IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

27/5/16

DATE SIGNATURE

27/5/2016

CASE NO: 55943/2014

In the matter between:

C S HENTIQ 1009 (PTY) LTD	Applicant
and	
MINISTER OF MINERAL RESOURCES OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
DIRECTOR GENERAL OF THE DEPARTMENT MINERAL RESOURCES	Second Respondent
REGIONAL MANAGER MPUMALANGA REGION DEPARTMENT OF MINERAL RESOURCES	Third Respondent
BOHLABA MINE (PTY) LIMITED	Fourth Respondent

JUDGMENT

MOTHLE J

INTRODUCTION

1. This is an application for review, launched by C S Hentiq 1009 (Pty) Ltd ("*Hentiq*"), against the Minister of Mineral Resources ("*the Minister*"), Director General of the Department of Mineral Resources ("*the DG*"), the Regional Manager Mpumalanga Region of the Department of Mineral Resources ("*the Regional Manager*") and Bohlaba Mine (Pty) Ltd ("*Bohlaba Mine*").

2. This review application is brought in terms of the provisions of **The Promotion of Administrative Justice Act, 3 of 2000** ("*PAJA*"). Hentiq seeks as relief the following:

2.1 A review and setting aside on the merits, the decision by the Regional Manager to decline the applications for prospecting rights;

2.2 Declare that Hentiq had exhausted internal appeal remedies before launching this application; *alternatively*

2.3 That in the event this Court finds that the internal remedies have not been exhausted, grant Hentiq exemption from exhausting such internal remedies;

2.4 Order the Regional Manager to grant Hentiq such prospecting rights as it has applied for by entering this in the register as required by the relevant legislation; and

2.5 A cost order against the Respondents who oppose this application.

3. No relief is sought against Bohlaba Mine.

4. The State Attorney is acting on behalf of the Minister, the DG and the Regional Manager *("collectively referred to in this judgment as the Respondents").* The Respondents oppose this application, firstly on the grounds that Hentiq had not exhausted its internal remedies in terms of the applicable legislation and in the alternative that Hentiq should not be granted exemption from exhausting such internal remedies.

BACKGROUND

5. Towards the end of 2012 specifically on 8 November 2012, Hentiq applied to the office of the Regional Manager for prospecting right (*"the first prospecting right application"*), for manganese, iron and gold ore on the farms Veghund R/E 440, Berghoek 751, Boschhoek 442, Frischewaagt 437 (Portion 2 and 3) Grenspad 433 and Diepgesit 434, all located in the Mpumalanga Province.

6. Later that month on 29 November 2012, Hentiq submitted to the same office, another application *(" the second prospecting right application")* for manganese, iron and gold ore on the farms Kalk-kloof 706 and Grootkop 617 also in the Mpumalanga Province.

7. What followed is a chronology of events which are germane to this application. The time frames and processes which were followed in dealing with the two applications for prospecting rights are central to the issues between the parties. I will therefore refer to them as they appeared in the heads of argument of Hentiq, as follows:

"C. *On 13 March 2013 the 3rd Respondent* (the Regional Manager) *rejected the applications in a rejection letter but only referred to manganese (and not iron ore and gold ore as well).*

D. *On 3 April 2013 the Applicant filed an appeal with the 2nd Respondent against the decision of the "sic" 2nd Respondent.* (The latter should read "3rd Respondent")

E. *On 4 April 2013 the 2nd Respondent's office acknowledged receipt of the appeal.*

F. *On 29 May 2013 the Applicants requested feedback from the Respondents relating to the appeal.*

G. *On 31 July 2013 the 3rd Respondent issued a second rejection letter relating to the application for prospecting rights. (This letter only referred to four of the six farms on which application were made).*

H. *On 21 August 2013 and 9 and 20 September 2013 the Applicant attempted to follow up with the 2nd Respondent relating to the confusion of the 1st and 2nd rejection letters. No proper answer was ever received.*

I. *On 21 August 2013 (for the sake of meticulousness and to protect its interest), the Applicant filed a second appeal against the second rejection letter.*

J. *On 15 October 2013 the Applicant wrote a formal letter to request finalisation of the appeals. An application to compel was brought under case number 58843/2013, after which the 3rd Respondent complied by replying to the appeals, giving reasons for his administrative decision and despatching the reasons to the Applicant.*

K. *On 6 November 2013 the Second Respondent provided the Applicant with the 3rd Respondent's reasons for its decision, and requested the Applicant to write a detailed response thereto.*

L. *On 26 November 2013 the Applicant responded to the 3rd Respondent's reasons for rejecting the applications.*

M. *The 2nd Respondent then failed to make a ruling within the 30-day period as prescribed by Regulation 74(9) of the MPRDA's regulations.*

N. *On 17 February 2014 the Applicant issued a final letter of demand to the 2nd Respondent to conclude the*

appeals, and received a reply stating that the appeals have been outsourced due to capacity constraints.

