REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

5/3/2014.

CASE NO: 38528/2012

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

5/3/2014
DATE

SIGNATURE

In the matter between:

COAL OF AFRICA LIMITED	First Applicant
REGULUS INVESTMENT HOLDINGS (PTY) LTD	Second Applicant

and

AKKERLAND BOERDERY (PTY) LTD	Respondent

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] On 4 July 2012 the applicants launched the application against the respondent for an order in the following terms:

1.1 Interdicting and restraining respondent from refusing first applicant access to the farm Lukin 643 MS, Administrative District of Soutpansberg, Limpopo Province for the purpose of conducting prospecting operations on that land pursuant to prospecting right 4/2005 executed on 14 June 2006 and the renewal thereof executed on 25 November 2009 and any further renewal thereof;

1.2 Authorising first applicant –

1.2.1 to enter onto the farm Lukin 643 MS together with its employees and to bring onto the land any plant, machinery or equipment and build or lay down any surface or underground infrastructure which may be required for purposes of prospecting;

1.2.2 to carry out any other activity incidental to its prospecting operations.

1.3 Interdicting and restraining respondent from refusing second applicant access to the farm Salaita 188 MT, Administrative District of Soutpansberg, Limpopo Province for the purposes of conducting prospecting operations on that land pursuant to prospecting right 5/2005 executed on 19 April 2005 and the

renewal thereof executed on 9 April 2010 and any further renewal thereof.

1.4 Authorising second applicant –

1.4.1 to enter onto the farm Salaita 188 MT together with its employees and to bring onto the land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for purposes of prospecting;

1.4.2 to carry out any other activity incidental to its prospecting operations.

1.5 Ordering the respondent to pay the costs of this application; and

1.6 Granting the applicant such further and/or alternative relief as this Court may deem appropriate.

[2] On the date of the hearing of this application, i.e. on 22 July 2013, the applicants sought and were granted amendment of the Notice of Motion, the effect whereof was to replace the date, "*14 June 2006*" in prayer 1.1 with the date "*2 October 2006, as amended on 19 January 2011*"; as well as to replace the phrase "*executed on 25 November 2009 and any further renewal thereof*" with the phrase, "*sought on 4 July 2011, and which renewal is still pending*".

[3] On the same date, i.e. 22 July 2013, the second applicant withdrew its application against the respondent as the prospecting right granted to it in favour of the farm Salaita, which right is referred to in the papers as PR 161 or 161 PR, expired due to effluxion of time in April 2013. This Court is thus left with the application relating to the farm Lukin, whose prospecting right is referred to in the papers herein as Lukin 38 PR or simply 38 PR to deal with.

[4] The applicants also served and filed an amended Notice of Motion, wherein the first applicant as the sole applicant (even though both the applicants are cited as such) sought an order in the following terms:

4.1 Interdicting and restraining respondent from refusing first applicant access to the farm Lukin 643 MS, Administrative District of Soutpansberg, Limpopo Province, for the purpose of conducting prospecting operations on that land pursuant to prospecting right 4/2005 executed on 2 October 2006, as amended on 19 January 2011 and the renewal thereof sought on 4 July 2011, and which renewal is still pending;

4.2 Authorising the first applicant –

4.2.1 to enter onto the farm Lukin 643 MS together with its employees and to bring onto the land any plant, machinery or equipment and build, construct or lay down

any surface or underground infrastructure which may be required for purposes of prospecting;

4.2.2 to carry out any other activity incidental to its prospecting operations.

[5] The applicants proceeded to set out the orders they sought in respect of the farm Salaita. I do not intend to repeat them in this judgment because the orders and prayers sought by the applicants, specifically the second applicant, against the respondent were withdrawn unreservedly.

[6] It is necessary to explain the use of registration numbers 4/2005 and 38 PR which are both used in this matter to refer to the prospecting rights in respect of the firm Lukin 643 MS. 38 PR is part of the reference number LP 30/5/1/1/2/38 PR, which is the file reference used in the Department of Minerals and Petroleum Resources Development; whereas the number 4/2005 is the reference number allocated to the prospecting rights at the Deeds Registry when same was registered.

THE PARTIES

[7] The first applicant, Coal of Africa Ltd ("*Coal of Africa*" or "*first applicant*" interchangeably), is a company incorporated according to the laws of Australia under Registration No CAN 008905388 and registered as an external profit company according to the laws of the Republic of South Africa

("*RSA*") under Registration No 2012/051325/10, which has its principal place of business at 2nd Floor, Gabba Building, The Campus, 57 Sloane Street, Bryanston, Johannesburg. The first applicant conducts business among others as a coal mining and exploration company.

[8] The second applicant, Regulus Investment Holdings (Pty) Ltd, is a private company registered and incorporated in terms of the company laws of the RSA, with its principal place of business also being the same as that of the first applicant i.e. 2nd Floor, Gabba Building, The Campus, 57 Sloane Street, Bryanston. The second applicant is wholly owned by the first applicant and also conducts business as a coal mining and exploration company, among others.

[9] The respondent, Akkerland Boerdery (Pty) Ltd, is a private company registered and incorporated in terms of the company laws of the RSA, with its registered address being at 321 Alpine Way, Lynnwood, Pretoria. The respondent is the registered owner of, and as such holds the surface rights in relation to, the properties known as the farm Lukin 643 MS, Title Deed Registration No T79229/1998 ("*Lukin*") and the farm Salaita 188 MT, Title Deed Registration No T79230/1998 ("*Salaita*").

[10] It is common cause as well as clearly apparent *ex facie* the Title Deeds that the mineral rights on the two farms were reserved to the State in 1944, which reservation is still valid and/or operative to date, under Certificate of Mineral Rights No 588/1944 RM. Consequently accordingly, the respondent

has never had and does not have any claim or title or right to those rights and/or to compensation in respect of them, specifically herein, to the coal on or underlying the properties.

CIRCUMSTANCES GIVING RISE TO THIS APPLICATION

[11] The genesis of this application is the respondent's refusal to allow the first applicant access to the farm Lukin for the latter to continue with prospecting operations.

