



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

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

CASE NO. 66559/2020

DATE
04/09/2023

SIGNATURE
N V KHUMALO J

DE BEERS CONSOLIDATED MINES (PTY) LTD

APPLICANT

**REGIONAL MANAGER, LIMPOPO: THE DEPARTMENT
OF MINERAL RESOURCES & ENERGY**

1ST RESPONDENT

**THE DIRECTOR GENERAL: THE DEPARTMENT OF MINERAL
RESOURCES & ENERGY**

2ND RESPONDENT

THE MINISTER OF MINERAL RESOURCES & ENERGY

3RD RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 04 September 2023.

JUDGMENT

Introduction

[1] Mining and the extraction of mineral and other natural resources is an economic activity which self-evidently has extensive impact and effect upon the environment.¹ The right to an environment that is not harmful to health or welfare is guaranteed by section 24 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Mineral and Petroleum Resources Development Act, 2002 (28 of 2002) (“MPRDA”), is the primary legislative instrument by which effect is given to section 24 of the Constitution in relation to mining activities. Section 2(h) of the MPRDA states that its object is to ensure that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.²

[2] This is a review application in terms of Rule 53 of the Uniform Rules of Court instituted by De Beer Consolidated Mines (Pty) Ltd (“DBCM”) seeking relief in the following order:

2.1. Directing that DBCM be exempted from the obligation to exhaust internal remedies as required for in section 7 (2) (c) of PAJA;

2.2. Declaring that section 43 of the MPRDA as it existed when the DBCM lodged its closure application on 03 November 2009 (pre amendment MPRDA) is applicable to the determination of such application;

2.3. Declaring that DBCM is not under any obligation to backfill the open pit at the Oaks Mine situated in the Limpopo Province on the properties known as the Oaks 153 MR, Oatlands I51 MR and Jakhalsfontein 199 MR;

¹ Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and others 2023 JDR 1815 (SCA).

² *Ibid* at section 2 (h) of the Mineral and Petroleum Resources Development Act 28 OF 2000.

2.4. that the decision of the Regional Manager to refuse to grant DBCM's closure application dated 03 November 2009 alternatively its refusal to decide ("the decision") the closure application be set aside in terms of section 8 of PAJA;

2.5. Alternatively, to prayer 4 above, that the decision be declared to be inconsistent with the principle of legality enshrined in section 1 (c) of the Constitution and that it be set aside for that reason;

2.6. Directing the Minister to grant the closure application and to issue a closure certificate in terms of section 43 (1) of the pre amendment MPRDA, alternatively to issue a closure certificate upon satisfaction of the requirements of section 43 (5) and 13 of the MPRDA;

2.7. In the alternative to prayer 2.1 - 2.6 above, directing the Minister to consider DBCM's internal appeal and within 25 days of the grant of this order to decide the appeal, having regard to this Court's judgement and to communicate his decision to DBCM within 5 days of its being taken; and

2.8 Ordering those Respondents that oppose this Application to pay the costs of this Application jointly and severally, such costs to include the costs of two Counsel.

Parties

[3] The 1st Respondent is the Regional Manager, Limpopo: Department of Mineral Resources and Energy and the 2nd Respondent, is the Director General; Department of Mineral Resources and Energy, who are both cited in their capacities as Government employees and organs of state responsible for administering, oversight, implementation and execution of the provisions of the MPRDA, by virtue of the powers delegated upon them by the Minister in terms of the provisions of s 7 and 8 of the MPRDA. The Minister of Mineral Resources and Energy is cited as the 3rd Respondent in his capacity as the cabinet member responsible for administering, oversight, implementation and execution of the provisions of the MPRDA.

[4] De Beers Consolidated Mines Pty Ltd (DBCM) is a member company of the De Beers Group of Companies, the world's leading diamond group and the owner of the Oaks Mine, that is situated in the rural area of Blouberg District Municipality, Musina in the Limpopo Province, with its registered address in Kimberley.

Factual Background

[5] DBCM Oaks Mine was an open pit diamond mine that stretches over three farm properties known as the Oaks 153 MR, Oatlands 151 MR and Jakhalsfontein 199 MR, covering a total area of 5 323,5 hectares. It is situated in a remote rural area with no immediate communities or neighbours around it where a small kimberlite pipe was discovered in 1988 having an estimated mine life of only 8 years, to a final pit depth of 200m. The Mine is in the Limpopo Water Management Area, the responsible water authority being the Department of Water Affairs and Forestry ("DWAF"), Polokwane Regional Office.

[6] On 6 April 1998, DBCM was, in accordance with s 9 (1) read with s 9 (3) (e) of the Mineral Act No. 50 of 1991 ("Mineral Act") granted a mining licence in respect of the Oaks Mine. An initial Environmental Management Programme ("EMP") was subsequently submitted by DBCM in February 1998 and approved on 24 June 1998 in accordance with Section 39 (1) of the Minerals Act (since repealed Act). The EMP contained measures to mitigate the environmental impact of mining during the phases of construction, operations, closure and rehabilitation phase. It expressly and significantly indicated that the Oaks mine pit would be rehabilitated by placing certain safety measures, but would in its end state remain open.

[7] In July 2003, DBCM adopted and applied for an amendment of its initial EMP. The Amended EMP still contained closure steps and rehabilitation measures which DBCM stipulated that "the mine pit to remain open". The amended EMP was on 29 July 2003, likewise adopted and approved by DMRE in accordance with section 39 (2) (c) of the erstwhile Minerals Act. This was prior to the commencement of the MPRDA on 1 May 2004. The Oaks Mine operated for a period of 10 years between the period 1998 to 2008, therefore *de facto* ceased its operations in 2008. The mining license has

since lapsed as it was not converted to the new order right. DBCM submit that the initial and Amended EMP, however remained valid and enforceable in accordance with item 10 of the transitional arrangements in schedule II of the MPRDA.³ DBCM alleges that s 43 in force at the time of its Application for a closure certificate in November 2009, is applicable to decide its Application, as a result seek such a declaration.

[8] According to DBCM only 69 hectares of the total area is affected by the mining operations, most of the mining area being undisturbed. During the construction, operation and closure of mine, as well as their rehabilitation, there was a series of measures included in the EMP aimed at protecting the environment from mining impacts. The open cone shape pit was developed due to an open cast mining technic that was used of blasting and excavating the kimberlite and surrounding host rocks. The crushing, washing and screening process was used to extract the diamond from the kimberlite ore remotely from the pit where excavated. The Oaks Mine therefore also comprises of waste rock and mine residue disposal (MRD) complex where waste products could be disposed of. The waste rock extracted from the open pit was to be disposed at the waste rock dump. Some of the waste rock was used to construct the wall of the mine residue disposal complex.

[9] The cone shaped open pit, covers an area of 8 hectares, and the final void of the pit was intended to cover an area of about 10.5 hectares. The pit's design allowed an overall pit slope of 50 % with 10 m high benches. The MRD is made up of a series of paddocks for coarse residue deposits and an area for fine residue deposits (slimes). According to DBCM the waste used for the construction of the paddock walls did not reach a final height of 20 m and has since been finally rehabilitated. Similarly, that the MRD complex which occupies 48,9 hectares has also been sustainably rehabilitated.

³ Item 10 (1) in Schedule II states that "any environmental management programme approved in terms of s 39 (1) of the Minerals Act and in force immediately before the MPRDA took effect and any steps in respect of the relevant performance assessment and duty to monitor connected with the environmental management programme continues to remain in force when [the MPRDA] comes into effect."

[10] On 3 November 2009 DMRE submitted an Application for a closure certificate in terms of s 43⁴ (3) of the MPRDA in respect of Oaks Mine appending a closure plan. The closure plan provided for safety, stability and sustainable land and vegetation as well as waste management measures with regard to the open pit mine. Moreover, the closure plan provided for post closure maintenance and control of the open pit, but stated, importantly (as with the Amended EMP) that upon closure of the Oaks Mine the open pit was to remain open. The DBCM argued that both its EMPs were approved unconditionally, as a result it had designed its mining activities and planned its operations on the basis that the pit would remain open.

[11] On April 2011, the 1st Respondent conducted a site inspection of the Oaks Mine and assessed DBCM's closure plan. On 7 July 2011 the 1st Respondent reported that DBCM needed to address the following environmental flaws findings before a closure certificate can be issued ("**1st Decision**"), which were inter alia, that:

[11.1] The open pit will pose a high risk to scavengers and illegal mining;

[11.2] The Department would like to see a practical plan for future land uses that would not encourage illegal mining and scavenger;

[11.3] All relevant stakeholders must have been consulted for future land use including the principal inspector of mines;

[11.4] The Department will not issue any Closure Certificate until all the requirement of relevant legislation has been satisfied.

[12] On 10 November 2012 still on the same findings proffered on 7 July 2011, the 1st Respondent indicated his resolve not to process the Closure Certificate Application unless DBCM complies ("**2nd Decision**"). In the interim, NEMA was amended on 08 December 2014 introducing section 24R (1) of NEMA⁵ Amendment Act 24, 2008 which

⁴ Section 43 (3) reads: "The holder of a prospecting right, mining right, retention permit or mining permit or the person contemplated in subsection (2), as the case may be, must apply for a closure certificate upon- (a) the lapsing, abandonment or cancellation of the right or permit in question; (b) cessation of the prospecting or mining operation; (c) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; or (d) completion of the prescribed closing plan to which a right, permit or permission relate."

⁵ Section 24R (1) of NEMA, introduced on 08 December 2014, provides that: "(1) Every holder, holder of an old order right and owner of works remains responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the management and sustainable

holds the previous holder of an old order right and owner of works still responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of extraneous water, the management and sustainable closure notwithstanding the issuing of closure certificate by the Minister of Mineral Resources and Energy.

