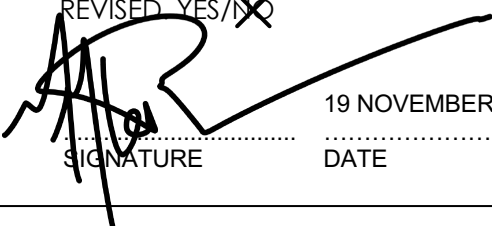


IN THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 19831/2020

(1)	REPORTABLE: YES/NO	<input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="checkbox"/>
(3)	REVISED YES/NO	<input checked="" type="checkbox"/>
		
SIGNATURE		DATE
		19 NOVEMBER 2021

SEDIBENG IRON ORE (PTY) LTD

Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY

First Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF

MINERAL RESOURCES AND ENERGY

Second Respondent

DEPUTY DIRECTOR-GENERAL OF THE DEPARTMENT

OF MINERAL RESOURCES AND ENERGY

Third Respondent

REGIONAL MANAGER, NORTHERN CAPE

PROVINCE: DEPARTMENT OF MINERAL

RESOURCES AND ENERGY

Fourth Respondent

REXTON HOLDINGS (PTY) LTD

Fifth Respondent

GERRIT JACOBUS ISAACS

Sixth Respondent

ELLEN CHRISTINA BEUKES

Seventh Respondent

JOSEPH JANSEN

Eighth Respondent

MARIA ISAACS

Ninth Respondent

NARISTA ISAACS

Tenth Respondent

BERNARD ISAACS

Eleventh Respondent

ANITA McCARTHY

Twelfth Respondent

CHARLIE McCARTHY

Thirteenth Respondent

CHARLTON McCARTHY

Fourteenth Respondent

CHARNE McCARTHY

Fifteenth Respondent

COENRAAD BEUKES

Sixteenth Respondent

ISAACS KLIPFONTEIN CC

Seventeenth Respondent

J U D G M E N T

LE ROUX AJ

INTRODUCTION

- [1] This is a review application in terms of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). It concerns the granting by the first respondent, the DMR Minister of Mineral Resources and Energy ("DMR Minister"), of a prospecting right in terms of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ("MPRDA") to the fifth respondent, Rexton Holdings (Pty) Ltd ("Rexton"), to prospect for manganese on the farm Klipfontein 437 ("Klipfontein").
- [2] The applicant, Sedibeng Iron Ore (Pty) Ltd ("Sedibeng") currently mines for iron ore on the farm Klipfontein. Sedibeng is a holder of a converted mining right with an approved environmental management programme ("Sedibeng's EMP") and an approved mine works plan.
- [3] The geology of Klipfontein is said to be such that the manganese ore seam lies below the iron ore which Sedibeng is mining. Sedibeng contends that in order to reach the manganese ore, it will be necessary for Rexton to drill through the iron ore, which will irreparably contaminate it and disrupt Sedibeng's mining operations. Rexton contends that the manganese ore for which it intends to prospect is located outside of the current active mining area of Sedibeng and that the risks of contamination and disruption are overstated by Sedibeng. Contradictory expert reports were provided by the parties on these questions.
- [4] As a result of the ministerial grant of a prospecting licence to Rexton, Sedibeng seeks the following relief:

- “4.1 *An order reviewing and setting aside the decision by the DMR Minister granting Rexton a prospecting right in terms of the MPRDA to prospect for, remove and dispose of manganese (“the Rexton Prospecting Right”) in, on and under Klipfontein.*
- 4.2 *An order remitting the matter to the Second Respondent (“the DirectorGeneral”) with directions that the Director-General must follow the procedure for the processing of administrative appeals prescribed in regulation 74 of the regulations promulgated under the MPRDA with regard to the appeal lodged by Sedibeng against the decision of the Third Respondent (“the Deputy Director-General”) to grant a prospecting right to the Fifth Respondent to prospect for manganese on Klipfontein.*
- 4.3 *An order that the decision of the Deputy Director-General as set out in the letter dated 19 December 2019, to grant a prospecting right to Rexton to prospect for manganese on Klipfontein, is suspended in terms of section 96(2)(a) of the MPRDA, pending the outcome of the appeal.*
- 4.4 *In the alternative to the relief sought . . . above, and in the event that the Court does not remit the matter to the DirectorGeneral, an order remitting the matter to the DMR Minister for reconsideration and correction in accordance with any recommendations this Court may deem fit.*
- 4.5 *That the Respondents pay the costs of this application in the event that they oppose it, and in the event of opposition, that the costs of this application shall be paid by those of the Respondents that oppose this application, jointly and severally. This application is opposed by the First to Fourth Respondents (jointly referred to as “the State Respondents”) and by Rexton. No opposing affidavits were filed on behalf of the DMR Minister, the Deputy Director-General or the Regional Manager.”*

RELEVANT FACTUAL BACKGROUND

- [5] Sedibeng acquired its mining right from its predecessor, Sedibeng Mining (Pty) Ltd (“Sedibeng Mining”) in 2009. Sedibeng has active mining operations on Klipfontein, and has invested in the related infrastructure and equipment necessary to support those mining operations.

