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

2016/06/24
DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

24/6/16

Case no. 42484/2016

IN THE MATTER BETWEEN:

TAISOAR CONSULTING AND PROJECTS (PTY)LTD	**FIRST APPLICANT**
and	
CANYON RESOURCES (PTY) LTD	**FIRST RESPONDENT**
ANTOBIZ (PTY) LTD	**SECOND RESPONDENT**
MINISTER OF MINERAL RESOURCES	**THIRD RESPONDENT**
DIRECTOR –GENERAL,	
DEPARTMENT OF MINERAL RESOURCES	**FOURTH RESPONDENT**

And :

CASE NO:28668\2016

CANYON RESOURCES (PTY) LTD	**FIRST APPELLANT**
ANTOBIZ (PTY) LTD	**SECOND APPELLANT**
MINISTER OF MINERAL RESOURCES	**THIRD APPELLANT**
DIRECTOR –GENERAL,	

DEPARTMENT OF MINERAL RESOURCES **FOURTH APPELLANT**

VERSUS

MINISTER OF MINERAL RESOURCES **RESPONDENT**

In Re: INTERLOCUTARY APPLICATION

JUDGMENT

LEGODI J;

HEARD ON: 7 June 2016

JUDGMENT HANDED DOWN ON: 24 June 2016

[1.] A court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to finding of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself as well as the identity of the decision maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved but, will not dictate which route should be followed to achieve that goal. In such circumstances, a court should pay due respect to the route selected by the decision maker[1] Unless exceptional circumstances are found by a court to exist on application by the affected person, PAJA, which has broad scope and applies to a wide range of administrative actions, requires that available internal remedies be enhanced prior to judicial review of an administrative action.[2]

[2] This case is about the judicial review of a decision taken on 22 April 2016 by the Acting Director General of the Department of Mineral Resources in terms of which an

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[1] Bato Star Fishing)Pty)Ltd V Minister of Environmental Affairs and Tourism and others 2004(4) SA 327 (CC) para 48

[2] See Koyabe and Others v Minister of Home Affairs and Others 2010 (4) SA 327 CC at para 34.

application by Canyon Resources (Pty) Ltd and Antobiz (Pty) Ltd for the renewal of mining right was refused.

[3] The application was brought as an interlocutory application to the main application by Canyon and Antobiz under case number 28668\2016 in terms of which they are inter alia, asking for a declaratory order that mining operating right granted previously, expires or expired on 16 May 2016 and not 16 May 2015 and that the regional Manager of the Department of Mineral Resources be directed to execute an amendment of Clause 3.1 of the mining right under which they have been operating by substituting the words "Six (6) years" therein to read "Seven (7) years".

[4] The present interlocutory application was brought on an urgent basis to be heard together with an urgent application brought by Tiasor Consulting and Projects (Pty) Ltd in terms of which a relief is sought as follows:

> *"1. Dispensing with the rule to service and time periods and disposing of this application as one of urgency in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.*
>
> *2. Directing that paragraph 2.3 of the provisional order under the above number be suspended.*
>
> *3. Interdicting the First respondents (Canyon Resources (Pty) Ltd from carrying out coal mining and related activities on portion 10 and 11 of the farm Schoongezicht 225 IR in the district of Delmas, Mpumalanga, pending the finalization of the main application under case number 28668\16.*
>
> *4. Interdicting the First Respondent from carrying out coal mining and related activities on portion 10 and 11 of the farm Schoongezicht 225 IR in the district of Delmas, Mpumalanga pending the outcome of the First Applicant's Phalaborwa Mining Right renewal application with reference number MP 30\5/1/2/2/244MR.*
>
> *5. Directing the Director General to accelerate the processing of the appeal lodged by the Applicant against the acceptance of the first Respondent Mining Right renewal application.*
>
> *6. Should the Director General grant the appeal and decline to approve the First Respondents Mining Right renewal application, an order directing the Regional Manager to accelerate the processing of the Applicants Prospecting Right and Mining Permit applications?*

7. That the First and Second Respondents is ordered to pay the costs of this application, on attorneys and own client scale.

8. Granting to the applicant further and\or alternative relief."

[5] I decided to deal with both applications as urgent. I decided to hear first counsel in the interlocutory application, in terms of which a relief is sought as follows:

"1. That in terms of Rule 6 (12) of the Uniform Rules of Court ("Rules") the Court dispenses with the forms and services provided for in the Rules and disposes of the relief sought in this notice of motion on an urgent basis;

2. That, in terms of section 7(2) (c) of the Promotion of Administrative Justice Act, 2000, the first applicant is exempted from its obligation to exhaust its internal remedies under section 96(1) of the MPRDA.

