IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION

CASE NO: 28980/10

In the matter between:

3/2/2012

SISHEN IRON ORE COMPANY (PTY) LIMITED	Applicant
and	
MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL: DEPT OF MINERAL RESOURCES	Second Respondent
DEPUTY DIRECTOR-GENERAL MINERAL REGULATION DEPARTMENT OF MINERAL RESOURCES	Third Respondent
THE REGIONAL MANAGER, NORTHER CAPE REGION DEPT OF MINERAL RESOURCES	Fourth Respondent
IMPERIAL CROWN TRADING 289 (PTY) LIMITED	Fifth Respondent
THE OFFICER PERFORMING FUNCTIONS IN TERMS OF THE MINING TITLES REGISTRATION ACT 1967, DEPT OF MINERAL RESOURCES	Sixth Respondent

JUDGMENT ON THE APPLICATION TO STRIKE OUT

ZONDO J:

Introduction

[1] In 2010 Sishen Iron Ore Company (Pty) Ltd, the applicant in this application,

launched an application in this Court for the review and setting aside of various decisions that had been taken by the first, second, third and fourth respondents concerning an application that had been made by Imperial Crown 289 (Pty) Ltd ("ICT"), the fifth respondent in those proceedings, and, in this application, to the Minister of Mineral Resources, the first Respondent, for the grant of a prospecting right for iron ore and manganese or some or other minerals in properties that the parties to those proceedings referred to as the Table 1 properties in Kuruman, Northern Cape. Sishen also sought in those proceedings an order compelling the Minister or her delegate to make a decision whether to grant or refuse its application for a mining right for iron ore and quartzite relating to a 21.4% undivided share in the right to iron ore in such properties which Sishen and the respondents believed had effectively been forfeited by Arcellor Mittal South Africa Limited at 24h00 on the 30th April 2009 and which they believed was available to the Minister to grant to someone else.

[2] ICT's application for a prospecting right related in part to the same 21.4% undivided share. Sishen's application for such mining right had been pending for a long time without any decision being taken on it. ICT's application had been granted by a delegate of the Minister. Another order which Sishen also sought in the review application was an order to the effect that it i.e. Sishen was the only competent person who could be granted the 21.4% of the mining right to iron ore in the Table 1 properties. Sishen also launched an application for an interdict restraining the Minister or her

delegate from granting ICT a mining right relating to the 21.4% share in the right to iron ore in the Table 1 properties pending the determination of the review application.

[3] Later on, Arcellor Mittal South Africa Limited ("AMSA") was joined as a second applicant in the review application and in the interdict application which Sishen had launched. AMSA sought orders:

(a) inter alia: declaring the grant of a prospecting right to ICT void *ab initi*;

(b) declaring that Sishen had been granted a 100% mining right for iron ore in respect of the Table 1 properties;

(c) declaring that Sishen was the exclusive holder of a converted mining right for iron ore and quartzite in respect of the Table 1 properties; and,

(d) declaring that any decision to grant a prospecting right or mining right for iron ore and quartzite in respect of the Table 1 properties to anyone including ICT after the converted mining right had been granted to Sishen was void *ab initio*.

The application to strike out.

[4] In due course the state respondents and ICT delivered and served their respective answering affidavits to Sishen's application for a review and interdict. After this, Sishen launched this application, being an application in terms of Rule 6(15) of the Uniform Rules of Court for an order striking out certain portions of certain affidavits filed by the

state respondents and ICT. Sishen, nevertheless, filed and served its replying affidavits to the answering affidavits. The parties also exchanged all the necessary affidavits in respect of AMSA's application. Sishen's and AMSA's review applications were heard by me from the 15th to the 19th August 2011. I reserved judgment on the 19th August 2011. On the 15th December 2011 I granted various orders. On the 20th December 2011 I provided a full judgment in the two review applications. I indicated in that judgment that Sishen's application to strike out certain portions of the respondents' affidavits was to be the subject of a separate judgment. This is the judgment in the latter application.