- [6] The extent of Sedibeng's mining right covers the entirety of Klipfontein.
- [7] On 20 June 2014, Rexton applied for a prospecting right for manganese ore on Klipfontein and on portion 3 of the farm 445. The latter property is not relevant to this judgment. In a letter dated 5 August 2014 the fourth respondent, the Regional Manager, Northern Cape Province Department of Mineral Resources and Energy ("DMR") ("Regional Manager"), informed Rexton that its prospecting right application was accepted, but only in respect of Klipfontein.
- [8] Rexton was aware of the fact that Sedibeng was already mining for iron ore on Klipfontein in terms of its lawful mining right when Rexton applied for its prospecting right.
- [9] Sedibeng contends that Rexton's prospecting rights application was improperly processed and that its submissions were ignored in that process, giving rise to the review grounds pursued in this case. The procedures followed by the parties that form the basis for this review are set out below.
- [10] Rexton first communicated with Sedibeng on 8 September 2014 in correspondence in which it informed Sedibeng of its application for the manganese ore prospecting right on Klipfontein, that it was requested to consult with Sedibeng in order to coordinate its prospecting activities with the extant mining activities, and recorded its hope to achieve a working agreement with Sedibeng within two weeks of its first correspondence. It also that Rexton intended to mine for manganese ore on Klipfontein following successful prospecting operations.

[11] Sedibeng responded to this notification, on 15 October 2014, by lodging an objection to the prospecting right application in terms of section 10(2) read with section 16(4)(b) of the MPRDA. Its objection rested on the fact that it was conducting active and optimal mining operations on the entire extent of Klipfontein and was therefore concerned that Rexton would prospect on Klipfontein in a manner that would conflict with its mining activities. It recorded its concerns about compliance with the Mine Health and Safety Act, No. 29 of 1996 (the “MHSA”) and contended that, because iron ore and manganese ore were associated minerals, and because of the geology where the manganese ore at Klipfontein is said to be located below the iron ore, the iron ore would need to be mined out before the manganese ore could be mined. Sedibeng also recorded its concern that Rexton’s environmental management plan (“Rexton’s EMP”) would need to take account of Sedibeng’s mining activities on the farm, and that Sedibeng’s approved EMP and mining plan had not contemplated other prospecting operations occurring on Klipfontein simultaneously. It also recorded that Rexton’s prospecting would increase Sedibeng’s rehabilitation obligations and noted that there were two families that occupied Klipfontein with whom Rexton should consult. Sedibeng received no response to its objections and repeated them in later correspondence dated 25 November 2014.

[12] A representative of Sedibeng met DMR officials at the regional office in Kimberley on 2 July 2015 and 13 November 2015 to request an update on the prospecting rights application and the processing of Sedibeng’s objection to it. Sedibeng’s representative was assured that its objections would be

referred to the Regional Mining Development and Environmental Committee (“REMDEC”) in terms of section 10 of the MPRDA for consideration.

[13] Further correspondence followed in June 2016 between Sedibeng and the Regional Manager and Deputy Director-General and, on 31 August 2016, Sedibeng lodged a formal objection against the DMR’s acceptance of Rexton’s prospecting rights application and explained why it would not be possible to conclude a workable agreement to accommodate Rexton’s prospecting operations. It contended chiefly that this was because Sedibeng operated a mining right over the entire mining right area and it was liable for the environmental, and mine health and safety compliance requirements that simultaneous mining and prospecting operations on the same property would occasion. It also identified various environmental, mine health and safety, and economic viability risks and potential liability that it contends would arise to be bore by it.

[14] Sedibeng relied on geological investigations of its mining right area showing that the iron ore and manganese ore mineralisations occurred in different stratigraphic zones of the ore body in the Postmasburg Formation and, because the manganese ore underlies the iron ore, Sedibeng contended it could not safely be mined unless the overlaying iron ore was first mined out. Sedibeng also recorded objections on the basis that the manganese ore would contaminate the iron ore, compromising its saleability and that there may be a compromise of the groundwater quality within the Sedibeng mining right area that was an unreasonable safety and health liability risk. Sedibeng received no response from the Regional Manager to this letter.