[13] On 26 February 2016, the 1st Respondent sent a reminder letter to DBCM for a response to the DMRE's comment in the letter of 10 November 2012, further advising DBCM that its Oak Mine Closure Application would be processed after DBCM has addressed the comments raised therein. He gave DBCM a period until 15 April 2016 to respond.

[14] DBCM responded to the letters of 10 November 2012 and 26 February 2016 from the DMRE only on 9 November 2017, requesting DMRE to agree to an amendment of DBCM's 29 July 2003 approved EMP and to providing DBCM with the Closure Certificate in terms of s 43 of the MPRDA after execution of DBCM proposal. DBCM's had proposed the following, that:

[14.1] In respect of the approved EMP and requirement that DBCM reshape the open pit – that it be approved that the slope of the first bench leading to the surface will be finished off evenly at a gradient of not more than 1:2 (about 26 degrees to the horizontal ground level). The vertical height of the second bench will not exceed 5m and the horizontal portion of this will not be less than 2 m to the top edge of the following side wall. Both internal and independent external studies conducted concluded that the sloping of the open pit as per the EMP will not satisfy the concerns raised by the DMRE. As a result to solve the concern that the pit will pose a high risk for scavenging and illegal mining, DBCM proposed as a solution, that an enviro- berm with a vertical height of 4 m and width of 3 m be constructed along the perimeter of the open pit to restrict access by both humans and animals.

closure thereof, notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act 2002, to the holder or owner concerned."

[14.2] **In respect of the Department's request for a practical plan for future land uses that would not encourage scavenging and illegal mining -** DBCM indicated that a comprehensive surface environmental rehabilitation was completed. This included the de-commissioning and rehabilitation of all surface infrastructure, all mineral residue facilities as well as blasting waste rock into the open pit to cover any remaining diamond bearing material. Whilst also mentioning that the properties comprising of the Oaks mine have been purchased by a Game farmer. These farms surround the Oaks Mine situated some distance from the nearest public road as well as the access control exercised by the farmer which further restricts any access to the property and will further deter scavenging or illegal mining.

[14.3] **On the issue of all relevant stakeholders and interested and affected parties to be thoroughly consulted, -** DBCM submitted that as part of the decommissioning and closure process that took place in 2009 various consultations took place with the Regulator and other interested and affected parties. DBCM also ensures that regular meetings are held with the local land owners in the area.

[15] The 1st Respondent in a letter dated 23 October 2018 rejected DBCM's submitted Oaks Mine Closure Application and Closure Plan ("**3rd Decision**") on the basis that it want the pit to be well rehabilitated and DBCM has no intention to close the pit. It called upon DBCM to submit a new Closure Plan that will indicate how the pit will be rehabilitated and include proof of results of consultations with interested affected parties and the Department, prior its submission of the revised Closure Plan.

[16] On 23 April 2019 the 1st Respondent wrote a Memorandum to the Chief Director: Legal Service maintaining that the pit at the Oaks Mine must be backfilled on the basis of health and safety reasons.

[17] **DBCM submitted its Closure Application and an approved EMP Plan on 16 October 2019,** in response to the letter of 23 October 2018 from the DMRE alleging that; the Oaks Mine had been successfully rehabilitated in accordance with its

approved authorisation. The delay in issuing of the Closure Certificate was in contravention of s 6 of the MPRDA which requires the DMRE to comply with the principles of administrative justice that requires decisions to be taken within a reasonable time as expressly entrenched in s 6 of PAJA. It wished to engage the DMRE so as to provide all the clarifications. The requirement by DMRE that DBCM submits a new Closure Application on the basis that the pit must be backfilled is neither rational nor procedurally fair as required by s 6 of PAJA. The requirement that the pit be backfilled must be rationally connected to the EMP of the mine). The DMRE has raised safety issues of the open pit throughout the closure process, and no environmental issues. The safety issues are raised and catered for in the EMP. The DMRE has not conclusively stated that the pit must be closed and it just assumed that the reference to rehabilitation means it must be backfilled. At all times in the amended EMP, it was clear that the pit would remain open and approximately 10 hectares of the land will not be able to be restored and would be made safe using a fence that is currently in place and effective. Also that on approval of the amended EMP, there was no request of any adjustments requiring that the pit be backfilled. Therefore, the basis upon which DMRE requires the pit to be backfilled is unclear.

[18] It was DBCM's submission that one of the principles of mine closure set out in s 56 (f) of the MPRDA Regulations is that the operations are closed efficiently, cost effectively and must be financially feasible. The backfilling of the pit is not cost effective due to a dramatic cost difference between backfilling and leaving the pit open. The cost is estimated at R100 Million in 2014 and R200 Million as in August 2019. DBCM has spent to that date R13 Million and have reserved R3,3 Million for the residual and latent environmental impacts. The backfilling will result in an excessive carbon footprint due to the fuel consumption of all the machinery and equipment that will be required. It will also require that all the rehabilitation commenced and finalised to date be destroyed in order to backfill the pit. There is also a possibility that there will not be sufficient backfill material.

[19] Furthermore, DBCM stated that it was clear that the pit would remain open and 10 hectares of the mine would not be able to be restored and would be made safe using a fence which is currently in place and effective. The predetermined state was a game farm with an open pit fenced off safely. DBCM has successfully delivered on its

obligation to rehabilitate the land to its predetermined state as required by the law and the following measures were put in place to make sure that the pit is safe:

[19.1] Lack of visibility of the farm with no sign of a mine in existence from the road leading to or from the Oaks mine. It is non-accessible perimeter of the farm surrounded by an electric fence which mitigates unauthorised entry.

[19.2] The instability of the farm is said to be residual, however risk to animals and humans could be managed through access control and therefore a fence was erected around the pit to mitigate any danger.

[19.3] The bottom walls of what have been benches and ramp have been blasted covering the kimberlite with thick rock layer, making the kimberlite impossible to access and any illegal mining rendered difficult if not impossible. The area currently patrolled by the new owners and farmers.

[20] In addition DBCM mentioned that the allegation that the pit poses a problem has been disproven by the effluxion of time with no safety incidents or illegal mining incidents reported since cessation of mining operations in 2009. A new closure plan is not feasible and will severely prejudice DBCM. The request contravenes the principle of fair administrative justice.

[21] DBCM further pointed out that consultations took place in 2008 when it embarked on a large scale consultation effort in preparation of its closure plan. Due to the delays of more than a decade in obtaining a closure certificate any new closure plan will not be effective, the parties previously consulted may not be the same or be available, the farm having not operated for more than a decade. It has complied and any further requirement that it do so not required in law.

[22] On 2 May 2020, 7 months thereafter, DBCM sent a follow up letter enquiring on the Application for the closure certificate accusing the DMRE of delaying and purporting to reject its closure application and plan on the basis of perceived inadequacy in the closure plan “not providing for the backfilling of the open pit”. It indicated that in the meantime a new firm Shangoni Management Services was appointed to conduct an assessment on the mine’s state of rehabilitation.

[23] According to DBCM, Shangoni conducted an independent evidence based update of the environmental risk assessment, considered the 10-year worth of actual mitigation measures that have been undertaken since the closure of the mines, with an intention to update the DMRE of the success of the current and ongoing rehabilitation efforts that has occurred over the past 10 years, mentioning that no wall failures were recorded, no illegal mining has taken place due to the remote location, a blasting over of the remaining kimberlite took place, strict access control measures in place, a 2,4 cm fence and a 700mm safety berm that demarcates the pit area restricts access. The new owner of the farm who operates a game farm and hunting business. The report's conclusion was that rehabilitation of the Oaks Mine complex over the past ten years has proven to be successful. In the circumstances alleged that any demand by DMRE to backfill the open pit is unreasonable and irrational.

[24] The DBCM insisted that, its Closure Application remains the one first submitted on 3 November 2009 on which the DMRE had failed, or refused or neglected to make a decision but only comments on its Closure Plan. Also that its Application must be decided in terms of s 43 of the MPRDA and the MPRD Regulations as they existed on the date the Closure Application was submitted. The s 43, NEMA and Regulations amendments effective post the date of its Closure Application not applicable. It demanded a final decision on the Closure Application by 10 June 2020 that takes into account the updated records.

[25] On 6 June 2020 the 1st Respondent informed DBCM in a letter that its Closure Application would continue or remain pending until a revised Closure Plan has been submitted to the DMRE explaining how the open pit on the Oaks Mine would be backfilled. Consequently, DBCM lodged an internal appeal with the 2nd Respondent on July 2020 against the refusal to process the closure certificate and failure to take a decision on the closure application submitted by DBCM. The DMRE is yet to make a decision, so the appeal remains open.

[26] The DMRE Legal Services had in the meantime indicated that as long as the internal appeal was with the 1st Respondent and until such time that the 1st Respondent has processed the internal appeal in accordance with s 39 of the MPRDA

Regulations, their hands were essentially tied. There has been no further communication from the DMRE notwithstanding being informed of the intention to proceed with the review application.

Application

[27] DBCM continued to bring this application in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) or alternatively the principle of legality as enshrined in s 1 (c) of the Constitution, for an order reviewing and setting aside the the 1st Respondent decision of refusal to grant DBCM a closure certificate, alternatively the 1st Respondent’s failure to take a decision on DBCM’s Application for the closure certificate as set out in the relief sought on the following grounds;

[27.1] DBCM has complied with the requirement to be granted a closure certificate, as well as the requirement in respect of the internal appeal decision making process. Notwithstanding such compliance, the closure certificate has not been granted to DBCM and the appeal remains pending.

[27.2] On the specific issue of the open pit that is being contended, that according to page 9 of DBCM’s approved amended EMP, the final table under the heading states” the open pit will remain”. Further on page 6-3 paragraph 6.4.1 under the subheading management measures of The pit was to remain open.