[12] The respondent relies on several grounds for its refusal to grant the requisite access. On the one hand, it can be understood as purporting to deny that the first applicant has a clear right to enter its property for purposes of prospecting. On the other hand, an impression is gained that the respondent is not actually disputing the existence of the right to prospect on the farm Lukin, but rather whether or not the existing prospecting rights thereon were validly conferred by the Department of Minerals and Petroleum Resources Development. Secondly, the respondents contended that proper consultations with themselves as landowners involved were not undertaken relative to the issue of access to their land by the first applicant.

[13] The respondent alleges further, that the requirements of the Mineral and Petroleum Development Act "MPRDA" were not met when the prospecting rights over Lukin were conferred. Their argument is that the prospecting rights over Lukin were not validly conferred on the applicants, that

the environmental management plan in respect thereof ("*EMP*") was not validly approved and that the operative prospecting work program ("*PWP*") did not comply with the regulations promulgated pursuant to the MPRDA. IT was the respondent's further contention that the prospecting right was not registered in terms of the Mining Titles Registration Act 16 of 1967 ("*MTRA*").

[14] The respondent also alleged that the farm Lukin is not zoned for prospecting or mining activities and that in any event, any prospecting by the applicant thereon would breach the provisions of the National Water Act 36 of 1998.

[15] The respondent also avers that the requirements for the grant of a final interdict, especially the requirements of "*clear right*" and "*Lack of a suitable alternative remedy*" were not made out.

[16] Another bone of contention between the two parties is the issue of the continued validity of the prospecting rights over the farm Lukin. According to the applicant the first five-year period of their validity expired in 2011 and an application for their extension for the allowed further three year period is still pending with the relevant authorities. According to the respondent those rights expired finally on 13 June 2012 after their extension, on 14 June 2009.

[17] The inter-relatedness of the respondent's grounds of refusing the first applicant access to Lukin is ably demonstrated by the following except from its answering affidavit:[1]

> "7. *Within the same context and against the background of the fundamental nature of the right of ownership in the* [farm], *we submit ... that the applicants did not demonstrate a clear right as an indispensible prerequisite for the interdictory relief claimed.*
>
> 7.1 *For the submission we rely on any one or more of the following four alternative propositions, namely.*
>
> 7.1.1 *that, <u>firstly</u>, the transfer and cession of the* [two] *prospecting rights to the* [two] *applicants are invalid because the officials who purported to consent to those transfers and cessions were not authorised in law to do so for want of delegated power, or*
>
> 7.1.2 *that, <u>secondly</u>, the* [two] *amended prospecting rights upon which the* [two] *applicants rely for relief against Akkerland Boerdery cannot be enforced against it because those prospecting rights as amended have not yet been registered in the Mineral and Petroleum Titles Registration Office under the Mining Titles Registration Act 16 of 1967 as amended and/or, as far as the farm Lukin is concerned, the cession or transfer has not yet been registered under the MTRA so that for this reason also that prospecting right is not enforceable against Akkerland Boerdery; or*
>
> 7.1.3 *that, <u>thirdly</u>, the* [two] *amended prospecting rights upon which the* [two] *applicants rely for relief against Akkerland Boerdery cannot be enforced against it because the prospecting work program(mes), forming an integral part thereof, are either invalid or non-compliance with the prescripts of regulation 7 of the Mineral and Petroleum Resources Development Regulations or are so vague that they are unenforceable; or*
>
> 7.1.4 *that, <u>fourthly</u>, the* [two] *applicants do not have the required zoning permission from the local authority*

[1] Answering Affidavit, para 7 at folio 83 of the paginated papers.

> *that would permit the intended prospecting activities on the* [two] *farms and such activities are in terms of the provisions of the Town-Planning and Townships Ordinance 15 of 1986*[2] *indeed prohibited upon pain of a criminal sanction.*"

[18] I have placed some words like "*two*" in brackets to signify that the quote should be understood as referring only to the farm Lukin. The excerpt was originally in respect of both Lukin and the farm Salaita.

[19] I will elaborate on the above further on in this judgment.

[20] The first applicant strongly relied upon section 25 of the Constitution of the Republic of South Africa Act 20 of 1996 ("*the Constitution*"), the relevant portions whereof read as follows:

> "*(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
>
> *(2) Property may be expropriated only in terms of law of general application –*
>
> *(a) for a public purpose or in the public interest; and*
>
> *(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*"[3]

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[2] Hereinafter referred to as Ordinance 15 of 1986.
[3] Roux : Woolman and Others *Constitutional Law in South Africa* (2012), Revision Service 4 : 46-6 under "*Property*".

[21] Within the context of the above words from our Constitution, it was submitted on behalf of the respondent that –

> "... *Within this context and against the background of the fundamental nature of the right of ownership in the ... farm(s). we submit ... that this application is moot or academic because one prospecting right is about to expire on 18 April 2013 (and by the time of the hearing in this matter it would have already expired) whilst in our submission the other prospecting right expired on 13 June 2012, in both instances by operation of law, and as such they cannot justify or legitimise any infringement or limitation of the rights of ownership to the ... farm(s).*"[4]

[22] It is my considered view that the above contention may be tenable and somewhat acceptable if the basis therefor as set out therein was found to be correct. An appropriate conclusion will be made when the standpoints of the two contesting parties have been analysed.

STATUTORY PRESCRIPTS APPLICABLE

[23] Prior to the introduction of the MPRDA, it was universally accepted that mineral rights were real rights. It is for this reason that they were accepted as real rights that they were required to be registered under the Deeds Registry Act. Common law mineral rights as previously known have been done away with under the MPRDA and have been replaced with various statutorily defined rights, including prospecting rights, which are granted by the Minister of Mineral Resources.[5]

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[4] Respondent's Heads of Argument, para 6, at folio 75 of the paginated papers.
[5] *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] 1 All SA 364 (SCA) para [20]; section 17 of the MPRDA.

[24] Prospecting rights granted in terms of the MPRDA are limited real rights in respect of the mineral and the land to which such rights relate.[6] There is nowhere in the applicable section where it is stated that for a prospecting right to be recognised as a real right (albeit a limited one). it should be registered in terms of or under the MTRA first.

[25] A conclusion cannot thus be escaped, that a prospecting right becomes a real right in respect of the mineral and the land when it is granted under the MPRDA, not when it is registered under the MTRA.

[26] Section 5(3)(a) of the MPRDA provides as follows:

> "*Subject to this Act, any holder of a prospecting right may enter the land to which such right relates together with his or her employees and may bring onto the land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting* ..."

