REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

30/01/2014.
CASE NO: 3081/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

30/01/2014 .....
DATE SIGNATURE

In the matter between:

MAWETSE SA MINING CORPORATION (PTY) LTD.	Applicant
and	
THE MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES	Second Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL DEVELOPMENT, DEPARTMENT OF MINERAL RESOURCES	Third Respondent
REGIONAL MANAGER: LIMPOPO REGION, DEPARTMENT OF MINERAL RESOURCES	Fourth Respondent
DILOKONG CHROME MINE (PTY) LTD.	Fifth Respondent

JUDGMENT

MASIPA, J:

INTRODUCTION

[1] This is a review application brought in terms of Rule 53 of the Uniform Rules of Court. The applicant ("Mawetse") seeks the following relief:

1.1 A review and setting aside of the grant of a prospecting right to the fifth respondent ("Dilokong"). (I pause to state that the prospecting right was granted in respect of Chrome ore (base metals) on the farm Driekop 253 KT to Dilokong).

1.2 The applicant also seeks an order that the decision referred to in paragraph 1 is substituted with a decision in the following terms:

> *"Dilokong's application for a prospecting right in respect of Chrome ore (base metals) in respect of the farm Driekop 253 KT is refused."*

1.3 Alternatively to paragraphs 1 and 2, that the fifth respondent does not hold a valid prospecting right in respect of Chrome on the Farm Driekop 253 KT;

1.4 Further alternatively to paragraphs 1 and 2 that the prospecting right purportedly granted to the fifth respondent in respect of Driekop 253 KT has lapsed and no longer constitutes a bar to considering the applicant 's application for a prospecting right;

1.5 The decision of the fourth respondent of 27 October 2009 refusing the applicant's application for a prospecting right in respect of Driekop 253 KT is set aside insofar as fourth respondent refused the application;

1.6 The applicant's application for prospecting rights in respect of Driekop 253 KT is remitted to the Third Respondent for consideration in the light of the above within 30 days.

GROUNDS OF REVIEW

[2] In terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA), alternatively the principle of legality, the applicant seeks to review and set aside the prospecting right granted to fifth respondent on the following grounds:

2.1 The decision maker who purported to award the prospecting right was not authorized to do so;

2.2 The fifth respondent's application for a prospecting right was fatally defective in that, *inter alia*, the fifth respondent lacked the required Black Economic Empowerment (BEE) status at the time that it applied;

2.3 No prospecting right has been lawfully awarded to fifth respondent in respect of the property;

2.4 If a prospecting right had been awarded to fifth respondent it has now lapsed;

2.5 The reasons for upholding the award of the prospecting right to fifth respondent were inadequate, irregular and unlawful.

[3] In its answering affidavit Dilokong opposes the application. In addition it filed a counter-application in which it seeks an order against the first to fourth respondents compelling them to execute the prospecting right in question. For convenience I shall refer to the first to the fourth respondents collectively as the DMR respondents and individually as the first, second, third and fourth respondents respectively. The DMR respondents are not opposing the counter-application. Mawetse, however, is opposing the relief sought by Dilokong in its counter-application. (I pause to state that the relief sought by Dilokong in its counter-application is inextricably linked to the relief sought by Mawetse by way of review.)

[4] Before I deal with each ground of review it is convenient to briefly set out the background to this application.

FACTUAL BACKGROUND

[5] In November 2006 Dilokong applied for a prospering right in respect of chrome over the Farm Driekop 253 KT in the Magisterial District of Sekhukhune. The application was made in terms of Section 16(1) of the Mineral and Petroleum Resources Development Act of 2002 ("MPRDA" or "the Act").

[6] On 6 December 2006 the fourth respondent accepted the application and conveyed such acceptance to Dilokong by letter the body of which stated the following:

> "2. *In terms of section 14(4) of the MPRDA you are therefore required:*
>
> *2.1 To submit an environmental management plan in or before 4 February 2007 but not before the date mentioned in (b) below;*
>
> *2.2 To notify in writing and consult with the landowner or lawful occupier and any other affected party and submit the result of such consultation to this office;*
>
> *2.3 To consult with the Department of Land Affairs if the land is state-owned and in the event that the land is subject to land restitution to consult the office of the Commission on restitution of land rights and submit the result of such consultation to this office on or before the 05 January 2007.*
>
> 3. *You are further requested in terms of section 17(4) of the Act to give effect to the object referred to in section 2(d) of the Act. In*

this regard you are required to submit by no later than 04 February 2007, the following documents:

3.1 Duly signed shareholders agreements;

3.2 Share certificates and shareholders registers;

3.3 Articles and Memorandum of Association of the company;

3.4 Details relating to funding (all relevant agreements); and

3.5 Any other agreement or documents relating to the agreement."

[7] On 21 June 2007 Mr JF Rocha, in his capacity as the Deputy Director General ("DDG"), signed a power of attorney in favour of the Regional Manager, Limpopo Region, empowering the latter to sign a prospecting right in favour of Dilokong according to the approval signed by him on the same day.