[5] Through this application Sishen objects to certain portions of certain affidavits filed and served by the state respondents and ICT in response to its review and interdict applications to this Court. It contends that some of those portions of affidavits are irrelevant, others are vexatious or are both irrelevant and vexatious and others constitute hearsay evidence and that all of them should be struck out of the relevant affidavits. The state respondents and ICT oppose this application. AMSA takes no part in this application because no strike out order is sought against any portion of its affidavits.

[6] The main answering affidavit filed on behalf of the State respondents was deposed to by Mr Sandile Nogxina who was Director-General of the Department of Mineral Resources during the relevant period. Mr Roccha who was at the relevant time the Deputy Director-General: Mineral Regulation in the same Department also deposed to an answering affidavit on his own behalf as the third respondent in the review and interdict

applications. Both affidavits contained parts to which Sishen objected and sought to have struck out. Mr Sehunelo deposed to ICT's answering affidavit to Sishen's review and interdict applications. ICT also filed and served two affidavits deposed to by Mr Costa in support of the opposition to Sishen's application. Sishen also objected to certain portions of Mr Sehunelo's affidavit and Mr Costa's affidavit and sought to have them struck out.

[7] The portions of the respondent's affidavits which Sishen seeks to have struck out were indentified in Annexures "A", "B" and "C" to its Notice of Motion in the application to strike out. For convenience those annexures are attached to this judgment as Annexures "A", "B" and "C". This will facilitate the identification of the portions of the affidavits to which Sishen objects.

[8] In presenting its case for the striking out of certain portions of certain affidavits filed and served on behalf of the state respondents and ICT, Sishen divided the portions of affidavits to which it was objecting into three categories. The first category related to those portions of the affidavits in respect of which the reasons for its objection were that they were irrelevant to the review application or were vexatious. The portions of the respondents' affidavits which fall under this category appear in Annexure "A".

[9] The second category of portions of the respondents' affidavits are those in respect of which Sishen's reason for objection is that they are wholly irrelevant and were included in the affidavits solely to embarrass Sishen. This category consists of two

affidavits deposed to by Mr Armando Costa and certain averments contained in Mr Schunelo's affidavit. Sishen says that Mr Costa's affidavits and "the associated allegations" contained in ICT's answering affidavit constitute particularly egregious examples of attempts by ICT to introduce evidence which is wholly irrelevant and aimed at simply embarrassing it. The portions of the affidavits which fall under this category are identified in Annexure "B".

[10] The third category are portions of the state respondents' affidavits and ICT's affidavits which were required to have been confirmed by way of confirmatory affidavits, but were not confirmed at the time that the state respondents' and ICT's answering affidavits were delivered and served. For that reason, contends Sishen, such portions constitute hearsay evidence and are therefore, inadmissible. The portions of the affidavits which fall under this category are identified in Annexure "C".

The principles applicable to a Rule 6(15) application.

[11] Before I can deal with the merits of the application to strike out, it is important to have regard to the principles which govern the granting or refusal of such applications. Sishen's application has been brought in terms of Rule 6(15) of the Uniform Rules of Court. Rule 6(15) reads as follows:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is

satisfied that the applicant will be prejudiced in his case if it be not granted."

The provision of Rule 6(15) seems to me to prescribe two requirements that must be met before a court may make an order striking out a matter from an affidavit. The first requirement is in the first sentence of the subrule. It is that the matter sought to be struck out of an affidavit must be either scandalous or vexatious or irrelevant. The second is to be found in the second sentence of the subrule in the form of a proviso. It has the same effect as a proviso to the first requirement. It is that, if the court finds that the matter complained of is scandalous or vexatious or irrelevant, the court must be satisfied that the presence of the scandalous or vexatious or irrelevant matter in the affidavit will prejudice the applicant in its case if an order striking it out is not made.