[27] It deserves mention that part of the applicants' Notice of Motion in this matter is couched in the very words of section 5(3)(a) quoted above.

[28] As regards the issue of the registration of a prospecting right, section 19(2) of the MPRDA states as follows:

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[6] Section 5(1) of the MPRDA.

"The holder of a prospecting right must –

(a) lodge such right for registration at the Mining Titles Office within 30 days of the date on which the right –

(i) becomes effective in terms of section 17(5); or

(ii) is renewed in terms of section 18(3);

(b) 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."

[29] Section 17(5) of the MTRA reads as follows:

"The granting of a prospecting right in terms of subsection (1) becomes effective on the date on which the environmental management programme is approved in terms of section 39."

[30] It was submitted on behalf of the first applicant that the plain reading of section 19(2) of the MPRDA envisages that registration may occur after the right has become effective, i.e. when it has become enforceable, especially when it is apparent that the section treats separately the concepts of (a) lodging the right in terms of the MTRA for registration and (b) the exercising of the prospecting right. I tend to agree. A holder of a prospecting right must lodge its registration within 30 days and must commence prospecting within 120 days of the right becoming effective under section 17(5) of the MTRA. If enforcement of the right, and in particular, if prospecting was dependent on prior registration under the MTRA, section 19(2)(b) of the MPRDA would have

unambiguously linked the commencement of prospecting to the registration of that right to prospect.

[31] If the respondent's contention is anything to go by, the holder of a prospecting right cannot commence with prospecting activities – which include or involve entering the land in relation to which the right is granted – until a real right has been conferred on it through the mechanism of registration under the MTRA. The above presuppose that the holder of the right would be in breach were it to commence with prospecting prior to registration.

[32] Such an interpretation, that a prospecting right becomes "*effective*" but remains unenforceable against the owner of the land in respect of which it has been granted and notice thereof given to such owner, because it has not been registered, would be impractical as well as stultify the broader operation of the MPRDA. It would also result in an absurdity. It can even render ineffective the strict periods within which prospecting should be conducted unless the effect of the respondent's submission is that further applications for changes in the periods of validity of such prospecting rights should also be embarked upon. Experience have proved that officialdom have a way of procrastinating and taking months or years before dealing with applications, as has been the case in this application also where applications lodged many months back are still pending.

[33] That in my view and finding cannot be said to be what the legislature intended when the applicable statutes were passed. It would be out of synch with the spirit of the legislation.

[34] The above interpretation in my further view is fortified by the definition of "*right*" in section 1 of the MPRDA. It is defined as –

> "*... any right held by or under any deed and registered or capable of being registered in terms of the Mineral and Petroleum Resources Development Act, 2002.*" (my emphasis)

[35] Section 18(5) of the MPRDA provides that –

> "*... a prospecting right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused.*"

[36] The fact that the situation in relation to an existing right to prospect that is about the expire and its holder has applied for its extension is clearly circumscribed, unlike the situation in relation to a new right, in my further view supports the finding I am making.

[37] A prospecting right is valid for an initial period of 5 years and can be renewed only once for a further period of 3 years.[7]

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[7] Section 18(4) of the MPRDA.

[38] It is correct, as the respondent went to lengths to point out, that land ownership is not placed on a back-burner when prospecting right acquisition and prospecting operations are at work. The MPRDA itself has as one of its core objectives the giving of effect to section 24 of the Constitution.[8] An applicant for a prospecting right under the MPRDA is obliged to satisfy the relevant Department(s) that environmental considerations justify the grant of the right, which in its nature, presupposes the invasion, actual and potential of the environmental and property rights conferred by section 24 of the Constitution.[9] Therefore, an application for prospecting rights may only be granted if, among other things, the prospecting will not result in unacceptable pollution and/or ecological degradation or damage to the environment.[10]

[39] To ensure that environmental considerations are adequately recognised and addressed when the granting of a prospecting right is in issue, the MPRDA provides for consultation at various levels, both before and after the grant of such a right. An environmental management plan, which represents a scheme of things aimed at indicating how the management and rehabilitation of the impact on the environment is to be dealt with, must be submitted. This requirement in my view, is a legislative acknowledgement that prospecting and, to a far extent, mining, (which may or may not follow a successful prospecting operation) by its very nature, harms the environment. This invasion of an owner's right of ownership and accompanying harm to the environment by prospecting and mining is, in principle, justified by the need to

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[8] Section 2(h) of the MPRDA.
[9] Section 17(1)(d) of the MPRDA.
[10] *Sephaku Tin (Pty) Ltd v Kranskoppie Boerdery* (unreported) Case No 47561/2010 (North Gauteng High Court) per Tuchten J, p 7 para [9], decided on 7 May 2012.

promote development and to contribute towards the redress of poverty and lack of access to the resources and the riches of our country by as many of the inhabitants of our country in line with the previous, preconstitutional dispensation.[11] In keeping with the provisions of section 10(1) of the MPRDA, the decision-maker who determines whether or not to grant a right under the MPRDA must balance environmental considerations against the other objects of the measure to determine whether the harm is unacceptable. The views and interests of the landowner, who may be unwilling to allow his/her property to be "*invaded*" this way, and those of the broader community, must be taken into account in the decision-making process.[12]

[40] Even after the grant of a prospecting right, the prospector does not have an unrestricted and unregulated right to enter the property and exercise those rights. He must do so in accordance with the MPRDA, the conditions of his prospective right and other relevant legislative prescripts.[13] He must comply with the requirements of the environmental management plan which he had to submit and have had approved before he could be awarded his prospecting right. There are timeframes within which prospecting must commence from the date on which the prospecting right became effective and before he actually enters the land where prospecting is to take place, he must notify the landowner or lawful occupant of his intention to do so and engage in appropriate consultations with such landowner or lawful occupant.[14]

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[11] Section 2(d) and (e) of the MPRDA.
[12] *Sephaku Tin v Kranskoppie Boerdery (supra)* para [11].
[13] Sections 17(6) and 19(2)(d) of the MPRDA.
[14] Sections 5(4)(c) and 19(2)(c) of the MPRDA.