[8] Paragraph 5 of annexure "PWM 13" reads thus:

"*ASSESSMENT OF CHARTER COMPLIANCE*

5.1 Compliance with section 17(4)

The Shareholders Agreement and/or Share Certificates were not submitted."

[9] Paragraph 6 of the approval recommends that a prospecting right to Dilokong Chrome Mine should be granted in accordance with section 17(1) of the Act for a period of 4 years subject to -

"*(i) The applicant, where applicable , submitting (before execution) all other outstanding information and documentation (including shareholders agreement with a BEE entity not holding less than 26% of equity in the operation and financial guaranteeing the amount of R15 000,00); and*

6.1.2 Signed the attached power of attorney, authorizing the Acting Regional Manager, Limpopo Region, to sign on your behalf the prospecting right to be granted to Dilokong Chrome Mine in this regard."

[10] On 18 July 2007, in Annexure "PWM4", Rocha confirmed the grant to Dilokong thus:

"*1. This is to confirm that your above mentioned application for the prospecting of Chrome Ore (Base Metals) in respect of the above mentioned properties has been granted in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) ...*

2. Take note that the Regional Manager will approve the environmental management plan on the date of signing the right."

[11] It is common cause that the prospecting right granted to Dilokong was to be signed and notarially executed by the Regional Manager: Limpopo Region on 14 November 2007. However, the right was never executed.

[12] In September 2009 Mawetse applied for a prospecting right in respect of two farms, namely Mooihoek and Driekop 253 KT.

[13] On 27 October 2009, Mawetse was informed in Annexure "PMW2" that its application in respect of Driekop had been rejected because that prospecting right had already been granted to another entity. It is common cause that the entity concerned is Dilokong.

[14] In October 2010 Mawetse launched an application seeking a declaration that no person holds a prospecting right in respect of chrome on Driekop, alternatively that Dilokong had abandoned its right.

[15] Dilokong took the point that Mawetse's application was premature because Mawetse had not exhausted its internal appeal to the Minister in terms of section 96 of the MPRDA. However, when Mawetse lodged such an appeal with the Minister, she refused to consider it on the ground that the matter was "*sub judice*" as a result of the first application.

[16] As a result Mawetse launched a second application to set aside the Minister's decision that she was unable to consider the appeal due to the litigation between the parties.

[17] In July 2011 an order compelling the Minister to take the necessary steps to have the appeal decided was granted. Pursuant to the court order the Minister considered Mawetse's internal appeal and dismissed it on 16 August 2011. In essence the Minister upheld the grant of the prospecting right to Dilokong.

[18] Meanwhile the Department had refused to provide Mawetse with the information regarding the purported grant of a prospecting right to Dilokong. Mawetse had, as a result, approached this court for an order granting access to the requested information. On 30 August 2010 the court granted the order as sought.

I proceed to deal with each ground of review in turn.

LACK OF AUTHORITY

[19] Mawetse's contention was that the decision to award Dilokong a prospecting right was reviewable in terms of section 6 of the Promotion of Administrative Justice Act, Act No. 3 of 2000 (PAJA), as, *inter alia*, the official who purported to grant the prospecting right to Dilokong lacked the legal authority to do so. It is common cause that the only person lawfully entitled to award a prospecting right was the Deputy Director General (DDG). Also common cause is that it was the DDG who took the decision to award a prospecting right to Dilokong as can be seen from the power of attorney and the approval annexed to the founding affidavit. The dispute seems to arise from the terms of the right as set out in Annexure " PWM5"

[20] Annexure "PWM5", a document headed 'PROSPECTING RIGHT', reads thus on page 52 of the papers:

"LET IT HEREBY BE MADE KNOWN

THAT on this 14 day of NOVEMBER in the year 2007, before me, ELVIRA LE ROUX notary public duly sworn and admitted, residing and practicing at POLOKWANE, in the LIMPOPO Province of South Africa, and in the presence of the subscribing competent witnesses, personally came and appeared:

GABATSHOLWE LEVY RAPOO Regional Manager, Limpopo Region of the Department of Minerals and Energy, and as such in his/her capacity as the duly authorized representative of:

THE MINISTER OF MINERALS AND ENERGY

The said Regional Manager, being duly authorized thereto under and by virtue of a Power of Attorney granted by the Deputy Director General: Mineral Regulation of the Department of Minerals and Energy on the 21 day of JUNE in the year 2007 in terms of the powers delegated to him by the Minister on the 12th day of May 2004 in terms of section 103 (1) of the Mineral and Petroleum Resources Development Act 2002 (Act No. 28 of 2002).