[12] It follows from the above that, according to Rule 6(15), for an applicant in an application to strike out brought in terms of Rule 6 (15) to succeed, it is not enough to show that the matter to which it objects in the opponent's affidavit is scandalous or vexatious or irrelevant but such applicant must, in addition, also show that it will be prejudiced in its case if the court does not grant an order striking out such matter. Accordingly, these two requirements must both be shown to be present before the Court may grant an order striking out a matter. Where the applicant has met only one of the two requirements in respect of a particular matter that it seeks to have struck out, the application must fail. Therefore, if a matter in an affidavit is shown to be scandalous or vexatious or irrelevant only and it is not shown that its continued presence in the affidavit

will also prejudice the applicant in its case, the application to strike that matter out must fail.

[13] It seems to me that the intention of the second part of the subrule was to avoid the bringing of applications to strike out scandalous or vexatious or irrelevant matters in affidavits simply because they were scandalous or vexatious or irrelevant. The intention of the drafters of the subrule was that not every scandalous, vexatious or irrelevant matter in an opponent's affidavit requires to be struck out but that only those scandalous, vexatious or irrelevant matters in affidavits whose continued presence in the affidavits would prejudice the party concerned in its case would fall within the ambit of the subrule. I now turn to a consideration of the merits of the application to strike out.

The portions of Mr Nogxina's affidavit identified in Annexure "A"

[14] The portions of affidavits that fall under the first category are those that are identified in Annexure "A". They are to be found in Mr Nogxina's affidavits as well as in Mr Sehunelo's affidavit. The part of Mr Nogxina's affidavit that falls under this category of the portions of affidavits to which Sishen objects is one where, according to Sishen, Mr Nogxina "ventures a lengthy and inaccurate description of the history of ISCOR, the genesis, objects and interpretation of the supply agreement between SIOC and AMSA, his views of the relationship between AMSA and SIOC and the circumstances under which AMSA ceased to hold a 21.4% old order mining right, the

Government's economic objective and the role of cheap iron ore and steel in the fulfillment of those objectives." Sishen contends that "(t)hese allegations are entirely irrelevant to the determination of the issues before this Court."

[15] Although some of these statements made by Mr Nogxina by way of the background history are, indeed, irrelevant, other statements in that history provide a useful background. With regard to those parts that are irrelevant, it has not been shown that Sishen is prejudiced or will be prejudiced in its case by the continued presence of those parts in Mr Nogxina's affidavit if an order is not made striking them out. In its founding affidavit in support of the application to strike out, Sishen did not, in regard to these parts of Mr Nogxina's affidavit, deal with how they will prejudice it in its case if they are not struck out. In the circumstances the second requirement of Rule 6(15) has not been met and this Court is precluded by the second part of the subrule from granting an order striking those parts of Mr Nogxina's affidavit out.

[16] Sishen also complains under this category that both Mr Nogxina, in his affidavit, and Mr Schunelo, in his affidavit as well, make a substantial number of averments concerning the circumstances under which Sishen had lodged its application for a mining right. Sishen refers to that part of Mr Nogxina's affidavit where Mr Nogxina stated that the manner in which Sishen's application for a mining right was lodged was 'irregular, grossly improper and, in fact, amounts to fraud" and "(i)n the result the applicant's application was not validly lodged and is, therefore disqualified from consideration by

the DMR." Sishen states that extensive evidence is canvassed to found these averments. Sishen says that Mr Roccha and Mr Sehunelo made similar statements in their affidavits, namely, statements dealing with the circumstances under which Sishen's application for a mining right was lodged. Sishen says that those statements and evidence surrounding the manner in which its mining right application was lodged are irrelevant.