- [15] Two months later, on 21 October 2016, Rexton informed Sedibeng's attorney that it had been granted a prospecting right to prospect for manganese ore on Klipfontein. It appears that the decision to grant Rexton a prospecting right had been taken a month earlier, on or about 27 September 2016 by the Deputy Director-General in an exercise of that power delegated by the DMR Minister.
- [16] On 17 November 2016, Sedibeng lodged an administrative appeal in terms of section 96 of the MPRDA with the Deputy Director-General against the decision of the Deputy Director-General to grant Rexton's prospecting right. I shall refer to this as the first appeal.
- [17] Sedibeng also applied in terms of section 96(2) of the MPRDA for a suspension of the decision of the Deputy Director-General pending the outcome of the first appeal. Sedibeng's application for suspension was granted by the acting Deputy Director-General on 25 January 2017 on the basis that Sedibeng as a converted mining right holder would suffer prejudice. In a letter dated 20 December 2017, the Deputy Director-General upheld the first appeal and set aside the Deputy Director-General's decision to grant Rexton a prospecting right.
- [18] On 14 May 2018 Rexton addressed a letter to the DMR Minister, requesting his intervention. This was processed by the DMR Minister as a second appeal. The second appeal was dismissed by the DMR Minister on 13 December 2018 and the DMR Minister directed that the application should

be remitted to the Regional Manager for further processing in terms of the MPRDA.

[19] On 26 September 2019, a meeting of REMDEC was held during which representatives of Rexton and Sedibeng made both oral and written submissions. On 2 November 2019, the chairperson of REMDEC addressed a letter to Sedibeng in which he stated that it had instructed the parties to submit final results of “further consultation” regarding:

19.1. A cooperative working agreement model;

19.2. Proximity of the outcrop;

19.3. Spatial coordinates of the parties’ areas of interest; and

19.4. Detailed plans for coexistence.

[20] Sedibeng responded to this request on 7 October 2019 stating that it had not been requested to conduct further consultations on the listed items and recorded that the REMDEC meeting with representatives of the parties had concluded with the chairperson recording the futility of requesting the parties to try to reach a working agreement, and identified several other practical obstacles to reaching any agreement with Rexton including regarding missing information about Rexton’s proposed prospecting work programme and EMP.

[21] Sedibeng also submitted further reports to REMDEC in October 2019 to which it received no response from REMDEC. In an email dated 13 January

2020, REMDEC informed Sedibeng that it has recommended that Rexton's application be processed to finality, meaning that it had been granted by REMDEC. That day, Sedibeng instructed its attorneys, who consequently sent a request to REMDEC to furnish it with reasons for that decision in terms of section 5 of PAJA and received no response to that request.

[22] In a further letter dated 14 January 2020, further clarity was sought by Sedibeng about the status of Rexton's prospecting rights application and whether the DMR Minister had taken any decision in regard thereto. On 15 January 2020, the Regional Manager responded, confirming that no decision regarding Rexton's prospecting rights application had been taken by the DMR Minister.

[23] On 22 January 2020, Sedibeng lodged an objection to the approval of Rexton's EMP and any other application for environmental authorisation that Rexton may have lodged. There was no response thereto, save that, on 31 January 2020, Sedibeng became aware that the Deputy Director-General had decided on 19 December 2019 to grant Rexton a prospecting right for manganese ore on Klipfontein. On 6 February 2020, Sedibeng's attorneys lodged an appeal to the Deputy Director-General in terms of section 96 of the MPRDA against the decision of the Deputy Director-General to grant Rexton a prospecting right.

[24] On 19 February 2020, Sedibeng received word that the DMR Minister had granted Rexton's prospecting right in an email. Curiously, this email correspondence was recalled later on in the afternoon of 19 February 2020.

In response to these developments, Sedibeng's attorneys emailed the regional office and department office, requesting clarity on the authenticity of the correspondence received informing Sedibeng that Rexton's prospecting rights application had been granted and the reasons for the withdrawal of that email, and whether the attempt to withdraw the email meant that the decision was not in force or effect and could be ignored. No response was received to these enquiries.

[25] On 2 March 2020, the Deputy Director-General informed Sedibeng that the DMR Minister had granted the prospecting right to Rexton and that its appeal to the Deputy Director-General against the decision of the Deputy Director-General had become moot.

[26] The DMR Minister provided his reasons for the challenged decision, which I quote in full relevant part below:

***“REASONS FOR THE DECISION TO GRANT THE PROSPECTING
RIGHT TO FIFTH RESPONDENT***

- *Having received the application for prospecting right and considered the internal appeals launched against the granting and suspension of the decision to grant the application, the Minister applied his mind and deemed it fit to grant the application for the following reasons:*
 - *Minister was satisfied that fifth respondent complied with the requirements of section 16 of the MPRDA.*
 - *The objection against the decision of the third respondent to grant the application without referring the matter to REMDEC, in terms of section 10 of the MPRDA was dealt with, and third respondent's decision was suspended pending the internal appeal. This appeal was later finalised the decision of the third respondent was set aside by the second respondent.*