[27.3] First Respondent’s failure to grant the closure Application, alternatively refusal to decide the closure Application purports to interfere in a very material way with DBCM’s rights. The decision amounts to administrative action because the 1st Respondent constitute an organ of state for the purpose of PAJA, and the decision to refuse to grant the closure application, or alternatively, the refusal to decide the closure application adversely affects DBCM’s right and has a direct external legal effect, accordingly reviewable under s 6 (2) of PAJA on the basis that:

[27.3.1] The first Respondent's decision influenced by a material error of law being that "the closure application is regulated by the current provisions of the MPRDA (s 6 (2) (d) OF PAJA); for the reasons that:

[27.3.1.1] Both the initial and the amended EMP were approved by the DMRE prior the commencement of the MPRDA on 14 May 2004, and at the time the law applicable in terms of the Mineral Act in s 38 stated that:

"The rehabilitation of the surface of land concerned in any prospecting or mining shall be carried out by the holder of the prospecting permit or mining authorisation concerned-

(a) in accordance with the rehabilitation programme approved in terms of s 39 if any;

(b) as an integral part of the prospecting or mining operations concerned;

(c) simultaneously with such operations, unless determined otherwise in writing by the regional director; and

(d) to the satisfaction of the regional director concerned.

Also referring to s 12 of the Minerals Act which regulated liability in relation to closure of mines provided that:

"Continuation of liability until certificate is issued

12. if any prospecting permit or mining authorisation is suspended, cancelled or abandoned or if it lapses in terms of this Act, or if any portion of the land comprising the subject of such permit or authorisation is abandoned under s 11 (2) or the operations at the work cease, the person

who was the holder of such permit or authorisation immediately prior to such suspension, cancellation or abandonment or lapsing or the holder of such permit or mining authorisation or the owner of such works as the case may be, shall remain liable for complying with the relevant provisions of this Act, until the regional director concerned issues a certificate to the effect that the said provisions have been complied with.

[27.3.1.2] At the commencement of the MPRDA, the Mineral Act was in its whole entirety repealed save for a number of limited definitions which continue to apply. The transition of mineral regulation from the Minerals Act to MPRDA was itself regulated in terms of transitional arrangements contained in Schedule II of the MPRDA. In this regard with reference to the original version of the MPRDA prior to any amendment, item 10 of the transitional arrangement contained in Schedule 11 to the MPRDA stated:

“Continuation of approved environmental management programme

10.(1) Any environmental management programme approved in terms of s 39 (1) of the Minerals Act and in force immediately before this Act took effect, and any steps taken in respect of the performance assessment and duty to monitor connected with that environmental management programme continues to remain in force when this Act comes into effect.

(2) Sub item 1 does not prevent the Minister from directing the amendment of the environmental management programme in order to bring it into line with the requirements of this Act.

(3) Any person exempted in terms of s 39 (2) (a) of the Minerals Act before this Act took effect and whose exemption does not otherwise remain in force in terms of this Act, must apply for an exemption in terms of this Act

within 1 year from the date on which this Act took effect, otherwise the exemption lapses.

(4) if the holder of an old prospecting right or old order mining right ceases the relevant prospecting or mining operation, the holder must apply for a closure certificate in terms of s 43.

(5) s 38 applies to a holder of an old prospecting right or old order mining right.

[27.3.1.3] Prior to its amendment s 43 read:

“43. Issuing of a closure certificate

(1) The holder of a prospecting right, mining right, retention permit or mining permit remains responsible for any environmental right, pollution or ecological degradation and the management thereof, until the minister has issued a closure certificate to the holder concerned,

(2) On written application by the holder of a prospecting right, mining right or mining permit in the prescribed manner, the Minister may transfer such environmental liabilities and responsibilities as may be identified in the environmental management plan or environmental management programme or any prescribed closure plan to a person with such qualifications as may be prescribed.

(3) The holder of a prospecting right, mining right, retention permit or mining permit or the person contemplated in subsection (2) as the case may be, must apply for an closure certificate upon-

(a) the lapsing, abandonment, cancellation of the right or permit in question;

(b) the cessation of the prospecting or mining operation;

- (c) the relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; or completion of the prescribed closing plan to which a right, permit or permission relate;
- (d) Completion of the prescribed closing plan to which a right, permit, or permission relate.

(4) An Application for an closure certificate must be made to the Regional Manager in whose region the land in question is situated within 180 days of the occurrence of lapsing, abandonment, cancellation, cessation relinquishment or completion contemplated in subsection 3 and must be accompanied by the prescribed environmental risk report.

(5) No closure certificate may be issued unless the Chief Inspector and the Department of Water Affairs and Forestry have confirmed in writing that the provisions pertaining to health and safety and management of potential pollution to water resources has been addressed.”

[27.3.1.4] Section 43 now reads-

“43. Issuing of a closure certificate

(1) The holder of a prospecting right, mining right, retention permit, mining permit, or previous holder of an old order right of previous owner of works that has ceased to exist, remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisations and the management and sustainable closure thereof, until the minister has issued a closure certificate in terms of this Act to the holder or owner concerned.

(2) On the written Application in the prescribed manner by the holder of a prospecting right, mining right, retention permit, mining permit or previous holder of an old order right or previous owner of works that has ceased to exist, the minister may transfer such environmental liabilities and responsibilities as may be identified in the environmental management report and any prescribed closure plan to a person with such qualifications as may be prescribed.

(3) The holder of a prospecting right, mining right, retention permit, mining permit or previous holder of an old order right or previous owner of works that has ceased to exist, or the person contemplated in subsection (2), as the case may be must apply for a closure certificate upon-

- (a) The lapsing, abandonment or cancellation of the right or permit in question;*
- (b) Cessation of the prospecting and mining operation;*
- (c) The relinquishment of any portion of the prospecting of the land to which a right, permit or permission relate; or*
- (d) completion of the prescribed closing plan to which a right, permit or permission relate.*

(4) An application for a closure certificate must be made to the Regional Manager in whose region the land in question is situated within 180 days of the occurrence of the lapsing, abandonment, cancellation, cessation, relinquishment or completion contemplated in subsection 3 and must be accompanied by the required information, programmes, plans and reports prescribed in terms of this Act and the National Environmental Management Act 1998.

(5) No closure certificate may be issued until the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting

the environment have confirmed in writing that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed.

(5A) Confirmation from the Chief Inspector and each government department contemplated in subsection (5) must be received within 60 days from the date the Minister informs such Chief Inspector or government department, in writing to do so.

(6) When the Minister issues a certificate, he or she must return such portion of the financial provision contemplated in s 41 [sic] the National Environmental Management Act 1998, as the Minister may deem appropriate, to the holder of a prospecting right, mining right, retention permit or mining permit, previous holder of an old order right, or previous owner of works that has ceased to exist. Or the person contemplated in subsection (10).

[27.3.1.5] The section further on subsection 11 to 13 reads as follows:

(11) The holder of a prospecting right, mining right, retention permit, mining permit or previous holder of an old order right or previous owner of works that has ceased to exist, or the person contemplated in subsection (2) as the case may be, operating or who has operated within an area identified in subsection (9) must amend their programmes, plans or environmental authorisations accordingly, or submit a closure plan, subject to the approval of a minister, which is aligned with the closure strategies contemplated in subsection 10.

(12) *In relations to mines with an interconnected or intergrated health, safety, social or an environmental impact, the Minister may, in consultation with the Minister of Environmental Affairs and Tourism determine the apportionment of liability for mine closure as prescribed.*

(13) No closure certificate may be issued unless-

(a) *the Council for Geoscience has confirmed in writing that complete and correct prospecting reports in terms of s 21 (1) have been submitted to the Council for Geoscience;*

(b) *Complete and correct records, borehole core data or core log data that the Council for Geoscience may deem relevant, have been lodged with the Council for Geoscience or*

(c) *in the case of the holder, a permit or a right in terms of this Act, the complete and correct surface and the relevant underground geological plans have been lodged with the Council for Geoscience.”*

[28] DBCM argued that; the legislative framework applicable to Oaks Mine closure is presently set out in s 43 of the MPRDA read with regulations 56-62 of the MPRDA Regulations which was applicable at the time it applied for the closure of the Oakes Mines and forms a material dispute between the 1st Respondent and DBCM, with the former asserting that the law which applies is the law as it now stands. It contends that there are no transitional arrangements in the section to usher in the procedural effects of the change. If the sections were to be interpreted retrospectively, this would give rise to irrationality in circumstances where the Constitution requires that people must be able to manage their affairs and take action or refrain from taking action in terms of laws which are in force at the relevant time.

[29] According to DBCM where a statutory procedure is commenced in terms of a particular legal regime, it must be completed under that regime and will not be affected by changes in the regime, particularly where the changes are materially adverse to the interests of the person participating in the procedure. On the proper interpretation of the relevant amendments to MPRDA, they do not apply retrospectively to actions

already completed and do not require DCBM to engage in rehabilitation not contemplated in its approved EMPs. DCBM contends that a law that is retrospective to that degree is inconsistent with a democratic order under the rule of law and the Constitution. DCBM accordingly argued that the initial EMP and the amended EMP continued to apply when the MPRDA took effect on 1 May 2004. At the time DCBM lodged its closure application in 2009, s 43 provided that upon grant of a closure certificate all obligations of a mining right holder would cease.

30. DCBM also alleged in relation to the Promotion of Administrative Justice Act, 2000 (“PAJA”) that:

[30.1] DMRE laboured under a material mistake of law and its decision failed to take into account relevant considerations and took irrelevant considerations into account (s 2 (e) (ii) of PAJA, in that:

[30.1.1] DCBM had complied with both EMPs which both expressly stated that the pit would stay open on closure as part of the rehabilitation and closure objectives of the mine. Back filling the pit at this point in time would be both impractical and irrational from an environmental, practical, technical and financial perspective. Had it been part of the plan, it would have been required to incorporate this into the way the mine was operated, arguing that for example topsoil would have been placed in a particular way and backfilling carried out as part of concurrent rehabilitation. Now that the mines have stopped operations it is not possible or practical to do so.