[17] In its founding affidavit in the review application Sishen dealt at some length with the circumstances surrounding the manner in which it lodged its application for the mining right relating to the 21.4% share of the rights in iron ore in the Table 1 properties. On its own version the manner in which Sishen lodged its application for the mining right cannot be said to have been usual or common. In effect Sishen is saying that, in answering its case as set out in the founding affidavit in the review application, the respondents should not have responded to these parts of its founding affidavits in which it dealt with the circumstances under which it had lodged its application for the mining right. The basis upon which Sishen advances this contention is that its application for the mining right had already been refused and it i.e. Sishen was no longer pursuing its application for a mandamus or for an order that it be granted the mining right.

[18] Sishen has failed to make out a case for a striking out order with regard to the portions of the respondents affidavits that deal with the circumstances surrounding how its application for a mining right was lodged. First, once Sishen had introduced into the founding affidavit of the review application the circumstances under which it had lodged

its application for the mining right, the respondents were entitled to deal with those circumstances in their answering affidavits. In this regard I point out that Sishen does not in its founding affidavit in support of the application to strike out state whether or not ICT was notified that such application had been refused, once Sishen's application had been refused. Nor does Sishen state whether it informed the state respondents before they completed the preparation of their answering affidavits that it was no longer going to pursue the application for a mandamus because, as long as they were not informed of this, the state respondents were entitled to deal with those parts of the founding affidavit. In fact even if they were informed, they were entitled to respond to those averments particularly because some of them implied that some of the officials of the Department of Mineral Resources may have been party to irregular arrangements with Sishen. Sishen accused officials of the Department of Mineral Resources of improper conduct. In such a case the state respondents were also entitled to point out conduct on Sishen's part which they believed or contended was improper.

[19] Sishen deals in paragraphs 32 to 38 of its review founding affidavit with the circumstances under which it had lodged its application for the mining right. It says that the last day for AMSA to lodge its old order mining right for conversion in terms of item 7 of Schedule II to the Mineral and Petroleum Resource Development Act, 2002 ("the MPRDA") was Thursday, the 30th April 2009. It also states that the 1st May 2009, which it says was a Friday, was a public holiday, and consequently the offices of the Department of Mineral Resources would be closed on that day. Therefore, says Sishen, it

would not be possible for the Department of Mineral Resources to receive its application for the mining right on the 1st May 2009. The first business day after the expiry of the five year period on the 30th April 2009 was going to be Monday the 4th May 2009. It is clear that Sishen wanted to make sure by all means that its application was the first one to be received, after the expiry of the five year period, in respect of iron ore and aggregate in the Table 1 properties.

[20] In its founding affidavit in the review application Sishen inter alia says in par 33:

> "1 May 2009 was the first day after the cessation of existence of AMSA's old order mining right in respect of the 21.4% undivided share and was a public holiday and the offices of the DMR (Department of Mineral Resources) were therefore closed on that day. Because 1 May 2009 was the first date on which such application could be made but the offices of the DMR would be closed on that day, SIOC delivered its application to the DMR on Thursday 30 April 2009. SIOC's representative Mr Godfrey Mferoane had arranged with Chief Director Mr Michael Oberholzer for the DMR in Kimberley, to physically receive delivery of the application that day but to date stamp it 1 May 2009 in order for it to be officially lodged for purposes of S22 as if on 1 May 2009. This was done on the understanding that the lodgement would only take effect on the first business day following the expiry of the old order mining right. While SIOC paid over the prescribed fee for lodgement on 30th April 2009, the DMR only receipted the fee for the application on Monday 4 May 2009, which was the first business day following the cessation of existence of the old order mining right on 30 April 2009. The delivery of the application to the Kimberly offices of the DMR is evidenced by the "Received" rubber stamp dated 1 May 2009 on the covering letter to the application which is annexure F12 hereto."