- *Against the appeal launched by fifth respondent, the Minister, confirmed the decision of the second respondent to set aside the third respondent's decision to grant the prospecting right thereof. Further, the Minister referred the matter to REMDEC for consideration and for the matter to be referred back to him once REMDEC has finalised the matter.*
- *It follows therefore that third respondent's decision of 19 December 2019 to grant the prospecting right after the referral to REMDEC as per the Minister's directive was incorrect. The Minister has the powers to withdraw decisions. The Minister, in terms of section 103(4)(b) of the MPRDA exercised his powers and withdrew the decision aforementioned.*
- *The Minister's decision to grant the prospecting right is therefore premised on the fact that the 19 December 2019 decision no longer had effect and ceased to exist once it was withdrawn.*
 - *It must also be stated that further to compliance with section 16 of the MPRDA, fifth respondent also complied with section 17(1) of the MPRDA, and that financial competence and technical ability to conduct prospecting optimally was demonstrated.*
 - *The Minister was satisfied that the proposed prospecting activities would not result in the unacceptable pollution, ecological degradation or damage to environmental.*
 - *Minister was satisfied with the fifth respondent's ability to comply with the relevant provisions of the Mine Health and Safety Act, 29 of 1996.*
 - *Minister was also satisfied that fifth respondent is not in contravention of any provision of the Act.*
- *In conclusion, the MPRDA and against applicant's objection or complaint that the prospecting right is granted over the land in which they hold a mining right, is not under the circumstances, a factor on which the Minister would in isolation to any other reason refuse a prospecting right. In amplification, the MPRDA does not prohibit granting of a prospecting right on a piece of land where there is an existing mining ring for different minerals.*
- *The Minister deemed it practical and possible for prospecting activities to be conducted in the same land over which applicant holds a mining right for different minerals.”*

THE APPLICANT'S GROUNDS OF REVIEW

[27] The applicant advances six grounds of review:

- 27.1. The DMR Minister was not empowered to take a decision in terms of section 103(4)(b) of the MPRDA;
- 27.2. The binding directive issued by the Regional Manager to enter into a working agreement had not been complied with and therefore Rexton's prospecting right could not be granted in terms of section 17(1)(e) of the MPRDA read with section 16(4)(b) and section 98A;
- 27.3. The DMR Minister's decision to grant Rexton a prospecting right is not rationally connected to the information before the DMR Minister in that it did not take account of the expert reports provided to the department showing the impossibility of prospecting for manganese or simultaneously with Sedibeng's current iron ore mining operations;
- 27.4. Rexton would not be able to optimally prospect for manganese ore on Klipfontein in terms of section 17(1)(a) of the MPRDA;
- 27.5. Proper consideration was not given to the environmental requirements of the MPRDA read with National Environmental Management Act, No 107 of 1998 ("NEMA"); and
- 27.6. Proper consideration was not given to the mine health and safety requirements of the MPRDA.

[28] If the first ground of review is upheld, it is dispositive of this review application. For this reason, I deal with it first amongst the grounds of review. However, before I do, the first to fourth respondents have raised a point *in limine* that must be addressed as a preliminary matter.

IN LIMINE JOINDER

[29] The first to fourth respondents, to whom I shall refer as “the government respondents”, first raise a point *in limine* that, in terms of the Uniform Rules of the High Court, the non-joinder of the Minister of Environment, Forestry and Fisheries to this matter is irregular and that this matter should not be determined without the participation of the Minister of Environment, Forestry and Fisheries. This is because the prospecting right at issue coexists with the environmental authorisation that was the subject of a pending NEMA appeal and, therefore, any determination related to the status of the prospecting right should only occur with the benefit of the participation of the Minister of Environment, Forestry and Fisheries on the question of the environmental authorisation that forms part of the application for any prospecting right.

[30] Due to the decision I make below on the grounds of review advanced by the applicant, it is not necessary to decide the non-joinder point. I therefore turn to the case made out on the first ground of review by the parties.

FIRST GROUND OF REVIEW - THE MINISTERIAL POWER IN SECTION 103(4)(b)

[31] On the correspondence contained in the record, on 19 February 2020, the DMR Minister purported to take a decision in terms of section 103(4)(b) of the MPRDA in which he:

31.1. Withdrew an earlier decision taken by the Deputy Director-General (“the December 2019 decision”) to grant a prospecting right to Rexton for manganese or prospecting on Klipfontein; and

31.2. Took a decision to grant a prospecting right to prospect for manganese ore on Klipfontein to Rexton.

[32] The Deputy Director-General signed a Departmental Recommendation provided to the DMR Minister which requested the granting of a prospecting right to Rexton. The DMR Minister approved this request from the Deputy Director-General, despite the pending appeal lodged by Sedibeng. The Departmental Recommendation, in relevant part, stated:

RECOMMENDATION

In light of the fact that the applicant's mining right was already granted in terms of section 17(1) of the Act, as indicated in paragraph 2.4 above, it is recommended that you, please, consider to –

acting under section 103(4)(b) of the Act, withdraw the delegation made to the Deputy Director-General: Mineral Regulation in terms of section 103(1) of the Act insofar as the original decisions made by the latter in so exercising his power or performing the duty delegated to grant the prospecting right erroneously instead of being granted by the Minister: Department of Mineral Resources and Energy on farm Klipfontein No. 437, for manganese to Rexton Holdings (Pty) Ltd;

to grant a prospecting right to Rexton Holdings (Pty) Ltd in terms of section 17(1) of the Act for a period of five (05) years; and

sign the attached power of attorney, authorising the Regional Manager, Northern Cape Region, to sign on your behalf the prospecting right to be granted to Rexton Holdings (Pty) Ltd in this regard.