[30.1.2] The pit only consists of 10 hectares of the total 69 hectares of mining area. An area of about 49 hectares will have to be disturbed to have sufficient material to fill the 10 hectares. Leaving another 49 hectares that will have to be rehabilitated which was never catered for in the mine planning and rehabilitation and no funds set aside for such eventuality. – It will also result in an excessive carbon footprint due to the fuel consumption of all the machinery and equipment which would require that all rehabilitation commenced with and finalised to date be

destroyed in order to back fill the pit. Which is contrary to achieving and maintaining environmentally sound closure and rehabilitation.

[30.1.3] The ground water could be impacted negatively due to the materials being used, with a probability that there will not be sufficient backfill material. Backfilling could effectively undo the already proven successful rehabilitation of the mining area completed to date. The financial feasibility of the 1st Respondent's demand that the pit be back filled must be considered with the reference to the success of the environment's rehabilitation and the merits of the 1st Respondent's reasons for demanding that the pit be back filled. The DMRE should not be entitled to impose new conditions where a party has already mined in accordance with what was understood to be their ultimate obligations.

[30.2] The 1st Respondent decision inconsistent with the approved closure objectives and is not rationally connected to the information before him or the reasons given for the decision by the administrator (s 6 (2) (f) (i) (cc) and (dd) of PAJA. For that reason, the decision is also arbitrary and capricious (s 6 (2) (e) (iv)), in that:

[30.2.1] The required backfill is inconsistent with the approved closure objectives. Backfilling not going to achieve any particular purposes. For DCBM to back fill the pit in the absence of any EMP to that effect would mean that it is acting in contravention of the applicable laws that regulate mine closure and rehabilitation.

[30.2.3] DCBM has gone to extensive length to comply with both EMP and the closure application and has produced credible evidence that the Oaks Mine has been successfully rehabilitated to date.

[31] DBCM reckoned that considering all the above factors, a reasonable decision maker in the 1st Respondent's position would have granted DCBM's closure application and issued the closure certificate (s 6 (2) (h)). For all the reasons set out above the 1st Respondent's decision for refusing to grant the closure Application is in

all circumstances arbitrary and capricious and failure to grant the closure certificate amounting to a decision that is an unlawful and unconstitutional (s 6 (2) (l)).

The 2nd Respondent's failure to decide the appeal.

[32] On 2nd Respondent's failure to take a decision on the internal appeal DBCM filed in terms of s 96 of the MPRDA against 1st Respondent's refusal to process and decide DBCM's closure application unless the unlawful condition of backfilling the open pit is met, DBCM sought to invoke the provisions of s 6 (1) of PAJA that provides for institution of proceedings in a court or a tribunal for the judicial review of an administrative action that is defined to include any failure to take a decision or an action by an organ of state for which the court has in terms of s 6 (2) (g) the power to judicially review.

[33] DBCM referring to the provisions of s 96⁶ and to its internal appeal indicated that a period of more than 10 years has elapsed since it has lodged its closure application. It alleged that the delay by DMRE was contrary to the DMRE statutory obligations as set out in s 6 of the MPRDA namely that "...any administrative process conducted or decision taken, in terms of this Act must be within a reasonable time or in accordance with the principle of lawfulness, reasonableness and procedural fairness."

[34] The same principle applicable in respect of the 2nd Respondent's delay in making a decision on the internal appeal, a period of 6 months has lapsed and the

⁶ S 96 reads:

"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 within 30 days becoming aware of such administrative decision in the prescribed manner to-

(a) the Director-General, if it is an administrative decision by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act;

(b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency. [Subs. (1) substituted by s. 68 of Act 49/2008 w.e.f. 7 June 2013]

[...]

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), apply to any court proceedings contemplated in this section"

decision is still pending. DBCM argued that the 2nd Respondent failed to take a decision he is duty bound to do in terms of s 6 (3)(a) of PAJA. If any person relies on the ground of review referred to under s 6 (2) (g) of PAJA and the relevant law (as is the case in this matter) does not prescribe the period within which the administrator is required to take that decision, on the administrator's failure to take a decision it is duty bound to take, that person may institute proceedings for review on the ground that there has been unreasonable delay in taking the decision.

[35] DBCM avers that it had a right to seek an order directing the taking of the decision or a declaration of rights in relation to taking of the decision; or an interdict aimed at doing justice between the parties. This is constructed on the recognition that a court faced with a failure to take a decision will not be in a position to assess the merits on the basis of rationality or reasonableness, because no decision will exist which can be subjected to scrutiny and review on those grounds.

[36] It therefore argued that should DBCM not be successful in prayers 1 -3 and 6 of its notice of motion, in the alternative DBCM seeks an order that the court direct the 3rd Respondent, as the ultimate decision maker on appeals, to decide the appeal within a period of 25 days, and communicate such decision to DBCM in 5 days. The Minister's decision on the internal appeal ought to be taken in line with the legal principles relating to closure applications, as they existed in November 2009, the time the closure application was lodged. (Although another Application submitted in 2019 with an application to amend the EMPr again). As little purpose would be served in directing the 2nd Respondent to make a decision since the Minister would be the ultimate decision- maker. Matters have been delayed long enough and DBCM now entitled to an expedited outcome to its internal appeal on those grounds.

[37] **On the legality challenge:** To the extent that the 1st and 2nd Respondent's impugned decision does not amount to an administrative action, DBCM argues that the decision nevertheless constitutes an unlawful exercise of public power, it being trite that every exercise of public power must comply with the principle of legality and the rule of law in accordance with s 1 © of the Constitution. Irrationality and unlawful conduct violates the principle of legality enshrined in the rule of law, as such it would be reviewable and can therefore be set aside on that basis.

[37.1] DBCM further argued that the 1st Respondent's refusal to process and decide the application as well as the 2nd Respondent's failure to decide the internal appeal and 1st Respondent refusal and or failure to process or decide the closure application was not only unreasonable but also irrational and for that reason too, unlawful. Even though they would then be of no force or effect, an administrative action is valid despite the patent irrationality or unlawfulness, until it is set aside by the court of law, hence the Application, either in terms of PAJA or principle of illegality.

[38] **Compliance with s 7 (2) of PAJA (Condonation):** - In terms of s 7 (1) and (2)⁷ of the MPRDA any proceedings for judicial review in terms of s 6 (1) must be instituted without reasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of the internal remedies has been concluded or where there are no internal remedies, on which the person concerned became aware of the administrative action and reasons for it or might have reasonably have been expected to have become aware of the action and the reasons. In accordance with s 96 (3), No person may apply to court for a review of an administrative decision unless such a person has exhausted his or her remedies in terms of s 96 (1) of the MPRDA. If a court is not satisfied that any internal remedy exhausted, the court or tribunal may direct that the person concerned must first exhaust such remedy before instituting proceedings

⁷ 7. Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

(2)

(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*

in a court of law for judicial review. A court may in exceptional circumstances and on application by the person concerned exempt such a person from the obligation to exhaust any internal remedy if the court or tribunal deem it to be in the interest of justice.

[38.1] DBCM contends that it has complied with the requirement to exhaust internal processes to the extent possible and should not be forced to go to court to force the 2nd Respondent to perform his statutory duties before bringing an application to grant relief which the 2nd Respondent ought, but failed, to grant by upholding DBCM's internal appeal. However, should the court not be satisfied that DBCM complied, there is no definition of what is referred to as exceptional circumstances in the statute and submit that it depends on the facts and circumstances of a particular case and the nature of the administrative action in issue and the out of the ordinary circumstances that render it inappropriate for the court to require the s 7 (2) Applicant to first exhaust the internal remedy. DBCM submits that circumstances in this matter are such as to require the immediate intervention of the courts rather than await exhaustion of internal remedies alleging that it in good faith took reasonable steps to exhaust available remedies with a view to obtaining administrative redress by noting an appeal with 2nd Respondent. Its case distinguishable from the cases for which internal appeal procedure provided, as where internal procedure would not be effective and its pursuit futile, a court may allow a litigant to approach it directly. So too where the internal appellant tribunal has developed a rigid policy which render the exhaustion of internal processes rigid. It argues, that exceptional circumstances may require that failure to comply or non-exhaustion of internal proceedings be condoned and proceed with judicial review nonetheless. The requirement that remedies be exhausted not being absolute.

[38.2] DBCM argues that it has complied with the time frames requirements prescribed in terms of the MPRDA for an internal appeal had followed up in respect of the progress of the appeal. It has however been frustrated by the DMRE in its efforts to exhaust the internal remedy which has unreasonably delayed processing the appeal and offered no explanation in this respect. DMRE's conduct and delay causing prejudice to DBCM.

[38.3] It further argued that it had good prospects of success in respect of the review application which is an important fact to consider in determining whether it should, in the interest of justice, be exempted from the obligation to exhaust internal remedies. Also that any non-observance of the PAJA requirement not flagrant and gross and its explanation not vague and inadequate. It ought to be permitted to approach the court directly. By doing so the autonomy of the administrative process will not be undermined considering that the higher administrative body, the 2nd Respondent was given an opportunity to exhaust its own existing mechanism, and failed to make a decision. In view of the facts and circumstances indicated, it would be in the interest of justice that DBCM be granted condonation. It cannot be in the interest of justice that the decisions of the 1st and 2nd Respondent, which according to it are clearly unlawful remain beyond challenge.

[38.4] DBCM accordingly submitted that all the aforementioned factors warrant a finding that DBCM is exempted from the obligation to have exhausted the internal remedy of an appeal available to it and prays for such an exemption.