[41] The Mineral, Petroleum and Energy Department ("*Department*") is given wide powers to control the manner in which a prospector conducts himself or does his prospecting work on the land. It has the power to instruct the prospector to take urgent remedial measures to protect the health and wellbeing of any affected persons or to remedy ecological degradation it is causing or has caused, ensure that the prospecting operations do not contribute towards irrevocable degradation of the ecology and order cessation of activities or operations when any of the above do occur, or take steps on its own to prevent any of the above happening. It can under certain circumstances even suspend or cancel a prospecting right.[15]

[42] The legislature has enacted a wide range of measures to implement constitutional obligations under section 24 of the Constitution in relation to the environment. The National Environmental Management Act[16] ("*NEMA*") sets out the principles which apply to all actions which may significantly affect the environment and also guide the interpretation, administration and implementation of all laws concerned with the protection or management of the environment.[17]

[43] The National Environmental Management : Protected Areas Act[18] ("*NEMPA*") protects and enables the conservation of ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes. It provides for the creation by administrative decision-

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[15] Sections 45 and 47 of the MPRDA.
[16] Act 107 of 1998.
[17] Section 2 of NEMA.
[18] Act 57 of 2003.

makers, of protected areas like nature reserves. Under NEMPA, no commercial prospecting or mining activity may be conducted within such protected areas as would have been created even after prospecting and/or mining rights had already been granted in respect of such area.[19]

[44] The long and short of the position as governed by the above Acts is that the nature of the rights created under mining and environmental legislation (which include prospecting) is such that a number of different and potentially competing rights and interests must be considered and, if possible, accommodated. That is the reason why the many steps of the process towards the creation and/or enjoyment of the rights are accompanied by wide consultative processes. However, none of the parties involved or relevant to such consultative processes should be or be seen as being obstructive.

[45] Such consultations are not confined to between aspirant prospective and landowners, aspirant prospectors and the broader community, Department and landowner or the Department and the public. There must also be co-ordination and consultations between the different affected State Departments which administer prospecting and mining generally as well as environmental issues related thereto. In short, the Department is obliged to consult with their colleagues responsible for the administration of NEMA and NEMPA whenever the adequacy of the environmental management plan, the approval of which is a prerequisite for a prospecting right to be granted or to become effective, is being considered.

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[19] Sections 23 and 48(1)(a) of NEMPA.

[46] Municipal Bye-laws applicable within the area prospecting is to be conducted should also be respected and complied with.

HISTORY OF LUKIN 643 MS's PROSPECTING RIGHTS

[47] Initially, the right to prospect on the farm Lukin originally fell within a different prospecting right, 30/5/1/1/2/G1PR ("*61 PR*"), and not 38 PR as it now does. This initial right was notarially executed together with its prospecting work programs ("*PWP's*") on 14 June 2006 and was registered under the MTRA on 3 July 2006. Its environmental management plan ("*EMP*") was also approved on 14 June 2006. This initial right was held by Kwezi Mining (Pty) Ltd ("*Kwezi Mining*"). Before it expired on 13 June 2009, Kwezi Mining applied for its renewal. Such renewal was approved and notarially executed on 25 November 2009. This right was amended to exclude the farm Lukin as will be fully explained hereinafter.

[48] Prospecting right 38 PR was notarially executed on 2 October 2006 and registered with its PWP on 4 October 2006. It was held by Motjoli Resources (Pty) Ltd ("*Motjoli Resources*"). This right was also subsequently amended to include the farm Lukin as would be explained.

[49] Before prospecting right 38 PR was amended, ministerial approval was sought and obtained in terms of section 11(1) of the MPRDA to cede same from Motjoli Resources to Coal of Africa ("*Coal*"), the present applicant. This approval was obtained on 22 March 2007. The cession was notarially

executed on 22 December 2010. It was lodged for registration in terms of the MTRA on 12 January 2011. As at the date of argument of this application, registration was still pending.

[50] On 9 April 2010 various parties that had prospecting rights over various farms in a disorganised fashion. i.e. one party prospecting on a farm which may be bordering on two prospected on by two or three different prospecting authorities, agreed amongst themselves on a way of consolidating and restructuring their prospecting areas such that one group would be working on farms that adjourned each other. Those parties included Kwezi Mining. Motjoli Resources and Coal. They then subsequently lodged an application in terms of section 102 of DMR for the Minister's consent to amend various prospecting rights such that certain farms were removed from certain prospecting rights and included in others. The farm Lukin was removed from prospecting rights 61 PR and included in prospecting right 38 PR. Ministerial consent for the amendment(s) to those prospecting rights was granted on 30 August 2010. Application was made on 22 September 2010 for the amendment of the PWP relating to 38 PR so as to cater for the inclusion of the farm Lukin and to reflect the holder of the prospecting right as Coal. The inclusion part was pursuant to the section 102 Ministerial consent and the reflection of the transfer of the prospecting right was pursuant to the consent to transfer in terms of section 11(1).

[51] The amended PWP also indicated that 120 additional boreholes were to be drilled.

[52] Prospecting right 38 PR having been ceded for Coal and approval of the amended PWP having been granted, the variation to prospecting right 38 PR to reflect the inclusion of Lukin and to reflect Coal as the holder of the right was notarially executed on 19 January 2011. That notarially executed right was lodged for registration on 31 January 2011. As at the date of argument of this application, the registration thereof had not as yet taken effect.

SPECIFIC ALLEGATIONS OF IMPROPRIETY ISSUED BY THE RESPONDENT

[53] In opposition of this application the respondent raised several issues like invalid administrative Acts, lack of consultations with appropriate stakeholders, failure to comply with zoning requirements as well non-satisfaction of some of the requirements for the granting of interdicts, specifically the requirement of lack of suitable alternative remedies.

ALLEGATIONS OF INVALID ADMINISTRATIVE ACTS

[54] The respondent contends that Coal are not holders of valid prospecting rights. It does not contend that such prospecting rights do not exist or were never granted. Their contention is premised on allegations that the existing prospecting rights in respect of 38 PR relating to the farm Lukin were granted in the midst of invalid administrative acts. Their big gripe is that these prospecting rights are invalid as they were not lawfully conferred. The respondent in addition contends that there are no valid amended PWP and

EMP. In this instance also, the respondent does not dispute the existence of the PWP and EMP approved by authorised public functionaries, but contend that the processes preceding their approval are unlawful, thus invalidating them. As regards the PWP the respondent contends that for e.g., it does not comply with the regulations published under the MPRDA and that there were no consultations regarding the amendments. As regards the EMP, the respondent contended that there were no consultations regarding them, presupposing that they should be regarded as being invalid.