[33] Significantly, for reasons that will become immediately obvious, the Departmental Recommendation is silent regarding the existence of any existing rights held by Sedibeng and a basis to conclude these are unaffected by the recommended course of action. It also is material that the Departmental Recommendation focusses on the need to correct the error of the Deputy Director General, rather than addressing the reasons why the DMR Minister should accept the official's recommendation and grant the prospecting right to Rexton in light of Sedibeng's existing rights.

[34] Section 103(4)(b) of the MPRDA provides as follows:

"The Minister, Director-General, Regional Manager or officer may at any time-

(a) withdraw a delegation or assignment made in terms of subsection (1), (2) or (3), as the case may be; and

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be: Provided that no existing right of any person shall be affected by such withdrawal and amending of a decision."

(emphasis added)

Sedibeng's submissions

[35] Sedibeng contends that the wording of this provision is clear and prohibits any withdrawal or amendment of any decision where existing rights of any person would be affected by that withdrawal or amendment. The applicant

contends that section 103(4)(b) of the MPRDA was only available to the DMR Minister if there were no existing rights that were affected.

[36] Sedibeng also contends that there are two existing rights that it enjoys that prevented the DMR Minister from using his section 103(4)(b) power. The first is the right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution and PAJA, and the second is the converted mining right under which Sedibeng was conducting active mining operations on the properties forming the subject of that mining right.

[37] In short, Sedibeng contends that the DMR Minister is not empowered to act in terms of section 103(4)(b) of the MPRDA because Sedibeng's converted mining right and its administrative rights, including with regard to the pending appeal it lodged against the decision of the Deputy Director-General, required the DMR Minister not to withdraw or amend any decision.

[38] Sedibeng further contends that section 96(2)(b) of the MPRDA requires that, once an administrative appeal has been lodged, any subsequent application in terms of the MPRDA must be suspended pending the finalisation of the appeal. Accordingly, the applicant contends that the application decided upon by the DMR Minister purportedly acting in terms of section 103(4)(b) of the MPRDA had to be suspended pending the finalisation of Sedibeng's appeal.

[39] For his part, the Deputy Director-General contended that his request in the Departmental Recommendation to the DMR Minister to act in terms of

section 103(4)(b) of the MPRDA was not an “application” in the sense that the applicant contends. The MPRDA does not contain a definition of the word “application”, and Sedibeng contends that it should be given its ordinary grammatical meaning. In the context of this case, it submitted that “application” here means Rexton’s application to be granted a prospecting right for manganese ore over the Klipfontein property.

[40] In sum, Sedibeng contends that the DMR Minister took a decision to grant Rexton a prospecting right in terms of section 103(4)(b) of the MPRDA, but was acting *ultra vires* when he did so because Sedibeng’s existing rights, both to administrative justice in its pending appeal and to its converted mining right, were affected.

[41] In conclusion, Sedibeng contends that the DMR Minister’s decision granting Rexton a prospecting right for manganese ore over Klipfontein in terms of section 103(4)(b) should be reviewed and set aside in terms of various provisions of PAJA, including:

41.1. Section 6(2)(a)(i) of PAJA because the DMR Minister was not authorised to withdraw the final decision of the Deputy Director-General and to substitute the decision because the existing rights of Sedibeng were affected;

41.2. Section 6(2)(b) of PAJA because a mandatory condition prescribed by section 103(4)(b) of the MPRDA was not complied with, namely that the mechanism of section 103(4)(b) of the MPRDA may only

be used provided that existing rights may not be affected by such withdrawal and amending of a decision;

