of these decisions were taken in terms of the MPRDA by the Regional Manager and the Deputy Director-General. Therefore, in accordance with section 96(1), they were subject to an internal appeal. Section 96(1) provides:

> "Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to—
>
> (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
>
> (b) the Minister, if it is an administrative decision by the Director-General or the designated agency."

[126] Even if section 96(3) did not exist, the duty to exhaust domestic remedies would have been triggered by the mere provision of the internal appeal. It will be recalled that section 7 of PAJA precludes a court from reviewing an administrative action until internal remedies provided for in other laws are exhausted. There can be no doubt that section 96(1) constitutes such other law.

[127] The interpretation of section 96 of the MPRDA, read with section 7 of PAJA, lies at the heart of the differences between this judgment and the main judgment. I construe these sections to mean that an aggrieved party must first exhaust internal remedies before instituting a review challenge to a decision taken in terms of the MPRDA, unless such party has been exempted from doing so by the court upon establishing exceptional circumstances and that it is in the interests of justice to grant the exemption. This interpretation, with regard to section 7 of PAJA, is affirmed in *Nichol* and *Koyabe.*

[128] The main judgment interprets these sections differently. Relying on an English case, *Kammins*,[75] the main judgment holds that the duty to exhaust internal remedies imposed by section 96 of the MPRDA may be waived by administrative functionaries. I am unable to agree for the following reasons. First, the House of Lords in *Kammins* interpreted a statute that dealt with the renting of property and not the duty to exhaust the domestic remedies. That statute regulated and imposed time limits within which a tenant could apply to a court to renew a lease for the parties. The relevant provision

[75] *Kammins* above n 42.

required the tenant to give the landlord notice before making an application for a new lease which must be made after two months of giving notice but not later than four months from the date of notice. The issue in *Kammins* was whether on a proper construction of the relevant provision, the landlord for whose benefit the time bar was enacted could waive the time limit requirement. The House of Lords said the landlord could do so. The setting in which waiver was recognised in that case is different from the present.

[129] Second, section 96(3) of the MPRDA does not impose a time bar. Nor does it confer a benefit on the administrative functionaries considering the internal appeal. On the contrary, it imposes an obligation on the aggrieved party to exhaust internal remedies. The corollary is that the appeal functionaries are bound to decide those appeals. They have no power under the MPRDA to circumvent the provisions of section 96(3) and direct that the aggrieved party should rather institute review proceedings without exhausting internal appeals.

[130] Third, the text of section 29(3) of the English Landlord and Tenant Act is quite different from section 96(3) of the MPRDA. It is not only a matter of the two provisions dealing with different subject-matters but they are also worded differently. Moreover, caution must be exercised when foreign cases are used to interpret legislation passed by our Parliament. It is doubtful in our circumstances that administrative functionaries who fall under the Executive arm of Government may

decline to carry out a legislative injunction such as the one in section 96(3) of the MPRDA and direct that what it requires must be dealt with in a different manner.

[131] In *New Clicks,*[76] Chaskalson CJ rejected the suggestion in academic writings to the effect that PAJA must be interpreted with reference to German and Australian law because its provisions had been borrowed from those countries. Chaskalson CJ said:

> "Before leaving this part of the judgment one further comment is necessary. In the academic writings on PAJA reference is made to the fact that certain of its provisions have been borrowed from German and Australian law. PAJA must, however, be interpreted by our courts in the context of our law, and not in the context of the legal systems from which provisions may have been borrowed. In neither of the countries is there a defined constitutional right to just administrative action. Transplanting provisions from such countries into our legal and constitutional framework may produce results different from those obtained in the countries from which they have been taken."[77] (Footnote omitted.)

[132] Section 96(3) and section 7 of PAJA are framed in peremptory terms which is an indication, in my view, that their requirements should be observed, except in circumstances where an exemption is granted. With regard to section 7 of PAJA, Hoexter says:

> "These are stringent provisions cast in peremptory language. Review is prohibited unless *any internal remedy* provided for *in any other law* has been exhausted. The court is obliged to turn the applicant away if it is not satisfied that internal remedies have been exhausted, and may grant exemption from the duty *only in exceptional*

[76] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*).

[77] Id at para 142.

> *circumstances* where it is in the interests of justice to do so."[78] (Emphasis in original.)

[133] In *Bengwenyama*[79] this Court assumed that the failure to decide an internal appeal meant that the internal process had been concluded. And this finding was made in the context of section 7(1)(a) of PAJA which requires that the review application be instituted within 180 days after the date on which the internal remedies have been concluded.[80] It was for this limited purpose that the Court assumed the date of conclusion of the internal appeal concerned. Based on the calculation of the period from that date, this Court held that there was no delay in instituting the review application.[81] This is different from saying that if the administrative functionaries wish that the matter be decided by the court the aggrieved party is relieved from the duty to exhaust domestic remedies. Nor does it mean that they have the power to waive statutory requirements.