MR SUWEI ZHANG, in his capacity as a duly authorized representative of DILOKONG CHROME MINE (PTY) LTD ..."

[21] Later "PWM5" reads:

"NOW THEREFORE THE MINISTER GRANTS A PROSPECTING RIGHT TO THE HOLDER SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:"

[22] Paragraph 3 of "PWM5" reads:

"3. Commencement, Duration and Renewal

3.1 The prospecting right shall commence on 14 NOVEMBER 2007 and, unless cancelled or suspended in terms of section 47 of the Act, will continue in force for a period of THREE years ending 13 NOVEMBER 2010.

..."

[23] According to Mawetse the prospecting right as set out in Annexure "PWM5" is completely different from that recommended in Annexure "PWM13". Counsel for Mawetse submitted that the variation in the material terms of the right such as the duration of the prospecting right and the 'waiver' of the BEE requirement was an indication that the terms were not determined by the DDG but by the Regional Manager. The award of the prospecting right to Dilokong, therefore, was *ultra vires* and unlawful and the right ought to be set aside. In support of his submission counsel for Mawetse referred to the matter of *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) where the court dealt with a similar issue, of a Regional Manager not acting in accordance with the Power of Attorney. There the court found that the Regional Manager had acted *ultra vires* as he had no authority to determine the terms of the prospecting right. It is so that in the present matter, in amending the duration of the right from 4 years to 3 years, *inter alia*, the Regional Manager used his discretion. This happened at the time when the Regional Manager did not have authority to do so.

[24] As in *Meepo supra*, the fact is that the Minister had delegated the power to grant a prospecting right specifically to the Deputy Director General. He was, therefore, not entitled to delegate that power any further.

[25] However, an important difference is that in the present case the prospecting right was never executed. This is no small difference as a prospecting right can be of no use unless it is implemented. There can,

therefore, be no suggestion that the Regional Manager acted *ultra vires* his powers as he has not acted at all. I say this because "PWM5" has not been signed. There has not been any explanation for this omission. No importance, therefore, can be attached to "PWM5". In my view, the only document of relevance in establishing authority is Annexure "PWM13", the letter of approval signed by the DDG, who had delegated power from the Minister. The efficacy of this document has not been attacked.

[26] For that reason this ground of review cannot succeed.

NON-COMPLIANCE WITH BEE REQUIREMENTS

[27] It is common cause that at the time Dilokong applied for a prospecting right it did not comply with the BEE requirement. The question is whether non compliance with the BEE requirement is fatal to the application. Mawetse contends that Dilokong should never have been awarded the prospecting right as its BEE non compliance was a fatal flaw in its application.

[28] It was submitted on behalf of Mawetse that the decision of 21 June 2007 purporting to grant a prospecting right to Dilokong was unlawful. It was submitted further that from the outset Dilokong's application for a prospecting right was defective and should not have been granted; that the decision was prejudicial to other potential applicants for the same right, and was, therefore, procedurally unfair. It was, also unreasonable and was an error of law as the

decision maker knew that the application was defective but granted it anyway. Accordingly, the decision was reviewable in terms of section 6(2) of the PAJA.

[29] The DMR respondents have not denied the above nor can they as the facts are clear from hereunder:

29.1 Dilokong was called upon, in terms of section 17(4) of the MPRDA to comply with the object of section of 2(2)(d) of the Act by, *inter alia*, submitting various documents. This is confirmed in the affidavit of the MDR. The deponent to this affidavit is Motlatso Constance Kobe, the Chief Director; Mineral Regulation Branch in the office of the Minster for Mineral Resources.

[30] In paragraph 3.5 of the affidavit she clearly states that in "PWM3" (an acceptance letter from the fourth respondent to Dilokong dated 06 December 2006) Dilokong was called upon to comply with the objects of MPRDA as set out in Section 2(d) of the Act by submitting, not later than 4 February 2007, relevant documents which included a duly signed shareholders agreement.