Supplementary

[39] In its supplementary Affidavit DBCM pointed out that the record does not have the reasons for refusal to grant the Closure Application and therefore it can be inferred that there were no reasons given. The decision for failure to furnish any reasons, by definition irrational. Only facts surrounding the closure application and recommendations post the 1st Respondent's decision (which recommends the scientific study of the appropriate method to be followed on rehabilitation so that the principle of sustainable development is not compromised) were annexed. DBCM also argues that the 1st Respondent referred to facts confined to issues of rehabilitation of the environment in terms of safety to humans and animals and do not go further than that, therefore limited to those issues.

[40] Furthermore, the record attached a site inspection report of 26 May 2021 that indicates that as far as a month ago the DMRE made no findings of non-compliance

in respect of the National Environment Management Waste Act 2004 of 2008 that there was nothing happening in relation to the air, soil, vegetation, noise and water and no community leaving in the vicinity. As a result, DBCM added the lack of finding of non-compliance as a further ground in support of its review application. Also the failure to procure the scientific investigation to support his decision even though having identified a need for the investigation which could provide such a basis made the decision irrational for lack of such a basis. As a result, it argued that a reasonable decision maker in the position of the 1st Respondent would have granted the closure application.

Respondent s' response

[41] In response, the Respondents filed an answering affidavit deposed to by the 1st Respondent raising a point *in limine* of non-joinder to the Application. The basis thereof being that DBCM failed to join other Departments and parties that have an interest which are to be affected by the relief sought in the matter reliant on s 43 (5),⁸ 43 (13)⁹ of the MPRDA as amended in 2008 which provisions came into effect on 7 June 2013. In terms of the provisions the granting of the closure certificate is prohibited unless certain officials have in writing given their opinion or approval or acceptance of the environmental rehabilitation, confirming that the provisions pertaining to health and safety and management pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environment authorisation have been addressed. Specifically, in terms of s 43 (5), the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment should have confirmed in a written report.

[42] The Respondents also referred to s 2 (4) (g) of NEMA the overarching umbrella legislation for environment in the country that requires the decision to approve or reject the Oaks Mine Closure Application and plan, to take into account the interest and needs and values of all interested and affected parties. Including Regulation 62 (j) of the MRPDA Regulations that provides for the Closure Application to include amongst

⁸ Supra on page 17 para

⁹ Supra on page 19 para

others a record of interested and affected persons consulted and s 2 (4) (k) of NEMA that requires that the decision be taken in an open and transparent manner. Respondent also pointed out that DBCM has confirmed to have sold the property to a game farmer who would use it for game and stock farming pointing out that s 33 (b) of the Constitution entitles everyone to procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened.

[43] On the issue of joinder, the DBCM is said to have failed to join the Minister of Limpopo Economic Development, Environment and Tourism (MEC: LEDET), Department of Environmental Affairs, Minister of Water and Sanitation, Blouberg Local Municipality, Limpopo Heritage Resources Authority (LHRA), Chief Inspector of Mines. According to the Respondent, given that the parties not joined have specialist expertise in their respective fields, these parties are directly and profoundly involved in this matter including the adjacent landowners. The Respondents therefore argue that the non-joinder of these parties is dispositive of the matter and therefore the review application before this court should be dismissed.

The pit closure

[44] The Respondents disputes DBCM's assertion that in terms of the amended EMP of May/July 2003 (amended EMP) the pit at the Oaks Mine was to remain open after cessation of the mining operations, as a result the Minister should have granted the Oaks Mine the closure certificate in terms of s 43 (3) of the MPRDA not as amended.

[45] According to the Respondents the Oaks Mine amended EMP of May 2003 was approved in terms of s 39 (2) on condition (that is contained in the EMP) that DBCM, as the holder of the old order mining right will notify and consult with all the affected and interested parties as required in terms of s 2 (4) (f) and s 2 (4) (k) of NEMA, read with s 33 (b) of the Constitution. However, DBCM's record of notification and consultation with the relevant persons after the approval was never submitted to the Regional Manager notwithstanding the condition of the amended EPM approval. The failure by DBCM to subject the amended EPM of May 2003 and the Oaks Mine Closure Plan of 2008 to public processes as per statutory requirement is fatal and its review application should be dismissed on that ground only.

[46] Furthermore, on or about 2005 after the MPRDA came into effect in 2004, the DMRE published guidelines as contemplated in Regulation 54 (1) of the MPRDA Regulations titled “the Guideline Document for the Evaluation of Quantum Closure Related Financial Provision provided by a mine (the 2005 guidelines) introducing guidance to holders of old order mining rights on how to comply with the stringent requirements of the new mining legislation (MPRDA). Section C of the guidelines on the Generally Accepted Closure Method provides that DBCM when rehabilitating the Oaks Mine must ensure that:

[46.1] the excess material from the open cast pit is deposited in close proximity to the pit for in filling of the open cast pit once the ore body has been removed.

[46.2] the open cast pit perimeter wall must still be rendered safe for humans and domestic animals.

[47] DBCM did not convert its amended EMP of May 2003 or amend it to comply with the 2005 guidelines introduced after MPRDA came into effect in 1 May 2004. The amended EMP of May 2003 relied upon was not accompanied by the record of notifications and consultation with all the interested and affected parties. The DBCM's 2003 EMP therefore ceased to exist by operation of the law on 30 April 2009, the cut-off date for conversion of the Oaks Mine old order mining rights and its EMP. DBCM failed to provide a reasonable explanation for its failure to lodge its amended EMP with the 1st Respondent as Regional Manager during the transitional period of the MPRDA or amend its EMP to comply with the 2005 Guidelines and the stringent requirements of the MPRDA. The Respondents argued that DBCM's reliance on the old EMP of May 2003 issued under the repealed Mineral Act which fall short to the requirements of the Constitution, NEMA, MPRDA and 2005 guidelines is fatal to DBCM's Application which must then be dismissed.

[48] During the transitional period the Minister or MDRE in terms of s 10 (2) of the MPRDA read with s 12 (5) (a) of the NEMA Amendment Act (NEMAA) was empowered to direct De Beers to upgrade the Oaks Mine EMP and to the action and address pollution, ecological degradation and damage to the environment.

[49] DBCM ignored the administrative decision taken by the MDRE: Sub directorate Mine, Health and Safety after the inspection in 2008 prior to DBCM cessation of the mining operations, when it issued the health and safety instructions against DBCM pursuant to s 55 (1) of MHSA which when read with the decision to refuse a closure application pointed out, inter alia, that:

[49.1] *The “Oaks Mine open pit” will pose a high risk for scavenger and illegal mining.*

[49.2] *The practical plan for future land uses that would not encourage illegal mining or scavenging must be submitted to the DMRE.*

[49.3] *All relevant and stakeholders must be thoroughly consulted for future land use including principal inspector of mines.*

[49.4] *The department will not issue closure certificate until DBCM satisfies all the requirements of relevant legislations.*

[50] DBCM never appealed the decision or instruction to the Chief Inspector of Mines, the appeal authority in terms of s 57 (1) of the MHSA which decision therefore remains binding until it is reviewed and set aside by the court. It has failed to provide an explanation for its failure to appeal the s 55 (1) health and safety instructions or to apply for an exemption for exhausting internal remedies provided by MHSA. DBCM has in the meantime sold the farm without an approved Inspector of Mines’ health and safety plan for the game farming and there is no application to the DMRE for transfer of environmental liabilities filed in terms of s 43 (3) from the DBCM to the game farmer. DBCM’s failure to appeal is therefore submitted to be also fatal to the Application.

[51] The Respondent therefore argue that the DBCM’s contention that in terms of item 10 (1) of Schedule the MPRDA, the Oaks Mine amended EMP of 2003 approved in terms of s 39 (2) of the repealed Minerals Act continued to remain in force when the MPRDA came into force on 1 May 2004 has no basis in fact and law in that:

[51.1] The amended EMP of 2003 was never subjected to the public participation process;

[51.2] The amended EMP was not lodged with the Regional Manager in terms of s 7 (2) (j) of Schedule II of the MPRDA when the latter Act came into effect or amended it to comply with the 2005 Guidelines and the stringent requirements of the new MPRDA.

[51.3] The 2003 EMP ceased to exist by operation of the law on 30 April 2009, the cut- off date for conversion of the Oaks Mine old order mining right and its EMPs. The Respondent argues that as a result DBCM's reliance on the 2003 EMP should be fatal to the review Application and it and should be dismissed on that ground alone.

Costs of backfilling the pit

[52] The Respondent denies that the costs amount stated by DBCM to be estimated at R100 Million for financial year 2014 and R206 Million for financial year 2019 and, costs already incurred in rehabilitating the mine to date being R12.3 Million have any basis in fact or law arguing that:

[52.1] DBCM was in terms of item 7 (2) (a) to (k) of Schedule II of the MPRDA required to submit documentary evidence to prove its technical and financial ability to mitigate and rehabilitate the relevant environmental impact of its mining activities. It is also required in terms of s 28 to keep information and data in respect of mining or processing of minerals and to submit the prescribed information to the Director General. There was no such disclosure of the mentioned documentary evidence relating to its technical or financial statements or submission of its reports from the period 2014-2019 as required in terms of s 7 (2) (a) to (k). Also DBCM failed to submit a report on its mining and processing of minerals which the Respondent submit that it is fatal to DBCM's review Application.

[53] The failure by DBCM to submit to the Regional Manager information underpinning the compromising or sale of the Oak mine to a farmer is considered also fatal by the Respondents, including the failure to submit the following environmental information relating to the sale and closure:

[53.1] The record of notification and consultation with the interested or affected parties on post closure land use;

[53.2] The Application to the MEC for the registration of the Oaks Farms properties as a game farm in terms of s 28 (1) of the Threatened or Protected Species Regulations and EMP/EIA in support of the Application;

[53.3] The rezoning Application of the Oaks Mine from a mining to an agricultural/game farming land use zone in terms of s 28 of SPLUMA read with Blouberg Local Municipality Spatial Development Framework and Land Use Scheme and the record of notification and consultation. The sale agreement and registration of right of servitude over properties compromising the Oaks Mine previously used for mining operations;

[53.4] an Application for transfer of environmental liabilities filed in terms of s 43 (3) from DBCM to the game farmer.