- 41.3. Section 6(2)(c) of PAJA because it was procedurally unfair not to afford Sedibeng an opportunity to have its objections and appeal to the granting of a prospecting right to Rexton heard and considered;
- 41.4. Section 6(2)(a) of PAJA, because the DMR Minister could not approve the application to act in terms of section 103(4)(b) of the MPRDA after Sedibeng's appeal was lodged. The DMR Minister had to suspend the application pending the outcome of the appeal. The DMR Minister was therefore not empowered by section 103(4)(b) read with section 96(2)(b) of the MPRDA to approve the application to act in terms of section 103(4)(b) of the MPRDA;
- 41.5. Section 6(2)(b) of PAJA, because a mandatory and material procedure prescribed in section 96(2)(b) of the MPRDA, namely that the application in terms of section 103(4)(b) of the MPRDA had to be suspended, was not complied with. Furthermore, the DMR Minister and the Deputy Director-General failed to comply with the mandatory requirements of section 96 of the MPRDA read with regulation 74 of the regulations promulgated in terms of the MPRDA to process Sedibeng's appeal;
- 41.6. Section 6(2)(c) of PAJA, because it was procedurally unfair to proceed with the application in terms of 103(4)(b) despite the appeal having been lodged in terms of section 96 of the MPRDA;

- 41.7. Section 6(2)(d) of PAJA, because it was materially influenced by an error of law, namely that the DMR Minister could grant the application in terms of section 103(4)(b) contrary to the prohibitions in section 96(2)(b) of the MPRDA and in section 103(4)(b) that existing rights may not be affected by an administrative action taken in terms of section 103(4)(b) of the MPRDA;
- 41.8. Section 6(2)(e)(i) of PAJA, namely that it was taken for a reason not authorised by section 103(4)(b) of the MPRDA, in that section 103(4)(b) of the MPRDA only authorises an administrative action to be taken if existing rights are not affected;
- 41.9. Section 6(2)(e)(iii) of PAJA, in that the DMR Minister failed to take relevant considerations into account, namely Sedibeng's existing rights as the holder of a converted mining right in respect of Klipfontein;
- 41.10. Section 6(2)(f)(i) of PAJA, namely that it contravenes sections 96(2)(b) of the MPRDA and section 103(4)(b) of the MPRDA; and
- 41.11. Section 6(2)(f)(ii)(bb) of PAJA, namely that it is not rationally connected to the purpose of the empowering provision and in terms of section 6(2)(f)(cc) of PAJA, namely that it is not rationally connected to the information before the DMR Minister.

The government respondents' submissions

- [42] For their part, the government respondents contend that the Departmental Recommendation is not an “application” for a prospecting right in terms of the MPRDA and that the pending appeal could not have the effect of suspending what they contend is only a departmental internal procedure engaged in by officials in their interactions with the Minister. The government respondents referred to the Departmental Recommendation as an “internal process” within the department and contend that this is not the type of application that engages with the Minister’s section 103(4)(b) powers.
- [43] The government respondents also contend that it is clear that a recommendation to the Minister by an official cannot be interpreted to be the same as an application envisaged in terms of section 9 of the MPRDA. They contend that the Departmental Recommendation was a request by the official that the Minister act in terms of legislation and that that legislation provides that the Minister may at any time withdraw a delegation of assignment that had been made in terms of section 103(1), that the Minister was therefore only exercising that power and that he did so lawfully in terms of the MPRDA.
- [44] The government respondents further contend that the applicant’s appeal has no effect of suspending any of these administrative processes followed by the department internally, and that the Minister’s powers or, specifically, his section 103(4)(b) power to withdraw or suspend the exercise of those powers subject to delegation, could not be negated by the pending appeal.
- [45] Finally, the government respondents contend that when the Minister exercised his power under section 103(4)(b), it was not so unreasonable that

no reasonable person could have exercised the power or performed that function.

- [46] For these reasons, the government respondents submit that the first ground of review must fail.

Rexton's submissions

- [47] Rexton applied for its prospecting right for manganese ore on Klipfontein on 20 June 2014 and the Regional Manager accepted that application on 5 August 2014. Rexton contends that the DMR Minister acted reasonably in granting the prospecting right because the applicant had received notice of the application and was afforded ample opportunity to exercise its rights and make submissions to the DMR Minister.

- [48] Rexton contends that Sedibeng, since notification of Rexton's application for the manganese ore prospecting right, has adopted an obstructive and unreasonable attitude and has, as a result, consistently refused to engage in any process of consultation with Rexton to enable the coordinated and cooperative exercise of both the mining and prospecting rights over Klipfontein. Rexton also contends that it has since 2014 repeatedly stated that it has no intention of conducting its prospecting activities within Sedibeng's active mining area and that Sedibeng's holding of the converted mining right over the entirety of Klipfontein does not sterilise the portions of the farm that are located outside of its active mining area from the exercise of a lawfully granted prospecting right.

[49] Rexton contends that this negates all of the objections raised by Sedibeng on issues of joint environmental and rehabilitation obligations and mine health and safety.

[50] Rexton further contends that it complied with all of the notification and consultation requirements imposed upon it, and that it did in fact consult both with Sedibeng and with the intervening parties who are residents of Klipfontein said to be affected by the prospecting rights application, Rexton therefore contends that the DMR Minister acted reasonably and within the scope and pursuant to the powers granted to him in terms of the MPRDA when he awarded Rexton the prospecting right for the manganese ore in terms of section 103(4)9B).