[55] For the above reasons the respondent contended that Coal cannot seek to enforce prospecting right 38 PR as envisaged in section 5(3) of the MPRDA.

[56] The first question to ask is whether or not the respondent is entitled to disregard the administrative acts performed by the officials simply because it believes them to be invalid.

[57] The grant of a prospecting right is an administrative act, as is the grant of a variation or amendment thereof, the grant of a variation to PWP or EMP, giving of ministerial consent under sections 11 and 102 of the MPRDA among others and/or the approving of EMP's by Regional Managers under section 39.

[58] The status of an administrative act, whether valid or invalid, is an aspect of administrative law which involves an understanding of the distinction between void and voidable administrative acts. It is common cause that generally, an unlawful administrative act remains valid and/or enforceable in law and has legal consequences which prevail until the so-said unlawful administrative act or decision is reviewed and set aside. In this sense, such acts are said to be or described as voidable.

[59] The anomaly whereby an unlawful administrative act can produce legally effective consequences was dealt with by the Supreme Court of Appeal in the leading decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others.*[20] In a unanimous decision the court thereat placed reliance for this approach on the evidentiary presumption as to the legal validity of an administrative act, which is expressed in the legal *maxim*, "*... omnia praesumuntur rite esse acta ...*". The court described this approach as one based on pragmatism.[21]

[60] Lord Radcliffe pronounced on this *maxim* as follows in *Smith v East Rural District* [1956] All ER 855 at 871H:

> "*An* [administrative] *order ... is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.*"

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[20] 2004 (6) SA 222 SCA).
[21] *Oudekraal Estates (supra)* at para [27].

[61] The court in *Oudekraal Estates* went on to find that the proper enquiry in each case, at least at first, is not whether the initial act was valid, but rather whether the substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.[22]

[62] Cut to the bone, the above means that administrative action is treated as valid unless and until a court pronounces authoritatively on its invalidity, even though it may later be held to be invalid. The term "*voidable*" as alluded to above in this context means "*... treated as valid until declared invalid ...*".

[63] The respondents herein have not attacked any invalidity in the courts.

[64] Authoritative administrative law writer, Cora Hoexter,[23] correctly in my view, summarised the effect of the judgment in *Oudekraal Estates* as being that –

> "*... until an illegality is set aside by court, it exists in fact and is capable of having legally valid consequences – meaning that even an obvious illegality cannot simply be ignored.*"

[65] It is my considered view and finding that the proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view individuals take of

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[22] *Oudekraal Estates (supra)* at para [31].
[23] Hoexter, *Administrative Law in South Africa*, 2nd Ed. p 547.

the validity of the act in question. It is for the above reason that the court in *Oudekraal Estates* concluded that –

> *"... our law have always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."*[24]

[66] The court in *Oudekraal Estates* further stated that the analysis of the approach to the problems which arise in relation to unlawful administrative action recognises the value of certainty in a modern bureaucratic state which is a value the Legislature would have in mind as a desirable objective when enacting enabling legislation such as the ones we are dealing with in this matter.[25]

[67] It follows that even if the administrative acts which the respondent is complaining about were invalidly made, they are, at best for the respondent, invalid in the sense that they are voidable. The respondent is therefore not entitled to disregard the administrative acts performed by officials of the DMR. Until those decisions which constitute those administrative acts have been reviewed and set aside by a court in proceedings for judicial review, those decisions will exist as a fact and will have the legal consequences intended.

[68] The respondent thus is not entitled, in the circumstances of this case, to ignore those legal consequences simply on the basis that it is challenging

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[24] *Oudekraal Estates (supra)* at 242B.
[25] *Oudekraal Estates (supra)* at para [37].

in these proceedings the validity of the decisions made by the DMR officials. If a challenge is to be taken seriously, it must be by way of judicial review proceedings. The respondent has failed to bring such judicial review proceedings.

[69] It is so that a party has a right to raise the invalidity of an administrative act as a defence to its failure to give effect thereto.

[70] The court in *Oudekraal Estates* found that there are two circumstances in which the invalidity of an administrative act may be a defence, namely:

70.1 where the person or official placing reliance on the first invalid administrative act or person giving effect thereto has legal power to act validly notwithstanding the invalidity of the first act; and

70.2 where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act and where the invalidity of an administrative act is put up as a defence thereto – the so frequently called "*collateral challenge*".

[71] It goes without saying therefore that unlawful acts, whilst they may be void in law, exist in fact and they more often than not appear to be valid. Those unaware of their invalidity may take decisions based on them in good faith as they would be acting on the assumption that these acts are valid. The

validity of the subsequent conduct depends on the legal powers of the second actor. As alluded to above –

> "... *If the validity of consequent acts depend on no more than the factual existence of the initial acts, then the consequent acts will have legal effect for so long as the initial act is not set aside by a competent court.*"[26]

[72] In the circumstances, the validity of the administrative acts in question here, namely, the grant of the prospecting rights, the renewal or amendment thereof, the grant of an amended prospecting work program ("*PWP*"), and the approval of the EMP do not depend on the legal validity of the relevant or responsible official's decision to grant or approve but depends merely upon the fact that such administrative act or decision was taken. The effect of the above is that the holder of a prospecting right is entitled to exercise the ordinary rights of such holder, which, under section 5(3) of the MPRDA include obtaining access for purposes of conducting prospecting activities.

[73] The court in *Joubert and Others v Miranda Mining Company Ltd*[27] ("*Miranda case*") stated as follows:

> "... *the right to enter the land solidifies, once the mining permit holder has complied with the provisions regarding notification and consultation with the owner of the land ...*"[28]

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[26] *Oudekraal Estates (supra)* at 247C-248A.
[27] 2010 (1) SA 198 (SCA) at para [12].
[28] *Miranda Mining (supra)* at para [13].

[74] When all aspects relative to this matter are considered, the respondent has and still is refusing the applicant ("*Coal*") access to the farm Lukin. The respondent, Akkerland, cannot on this ground refuse access in principle as it is doing. The only basis upon which the effects of the administrative acts by the officials of the DMR granting the prospecting rights can be avoided is to have them set aside in review proceedings, which process was never undertaken by the respondent.