[53.5] The Water Use License Application/cession or amendment and the EMP/EIA studies for the game farm. The Oaks Mine and Health and Safety Plan or Risk Assessment studies approved by the Chief Inspector of Mines for game farming.

[53.6] The Heritage Assessment studies and Risk Plan approved by the LHRA and NHRA in respect of archaeology survey conducted over the Oaks Mine properties before the commencement of mining operation

[54] Furthermore, the Respondents argue that DBCM was granted an ample opportunity since 7 July 2011 and was also sent a reminder in February 2016 to amend and submit a revised Closure Plan. The Application must therefore be dismissed as DBCM nevertheless failed:

[54.1] To submit the amended or revised Closure plan indicating that Health and safety requirements to be complied with and report on its post closure land use consultations with interested and affected persons.

[54.2] To appeal to the DG in terms of s 96 of the MPRDA, the decisions of the First Respondent taken on July 2011, 10 November 2012 and 23 October 2018 refusing to issue DBCM the Closure Certificate.

[54.3] To review the decision under PAJA within 180 days of becoming aware of the decisions.

On the declaratory orders sought by DBCM

[55] On the declaratory orders sought by DBCM that the old s 43 that prevailed on 3 November 2009 when it applied for Closure Certificate is applicable to the determination of its Closure Application and Plan and therefore that it be declared that (a) it is not under any obligation to back fill the Oaks Mine open pit, and that (c) the decision that it does inconsistent with the principle of legality enshrined in the Constitution, the Respondents argued that:

[55.1] The new s 43 that came into effect on 7 June 2013 although the amendment was in 2008, provides that DBCM as the holder of the old order mining right is responsible for the environmental degradation and or pollution, notwithstanding the issuing of the closure certificate by the MDRE. As a result, DBCM's contention that Oaks Mine operations under the repealed Minerals Act were conducted in terms of the amended EMP and the old s 43 has no merit.

[55.2] DBCM's seeking of a declaratory order to the effect that the old provision of s 43 that was amended is applicable to the Oaks Mine closure Application and that there are no transitional arrangements in the section to usher in the procedural effect of the change is not only misconceived but also amongst others, hypothetical due to the following reason:

[55.2.1] DBCM's mining operations under the repealed Minerals Act regime were conducted subject to compliance with any other laws, the mining permit stating that: the permit does not exempt the holder from the requirements of any provision of any other law, which is what happened when the MPRDA came into effect on 1 May 2004, the mining right is stated in its s 23 (6) to be subject to the Act and any relevant law the terms and conditions stated in the rights. DBCM'S contention that the decision to refuse to grant the Closure certificate is inconsistent with the principle of legality lacks merit.

[55.3] The Respondent also dispute that there was any ambiguity with the application of s 43 provisions as the amendment came into effect on 7 June 2013 when the Application for closure was in 2009. Since as early as 2008, there was no ambiguity and the intention of the legislature clear that DBCM as the holder of the old mining right would be responsible for environmental degradation and pollution notwithstanding the issuing of the Oaks Mine closure certificate. The Respondents therefore argue that inviting the court to make a declaratory order enforcing an old repealed statute order amended in 2008 (effective from 2013) is abstract, academic and hypothetical. NEMA, the overarching umbrella legislation for environment in South Africa became a retrospective legislation and introduced s 28 (1A). DBCM is therefore retrospectively liable for environmental degradation or harm that occurred over the Oaks Mine properties, even before the commencement of NEMA. Even though s 43 was not in force yet, s 28 (1) and (A) of NEMA was already applicable. Respondents therefore disputes the contention that there were no transitional arrangement and submits that the declaratory order sought, that the old s 43 is applicable to DBCM closure Application filed in 2009 is abstract and a declaratory order cannot be granted where the law is clear.

[55.4] The Respondents urged the court to refuse the order since the legal position on DBCM's obligation to backfill the open pit and responsibility for environmental degradation or harm over the Oaks Mine has been clearly defined, specifically in the following statutory provisions:

Section 2 (4) (p) of NEMA (**The polluter pays principle**) provides that:

“the cost of remedying pollution, environmental degradation, consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid by those responsible for harming the environment.”

and

Section **28 (1) of NEMA** requires that *“Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring or, in so far as it is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution, degradation of the environment.”*

Section 28 (1A) on a retention of liability states that: Subsection (1) also applies to a significant pollution or degradation that;

- (a) occurred before the commencement of this Act;
- (b) arises or is likely to arise at a different time from the actual activity that caused the contamination;
- (c) or arises through an activity of a person that results in a change to pre-existing contamination (subsection (1A) inserted by s 12 (a) of Act 14 of 2009 with effect from 18 September 2009

[55.5] DBCM is therefore retrospectively liable for the environmental degradation or harm that happened to the Oaks Mine properties even before the commencement of NEMA. The law is clear that DBCM obligated to backfill the open pit and its responsibility is clear.

[55.6] Furthermore, the Respondents refer to the following section of NEMA to substantiate the fact of being the responsibility of DBCM to ameliorate the impact of mining on the environment:

[55.6.1] s 24 (N) (7) (f) that states that *“ a holder of a permit is responsible for any environmental damages, pollution, pumping and treatment of polluted or extraneous water or ecological degradation as a result of his or her operations to which such right, permit or environmental authorisation relates.”*

[55.6.2] Section 24 (N) (8) states that “*notwithstanding the provisions of the South African Companies Act 71 of 2008, the directors of DBCM are jointly and severally liable for any negative impact on the environment whether advertently or inadvertently caused by the company or close corporation that they represent including damage, degradation or pollution.*”

[55.6.3] Section 38 (1) (d) of the MPRDA that provide that De Beer as the holder of the old order mining right, must as far as it is reasonably practicable, rehabilitate the environment affected by mining operations to its natural or predetermined state or to a land use that conforms to the generally accepted principles of sustainable development.

[55.6.4] Section 12 (5) (a) of the NEMAA which came into effect on 01 May 2009 which give the Mineral Resources Minister powers to direct DBCM, the holder of old order rights to upgrade the Oaks Mine, to upgrade the Oaks Mine EMP and to take action and address pollution, adverse ecological degradation or damage to the environment.

[56] The Respondent also argues that a declaratory order on a point taken or raised that has already been decided by a competent court cannot be granted. Reference is made to a fact that the Supreme Court of Appeal (SCA) has already decided that the directives or instructions already issued by the Regulatory State Department *in casu* the DMRE, against the holder of a mining right persists even after the Oaks Mine properties are sold to the game farmer and the prior owner has lost its connection with the land. The order for a declaratory order must be refused.

[57] The Respondents also argue that the declaratory order is too wide and purports to bind category of parties not all of whom are before court. A point already raised *in limine*. The order also affects the constitutional mandate of the

state regulatory departments and rights of other interested and affected parties not joined in the proceedings.

[58] Since the property has been sold to a game farmer and there seems to be no Application for the transfer of environmental liabilities to the game farmer, filed pursuant to s 43 (3) of the MPRDA placed before the 1st Respondent and this court. The Respondents argued that there is no tangible and justifiable advantage in relation to DBCM's position that appears to flow from the grant of the order.

[59] Furthermore the Respondents submit, on the basis of DBCM's substantial delay in bringing the Application for review and the internal appeal against the decision of the 1st Respondent's refusal or failure to decide on the closure application, and with no reasonable explanation tendered, the court should dismiss the Application and not grant the declaratory order sought.

[60] In addition the Respondents refer to the right enshrined in s 24 of the Constitution to a healthy environment and property rights of other interested and affected parties and s 24 constitutional mandate of relevant state departments which DBCM failed to place before court. Also s 33 of the Constitution that deals with the right to administrative decision read with s 2 (4) (f) of PAJA that required that all the interested and affected persons affected by the impugned decision to approve the EMP Amendment of May 2003 must be notified. They argue that the application is misguided and misconceived.

[61] Furthermore reference is made to Item 10 that contains provisions for the continuation of the approved EMP, Sub item (1) and (2), which are equally important to the consideration hereof. Sub item (1) states:

“Any environmental management programme approved in terms of s 39 (1) of the Minerals Act and in force immediately before this Act took effect and any steps taken in respect of the relevant performance assessment and duty to monitor connected with that environmental

management programme continues to remain in force when this Act comes into effect”

Whilst sub item 2 states that:

“Sub item 1 does not prevent the Minister from directing the amendment of an environmental management programme in order to bring it into line with the requirements of this Act”

[62] On 30 April 2009, the Oaks Mine amended EMP, approved in terms of s 39 of the repealed Minerals Act, which was not converted in terms of item 7 (2) (j) of Schedule II to the MPRDA, ceased to exist by operation of law. The Respondents therefore deny that any provisions of the MPRDA were violated by the 1st Respondent when the above decision was taken.

[63] Also for the fact that the Oaks Mine were sold to a third party without a transfer of environmental liabilities filed in terms of s 43 (3) of the MPRDA from DBCM to the game farmer, the 1st Respondent argue that its decision was lawful and procedurally fair.

On DBCM’s grounds of review

Error in law

[64] On DBCM insistence on the Application of the old s 43 to the amended EMP instead of the amended s 43 of MPRDA in relation to the backfilling of the open pit and the insistence that the amended EMP continues to be in force and that the Closure Application in May 2009 is governed by s 43 as it stood at the time of the amendment. The Respondent argued that as s 43 was amended in 2008 prior to DBCM’s filing of its closure Application, the amended s 43 and s 23 (1) which introduced retrospectivity was then applicable in the determination of the Application. As a result, DBCM knew as far back as 2008 that it would be liable for environmental degradation and harm.