[31] The relevant portion of section 2 of the MPRDA provides:

"*The objects of this Act are to -*

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources."

[32] In challenging the second ground of review DMR stated that although there was a Shareholders Agreement relating the BEE requirement it was not possible for Dilokong to comply owing to events beyond its control.

[33] Dilokong explained its predicament as follows:

33.1 The Shareholders' Agreement dated 11 December 2006 entered into between Eastern Asian Metal Investment Co. Ltd, (of which Dilokong is a company 100% owned by ASA) and Limpopo Economic Development Enterprise (LIMDEV) specifically catered for a BEE Partner in par 3 of the agreement.

33.2 The DDG was in possession of the Shareholders Agreement at the time when the decision to award the prospecting right to Dilokong was made.

33.3 However, in consequence of State policy and Parliament intervention, LIMDEV, was restrained from disposing of the State assets in its possession. Consequently Dilokong was unable to comply with the terms and condition of the shareholder agreement relating to the BEE partner.

33.4 As a result of the above challenge Dilokong had been unable to give effect to the terms of the Shareholders on the BEE compliance.

[34] Counsel for Mawetse, correctly argued that the reasons for Dilokong's failure to comply with the requirements were irrelevant for purposes of these proceedings. What is relevant is that the grant of the prospecting right was subject to a condition that was never met. With Dilokong conceding that it was and still is not BEE compliant the question should be whether such failure to comply has any effect on the grant of the prospecting right to Dilokong.

IS THE BEE REQUIREMENT OPTIONAL?

[35] Part B of the application for prospecting right, in namely Annexure "PWM11" to the Applicant's Founding Affidavit records that the completion of Part B is optional for applications for a prospecting right. DMR sought to argue that this meant that the BEE requirement was only relevant for the execution of the prospecting right and had no relevance in the decision to award the prospecting right. It was submitted on behalf of DMR that it was only in respect of the execution of a mining right that it was imperative that the applicant be BEE compliant.

[36] Counsel for DMR further submitted that in terms of Section 17(4) of the MPRDA the Minister had a discretion to request the applicant for a prospecting right to give effect to the object referred to in Section 2(d). The Minister had a choice whether to exercise the discretion or not as there was no compulsion in such a request. Failure to comply with section 2(d) insofar as a prospecting right is concerned did not preclude the granting of a

prospecting right to Dilokong. Consequently Dilokong was rightfully awarded the prospecting right, was the argument.

[37] There is no substance in this submission for the following reasons. The purported grant of the prospecting right to Dilokong was always conditional on Dilokong's compliance with the Charter. This is clear from the following:

[38] The approval of 21 June 2010 records that Dilokong has not complied with the Charter and section 17(4) of the MPRDA on the date of approval, and recommends the grant of the right subject to Dilokong so complying.

BEE COMPLIANCE - THE MPDRA AND THE MINING CHARTER

[39] Counsel for Dilokong submitted that in the MPRDA there are no statutory requirements that enjoins an applicant for a prospecting right to be BEE compliant, either at the time of lodging and acceptance of the application or at the time when the decision to grant a prospecting right is taken. He argued that the circumstances under which a prospecting right must be refused or granted are set out in section 17(1) and 17(2) of the MPRDA: the Minister or her delegate is obliged to grant a prospecting right if the "requirements of section 17(1) of the MPRDA have been met".

[40] It is so that both section 17(1) and 17(2) play a pivotal role in the decision whether an application for a prospecting right ought to be granted or refused. However, the two sub sections cannot be read in isolation. They have to be read in conjunction with other relevant provisions.

[41] Section 17(4) of the MPRDA reads thus:

> "*17(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in Section 2(d).*"

[42] If the intention of the Legislature was to restrict the discretion of the Minister to the stage of execution the Act would have said so. There is no justification to confine section 17(4) to the stage of execution. That BEE compliance is a requirement is also clear from the Charter.

42.1 The Charter is made in terms of section 100 of the MPRDA. The objective is to "develop a broad-based socio-economic empowerment Charter that will set the framework, targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry and allow such South Africans to benefit from the exploitation of mining and mineral resources".

42.2 Section 1 of the MPRDA defines "broad-based economic empowerment" as, *inter alia*, -

A social or economic strategy, plan, principle, approach or act which is aimed at - ...

(b) Transforming such industries so as to assist in, provide for, initiate or facilitate

(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations."

42.3 Neither this definition nor section 100(2) of the MPRDA, restricts the application of the Mining Charter to mining rights, or the stage of execution. On the contrary, section 100(2) refers more broadly to the "mining industry", and the definition expressly includes prospecting within its ambit.