[75] In relation to the point in paragraph 60.2 above, namely, that invalidity may be raised as a defence where a public authority seeks to coerce the subject into compliance, the underlying premise for this is that it would be a fundamental departure from the rule of law if an individual were liable to conviction – which is normally in criminal courts – for contravening some rule which itself stands to be set aside by a court as unlawful. For a collateral defence to be raised, enforcement proceedings are a prerequisite. They must have been instituted by the administrative authority involved. In such an instance the individual subject will be able to raise the voidness of the underlying administrative act as a defence.[29]

[76] There is no question of a public authority seeking to coerce any subject here. No enforcement proceedings have ever been contemplated. The applicants are not public authorities seeking to enforce any previous administrative acts of theirs.

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[29] *Oudekraal Estates (supra)* at 244F and 245G-246A.

[77] The present proceedings are also not review proceedings. If they were, the court would have had a discretion whether or not to set aside the allegedly invalid decisions of the DMR. This is material or relevant as the extent of the substantial funds that had been expended by the applicant pursuant to it having obtained prospecting rights and the delay on the part of the respondent is bringing an application for review is anything to go by.

[78] The attitude of the Supreme Court of Appeal in respect of applicants for judicial review is that they should not adopt a supine attitude to bringing review proceedings and that –

> "*... there was a duty on applicants in general not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they become aware of the decision in question.*"[30]

[79] The above approaches generally followed by the court in *Oudekraal Estates* was followed or referred to with approval and applied by the Constitutional Court in *Camps Bay Ratepayers Association and Another v Harrison and the Municipality of the City of Cape Town.*[31]

[80] The above approach where a party considers that rights were unlawfully conferred under the MPRDA was confirmed in *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South*

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[30] *Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) at para [51].
[31] 2011 (2) BCLR 121 (CC) at para [62].

Africa and Others.[32] In the above case, in the course of a review of the decision to convert an old order prospecting right the issue of whether an earlier administrative decision to renew the prospecting right was challenged because it had not been made timeously. The court therein pointed out that the administrative decision to renew had not been taken on review, existed as a fact and had legal consequences which could not be overlooked.[33]

[81] As a result, this ground cannot avail the respondent.

THE REQUIREMENT OF CONSULTATION

[82] The respondent does not dispute that on 23 January 2012 the applicants addressed a letter to it in which they sought to consult with the respondent for purposes of obtaining access to the farm Lukin in accordance with their prospecting rights for the purposes of drilling further boreholes on the property.

[83] The respondents in their submissions attempted to pour cold water on this letter and its import. After analysing the arguments on this aspect I am satisfied that the respondent was approached for purposes of consultations but the respondent refused to consult or frustrated the applicant's attempts to have such consultations going. It cannot now rely on an alleged failure to consult as required under section 5(4) of the MPRDA.

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[32] [2011] 3 All SA 610 at paras [45] to [47].
[33] *Norgold Investment (supra)* at paras [45] to [46].

ALLEGED FAILURE TO COMPLY WITH ZONING REQUIREMENTS

[84] Compliance with zoning requirements is an essential part of the grant and utilisation of a prospecting permit. There are varying zoning requirements in respect of different areas.

[85] In *Maccsand (Pty) Ltd v City of Cape Town and Others*[34] Maccsand obtained a mining right and a mining permit under the MPRDA in respect of dunes zoned as public open space under the Land Use Planning Ordinance 15 of 1985 (Cape) ("*LUPO*"). In issue was whether the application of the Ordinance to the land ended on the grant of the mining right and permit or whether the exercise of the mining right was subject to the Ordinance i.e. such that mining could not take place until the land was appropriately re-zoned.

[86] The Constitutional Court held that mining cannot take place until the land in question is appropriately re-zoned because it is proper for one sphere of Government to take a decision – just like decisions taken by the DMR in terms of the MPRDA – whose implementation may not take place until consent of another sphere is granted – such as the consent of a municipality in terms of an Ordinance or land use scheme.[35] The court further held that there is no conflict between an Ordinance and MPRDA.[36] Each is concerned with a different subject matter.

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[34] 2012 (4) SA 181 (CC).
[35] *Maccsand (supra)* at para [38].
[36] *Maccsand (supra)* at para [52].

[87] The decision in *Maccsand* revolved around the facts of that case which was based on the provisions of a differently worded Land Use Planning Ordinance operative and applicable in the Cape. The court found that in relation to the exercise of a mining right granted in terms of the MPRDA that this was subject to utilisation by virtue of the provisions of section 23 of the MPRDA.

[88] I agree with the applicant that in our present case, section 17(6) of the MPRDA would similarly render the exercise of a prospecting right subject to the applicable Land Use Planning Ordinance, in this instance, the Makhado Land Use Scheme, 2009. Both the MPRDA and the Makhado Land Use Scheme, 2009 ("*the Makhado Ordinance*") must be complied with.

[89] In the *Maccsand* judgment the court interpreted this aspect as meaning that –

> "*If the land owner wants to use the land for a purpose not permitted in terms of the zoning scheme or regulations, she or he must apply to the municipality for re-zoning or for a use departure.*"[37]

[90] In our present matter the respondent contended that the applicants did not comply with or respect the Makhado Land Use Scheme, 2009, consequently invalidating their prospecting ambitions. The applicants argued to the contrary.

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[37] *Maccsand (supra)* at para [17].

[91] The Makhado Land Use Scheme, 2009 was issued in terms of the Town Planning and Township Ordinance, 15 of 1986.

[92] The respondent maintains that the applicant have failed to comply with the Makhado zoning requirements. It contends further that the farm Lukin is zoned for agriculture and as such prospecting operations may not legally be conducted there. The above boils down to the following: The farm Lukin is primarily zoned for agriculture : The above, read with clauses 9.1 and 9.1 of the Scheme does not allow for prospecting activities. The respondent further contended that there is no "*consent use*" or secondary land use right granted in respect of this farm. As a consequence, so argued the respondent, the effect of the declarator sought by the applicant is a contravention of the law.

[93] It is not in dispute that the Makhado Land Use Scheme, 2009 is applicable in the area of the Makhado Local Municipality. The farm Lukin is located within the jurisdiction of the Makhado Local Municipality. It is also not in dispute that the farm Lukin is zoned "*Agricultural*", being Use 14 in terms of the Scheme.

[94] It is consequently not in dispute that generally, in terms of the Scheme, land may only be used in accordance with its approved land use zone as determined in the Land Use Scheme.