[134] The question that arises is what should be done in the peculiar circumstances of this case. Ordinarily, if the court before which the review proceedings are brought is not satisfied that internal remedies have been exhausted, it must refuse to entertain the review until those remedies are exhausted or an exemption has been granted to the applicant. Here the High Court did not insist that section 96 of the MPRDA and

[78] Hoexter *Administrative Law in South Africa* 2 ed (Juta and Co Ltd, Cape Town 2012) at 480.

[79] *Bengwenyama* above n 58.

[80] Id at para 59.

[81] Id at para 60.

section 7 of PAJA be complied with, probably because Dengetenge had withdrawn its opposition to the application.

[135] It is apparent from the special circumstances of this case, set out fully in the main judgment, that if Southern Sphere had applied for exemption, in all probability the High Court would have granted it. In these circumstances to remit the matter to the High Court for an application for an exemption to be made would be tantamount to placing form above substance. This is so because Dengetenge has conceded on the merits that the rights were granted to it unlawfully and in contravention of an interdict. Therefore, on the present facts, a remittal to the High Court would serve no purpose other than granting an exemption which is already justified on record.

[136] Accordingly I hold that a remittal solely for that purpose is neither justified nor warranted. Ordering a remittal here would constitute a waste of time and resources. Scarce judicial resources must not be spent on mere formalities which are not dispositive of a real dispute in particular litigation.

Failure to institute the review within 180-day period

[137] Section 96(4) of the MPRDA provides that sections 6, 7(1) and 8 of PAJA apply to proceedings in which decisions taken under the MPRDA are challenged. Section 7(1) of PAJA in turn provides:

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

> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[138] The text of the section shows that PAJA requires that review applications be instituted promptly after the impugned decision has been taken. It stipulates that review proceedings must be launched without unreasonable delay and sets the cut-off date at 180 days from the date the internal remedies have been concluded. Where no such remedies exist, the period of 180 days is calculated from the date on which the applicant for review was informed of the impugned administrative decision, became aware of it and the reasons for it or might reasonably have been expected to have become aware of the decision and its reasons.

[139] Although Dengetenge has asserted in its answering affidavit that Southern Sphere failed to institute the review application within 180 days, it has not stated how this period was calculated. Nor has it given the date from which the 180 days was computed. Consequently, the facts pleaded by Dengetenge fall short of establishing the delay asserted.

[140] It is for these reasons that I concur in the order proposed in the main judgment.

FRONEMAN J (Cameron J and Van der Westhuizen J concurring):

[141] I have read the judgments of my colleagues Zondo J and Jafta J. They both agree that leave to appeal should be granted but that the appeal should be dismissed, albeit for different reasons. I would not grant leave to appeal.

[142] I agree with and support Zondo J's finding that there is no merit in the complaint of bias brought against the Supreme Court of Appeal,[82] as well as his finding that there are no grounds for withdrawing the concession made by Dengetenge in the High Court.[83] He notes that this finding is sufficient ground to dismiss the appeal.[84] In my view it is a material factor in the preceding enquiry whether to grant leave to appeal, and sufficient reason for refusing leave.

[143] In *Mabaso*[85] this Court dealt with the interests-of-justice enquiry in a similar situation:

> "In considering an application for leave to appeal against a judgment of the High Court where the Supreme Court of Appeal has refused an application for condonation in respect of an appeal, this Court will consider, as in all applications for leave to appeal, whether it is in the interests of justice to grant leave to appeal. Guiding principles for determining the interests of justice have been established by this Court in a string of cases. Relevant factors include the importance of the determination of the constitutional issue, the question of whether the matter has been considered by the Supreme Court of Appeal, the nature of the order appealed against, and the prospects

[82] Main judgment at [48] above.

[83] Id at [52]-[60].

[84] Id at [60].

[85] *Mabaso* above n 37.

> of success. It is clear, though, that not one of the factors is necessarily determinative on its own.
>
> A further factor relevant to determining whether leave to appeal should be granted will be the circumstances in which the Supreme Court of Appeal has refused the application for condonation. It will often not be in the interests of justice for this Court to grant leave to appeal against such a decision of the Supreme Court of Appeal because there will often be no prospect that the appeal will be successful. *And where there has been a flagrant and gross breach of the rules of the Supreme Court of Appeal by the litigant, that too will militate against the grant of leave by this Court. It will only be in the interests of justice for leave to be granted in such cases where it is clear that the constitutional issue is of some importance, and that there are reasonable prospects of success in relation to the appeal on the constitutional issue.*"[86] (Emphasis added and footnotes omitted.)

[144] There was a "flagrant and gross" breach of the rules of the Supreme Court of Appeal by Dengetenge. Zondo J has dealt, in measured terms, with Dengetenge's attempt to deflect attention from this by alleging bias on the part of the Supreme Court of Appeal. His judgment also exposes the opportunism and disingenuousness in a similar attempt by Dengetenge to retract the concession made in the High Court. That shows that there are no prospects of success on appeal. But there is, unfortunately, also a pattern here of playing loosely with the integrity of court processes. And all this not for a higher constitutional principle. Granting leave to this Court under these circumstances is not in the interests of justice.

[145] The application for leave should be dismissed with costs, including the costs of two counsel.

[86] Id at paras 26-7.

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