[65] Further argued that the environmental information underpinning the sale of the property is not before court as a result the application must be dismissed.

Relevant and irrelevant consideration

[66] The Respondents submits that DBCM's ground of review based on the alleged irrelevant and relevant consideration by the 1st Respondent in refusing the closure application are lacking in merit due to the fact that DBCM relies on an EMP that is in contravention of the Constitution, NEMA, MPRDA, and NWA, MHSA, NEMBA and HNRA and SPLUMA.

[67] Also on the question of finances DBCM failed to file the necessary reports and information

On the 2nd Respondent's failure to decide the internal appeal

[68] On DBCM's allegation that 6 months had lapsed since their internal appeal against the 1st Respondent's failure to process the closure application was lodged on 20 July 2020, therefore the Department's delay to respond is in contravention of PAJA and DBCM entitled to seek order for DMRE to make a decision. Also that a period of 10 years has lapsed since DBCM had lodged its closure Application. The Respondent pointed out that DBCM was notified of the 1st Respondent's response in July 2011 and November 2012 to dismiss its closure application and it failed to appeal the decision to the DG /DMRE in terms of s 96 of the MPRDA or to respond since then until after 2018. It also filed its review whilst its appeal was still under consideration by the DG and for all these reasons the review should be dismissed.

On the legality principle,

[69] The Respondents alleged that DBCM failed to make a case under the principle of legality as they contend the decision to refuse the Application was consistent with the principle of legality and the Constitution.

Compliance with internal remedies

[70] The Respondent refutes the allegation that DBCM took reasonable steps to exhaust the s 96 internal appeal remedies of the MPRDA and has been frustrated by the DMRE delaying the decision on the appeal, therefore it would be in the interest of justice to grant DBCM an exemption in terms of s 7 (2) (c) of PAJA. The Respondents point out that DBCM had delayed responding to the refusal of its closure Application which decision was communicated to it on July 2011 and had to be reminded from then until 2018. The internal appeal only filed in July 2020. It argued that there are therefore no prospects of success as the closure application also falls short of the requirements of the Constitution and the applicable law. It is therefore not in the interest of justice to grant DBCM an exemption from exhausting the internal remedies.

Applicant's Reply

[71] In reply, DBCM raised the issue of the 1st Respondent's *locus standi* to oppose the application and depose to an affidavit on behalf of the 2nd and 3rd Respondent, that is the Director General and the Minister. DBCM denied that the 1st Respondent has the requisite authority, more so both Respondents have failed to file Affidavits confirming 1st Respondent's authority to depose to an Affidavit on their behalf and oppose the matter.

[72] On non-joinder DBCM pointed out that the issue can only arise depending on the court's decision on the declaratory order it is seeking, regarding the application of the MPRDA's old s 43 to its Closure Application. If the issue is decided in DBCM's favour that its Application is to be determined in terms of the old s 43 then the issue of joinder will not arise, only if the court decide otherwise will there be a need to deliberate the non-joinder point.

[73] It is however the DBCM's further submission that none of the parties referred to by the Respondent has any direct and or legal interest in the matter, neither is the purchaser farmer, nor the Blouberg Municipality. There are also no immediate neighbours. It pointed out that the relief sought is the granting of the closure certificate of Oaks Mine which deals solely with the cessation of responsibilities under the

MPRDA and none of the parties listed by the Respondent can be said to be affected by the relief sought and follows that they would not be interested.

[74] Addressing the record submitted the DBCM stated that the 1st Respondent did not furnish reasons for his decision not to grant the closure certificate, evidencing his contemporaneous consideration of the Application or a close and careful scrutiny of the documents said to constitute the record of his decision, which is irrational. The document titled “Reasons for the decision” attached to the record gives the 2nd Respondent an overview of the facts relating to the Application and recommendations post the decision. The picture painted by the record is that after receiving the well-motivated closure application and plan, the 1st Respondent plucked his decision out of thin air. The reasons appear to have been constructed by the 1st Respondent in his belated effort to respond to the review proceedings, which undermines the purpose of Rule 53 of the Uniform Rules of Court. There is no explanation of how the 1st Respondent evaluated the facts and information set out in the DBCM closure Application.

[75] Furthermore DBCM criticizes the 1st Respondent for dealing with prior decisions that are outside the decision of July 2020 that DBCM is complaining about, and has failed to show why that decision is not capable of being reviewed and set aside. A decision the Respondent does not deny that it is an administrative action subject to challenge in terms of PAJA and s 1 (c) of the Constitution, against which there has been no delay but a delay from the Respondents to decide the appeal.

[76] DBCM denies that the EMP for the establishment and operations of the Oaks Mine has anything to do with whether to grant the closure certificate or not. According to DBCM the notification of the I and AP (interested and affected parties) of the approval of the amended EMP which approval was unconditional is clerical and makes the 1st Respondent’s contention baseless. As part of the decommissioning and closure process that took place in 2009 it alleges to have taken extensive consultations with various stakeholders including I and AP. It also had regular meetings with local landowners in the areas including the owners of Oaks farms which surround the mine. The evidence was supplied with the closure Application. One such evidence was in a

report attached to the Application that is required in terms of Regulation 62 (j) of the MPRDA Regulation and the closure plan details the consultations DBCM conducted.

[77] With regard to the Guidelines DBCM argued that they are not peremptory but merely directory in nature. They also cannot contradict the Oaks Mine EMP that was preserved by the transitional provisions of the MPRDA and did not provide for the backfilling of the open cast pit. The DBCM submit that it was therefore not bound by the Guidelines nor obliged to convert or amend the Oaks Mine EMP in order to comply with the Guidelines.

[78] The DBCM denied that its amended EMP ceased to exist on May 2009, by operation of the law, the 1st Respondent having failed to indicate which law and does not address DBCM's contention that although DBCM's mining license was not converted into a new order and has since lapsed, the initial EMP and the amended EMP remain valid and enforceable in terms of s 10 (1)¹⁰ of the Transitional arrangement in Schedule II of the MPRDA. The DBCM therefore denies that it was obliged to lodge the EMP with the 1st Respondent during the transitional period of the MPRDA or to amend its EMP to comply with the Guidelines. As required by s 10 (1) the 3rd Respondent never directed DBCM to bring the EMP in line with the MPRDA or any applicable Guidelines due to the fact that the Oaks Mine stopped operation during the period which was allowed for conversion of the old order rights which opportunity DBCM did not utilise and instead elected to apply for a closure certificate.

[79] DBCM disputes that its reliance on the EMP falls short of the requirements of the MPRDA, Constitution, NEMA and the 2005 Guidelines and allege that the EMP is simply preserved and unaffected by both the enactment and subsequent amendment to the MPRDA.

[80] DBCM denied that the DMR: Sub Directorate MHS (DMRE) issued Health and Safety instructions in terms of s 55 of the Mine Health and Safety Act, 1996 (MHSA)

¹⁰ S 10 (a) reads:

“Any environmental management programme approved in terms of s 39 (1) of the Minerals Act and in force immediately before [the MPRDA] took effect and before any steps taken in relation to the relevant performance assessment and duty to monitor connected with the relevant environmental management programme continues to remain in force when [the MPRDA] comes into effect.”

to close the pit or that any purported instructions are subject to appeal. The purported instructions not attached to the 1st Respondent's affidavit. It also does not appear on the record of decision provided by the 1st Respondent but only an internal memo of the DMRE dated 23 April 2019, signed 3 September 2020, that read:

"The sub Directorate Health and Safety made the following recommendations that must be addressed before closure can be granted based on inspection conducted on 16 May 2008.

1. The installation of a security fence outside the safety zone/back break of the pit
2. The construction of the berm-walls around the pit area
3. Covering of the kimberlite at the bottom of the pit with waste material.
4. Storm water must be diverted away from the sheer zone on the western high wall and not allow any water to accumulate on the vicinity of the pit.
5. The chief inspectorate of Explosives must also be notified of the closure intentions.

[81] The DBCM alleged in respect of the memo that it was an internal memo with recommendations made by the DMRE to the Respondent's Directorate that was processing the DBCM closure Application. It never appealed such a purported or apparent instruction as it never received any formal instruction or the like in terms of the MHSA. Such instructions issued pursuant to s 55 of the MHSA will typically include a due date for compliance or appeal, failing which the DMRE will follow up with the recipient. DBCM denied receiving any follow up correspondence from the DMRE in relation to the apparent instruction for Oaks Mine. It alleges that in any event the issues purportedly raised in the instruction were for the first time addressed to DBCM by DMRE in the correspondence dated February 2016 based on a site inspection conducted on 7 November 2012. To which DBCM points out to have responded to the DMRE on 9 November 2017. The comments were that:

- “1. the open pit will pose a high risk for scavenging or illegal mining
2. The department would like to see a practical plan for future land use that would not encourage illegal mining or scavenging.
3. DBCM must also make sure that all relevant stakeholders and interested and affected parties is thoroughly consulted.”

[82] These are the same instructions of 7 July 2011 which were in a response by the 1st Respondent (1st Decision) to the closure application following a site inspection on 15 April 2011 to which DBCM never appealed or responded to until 2017 a year after the second reminder was sent on February 2016 which also followed up a site inspection that took place on 7 November 2012. The DBCM has also agreed in its Founding Affidavit that the 1st Respondent's constant refrain since the closure application was for the open pit to be backfilled and had attached the three responses from the 1st Respondent.

[83] Further, DBCM denied that s 2 (4) (f-k) of NEMA imposes any obligation to the holder of a mining right but set out the national environmental management principles and factors which guide organs of state in decision making. Whilst s 7 (2) (j) of Schedule II of the MPRDA is only applicable in circumstances where an old order right is converted. In DBMC's case the mining right lapsed, therefore it insists that the lapsing of the right did not put to an end the Oaks Mine EMP which is preserved in terms of s 10 (1) of Schedule II of MPRDA and not reliant on the conversion of an old order mine.