[95] The fact of the matter remains : the prospecting operations on the farm Lukin fall outside of a proclaimed township, leading to the applicant's contention that rather than prospecting being prohibited outright, such activities are taken as being generally permitted by the Makhado Ordinance or Scheme.

[96] On a proper construction of the Scheme, although it does not mention "*prospecting operations*" expressly, it also does not exclude same expressly. I agree with the applicants' contention and submission that while the definition "*Agricultural Use*" in the Scheme does not expressly include prospecting as a permitted land use, it cannot by any means be interpreted as not being permitted. The Scheme seems to be permanently exempting prospecting according to my reading thereof.

[97] Clause 25 of the Scheme under the heading "*Consent for Specific Purposes*" provides as follows:

> "*Without prejudice to any powers of the local municipality derived from any law, or the remainder of this Scheme, nothing in the foregoing provisions of this Scheme shall be construed as prohibiting or restricting the following:*
>
> *25.1 the exploitation of minerals on any land not included in a proclaimed township;*
>
> *25.2 the letting of a dwelling unit for occupancy for only one family: and*
>
> *25.3 the letting of no more than two rooms of a dwelling.*"

[98] Since the farm Lukin does not fall within a proclaimed township, there is thus no bar to prospecting or mining work taking place thereon.

[99] The respondent's interpretation of the above quote (clause 25 of the Scheme) is that on a proper construction, clause 25 is not concerned with primary land use rights, but with secondary land use rights. The upshot of their interpretation is that prospecting is not permitted on the farm.

[100] This calls for the deployment of the rules and canons of interpretation of statutes. The plainness of the words and language used in the Scheme in my view do not tend themselves to the construction contended for by the respondent. Section 25.1 of the Scheme is couched in very wide terms. Normally, the use of such wide and open language without qualification indicates that no restriction or qualification was intended.

[101] The "*Scheme*" as defined therein refers to the whole of the Scheme. The words, "... *nothing in the foregoing provisions of the Scheme* ..." is thus a reference to all the provisions of the Scheme which precede clause 25, and not simply the portion thereof pertaining to consent use, as the respondent has argued. It is also interesting to note that the Land Use Table contained in clause 10 (Part VI) of the Scheme is also included among those provisions of the Scheme that precede clause 25.

[102] By virtue of its language, clause 25 is there to ensure that mining, exploration, which includes prospecting is not interfered with as long as it takes place outside of an established township. "*Township*" in the Scheme is defined as –

> "*a settlement area which was planned and established in terms of ... the Town Planning and Township Ordinance, 1986 and for which a township general plan was approved and township register opened in the Deeds Registry Office.*"

[103] Section 21 of the Ordinance excludes from the ambit of municipal town planning both "*proclaimed land*" and "*areas on which prospecting and mining operations are being carried out*". (my emphasis). This in my view reinforces the perception and interpretation that the preparation of town planning schemes alleviates possible or future interference with mining, and by implication, exploratory processes preceding full-scale mining like prospecting.

[104] The concept, "*proclaimed land*" disappeared from the statute book with the repeal in its entirety of the Mining Rights Act, 1967. However, it is my considered view and finding that clause 25 of the Scheme is designed to have or achieve the same situation whereby in all areas outside an established or proclaimed township, prospecting activities may be carried out without there being a specific land use designation in the Land Use Table.

[105] Lest there be any doubt about my finding, the ordinary meaning of the word "*exploit*" in the phrase "*exploitation of minerals*" in clause 25 means "*To work (a mine, etc; to turn to industrial account (natural resources); to utilise for one's own ends*".[38] The activity of prospecting for minerals falls within the set meanings of "*exploitation of minerals*" as prospecting by its very nature is an activity designed to make use of and turn the minerals found to account.

[106] Another aspect flying in the face of the respondent's contention is that special, written and temporary consent provisions relating to consent use end with clause 24. Clause 25 is not a special, written or temporary consent provision. Neither is clause 26. It would appear that the sole premise for the respondent's contention is the fact that clause 25 falls within Part VI of the Scheme. However, it is my finding that the content and meaning of clause 25 demonstrates to the contrary.

[107] Furthermore, the term "*consent use*" is defined in the Scheme to mean the consent of the local municipality in terms of the Land Use Table read in conjunction with clauses 21, 22 and 23. The fact that clause 25 is not included among the above clauses is revealing of the fact that clause 25 do not constitute secondary land use rights which are obtained by way of a further permission or consent which has to be applied for and as such do not constitute a consent use.

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[38] Oxford English Dictionary, 2nd Edition.

[108] When one looks at the content of Part VI of the Scheme another scenario unfolds. The heading for this part of the Scheme is "*Special, Written and Temporary Consent of the Local Municipality*". It is made up of clauses 20 to 27 of the Scheme. Where consent is required, a written application must be made to the Municipality. Clause 20 simply stipulates those aspects which require consideration by the decision-maker before any such special, written or temporary consent is granted. Clause 24 lays down certain standard conditions to which the granting of a special or written consent relating to the exercise of a household enterprise from a dwelling unit is subject. The specific and specified three different types of consent envisaged in the Scheme are set out in clauses 21, 22 and 23. They are the specific clauses regulating how consents should be sought from the Municipality to use land in a manner other than the primary land use rights which attach to the relevant zoning of the property in question. An application has thus to be made in order to procure additional consent for certain purposes as clearly set out in those three clauses and the local Municipality may grant or refuse such consent. By contrast, the content of clause 25 does not provide for any formal application process for consent whereby consent has to be sought. There is no need for an application to trigger an exemption or "*consent*" as envisaged. Each of the three consents for specific purposes referred to in clauses 25.1 to 25.3 is in the nature of a permanent consent which simply applies as a matter of course without the need for any request or application for such consent. It therefore is a permanent consent amounting to a permanent exemption.

[109] Clause 25.1 is in the nature of granting a permanent exemption for use of the land for mineral exploitation as long as it is outside a proclaimed township. Coal is also a mineral as envisaged by the applicable statutes and the Scheme.

[110] The fact that mineral exploitation has not been brought under the special or temporary land uses set out in or governed by clause 23 is proof enough that it is a permanent land use governed by clause 25.1. Clause 25.1 is a general exemption allowing for prospecting, mining and related activities.

[111] I therefore find that the "*consent*" contained in clause 25.1, which is really in the nature of a standing or permanent exemption, entitles the applicant to lawfully exploit the minerals on Lukin insofar as the Scheme is concerned.