[43] It is so, as counsel for Dilokong submitted, that the Minister's discretionary power was carefully circumscribed: the Minister may not simply demand that all applications for prospecting rights must comply with section 17(4) of the MPRDA because the legislature imposed two jurisdictional facts for the exercise of the discretion. Firstly, the Minister or her delegate must have regard to the type of mineral concerned and, secondly, she or her delegate must have regard to the extent of the proposed prospecting project.

It was submitted on behalf of Dilokong that the Minister could not call upon an applicant for a prospecting right to comply with section 2(d) of the MPRDA without having regard to the two jurisdictional facts above.

[44] It has not been suggested by Dilokong that the Minister failed to exercise her discretion properly or that the present case is one of those where the Minister should have used her discretion not to request BEE compliance. The Minister, through her authorized delegate, recommended that a prospecting right be granted subject to compliance with the Mining Charter and that decision has not been attacked. Nowhere is there mention that this has to be done at the time of execution.

[45] It was submitted for the first time, on behalf of Dilokong, in its heads of argument, that it was the Regional Manager who made this request, and that the request was accordingly unauthorized and invalid. This submission cannot be sustained for the following reasons:

45.1 Dilokong does not challenge the authority of the Regional Manager to make the request contained in "PWM3" anywhere in its papers. The result is that neither the DMR respondents nor Mawetse had an opportunity to respond to the allegation.

45.2 Dilokong has not challenged the request contained in "PWM3", in any proceedings. The request concerned, therefore, remains valid in law until set aside by a court. (*Oudekraal Estates (Pty)*

Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 26.)

[46] Dilokong's submission also overlooks the fact that the approval and the Power of Attorney which, according to Dilokong, constituted the administrative decision to grant the right, were expressly subject to a suspensive condition, namely that Dilokong become BEE compliant. These decisions were properly taken by the DDG personally and not the Regional Manager.

[47] There is a further point that Dilokong argues which is that there is a distinction between mining and prospecting rights, in that compliance with the Mining Charter is compulsory in respect of mining rights, but may only be requested by the Minister in respect of prospecting rights. As already stated earlier there is nothing in the Charter to support this submission. However, even if this submission were to be correct, (which is doubtful), it is irrelevant in circumstances where the Minister has correctly exercised her discretion to require Dilokong to comply with the Charter in respect of the prospecting right. She clearly did so through her delegate, the DDG, by granting the prospecting right subject to the condition that Dilokong become BEE compliant. Counsel for Mawetse, correctly, submitted that the discretionary /mandatory distinction relied upon by Dilokong, takes the matter no further.

NO PROSPECTIVE RIGHT WAS AWARDED

[48] The Minister's decision to dismiss Mawetse's appeal and the Department's refusal to consider Mawetse's application for a prospecting right in respect of chrome over Driekop were founded on the claim that Dilokong is presently the holder of the prospecting right.

[49] It is Mawetse's contention that Dilokong was never properly awarded a prospecting right as, *inter aila*, the prospecting right is contractual in nature and that there was never a meeting of the minds between between the parties concerned. In support of this contention Mawetse relies on the case of Meepo *supra*.

[50] It was argued on behalf of Mawetse that Dilokong and the Department had not agreed on the terms of the purported right and that this was illustrated by that Dilokong had failed to execute the right. The right concerned had not been executed because Dilokong did not comply with one of the terms stpulated by the Department, namely that it had to produce proof that it had at least a 26% BEE shareholder and it could not. Because no agreement was ever reached regarding the terms of the prospecting right no prospecting right was ever granted, it was argued.

[51] Alternatively it was argued on behalf of Mawetse that the prospecting right could not be given effect to in the absence of Dilokong's compliance with the terms and the conditions of the shareholders agreement relating to the

BEE partner. If the prospecting right was, notwithstanding non compliance, given effect to, the right that is sought to be executed would then not accord with the right that was granted.

[52] Dilokong's defence to this ground of review sought to persuade this court that the Meepo case was wrongly decided and that a prospecting right is not contractual in nature. It was argued on behalf of Dilokong that the granting of a prospecting right is the exercise of a statutory power and nothing else.

[53] In my view nothing turns on whether the terms of the prospecting right are contractual as held in Meepo or statutory as contended by Dilokong.

[54] What matters in the present case is that the decision to grant a prospecting right was subject to conditions and the implementation of the right was held in abeyance until the conditions had been complied with. Dilokong failed to comply with the condition and accordingly disabled itself from implementing the right to prospect.