O. *The Applicant brought a second High Court application to compel the Respondents to finalise the appeals. A Court order was issued by the Court on 28 May 2014, ordering that the 2nd Respondents take a decision and give reasons.*

P. *The Court order was served on the Respondents on 12 June 2014.*

Q. *On 8 August 2014 the 2nd Respondent issued a letter, which letter withdrew the 3rd Respondent's decisions and referred them back to the 3rd Respondent for reconsideration (without a basis for such)."*

8. At the hearing of this application, counsel for the Respondents drew the Court's attention to a letter dated 11 May 2015 which was sent to Hentiq, dealing with the first application for prospecting rights. I will refer to the first two paragraphs of that letter which reads as follows:

"*1. Kindly be informed that your application for a prospecting right was reassessed and a decision has been take by the Regional Manager to accept your*

application in respect of the farm Grootkop 617 JT for manganese ore in terms of Section 16 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).

2. *Further be informed that the farm Kalk-kloof 706 JT has been excluded from your application as there is an existing prospecting right held by another party for the same minerals as contemplated in terms of Section 16(2)(b) of the Act."*

THE LAW

9. The consideration of the applications for a prospecting right is dealt with in terms of the provisions of **Section 16 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002 or MPRDA).** In particular in respect of the issues raised in this application, the regulations promulgated in terms of the MPRDA as they appear in the Government Gazette of 23 April 2004 are also applicable.

10. As already stated, this review application is launched in terms of PAJA.

INTERNAL REMEDIES

11. Hentiq makes the allegation that in strict compliance with the statutory requirements, the consideration of the appeals should have taken 72 days. However, the total process actually took 489 days before this application was launched.

12. In support of this allegation, Hentiq makes the following contentions:

12.1 The Regional Manager should have accepted or rejected the first application for prospecting right on or about 22 November 2012 (being 14 days of submission as provided for in section 16 (3) of the MPRDA), but did so only on 13 March 2013 (4 months late);

12.2 The Regional Manager should have accepted or rejected the second application for prospecting right on or about 13 December 2012, but did so only on 31 July 2013 (7 months late);

12.3 The Regional Manager should have provided its reply to the appeals and its reasons for the rejection of the applications on or about 2 May 2013 (Regulation 74(5)), but did so only on 30

October 2013 (6 months late). A High Court application had to be brought against the Regional Manager and the DG before they submitted reasons for the rejection of the applications;

12.4 The DG should have taken a decision to finalise the appeals after receipt of Hentiq's comments on or about 15 January 2014 (Regulation 74(9)), but did so only on 8 August 2014 (7 months late);

12.5 A second High Court application had to be brought to compel the DG to finalise the appeals. On 28 May 2014, the Court ordered the DG to comply with its order within 30 days (i.e. by 9 July 2014, but only did so on 8 August 2014 (1 month late in compliance with the Court order).

12.6 The DG did not comply with the Court order as it did not take any of the steps set out in the order. The DG also did not give reasons for his decision, as ordered in the Court order.

13. The Respondents in their answer to Hentiq's contention, refers the Court to a number of decisions[1] wherein the Courts have

[1] . Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC),; Van den Heever v Minister of Minerals and Energy and Others (1252/2010 [2012] (4 May 2012 and Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others 2014 (5) SA 138 (CC).

emphasised the need for parties to exhaust internal remedies before they resort to the Courts for appropriate relief. The Respondents, however, do not deal adequately with the delays as made out in the case by Hentiq. The explanation provided is that the delay occurred due to heavy work-load of numerous applications, notwithstanding the assertion that some of the work-load has been out-sourced.

14. It is against this background chronology of events that Hentiq pleads for exemption for their failure to appeal to the Minister, in compliance with the need to exhaust internal remedies.

15. Section 7 of PAJA provides that in launching a review application, a party must ensure that it has to exhaust the internal remedies before approaching Court for relief. The provisions of this section are peremptory. However, the section does empower the Court, in exceptional circumstances, to grant exemption from non-compliance with the need to exhaust internal remedies.

16. The MPRDA also provides for internal procedures that need to be complied with in exhausting internal remedies. Section 96 of the Act provides that a party aggrieved by any administrative

decision may appeal within 30 days of becoming aware of such decision. The section further provides that in the case of a decision by the Regional Manager, this is appealable to the Director General and in the case of a decision by the Director General; such is applicable to the Minister.