3. That the decision of the second respondent to refuse applicant's application for the renewal of its mining right for coal in respect of the property known as Portion 10 and 11 of the farm Schoongezicht 225 IR situated in the district of Delmas, Mpumalanga be reviewed and set aside;

4. That the second respondent is ordered to pay the costs of this application de bonis propriis on attorney and client scale signed on this the third day of June 2016.

[6] Just as a brief background, on 15 December 2008 what is referred to as Phalanndwa mining right in favour of Umthombo Resources (Pty)Ltd (now Canyon Resources (Pty) Ltd, was granted by the Director of the Department of Mineral Resources in respect Portion 10 and 11 of the farm Schoongezicht 225 IR situated in the district of Delmas, Mpumalanga. The dispute which is the subject of the dispute in the main application under case number 28668\2016 is whether the mining right aforesaid expired on16 May 2015 or 16 May 2016, Canyon contending that it expired only on 16 May 2016, whilst Taisoar contends that it expired during May 2015 and that the latter was therefore entitled to apply for prospecting and mining rights which applications were accepted by the regional manager as contemplated in section 16(2), 22(2) or 27(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act). It is the correctness or otherwise of the acceptance of the applications which forms part of the dispute in the main application.

[7] Coming back to the interlocutory application, internal remedies are designed to provide immediate and cost effective relief, giving the executive the opportunity to utilize its own mechanism, rectifying irregularity first if any before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost effective internal remedies cannot be gainsaid.[3] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanism undermines the authority of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a value range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilize their own fair procedures is crucial in administrative action.[4]

[8] Such 'own fair procedures,' in the administrative action, are founded in section 96 of the Act and for its importance, is quoted in its entirety:

> "*96 Internal appeal process and access to courts.*
>
> *(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to- (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.*
>
> *(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.*

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[3] See Kogabe supa at para 35.
[4] Kogase supra at para 36

(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.

[9] The duty to exhaust internal remedies is therefore a valuable necessary requirement in our law. However, that requirement should not rigidly be imposed, nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognised this need for flexibility, acknowledging in section 7 (2) (c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7 (2) of PAJA, the requirement that an individual exhausts internal remedies is therefore not absolute.[5] Section 7 (2) of PAJA provides:

"(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 30 remedy if the court or tribunal deems it in the interest of justice."

[10] As I said, the interlocutory application by Canyon is a request to be exempted from exhausting internal remedies in terms of section 7 of PAJA read with section 96 of the Act. For this, Canyon is required to show not only the existence of exceptional circumstances, but also that it will be in the interest of justice to review the decision of 22 April 2016 by the Acting Director General. The decision is stated as follows:

> *"1. This is to inform you that after careful consideration of your application to mine Coal in respect of the abovementioned property, the Acting Director-General: Department of Mineral resources, by virtue of powers delegated to me in terms of Section 103 (1) of the Mineral and Petroleum resources Development*

[5] See Koyabe supra para 38

Act 2002 (Act 28 of 2002) as amended have decided to refuse your application for a renewal of a mining right in terms of section 24(3) (a) of the Act.

2. The reasons for the refusal are as follows:

2.1 Failure to comply with section 24(1) (b) of the Act read together with section 24 (3) (a) in that the application for renewal of a mining right was not submitted in a prescribed manner in that the application was submitted after the expiry date of the mining right.

2.2 failure to comply with section 25(2)(c) of the Act in that the mining operations are not carried out in accordance with the mining work program.

2.3 Failure to meet the requirements of regulation 46 of the Act, therefore the renewal of the mining right should not be supported:

[11] Internal administrative remedies may require specialised knowledge which may be of a technical and or practical nature. The same holds true for fact –intensive cases where administrators have easier access to relevant facts and information. Judicial review can only benefit from full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact –finding and hence require a fully developed factual record.[6] (My emphasis).

[12] I cannot agree more with the statement above. Looking at the reason for the refusal of the renewal, only the Minister in the course of considering the internal appeal will be better placed to deal with the issues raised in the letter of refusal. He or she will have an easy access to information from the Director and documentation upon which the decision of refusal for renewal in the present case is based. The difficulty in the present case is that the court is required to take a decision to exempt Canyon from appealing in terms of section 96 of the Act and to review and set aside the decision without sufficient information, for example, no record of the decision. To seek to review the decision at this stage, would amount to usurping the Minister's powers and would amount to haste taking of a decision without sufficient information. Just on this ground alone, the interlocutory is destined to fail.

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[6] See Koyabe supra at para 37

[13] What constitutes exceptional circumstances for exemption to exhaust internal remedies will depend on the facts of each case, and the nature of the administrative action at issue. Thus, where internal remedy would not be effective or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too is the case where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[7]

[14] I am unable to see how the internal remedies created in section 96 can be said not to be effective or how a pursuit thereof can be futile. As I said, the Minister would be better placed to deal with the matter on internal appeal than this court on review. How can an exhaustion of internal remedies be futile when the lodging of the internal appeal can actually expedite the process at less cost?