THE RIGHT HAS LAPSED

[55] Mawetse contends that the prospecting right granted to Dilokong, if it was lawfully granted, has lapsed on the basis of one of the two grounds:

55.1 that it has expired in terms of section 56(a) of the MPRDA or

55.2 it was abandoned as contemplated in section 56(f) of the MPRDA. The two provisions read as follows:

> "*Any right, permit, permission or license granted or issued in terms of this Act shall lapse, whenever -*
>
> *(a) it expires*
>
> ...
>
> *(f) it is abandoned.*"

Has the prospecting right expired?

[56] The language of section 56 is clear and mandatory. It provides that any right issued in terms of the MPRDA shall lapse when it expires or is abandoned.

[57] In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and others v Smith* 2004 (1) SA 308 (SCA) at para 32 the court said the following about such language:

> "*The provisions of the invitation pertinent to the Pepper Bay case, on their plain wording, clearly state that the application fee must be paid at the time that the application is lodged. Paragraphs 15 and 16 of the instructions are similarly couched in peremptory terms. An applicant 'must pay' the application fee and 'must pay the application fee promptly and timeously'. The general principle is, of course, that*

> *language of a predominantly imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg Sutter v Scheepers 1932 AD 165 at 173 - 4).*"

[58] Section 56(a) of the MPRDA does not stipulate the expiry date. This, however, does not mean that a prospecting right is perpetual. It is, therefore, necessary to peruse other sections for guidance in this regard.

[59] Relying on section 18(5) of the MPRDA, Dilokong insists that the prospecting right awarded to it has not expired. It argues that section 18(5) refers to a "stated expiry date" in the context of one stated in the prospecting right itself. Since the prospecting right granted to Dilokong has not yet been notarially executed, there was no such date stated in the prospecting right itself, was the argument.

[60] In my view, reliance on section 18(5) is misplaced as we are here dealing with an application for a prospecting right and not with a renewal application. Annexure "PWM 4", a letter from the DDG, clearly informs Dilokong that the application for a prospecting right has been approved.
In paragraph 2 it is stated:

> "*Take note that the Regional Manager will approve the environmental management plan on the date of signing of the right.*"

[61] According to Dilokong the above communication must be seen in the context of section 17(5) of the MPRDA. This section provided, at the time, that the granting of a prospecting right only became effective on the date on which the environmental management plan is approved in terms of section 39 thereof. Since this step had not yet taken place, the prospecting right, including the duration thereof, had not yet taken legal effect, it was argued on behalf of Dilokong.

[62] This submission has no merit. It could never have been the intention of the Legislature to allow protracted delays to frustrate the objects of the MPRDA. On Dilokong's argument the prospecting right, which it says was awarded on 21 June 2007, is frozen in perpetuity and can never lapse since its term starts to run only once the right is executed. To endorse such an argument would amount to allowing the unlawful reservation and freezing of the mineral rights for Dilokong. This could not have been the intention of the Legislature.

[63] According to Dilokong the prospecting right that was due to be notarially executed on 14 November 2007 was to "continue in force for a period of three years ending on 13 November 2010". On Dilokong's own terms, therefore, the three year lifespan has expired. To conclude otherwise would be to make a finding which is at odds with the objects of the MPRDA which are clearly against the sterilization and reservation of mineral rights. It would also make a mockery of the objects of the MPRDA, which are, inter

alia, to ensure that mineral rights are timeously exploited for the benefit of the public.

[64] Not surprisingly DMR is in agreement with Dilokong. However its insistence that a prospecting right was lawfully awarded to Dilokong and that it is only the execution of that right which has been delayed does not assist Dilokong as the grant of the prospecting right is inextricably linked to its execution. It also does not avail Dilokong that it has launched a counter-application for the execution of the right and that the DMR is not opposing it.

[65] It appears to me that the DMR and Dilokong seem to think that the underlying problem can simply be cured by an order to execute the right. This thinking overlooks, among others, that in terms of section 17(6) of the MPRDA, a prospecting right is valid for a period specified in the right, which period may not exceed five years. There is a very good reason for this.

[66] An application for a prospecting right may be granted or refused. Where it is refused that may be the end of the matter, i.e. if the applicant elects not to take the matter further, by way of appeal or review. Where the application is granted, however, a process is embarked upon which culminates when the right is executed. Certain specified steps in the process between the grant of the right and its execution have to be taken and taken at specific periods. They are all important as they are all there for a purpose. Missing one step may have a serious impact not only on the process itself, which would be incomplete, but would also possibly have grave repercussions

for stake holders. By way of example, an Environmental Management Plan ("EMP"), is a prerequisite for a valid exercise of a prospecting right in terms of section 5 (4) of the MPRDA. Without it further progress after the approval of the right is stalled.