LACK OF ANY SUITABLE ALTERNATIVE REMEDY

[112] The purpose of this application by the respondent is to gain access to the farm Lukin for purposes of prospecting. The respondents have barred their access to it. As they (applicants) cannot take the law into their own hands, they have gone the route of interdicting the respondent from interfering with such access.

[113] The respondent contended that there was an alternative remedy open to the applicants, being the invocation of section 54 of the MPRDA.

[114] Section 54 of the MPRDA is generally aimed at regulating and/or resolving disputes between landowners and mining or prospecting operator concerning compensation. Such compensation is limited to reasonable compensation to the landowner or lawful occupier of the land for such loss or damage as they might suffer as a result of the holder's prospecting operations.

[115] Normally the holder of a right would lodge a complaint that he is being prejudiced in his prospecting operations by the landowner's lack of co-operation. The Regional Manager would then apprise the landowner or occupier of the relevant provisions of the MPRDA being breached in terms of section 54(2) of the MPRDA.

[116] The above processes do not advance access. It is so that the landowner may advance grounds why he believes further access to the land is prejudicial to him. Section 54(3) only envisages that further procedures in terms of section 54(3) to 54(6) may be triggered where a conclusion is arrived that the owner/occupier is likely to suffer loss or damage. The above requires a subjective view by the landowner or occupier.

[117] Murphy J dealt with section 54 in *Joubert NO v Miranda Mining*[39] where among others the following was stated:

> *"The section deals with the compensation payable under certain circumstances ...*

[39] *Supra* at 83-84.

... From those provisions it is clear that the only topic for consultation is the question of compensation for loss or damage suffered or to be suffered as a consequence of the mining operations. Section 54 does not include a general provision that if the parties are unable to reach agreement on compensation that the consequences of that is that the mining operations should be suspended. That will only occur where the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the mining permit holder ..."

[118] The respondent has valiantly tried to resuscitate issues relative to compensation in these papers. However, they appear to have been after-thoughts that are geared at further keeping the applicants out of the farm and/or their prospecting operations.

[119] It is so that the longer this dispute lasts, the more time set for operations elapse. It is interesting to note that the respondent already have lined up, grandiose schemes of operating hospitality businesses and other activities while these proceedings grind along.

[120] Should the applicants succeed in this application, the time lost in prospecting should be factored into the order to be made.

CONCLUSION

[121] The respondent has premised its opposition to this application on a landowner's right in terms of section 25 of the Constitution of the RSA, 1996 relating to the protection against being arbitrarily deprived of one's property.

with concomitant considerations of adequate compensation should expropriation be the suitable way forward.

[122] What the applicant wants is to be allowed to carry on with its prospecting rights on the property but has been locked out.

[123] That Akkerland Boerdery owns the land in issue and is entitled to beneficial utilisation is not in dispute.

[124] The applicants applied for the renewal of their aliotted prospecting permit for a further three year period during January 2011. Under normal circumstances the permit would expire this year, i.e. 2014, possibly around the third quarter hereof. They have not done any prospecting work ever since save for a brief period when they were allowed to enter the property. Unfortunately their access was short-lived since the respondent locked them out immediately thereafter. The parties have played a cat-and-mouse game with each other since then.

[125] Section 18(5) of the MPRDA decrees that a prospecting right in respect of which an application for renewal has been lodged shall, despite its stated expiry date, remain in force until such time as such application has been granted or refused. As at the time of writing this judgment, I have no clue as to what decision had been taken regarding that application.

[126] The MPRDA confers on the holder of a prospecting right or permit the rights referred to in section 5 of the above Act, which include –

126.1 the right to enter the land to which the right relates together with such employees, plant(s), machinery or equipment as may be required for purposes of prospecting;[40]

126.2 the right to prospect her own account and to remove and dispose of any such mineral found during the course of prospecting;[41] and

126.3 the right to carry out any other activity incidental to prospecting.[42]

[127] After taking into account the viewpoints of both sides, checking on the applicable laws and factoring facts as dictated by probabilities and the circumstances, it is my view and finding that the applicants have made out a case for the grant of the prayers they sought. The respondent's points of dispute and defence did not withstand scrutiny.

[128] In the order that is to be issued, care must be exercised to ensure that the applicants' victory is not pyrrhic or hollow : they should be allowed maximum period allowable by law to do their prospecting work.

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[40] Section 5(3)(a).
[41] Section 5(3)(b) and (c).
[42] Section 5(3)(e).

[129] The respondent has adequate remedies to resort to in the event the applicant fails to perform its prospecting work according to plan or agreement.

[130] The parties, especially the respondent, should desist from shielding behind the veil of various individuals when necessary consultations are or should be embarked upon. It is my view that consultations in the course of operations such as these should be an ongoing process.

COSTS

[131] The applicant has asked for a costs order that should also include the costs consequent upon the employment of two counsel. The respondent asked for similar relief.

[132] I am persuaded that the complexity of this matter necessitated the employment of two counsel.

ORDER

[133] In the circumstances the following order is made:

133.1 The respondent is interdicted and restrained from refusing the applicant (Coal of Africa) access to the farm Lukin 643 MS, Administrative District Soutpansberg, Limpopo Province for purposes of conducting prospecting operations on that land

pursuant to prospecting right 4/2005 executed on 14 June 2006 and the subsequent renewal thereof;

133.2 The applicant is authorised –

133.2.1 to enter the farm Lukin 643 MS together with its employees and to bring onto the land any plant, machinery or equipment, and build, construct or lay down any surface or underground infrastructure which may be required for purposes of prospecting;

133.2.2 to carry out any other activity incidental to its prospecting operations.

133.3 The respondent is ordered to pay the costs of this application, which costs shall include the costs consequent or incidental to or on the employment of two counsel;

133.4 If the renewal of the prospecting permit for the farm Lukin has taken place in the meantime, the prospecting period would commence from the date of the handing down of this judgment;

133.5 If it has not yet been renewed, then the period will depend on such a renewal decision and if granted, the three year prospecting period should start from the date of notification of such renewal.

N F KGOMO
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH AND SOUTH GAUTENG
PRETORIA/JOHANNESBURG

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DATE OF HEARING	23 JULY 2013
DATE OF JUDGMENT	FEBRUARY 2014