17. The time frames within which appeals must be launched or may be considered are stated in detail in **Chapter 3, Regulation 74 of the MPRD Regulations, promulgated in terms of section 107 (1) (c) of the Act, as published in Government Notice R527 in Government Gazette of 23 April 2004 as amended.**

18. In terms of Regulation 74, the prescribed duration for consideration of each stage of an appeal is 21 days. In addition, section 6 of the MRPDA provides that subject to the PAJA, "*any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.*"

EVALUATION OF EVIDENCE

19. It is trite that a party not satisfied with an administrative decision, has to exhaust internal remedies where these are provided for in

terms of the law. It is only in exceptional circumstances that exemption for non-compliance with this principle may be granted in appropriate cases and on application to the Court.

20. It is common cause that Hentiq did not challenge the decision of the DG in referring the matter back to the Regional Manager, by launching an appeal to the Minister. This is the Respondents' contention. There are, however, two difficulties with this contention. In the first instance, in considering the appeal from the Regional Manager, the DG did not confirm or reject the decision of the Manager but rather referred the matter back to the Regional Manager.

21. The Act is silent on instances such as this, where the decision of the DG does not bring finality to the application. The question which arises in this instance is whether the DG's conduct in referring the appeal back to the Regional Manager, is an *"administrative decision"* as contemplated in section 96 (b) of the Act and thus appealable to the Minister. It seems to me that in considering the tenor of the Act, the authority to issue a prospecting and other right, vests in the Minister. Section 8 of the Act provides that the Regional Manager, in receiving and considering the applications for various mineral rights, exercises delegated or assigned functions. The decision to accept or reject

an application concerning these rights ultimately lies with the Minister. For that reason, the DG's decision to refer the appeal to the Regional Manager is a decision appealable to the Minister. Hentiq should have lodged an appeal with the Minister. It will therefore not be correct to grant exemption to Hentiq from appealing the DG's decision to the Minister

22. In the second instance, both the Regional Manager and the DG took considerable time in dealing with the applications and appeals, well beyond the time frames specifically provided for in Regulations 74, and generally, the 180 days provided for in PAJA.

23. The explanation provided by the Respondents is that due to the volume of applications involved, the Respondents could not give timeous consideration to all the applications that were launched. This Court is unable to understand why the Minister should promulgate Regulations providing for time frames which are not possible to comply with. Either the time frames have to be revisited or sufficient capacity be made available, to enable compliance with the legal requirements in terms of the Act and Regulations.

CONCLUSION AND FINDING.

24. This application has come before Court in 2016. That is almost 4 years after Hentiq had launched its first and second applications for prospecting rights. Between the time when the applications were launched in November 2012 and the last letter written to Hentiq dated 11 May 2015, a period of 3 years had lapsed while the applications for prospecting rights are being considered. There have been two Court interventions which seem to have had no effect. The delay is unreasonable, when one considers the provisions of section 6 of the MPRDA. This conduct is unsatisfactory and should, in my view, attract a cost order against the Respondents.

25. This Court thus finds that the decision by the DG to refer the appeals back to the Regional Manager for reconsideration, added to this unnecessary and inordinate delay. This decision, in so far as it affects the consideration of the rejected portions of the applications, should be reviewed and set aside.

26. This Court accepts that prior to the hearing of this application and through the letter of 11 May 2015; the Regional Manager had already taken a decision on one the applications. The Regional Manager has granted some of the prospecting rights

applied for by Hentiq. Where any prospecting right application has been rejected, *alternatively* prospecting right licence in certain farms has been rejected; the DG should then reconsider the appeals already submitted in respect of the outstanding prospecting right application and decide, providing written reasons for his decision. This decision of the DG on these appeals must be made within 21 days of the date of this order. Upon receipt of the DG's decision, Hentiq may appeal such decision to the Minister.

27. Having regard to the conspectus of the evidence before this Court, I am of the view therefore that this application should partially succeed and that the decision of the DG referring the appeals back to the Regional Manager insofar as the prospecting rights have not been granted, should be reviewed and set aside. Hentiq failed to appeal the DG's decision or non-decision to the Minister and there is thus no justification to grant an exemption.

28. The Respondents should be mulcted with costs for the inordinate and unreasonable delay in dealing with the applications for prospecting rights.

29. In the premises I make the following Order:

1. The application partially succeeds;

2. The application for exemption for non-compliance with the need to exhaust internal remedies is refused;

3. The decision by the Director General referring the appeals from the Regional Manager, back to the Regional Manager, in so far as it concerns the applications for prospecting rights which have been rejected or not yet considered, is hereby reviewed and set aside;

4. The Director General is ordered to consider the appeals launched by Hentiq against the decision of the Regional Manager concerning the rejected applications for prospecting rights;

5. The Director General should consider and decide on these appeals within 21 days from the date of this order, giving reasons in writing for his decision.

6. After 21 days Hentiq may further appeal the Director General's decision (or non-decision) to the Minister for his consideration and final decision, before resorting to Court.

7. The Respondents are ordered to pay the Applicant the costs of this application.

SP MOTHLE
Judge of the High Court of South Africa
Gauteng Division

Pretoria.

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