[21] It is clear from the above excerpt from Sishen's own affidavit that, although the 1st May 2009 was the first day on which the 21.4% share in the right to iron ore in the Table 1 properties became available for the public to apply to be granted such share, Sishen

actually delivered its application to the Department of Mineral Resources on the 30th April 2009 and that the Department of Mineral Resources actually received Sishen's application on the 30th April 2009 – before the share could be available. Sishen asked an official of the Department of Mineral Resources to represent that the application was received on Friday the 1st May 2009. This was, quite clearly, a misrepresentation of the truth. Sishen was not entitled to have its application given a date stamp which suggested that it was received by the Department of Mineral Resources on the 1st May 2009. It would have been different if Sishen had asked an official of the Department of Mineral Resources to come to work on Friday the 1st May 2009 and receive the application on that day and then ask the official to give the application the date stamp reflecting that it was received on the 1st May 2009. Sishen made itself guilty of asking an official of the Department of Mineral Resources to misrepresent the date on which its application for a mining right was received.

[22] In par 34 of its founding affidavit in its review application Sishen says:

> "SIOC also submitted a copy of its mining right application to the Pretoria office of the DMR. Similarly, SIOC delivered the application on the Pretoria office on 30 April 2009 and by arrangement it was also date-stamped as having been received by the Office of the DDG on 1 May 2009."

The remarks I have made about Sishen's conduct in being party to an act of misrepresentation of the date of receipt by the Department of Mineral Resources of its application for the mining right above apply with equal force to Sishen's conduct as

captured in this excerpt. The seriousness of Sishen's conduct in this regard may be exacerbated by the fact that it is possible that an application for a mining right that is delivered to or received by the Department of Mineral Resources before the mining right becomes available to be allocated by the Minister becomes disqualified. This is what may have motivated Sishen to initiate the misrepresentation of the date when its application was received by the Department of Mineral Resources. It is within the above context that the portions of Mr Nogxina's affidavit, Mr Rocha's affidavit and Mr Schunclo's affidavit to which Sishen objects under this category must be seen.

[23] In his affidavit Mr Nogxina dealt at some length with the circumstances under which and the manner in which Sishen lodged or submitted its application for the mining right. Mr Nogxina made among others the following points in connection with the manner in which Sishen submitted or lodged its application:

- he said that on no possible construction of the facts could the application be said to have been submitted on 1 May 2009 and yet, so he implied, Sishen persuaded an employee of the Department to date-stamp it as if it was received or submitted to the Department on that day.
- Sishen knew that in terms of sec 9(1)(a) read with sec 9(2) of the MPRDA, if Sishen's application was lodged on the first business day on which it could have been validly lodged, namely on the 4th May 2009 and there was another similar application for a prospecting right for the same mineral in the same

land, lodged on the same day, the two applications would be dealt with on the footing that they had been received at the same time and, if the other applicant was a historically disadvantaged person, the Minister would be entitled in terms of the MPRDA to give preference to the latter application.

– on the website of Anglo American, titled: "Kumba Iron Ore" "History" the following appeared:

> "Acting on the advice from the DMR, SIOC delivered its application on 30 April, on the agreement that the application would be accepted on the first working day thereafter.
>
> On 4 May 2009 SIOC's application was processed as accepted by the DMR.
>
> 1 May 2009, SIOC applied for the lapsed mining rights and on 4 May 2009 SIOC's application was accepted."

[24] Mr Nogxina drew attention to the fact that on its website Sishen or Kumba made the representation to the pubic that it was the Department of Mineral Resources which advised it to make the misrepresentation – something that was at odds even with Sishen's own version on affidavit. Mr Nogxina also drew attention to the fact that in the first sentence on the website Sishen or Kumba said that there was an agreement, obviously between Sishen and the Department of Mineral Resources, that its application would be accepted on the first working day after 30 April 2009 and yet in par 33 of its founding affidavit in its review application Sishen said that the "arrangement with Oberholzer" was "to physically receive delivery of the application on (30th April 2009) in order for it to be officially lodged for purposes of s22 as if on 1 May 2009" (my underlining).