[15] Counsel for Canyon was asked to direct this court to the exceptional circumstances articulated in its founding papers. I was told the circumstances are found in paragraph 12 which reads:

"*12. This matter is extremely urgent for the following reasons-*

12.1 As stated in the Main Application, the First Applicant currently employs at least 166 people at the Phalanndwa mine either as employee's and\or through contractors

12.2 The First Applicant has expended more than R199 million in building this mine.

12.3 il this Refusal Decision is not set aside, the applicant will suffer irreparable harm as the Phalanndwa mine will have to be closed and all employees and contractors retrenched and\or laid off.

[16] These issues were meant to deal with urgency, but insofar as they were intended to also prove exceptional circumstances not to resort to the internal process, I am unable to see in what context. The Minister should be able to deal with all these issues in considering the merits of the internal appeal. There is therefore no merit not to exhaust internal remedies contemplated in section 96 of the Act.

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[7] See Kayobe supra at para 39

[17] In the alternative, counsel for Canyon contended that the operation of the decision of 22 April 2016 must be suspended pending internal appeal process in terms of section 96. That suspension is also regulated under section 96. At the risk of repetition, in terms of subsection (2) any appeal in terms of subsection (1) does not suspend the operation of the administrative decision, unless it is suspended by the Director General or Minister as the case may be. So, until this process is exhausted, it will be pre-mature of this court to entertain any relief for the suspension of the decision of 22 April 2016. It is up to the Canyon whether it wishes the Director General to consider its request for suspension of the decision. Therefore, this issue can only be determined by this court once a decision for suspension has been taken and internal remedies exhausted.

[18] I now turn to deal with the urgent application by Taisoar, the relief of which is quoted in paragraph 4 of this judgment. Two of the relief in the Taisoar's notice of motion in my view, have failed by the wayside.

[19] Paragraph 2.3 of the provisional order, ought to be discharged. It reads as follows:

> *"2.3 The state respondents do not finally decide the application for the renewal of the mining right ("Phalanndwa Mining Right") held by the first applicant in respect of the Phalanndwa Mining Area".*
>
> This order was made by Basson J on the 26 April 2016. The order was clearly made by mistake because as on 26 April 2016 the Acting Director had already taken a decision on 22 April 2016 quoted in paragraph 10 of this judgment refusing Canyon's application for the renewal of the mining right. This too was conceded by Counsel on behalf of Canyon. The horse had already bolted when the order was made on 26 April 2016. For this reason, it ought to be discharged.

[20] Prayer 5 of the notice of motion quoted in paragraph 4 above is for an order directing the Director General to accelerate the processing of the appeal lodged by Taisoar against the acceptance of Canyon's application for renewal of the mining right. This too had fallen by the wayside because the renewal application has been dealt with by refusing to renew the application.

[21] Regarding prayer 6, this court is reluctant to make such an order. It should be left up to the Director General or State respondents as to when to consider the application by Taisoar for prospecting and mining rights. It is also up to Taisoar to approach the state respondents to expedite the application. Whether that is feasible before finalisation of internal remedies available to the Canyon and Antobiz is not for this court to decide.

[22] It is the interdict relief in prayers 2 and 3 of the notice of motion which counsel for Taisoar strongly argued. The argument was that the interdict must be granted because Canyon has no valid mining right to continue with its operation on the mine as such right had expired in May 2015. As I said earlier, this is the subject of a dispute in the main application. The nature of the relief sought pending the finalization of the main application by Canyon, will in my view, have final effect in that Canyon in the event it was to be successful with its application may find it difficult to recoup its loss.

[23] The essence of Canyon's main application is that its mining right did not expire in May 2015 but in May 2016 and that it applied for the renewal thereof in July 2015. Thus, it had the effect that the provisions of section 25 (1) kicked in. In other words, as a holder of mining right and subject to section 24, Canyon has exclusive right to apply for and be granted renewal of the mining right in respect of the mineral and mining area in question.[8]

[24] The Minister is obliged to grant the renewal on mining right, provided the applicant for such a renewal complied with subsections (1) and (2) and if the holder of the mining right has also complied with the requirements as envisaged in paragraph (a) to (d) of subsection (3).[9] I do not find it necessary to deal with the details. It suffices to mention that a properly lodged application for renewal of mining right, confers exclusive rights on the holder of a mining right to apply for renewal and be granted such a renewal. So, the issue to be ventilated in the main application is whether such a right has been forfeited by virtue of the fact that at time the application for renewal was lodged, canyon was no longer the holder of any such mining right as it allegedly expired in May 2015, an issue which is contested by Canyon.