MPRDA Definitions

[51] There is no decided caselaw on the interpretation and application of section 103(4)(b) to mine or the parties' knowledge. I therefore begin by considering the objective, plain meaning of certain definitions in the MPRDA in context and with reference to their purpose¹ that are relevant to the consideration of the extent of the power granted to the DMR Minister in section 103(4)(b), namely:

51.1. "Mining right" which means the right to mine granted in terms of section 23(1);

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

- 51.2. “Mining work programme” which is the planned mining work programme approved and to be followed in order to mine the mineral resource optimally;
- 51.3. “Prospecting” means intentionally searching for any mineral by means of any method which disturbs the surface or subsurface of the earth or in or on any residue stockpile or deposit in order to establish the existence of a mineral or determine the extent and economic value thereof;
- 51.4. “Prospecting area” is the area of land which is the subject of the prospecting right;
- 51.5. “Prospecting right” is the right to prospect granted in terms of section 17(1); and
- 51.6. “Prospecting work programme” is the planned prospecting work programme to be followed in order to establish the occurrence of any mineral resource in the prospecting area during the period applied for.
- 51.7. The absence of a definition of “application” in the MPRDA is already noted above.

[52] Rexton contends that the interpretation to be given to any provision of the MPRDA applied in this case must comply with section 4 which requires that interpretation to favour a reasonable interpretation consistent with the objects

of the Act over an interpretation which is inconsistent with the objects of the Act. The objects of the Act include the promotion of equitable access to the nation's mineral and petroleum resources to all the people of South Africa and the promotion of economic growth and mineral and petroleum resource development within the Republic, while providing for security of tenure in respect of prospecting exploration, mining and production operations, among other objects.

[53] Section 3 of the MPRDA notes that the mineral resources located in the Republic are the common heritage of all people of South Africa and empowers the DMR Minister to grant, issue, refuse, control, administer and manage any prospecting right and any mining right.

[54] Rexton accepts that a prospecting right and a mining right are limited real rights in respect of the mineral specified and the land to which the right relates. Rexton helpfully points out the material amendments made to the MPRDA and its regulatory framework. However, these are not relevant for purposes of this decision.

[55] Rexton disputes the geological expert evidence relied upon by Sedibeng that any prospecting for the manganese ore will deplete, cause instability or otherwise contaminate the iron ore formation to Sedibeng's detriment and explains in detail how the prospecting activities will not adversely affect the iron ore. It further disputes that the geological expert evidence relied on by Sedibeng is sufficiently certain or detailed as to the location of the different ore bodies and that it is, in fact, the prospecting process itself which will

determine whether any mining of the manganese ore can be conducted in a way that is compatible with the mining of iron ore. These disputes are material given the disposition of this case set out below.

[56] With respect to the first ground of review, namely that the DMR Minister was not empowered to take the decision in terms of section 103(4)(b) of the MPRDA, Rexton contends that it was the Deputy Director-General who took a decision on 19 December 2019 to grant the prospecting rights. That decision was the subject of the pending appeal and that the DMR Minister on 18 February 2020 withdrew that decision by the Deputy Director-General in terms of section 103(4)(b).

[57] Rexton contends that Sedibeng is mistaken in its contention that the decision could not have been taken by the DMR Minister because its rights were materially affected. It says this because what it sought in the appeal was to set aside the decision of the Deputy Director-General to grant the prospecting right on the contention that he was not empowered to make that decision. Sedibeng had already appealed the initial granting of Rexton's prospecting right in 2016 and had made detailed submission to REMDEC in that regard. In that process, the DMR Minister was awaiting the recommendation of REMDEC to make a final decision concerning the grant or refusal of a prospecting right to Rexton. Therefore, Rexton contends that the only substantive ground pursued in the pending appeal related to whether the Deputy Director-General was authorised to take the decision given that the matter had been referred to REMDEC and in light of the fact that the DMR

Minister was awaiting the recommendations of REMDEC to make a final decision on whether to grant Rexton the prospecting right or not.

[58] Rexton contends that Sedibeng accordingly only had limited rights in that appeal and could only challenge the Deputy Director-General's decision in that process. Rexton contends that this demonstrates a fallacy in Sedibeng's first ground of review because the DMR Minister should not need to invite submissions and conduct a lengthy appeal process where it was evident that the Deputy Director-General had no authority to take the granting decision and, instead, the DMR Minister's withdrawal of that decision was a speedy and cost-effective means to resolve the matter in terms of section 103(4)(b).

[59] Rexton contends that the effect of the withdrawal of the Deputy Director-General's decision in terms of section 103(4)(b) was that Sedibeng had succeeded with the substantive outcome sought in the appeal, namely the setting aside of the Deputy Director-General's decision by the DMR Minister.