[67] Dilokong's EMP was filed on 2 February 2007. No progress was made thereafter. It seems to me, as contended by Mawetse, that after 5 years the EMP would be outdated as the terrain and the communities in the area may have changed. Going ahead at this stage with the implementation of the right might have serious implications for the environment and the communities around Driekop.

[68] It is clear, therefore, that in the event there was a lawful award of a prospecting award to Dilokong that right has now been lost because of the unreasonable delay in using it. The reasons for such a delay are irrelevant.

[69] On this ground alone I find that the prospecting right awarded to Dilokong, if it was properly awarded, has lapsed as it has expired.

Has the right been abandoned?

[70] It is doubtful whether in a case, such as this one, where it is clearly impossible to execute a right it can be said that the right has been abandoned. However in view of my finding above that the right has lapsed it

shall not be necessary to determine whether the right in this case was abandoned.

REASONS FOR TURNING DOWN THE APPEAL WERE INADEQUATE, IRREGULAR AND UNLAWFUL.

[71] The right to written reasons is enshrined in section 33(2) of the Constitution, which provides:

> "*Everyone whose rights are adversely affected by administrative action has the right to be given written reasons.*"

[72] Section 5(2) of PAJA gives effect to this right. In terms of this provision the administrator is obliged to furnish adequate reasons in writing within 90 days after receiving a request for reasons from an affected party.

[73] In some cases, however, an administrator is obliged to give reasons whether or not there has been a request for the reasons. (See *Koyabe and others v Minister of Home Affairs and others (Lawyers for Human Rights as amicus curiae)* 2010 (4) SA 327 (CC), paragraphs [61] to [62].

[74] What constitutes adequate reasons shall always differ from case to case and depends partly on the statutory and factual context. In *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd*

2003 (6) SA 407; *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* (SCA), para [40] the court said the following:

> "*That the decision maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering the matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages.*"

[75] The duty to give reasons goes to the heart of procedural fairness, and has thus been described as "the third principle of natural justice". (See Hoexter *Administrative Law in South Africa*, 2nd ed (Cape Town: Juta & Co. Ltd, 2012) at 463, fn 15.

[76] Reasons for a decision play an important role in assisting the affected parties determine a way forward. It is fundamental in enabling affected parties to exercise their right to be heard, to challenge the decision or to rectify their position. The duty also encourages rational and structured decision making, and so improves decision making. (See *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651 (QB) at 665J-666A.)

[77] What constitutes adequate reasons will always vary depending on the circumstances of each case (*Koyabe supra* para [63]).

[78] The reasons provided by the Minister are embodied in Annexure "PWM 9". Whether or not the reasons concerned are adequate would depend on the scope and the nature of the appeal.

[79] In the present case the applicant states that the reasons provided by the Minister for turning down Mawetse's appeal are inadequate as they do not "engage with the substantive objections that were raised in the appeal at all". According to Mawetse the reasons provided merely restate the original decision and assert that it was properly taken by the Deputy Director General who was empowered to do so. There is no explanation of the basis for these conclusions.

[80] To determine the adequacy or otherwise of the reasons put forward by the Minister this court needs to understand the basis or the grounds of the appeal. The applicant did not put forward its internal appeal of 28 October 2010 as part of the evidence. In addition nowhere in its papers, that is, both the founding affidavit and the replying affidavit are the grounds of the applicant's appeal foreshadowed.

[81] Counsel for Dilokong correctly submitted that in the absence of the grounds of appeal concerned this court was in no position at all to determine whether the reasons furnished were adequate or not. There is, therefore, no substance in this ground of review.

THE COUNTER-APPLICATION

[82] Dilokong seeks a mandatory compelling the Minister to execute the prospecting right. The counter-application is incompetent for there are legal obstacles to the execution of the right as sought by Dilokong in its counter-application namely:

82.1 The moratorium precluding Dilokong from disposing of its equity in order to become BEE compliant; and

82.2 The Minister's determination that the prospecting right may not be executed unless and until Dilokong is BEE compliant.

[83] Dilokong has not sought to set aside the moratorium or the Minister's decision to require it to be BEE compliant.