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[8] Subsection (1) of section 25

[9] See subsection (3) of section 24

[25] For two reasons Canyon makes the contention, which is likely to turn into a fierce debate during the hearing of the main application. First, that the expiry of its mining right in May 2016 is confirmed in the mining right agreement signed by all parties and clause 3.1 reads:

> *"3.1 The right shall commence on 27th May 2009 and, unless cancelled or suspended in terms of this clause 13 of the right and or section 47 of the Act, will continue to be enforce for the period of six (6) years ending on 26 May 2016."*

[26] However, "2016" was changed to "2015" by hand entry made by notary Mr Mangena who is a signatory to the mining right agreement signed on 27 May 2009 and also signed by the Minister or on his behalf and the holder of the mining right.

[27] In a document under letterhead of Canyon and referred to as "SOCIAL AND LABOUR PLAN ACTIVITIES", and alleged to have been signed by all parties to the agreement, under paragraph 3.4.3.1 thereof dealing with "Structure" the life of the resource from start to completion is indicated as '6 years at the given rate of depletion'. The 'production timeline' is indicated as 'year 2 to 7' and 'Total coal production life of mine' production period is indicated as being from 'year 1 to year 7' and 'removal parting mined at 7 years'. Based on all of the above, it was contended on behalf of Canyon that there was a case to argue in the main application. That in my view, appears to be so and for this I am not persuaded to grant relief as sought in prayers 3 and 4 of Taisoar pending finalization of the main application.

[28] I should not be understood as giving Canyon licence or right to continue or not to continue with its mining activities. The fact of the matter is that it does not currently have a mining right in force, such right having expired during May 2015 or 2016 and the decision to renew the mining right having been refused on 22 April 2016.

[29] Furthermore, it must be remembered that a mining right in respect of which an application for renewal has been lodged shall despite its expiry date remain in force, until such time as such application is granted or refused.[10] This provision has fallen by

[10] Subsection (5) of section 24

the wayside as the application for renewal has since been refused. Any person is guilty of an offence if he or she contravenes or fails to comply with section 5A.[11]

[30] No person may mine and produce any mineral without mining right.[12] Canyon and Antobiz should be cognisance of this, bearing in mind that any authorised person without a warrant may enter any place where mining is being conducted in order to inspect any activity, process or operation carried out in or upon the area or place in question[13] and may require the holder of right, if any or any person carrying out or in charge of the carrying out such activities, process or operations to produce any book, record, statement or other document for inspection.[14] So, such document to be produced for inspection should include a document proving the existence of mining right for activities performed thereon.

[31] If an authorised person during the inspection finds that a contravention or suspected contravention or a failure to comply with any provisions of the Act has occurred or is occurring on the mining area or place, other mining operations are being conducted such a person may order the person in charge of such area, any person carrying out of such activities or operations or the manager, official, employee or agent of such holder or person, to take immediate rectifying steps[15] or order that mining, production or prospecting operations or part thereof be suspended or terminated and give such other instructions in connection therewith as may be necessary.[16]

[32] It is therefore incumbent on the Minister, Director General and or Regional Manager whether they bring to a stop the activities of the Canyon and Antobiz as envisaged in section 92 and 93 of the Act. They would be better placed to know how to manage the repercussions that might be brought by any suspension or termination of the mining activities of Canyon. Similarly, Taisoar should be at liberty to approach the state respondents to act in terms of the provisions of section 92 and 93. Taisoar's application ought to fail.

[33] Consequently an order is hereby made as follows:

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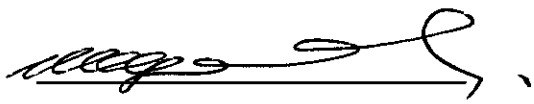
[11] Section 98 (a) (i)
[12] Section 5A (b)
[13] Section 92(a)
[14] Section 92(b)
[15] Section 93(1) (a) (i)
[16] Section 93(1)(b) (ii)

[33.1] Paragraph 2.3 of the interim order and quoted in paragraph 19 of this judgment is hereby discharged.

[33.2] Taisoar Consulting and Projects (Pty) Ltd's other reliefs sought in its notice of motion are hereby dismissed.

[33.3] Canyon Resources (Pty) Ltd and Antobiz (Pty) Ltd's interlocutory application is hereby dismissed.

[33.4] Each party to pay its own costs.



JUDGE OF THE HIGH COURT

MF LEGODI

Instructed for Applicant : VAN DER MERWE VAN DEN BERG ATTORNEY

COUNCEL FOR APPLICANT :I E TSHOMA

Instructed for 1ST & 2ND Respondent :STATE ATTORNEY

COUNCEL FOR RESPONDENT :LEON J BEKKER

Instructed dir 4th Respondent :B RIKHOTSO ATTORNEYS

COUNCEL FOR 4TH RESPONDENT : L BEKKER