[25] Mr Nogxina pointed out in par 36.7.4 of his affidavit that the above words "neatly encapsulates the misrepresentation inherent in the manner in which (Sishen's) application was lodged and, at the same time, explain part of the reason why it was irregular. The remaining part of the reason for this arises from the applicant's conduct in persuading the Department's officials to permit this irregularity." Mr Nogxina also made the point that this kind of conduct is unbecoming of a company the size and stature of Sishen. He says in par 36.8 that the manner in which Sishen lodged its application "for the mining right was irregular, grossly improper and, in fact, amounts to fraud".

[26] In the light of all the above I am satisfied that Mr Nogxina's response to how Sishen had said it had gone about lodging its application for the mining right falls within bounds of legitimacy and he was entitled to respond in the manner in which he did. Sishen introduced into the affidavits the subject of how it submitted its application. It cannot be heard to complain when its opponents use this to their advantage and to Sishen's detriment. Mr Sehunelo was also entitled to make the statements complained of in Annexure "A" because in Sishen's founding affidavit Sishen accused ICT of having lodged its application improperly as well. ICT was entitled to draw attention in its answering affidavit to Sishen's own conduct which ICT contended was unacceptable in regard to how it had lodged or submitted its application for the mineral right.

[27] In the result Sishen's application for an order striking out the portions of Mr

Nogxina's affidavit. Mr Rocha's affidavit and Mr Schunelo's affidavit as identified in Annexure "A" falls to be dismissed. This does not cover that portion of Mr Nogxina's affidavit which is dealt with in the next three paragraphs.

[28] In par 21 of its founding affidavit in the application to strike out, Sishen objects to a certain statement in Mr Nogxina's affidavit on the basis that it constitutes hearsay evidence because it clearly falls outside Mr Nogxina's personal knowledge and it is not confirmed by way of a confirmatory affidavit. The statement reads:

> "In the case of the ICT, it would have been informed that it cannot be given rights in respect of the farms Simondium and Constantia and the likelihood is overwhelming that, what that was communicated to ICT that it either expressly or tacitly limited its application accordingly."

Sishen said in par 21 of its founding affidavit that this statement is unsupported by any affidavit and is, therefore, hearsay, vexatious and prejudicial to Sishen. It is true that Mr Nogxina had no knowledge of what happened in this regard. Accordingly, without a confirmatory affidavit, this statement is hearsay and, therefore, irrelevant. However, I do not see how this statement would prejudice Sishen in its case nor has Sishen substantiated its statement in par 21 that this statement is prejudicial to itself. In the circumstances Sishen has failed to satisfy the second requirement in Rule 6(15). Its application to have the statement struck out falls to be dismissed.

<u>The portions of respondents' affidavits identified in Annexure "B"</u>

[29] The portions of affidavits identified by Sishen in annexure "B" as matters that are irrelevant and vexatious comprise the two affidavits of Mr Costa and the averments made in Mr Sehunelo's affidavit which are associated with the contents of Mr Costa's affidavits. The case which Sishen seeks to make out in its application is that Mr Costa's affidavits contain averments to the effect that, in conducting its mining operations in the Sishen Mine, Sishen has contravened provisions of the Mineral and Petroleum Resources Development Act, 2002, ("the MPRDA"), and other Acts, namely, the National Water Act, 1998 ("the NWA") and the National Enviromental Management Act, 1998 ("the NEMA").

[30] Sishen accepts that through these averments in Mr Costa's affidavits ICT seeks to show that Sishen is in contravention of the MPRDA and that, by reason of the provision of sec 23(1) and (3) of the MPRDA, Sishen is disqualified from being granted the mining right for which it had applied to the Minister relating to the 21.4% share in the right to iron ore in the Table 1 properties.

[31] Insofar as they are relevant, the provisions of sec 23(1) of the MPRDA read as follows:

> "(1) Subject to subsection (4), the Minister must grant a mining right if –
> (a) ... (c)
> (d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.
> (e) ...
> (f) ...
> (g) the applicant is not in contravention of any provision of this Act; and

(h) ..."
(my underlining).