[84] It is trite that administrative decisions are valid and stand until set aside by a competent court. Until set aside the decision has legal consequences that cannot be ignored. In *Oudekraal Estates (Pty) v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [26] the court stated the following:

> "*The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of*

producing legally valid consequences for so long as the unlawful act is not set aside."

[85] In the present case Dilokong has not attempted to have the two decisions above set aside by a court and cannot now conduct itself as if they do not exist.

[86] There is yet another reason why the Dilokong's counter-application cannot succeed and it is this: Dilokong has not availed itself of the internal appeal remedy provided for in section 96 of the MPRDA.

[87] Section 96 of the MPRDA (prior to amendment by Act 49 of 2008 which commenced on 7 June 2013) provides:

"*Internal appeal process and access to courts*

(1) Any person whose rights and 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.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister as the case may be.

(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 Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section."

[88] The law contemplates that the appeal should be made timeously. Regulation 74(1) of the Regulation to the MPRDA requires that an internal appeal be lodged within 30 days of an affected person becoming aware of the decision.

[89] Section 7of PAJA provides:

> "*(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*
>
> *(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."*

[90] In the present case the DDG made the grant of the prospecting right to Dilokong subject to the condition that Dilokong comply with the Mining Charter by demonstrating its BEE credentials.

[91] The Constitutional Court has held that internal appeals in terms of section 96 lie in respect of decisions of the Minister's delegates. (See *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 48-50.)

[92] In *Bengwenyama,* the court, re-iterated its earlier decision that "the need to allow executive agencies to utilize their own fair procedures is crucial in administrative action".

[93] Nowhere in the papers does Dilokong suggest that it appealed in terms of section 96 against the decision to render the grant of the right conditional on its compliance with the Mining Charter. Neither has it applied for condonation for its failure to exhaust its internal remedies, nor has it set out any exceptional circumstances that might persuade this court to grant such condonation. On the contrary Dilokong seems to have deliberately dragged its feet. It has known, at the latest, since 14 November 2007, of the Department's refusal to execute the right because of its failure to comply with the BEE requirements. Yet it elected not to litigate or appeal the decision in the hope that it would be able to obtain a suitable BEE partner and comply with the condition. This constitutes an unreasonable delay which fatally undermines the counter-application.

[94] In *Oudekraal Estates supra* the SCA emphasized the importance of prompt action in taking administrative decisions on review as prejudice to interested parties might flow from an unreasonable delay. Having regard to the above, it is clear that Dilokong's failure to pursue its internal appeal against the DDG's decision to impose a condition on the grant of the prospecting right as well as the unreasonable long delay are fatal to its counter-application.

[95] The counter-application, by Dilokong, therefore, has no merit and cannot succeed.

REVIEW OF THE DECISION REFUSING MAWETSE'S APPLICATION

[96] On 27 October 2009 the fourth respondent rejected Mawetse's application for a prospecting right in respect of chrome in Driekop. The basis of this refusal was that Dilokong already held that prospecting right in respect of the same mineral in Driekop.

[97] As can be seen above that decision was based on a material error of law. Accordingly it is reviewable in terms of section 2(d) of the PAJA. It should, therefore, be set aside in accordance with the relief sought in paragraph 6 of the notice of motion.

CONCLUSION

[98] I am of the view that Mawetse has made out a case for review for reasons referred to above.

[99] In the result I grant the following order:

99.1 It is declared that the fifth respondent does not hold a valid prospecting right in respect of chrome on the farm Driekop 253 KT as it has lapsed and no longer constitutes a bar to considering the applicant's application for a prospecting right.

99.2 The decision of the fourth respondent of 27 October 2009 refusing the applicant's application for a prospecting right in respect of chrome on the farm Driekop 253 KT, insofar as the fourth respondent refused the application, is set aside.

99.3 The applicant's application for a prospecting right in respect of Driekop 253 KT is remitted to the third respondent for consideration in the light of the above within 30 days of this order.

99.4 The fifth Respondent's counter-application is dismissed with costs.

99.5 The respondents are ordered to pay the costs jointly and severally, such costs to include costs of junior and senior counsel.

T M MASIPA
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

Counsel for the Applicant:	G J Marcus SC N Ferreira
Instructed by:	Maponya Incorporated
Counsel for the First to Fourth Respondents:	N Cassim SC M M Mokadikoa
Instructed by:	The State Attorney
Counsel for the Fifth Respondent:	M M Oosthuizen SC A Higgs
Instructed by:	Steyn Kinnear Incorporated
Date of Hearing:	15 October 2013
Date of Judgment:	30 January 2014