[60] That may well be correct. However, it does not answer the first ground of review. In what follows, I assume in Rexton's favour that its contentions are correct.

[61] Section 103(4)(b) requires, first, the identification of any existing rights that Sedibeng had at the time that the DMR Minister took his decision exercising the powers granted by the section. Sedibeng contends that it has two existing rights. First, its converted mining right for iron ore on Kilpfontein and second, its rights to fair administrative action. I accept that these are the two rights to be considered in this instance.

- [62] I further find that section 103(4)(b) must be interpreted to mean that these rights are not *adversely* or *detrimentally* affected by the withdrawal or amendment of a decision by the DMR Minister. To hold otherwise, namely that any effect on these rights regardless of whether it is adverse or not, would stymie achieving the purposes of the Act (including the optimal exploitation of more than one mineral resource on a given property) and paralyse the Minister's oversight of the regulatory regime.
- [63] Even if the second right is limited in the way contended for by Rexton, namely that the DMR Minister's decision in effect determines the internal appeal, that is not the full extent of that right. Sedibeng also enjoys fair administrative action rights in the decision-making of the DMR Minister under section 103(4)(b), including the right to have its submissions considered and reasons given for decisions taken after consideration of those submissions.
- [64] Absent in the record is any evidence that the DMR Minister considered either of these rights that Sedibeng holds. There is nothing to indicate that the DMR Minister considered and applied his mind to the submissions made by Sedibeng and his reasons are silent as to a basis for his stated satisfaction that these submissions were adequately addressed in his decision.
- [65] There also is nothing to indicate that the DMR Minister applied his mind to the dispute that arises about whether the existing mining right excludes prospecting by Rexton on Klipfontein, where that prospecting will occur outside of the current active mining area initially, but those mining activities

will migrate over the course of the Sedibeng mine's life coterminous with Rexton's prospecting activities.

[66] There is also nothing to indicate the DMR Minister's consideration of the contested geological evidence when determining the extent of the prospecting right that was granted.

[67] The DMR Minister's reasons record only his conclusion that "*the MPRDA does not prohibit granting of a prospecting right on a piece of land where there is an existing mining right for different minerals*" and that "[t]he Minister deemed it practical and possible for prospecting activities to be conducted in the same land over which applicant holds a mining right for different minerals" but not any reasons for that view in this case and in these circumstances in light of the evidence in the record to which regard must be expressly had.

[68] In *Administrative Law in South Africa* (2nd Edition) (2012), Professor Cora Hoexter (at page 221 and following) explores and concludes that a party whose rights are determined is entitled to judicial review of that determination in terms of PAJA and the procedural protections envisaged by PAJA. This is in contrast to the stricter and more onerous deprivation theory which requires an abolition of existing rights before judicial review and procedural protections would be available.

[69] Here, it is clear that the DMR Minister determined the rights of Rexton in its prospecting rights application -- and may have deprived Sedibeng of an element of its existing converted mining right as a result. I say that it "may have" resulted in a deprivation of Sedibeng's existing rights because, absent

express consideration, and a reasoned and final conclusion reached by the DMR Minister on the contested expert geological and other evidence relating to whether the manganese ore can or cannot be prospected for in a manner that does not adversely affect Sedibeng's mining operation in the period of time in which active mining and prospecting operations are contemplated is yet to be determined. For that reason, I remit the matter back to the DMR Minister to undertake the required consideration.

[70] The matter must be remitted back to the DMR Minister to consider at least these questions, as well as any others submitted as relevant and material by the parties to him, and determine the application for a prospecting right afresh in light of his reasoned conclusions regarding each:

70.1. What geological expert evidence exists that the manganese ore can be prospected for by Rexton in a manner that will not disrupt or threaten the (i) current and (ii) planned and approved active iron ore mining activities and (iii) attendant liabilities and obligations of Sedibeng on Kilpfontein?

70.2. What is the result of the consultation with the other intervening parties in this regard?

70.3. What practical arrangements are needed to enable Rexton to prospect for manganese ore on Kilpfontein simulatenously with Sedibeng's active mining operations?

- 70.4. What arrangements are needed to shield Sedibeng from additional obligations arising from Rexton's prospecting activities?

ORDER

[71] Accordingly I grant an order in the following terms:

- 71.1. The decision by the DMR Minister granting Rexton a prospecting right in terms of the MPRDA to prospect for, remove and dispose of manganese ore in, on or under Klipfontein is set aside;
- 71.2. The matter is remitted to the DMR Minister for reconsideration and correction in accordance with the guidance set out above;
- 71.3. the first to fifth respondents are to pay the costs of the application, jointly and severally, the one paying the others to be absolved.



LE ROUX AJ

Acting Judge of the High Court
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 19 November 2021 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 November 2021.

DATE OF HEARING: 21-22 APRIL 2021

DATE OF JUDGMENT: 19 NOVEMBER 2021

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