Subsection (4) requires the Minister, if he refuses to grant a mining right, to notify an applicant in writing within 30 days, and to give reasons for such refusal. Sec 23(3) reads thus:

> "(3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1)."

Those requirements include the requirement that the applicant be not in contravention of any provision of the MPRDA.

[32] When Sishen launched its review application, it sought, among others, an order compelling the Minister or her delegate to take a decision whether to grant or refuse its application for a mining right relating to the 21.4% share in the right to iron ore in the Table 1 properties. As at that time Sishen's application for the mining right had been pending before the Minister for a long time without the Minister or her delegate making a decision on its application. That is why Sishen brought in effect an application for a inter alia a mandamus. After Sishen had launched its application, the Director General, Mr Sandile Nogxina, took a decision on the application. He refused to grant Sishen the mining right. Sishen took the view that its application for a mandamus in respect of its application for a mining right fell away and it would no longer seek a mandamus.

[33] It is against the above background that Sishen contends that any averments made

or evidence given in Mr Costa's affidavits that it is in contravention of sec 23(1) and (3) of the MPRDA is irrelevant because in the review application the mandamus was no longer being pursued. Sishen also said that in the review application it was no longer seeking an order that it be granted the mining right relating to the 21.4% share in the right to iron ore in the Table 1 properties. Accordingly, contended Sishen, sec 23 (1) and (3) were irrelevant and so were averments that it had contravened some or other provisions of the MPRDA.

[34] Although Sishen may have decided not to pursue an order compelling the Minister or the Director-General to make a decision on its application for a mining right, it did not abandon its application for a declaratory order that it was the only competent person to apply for, or, to be granted, the mining right relating to the 21.4% share in the right to iron ore in the Table 1 properties. In fact it pursued that order up to the end of its review application. In my view the fact that Sishen did not abandon or withdraw the prayer for that order in its review application renders the averments that it is in contravention of the MPRDA relevant to the review application. In this regard one has to ask the question: what would be the effect of the Court granting Sishen such a declaratory order? Quite clearly, the effect of an order declaring that Sishen is the only competent person to apply for or to be granted the mining right would, for all intents and purposes, be <u>almost</u> to grant Sishen such a mining right. The whole purpose for Sishen including such a prayer among the orders that it sought in the review application was to secure the mining right for itself and exclude all competitors including ICT. ICT sought to oppose Sishen's

attempts to exclude it from the competition.

[35] It seems to me that the provisions of sec 23(3) were relevant because, quite clearly, the provisions of sec 23(3), read with sec 23(1)(g), disqualify a person who is in contravention of the MPRDA from benefiting under the MPRDA by way of being granted a mining right. If you contravene the MPRDA, you may not be granted a mining right or in fact any right or permit or license under the MPRDA. Accordingly, in seeking to acquire the mining right for itself or to defend itself against Sishen's attempt to exclude it from the competition for the mining right, ICT was entitled to rely on Sishen's (alleged) contravention of provisions of the MPRDA. If ICT does prove that Sishen is in contravention of provisions of the MPRDA, this would mean that Sishen is disqualified by reason of the provisions of sec 23(1)(g) read with sec 23(3) from being granted the mining right. Accordingly, this would result in Sishen's application for a declaratory order that it is the only competent party to be granted the mining right being dismissed. This, therefore, shows that the averments in Mr Costa's affidavits to the effect that Sishen is in breach of the MPRDA are highly relevant to the declaratory order which Sishen sought in its review application.

[36] Sishen also contended that the Department of Mineral Resources had not instituted any inquiry concerning, or made findings relating to, contraventions of the MPRDA on its part which would have afforded it an opportunity to respond to such allegations and that, in the absence of such prior findings, it could not be said to be disqualified from

being granted the mining right. Sishen is in effect saying such a finding must be made only by the Department of Mineral Resources.

[37] There is no merit in this contention. If Sishen chooses to come to Court and asks the Court for an order declaring that it is the only party competent to be granted the mining right relating to the 21.4% share in the right to iron ore in the Table 1 properties, any party that has a legal and substantial interest in the matter is entitled to invoke the provisions of sec 23(3) of the MPRDA and say that Sishen is not competent to be granted the mining right because it is in contravention of the MPRDA and its application for the mining right does not or will not meet the requirement of sec 23(1)(g) of the MPRDA and the Minister or her delegate will be precluded by the provision of sec 23(3) from granting it the mining right. That is what ICT has done by putting up affidavits in which the deponent avers that Sishen is in contravention of some or other provision of the MPRDA.

[38] In the light of the above Sishen has failed to show that the portions of affidavits identified in Annexure "B" to its Notice of Motion are irrelevant and fall to be struck out. Accordingly, its application for an order striking those portions of affidavits out falls to be dismissed. Sishen's contention that the contents of Mr Costa's affidavits and averments in Mr Sehunelo's affidavit relating to the contents of Mr Costa's affidavits are vexatious are, in the light of the conclusion reached above, also not vexatious.

Portions of affidavits of the respondents which were not confirmed by confirmatory

affidavits: Annexure "C" to the Notice of Motion

[39] When the state respondents and ICT delivered and served their respective answering affidavits to Sishen's review application, certain confirmatory affidavits to which reference was made in the answering affidavits and which were supposed to confirm the contents of certain portions of the answering affidavits were not delivered and served. In other words the confirmatory affidavits did not accompany the answering affidavits portions of which they were supposed to confirm. The deponents to the answering affidavits did not have personal knowledge of those portions of their affidavits. Such portions were at that time hearsay evidence and, therefore, inadmissible. However, later, the confirmatory affidavits were delivered and served. They confirmed the portions of the answering affidavits. Both the state respondents and ICT made applications for the condonation of their failure to deliver and serve the confirmatory affidavits on time. In my judgment in the main application I granted the necessary condonation for such failure. Such portions of the answering affidavits as had not initially been confirmed by way of confirmatory affidavits which required such confirmation ceased to be hearsay evidence once the confirmatory affidavits were delivered and served. In those circumstances Sishen's contention that they should be struck out because they constitute hearsay falls to be rejected. Accordingly, Sishen's application for an order striking out those portions of affidavits of the state respondents and ICT identified in Annexure "C" to the Notice of Motion falls to be dismissed.

[40] With regard to costs, it seems to me that Sishen should pay the costs of this application. In the circumstances the application to strike out certain portions of the affidavits filed on behalf of the respondents is dismissed with costs.

ZONDO, J

DATE OF JUDGMENT: 3 FEBRUARY 2012

APPEARANCES:

FOR THE APPLICANT:	ADV C. LOXTON SC
	ADV M. ANTROBUS SC
	ADV K. HOFMEYER SC
FOR THE 1ST, 2ND, 3RD, 4TH and 6th RESPONDENTS:	ADV W. VERMEULEN SC
	ADV T. KHATRI
FOR THE 5th RESPONDENT:	ADV C.E. PUCKRIN SC
	ADV C.N. VAN HEERDEN
	ADV E. WESSELS

[40] With regard to costs, it seems to me that Sishen should pay the costs of this application. In the circumstances the application to strike out certain portions of the affidavits filed on behalf of the respondents is dismissed with costs.

ZONDO, J

DATE OF JUDGMENT: 3 FEBRUARY 2012

APPEARANCES:

FOR THE APPLICANT:	ADV C. LOXTON SC
	ADV M. ANTROBUS SC
	ADV K. HOFMEYER SC
FOR THE 1ST, 2ND, 3RD, 4TH and 6TH RESPONDENTS:	ADV W. VERMEULEN SC
	ADV T. KHATRI
FOR THE 5TH RESPONDENT:	ADV C.E. PUCKIUN SC
	ADV C.N. VAN HEERDEN
	ADV E. WESSELS