[84] DBCM denies that it was ever called upon to submit its technical and financial ability to mitigate and rehabilitate the environmental impact of its mining activities. Also that it had an obligation to submit its audited financial statements and the 1st Respondent does not establish the basis for such an obligation.

[85] On its failure to comply with s 7 (2) (a-k) of Schedule II of the MPRDA, DBCM denied that to be fatal to its Application for closure and argued that it is not up to the Respondents to raise it as a hindrance to DBCM lodging a closure application. DBCM was obliged to apply for the certificate and the Respondent required to consider the Application properly.

[86] DBCM alleged to have sent the Department of Economic Development, Environment and Tourism its preliminary closure plan and invited the Department to visit the site on 28 July 2008. The Department visited the site on 25 September 2008 thereafter DBCM in 2009 sent its final closure plan to the Department of Economic, Development, Environment and Tourism.

[87] Regarding the rezoning of the Oaks Mine to a gaming farm, DBCM disputes that there was ever such a legal requirement. According to DBCM prior to its mining operations the land was zoned for agricultural use and its current use as a game farm agricultural, therefore no need to rezone the land.

[88] On the water use licence application/cession or amendment and the EMP/EIA studies submitted for game farming, DBCM refutes such a requirement on the basis that Oaks Mine operated on a general water authorisation in terms of National Water Act, 1998 and the game farmer is the relevant party responsible for holding any water use authorisation. DBCM denies that it is within the scope of the Chief Inspector of Mines' duties to approve a health and safety plan for a game farm but that of the DMRE, who is responsible for ensuring and certifying that the end land use is appropriate and acceptable.

[89] In relation to the Heritage Assessment Studies/Risk Plan approved by the under NHRA in respect of archaeology survey conducted over the Oaks Mine properties before the commencement of the mining operations, the DBCM points out that the Respondent conducted a heritage assessment as part of its 1998 EMP and the 2003 EMP confirms that there are no heritage related risks in respect of Oaks Mine. (The report however indicate a Stone Age site that was discovered)

[90] Furthermore the DBCM denied that there was any legal obligation for it to provide the DMRE with the sale agreement of the properties to the game farmer. On the application for transfer of the environmental liabilities filed in terms of s 43 of the MPRDA from DBCM to the game farmer, DBCM denies any legal obligation to apply as alleged. Nevertheless, alleging that one of the purpose for applying for closure certificate is to transfer such environmental liabilities.

[91] DBCM denies that it was supposed to submit an amended closure plan and reiterate that the plan that it submitted was compliant with the law. Also denies that MPRDA was amended in 2008 but that the amended s 43 of the MPRDA only came into effect in 2013 and that is after DBCM has lodged its closure Application. The relevant law applicable must exist at the time of consideration of the Application, not to come into effect at some future date, unless the amending Act is stated to be applicable retrospectively.

[92] With regard to s 28 (1A) of NEMA that is applicable retrospectively to significant pollution or degradation. It denied that it applicable to the determination of the closure application and the concept of rehabilitation as contemplated by s 43 of the MPRDA when DBCM lodged its closure application. Section 43 amendment was not in force when DBCM lodged its application on 3 November 2009. Therefore, as an amending Act, it is to be applicable retrospectively if stated to be retrospective in effect.

[93] DBCM in persistence with its stance also denies that the following statutes s 2 (4) (p), s 28, s 28 (1A), s 24 (N) (7)(f), s 24 N (8), s 24 (R) (1) of NEMA, s 43 of MPRDA, S 19 OF NWA, s 12 (5) (a) of NEMAA, required DBCM to backfill the pit at the time that DBCM lodged its closure Application. Further that s 38 (10 (d) of the MPRDA that the Respondents further rely upon was repealed by s 31 of Act 49 of 2008 which came into effect in 2013. It was applicable during the pre- amendment of the MPRDA.

[94] DBCM, based on the doctrine of subsidiary, contends the Respondents' attempt to rely on the Constitution on the point of consultation, when there are statutes that governs the situation. Also argues that the lack of consultation is not relevant to the validity of the decision challenged by DBCM. The decision to approve the amended DBCM'S EMP has also not been challenged in judicial proceedings and no factual allegation by the Respondents that it was ever challenged.

[95] DBCM contends that the Respondent's reliance on the earlier decisions to allege delay on DBCM to lodge the appeal within the period provided by the MPRDA (which is 30 days) is ineffectual as there was a decision made in 6 June 2020 replacing

the previous decisions, which is the decision that DBCM is challenging and the 2nd Respondent's failure to process the internal appeal.

Determinable Issues

[96] The issues to be determined arising from the various contestations raised by the parties are the following:

- (a) Whether 1st Respondent (or the Regional Manager) has the authority to depose to the answering affidavit and oppose the Application on behalf of the 2nd and 3rd Respondent, (the Director General and the Minister);
- (b) Whether there is non-joinder of other parties in the application;
- (c) Whether the amended section 43 of the MPRDA should be applied prospectively or retrospectively in considering DBCM's closure Application;
- (d) Whether the DBCM should first exhaust the internal remedies before approaching the court on review or there is justification (exceptional circumstances and/or in the interest of justice) for an exemption, by passing the requirements of s 96.
- (e) Depending on the finding on (d) determine whether a case has been made for a review Application.

1st Respondent's lack of authority

[97] DBCM in its argument referred to the provisions of Rule 7(1) of the Uniform Rules of Court (Rules) in contending that the 1st Respondent does not have the *locus standi* to depose to the answering affidavit and oppose the application on behalf of the 2nd and 3rd Respondents. Rule 7 (1) that is titled "Power of Attorney" reads:

(1) *“Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such a person may no longer act unless he satisfied the court that he is so authorised to act, and to enable him to do so the court may postpone the hearing of the action or application.”*

[98] DMRE argue that 1st Respondent’s allegation that he has the authority is not confirmed by the 2nd and the 3rd Respondent nor is any evidence attached to prove the correctness of the allegation or an explanation given as to why evidence of their authority is not provided. Consequently, the DBCM submitted that the 2nd and 3rd Respondents seemed to have decided not to enter into this debate and therefore not opposing the Application.

[99] On the other hand, the 1st Respondent challenges DBCM’s reliance on Rule 7(1) to dispute his *locus standi* as lacking any merit. It is submitted on behalf of the 1st Respondent that he, on behalf of the 2nd and 3rd second Respondents, is legally authorised to answer to DBCM’s allegations. This submission is premised on the fact that the 1st Respondent accepted the Oaks Mine Closure application in terms of s 43 of the MPRDA, rejected the application on 7 July 2011, 10 November 2012, 23 October 2018 and 06 June 2020. Besides, the 1st Respondent’s decision is appealable to the 2nd Respondent and thereafter to the 3rd Respondent in terms of section 96 (1) (a) and (b) of the MPRDA. He is cited as the 1st Respondent and DBCM seeks to review and set aside his decision to refuse to issue Oaks Mine Closure certificate. He accordingly, argued that DBCM’s argument of lack of competence should be dismissed.¹¹ The submission is incontrovertible as he is the person with the knowledge and can knowingly attest to the facts of this matter.

¹¹ *Ibid* at 0-100-101.

[100] Furthermore, a notice of intention to oppose was filed on behalf of the Respondents who are cited on the Notice as the 1st, 2nd and 3rd Respondents, the 2nd and 3rd Respondent's intention to oppose being expressly indicated in the Notice to oppose. There is therefore no merit for coming to a conclusion that the 2nd and 3rd Respondent decided not to enter into this debate and therefore are not opposing the Application.

[101] The court in *Unlawful Occupiers, School Site v City of Johannesburg*¹² held that:

*“the remedy of a respondent who wished to challenge the authority of a person allegedly acting on behalf of the purported applicant was provided for in Rule 7(1) of the Uniform Rules of Court. A party who wished to raise the issue of authority should not adopt the procedure of an argument based on no more than a textual analysis of the words used by the deponent in an attempt to prove his own authority. That method invariably resulted in a costly and wasteful investigation, which normally led to the conclusion that the applicant was indeed authorised.”*¹³

[102] DBCM has referred to Rule 7 of the Rules of the High Court and has seemed not to appreciate that in determining the question of whether a person has been authorised to institute and prosecute motion proceedings, it is irrelevant whether such person was authorised to depose to the founding affidavit.¹⁴ The deponent to an affidavit need not be authorised by the party concerned to depose to the affidavit.¹⁵ In *Games*, who is an authority on the question of *locus standi* in relation to the signing of the founding affidavit, the court held that:

“[19] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement

¹² 2005 (4) SA 199 (SCA).

¹³ *Ibid* at 200B-C.

¹⁴ *Games and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SA)

¹⁵ *Ibid* par 19.

has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.”¹⁶

[103] The Mineral and Petroleum Resources Development Act does not explicitly delegate to the Regional Manager the power to litigate. In *African Bank Ltd v Theron and another*,¹⁷ the Respondents challenged the authority of the general manager to depose to the affidavit on behalf of the African Bank. The court rejected the Respondent’s argument and held that:

“where the challenge to an applicant’s authority to depose to the founding affidavit was weak, a minimum of evidence was sufficient to justify the inference that the applicant was properly before the court. One of the general powers of management was the power to litigate and to authorise litigation, a fortiori in the case of a juristic person. There was no need for the legislature to enumerate every power of management when it divested one person of all his managerial powers and conferred those powers on another. There could be no meaningful power to manage without the power to exercise the legal rights of the bank, if necessary, by recourse to the courts”.¹⁸

[104] The 1st Respondent, as the Regional Manager, says that he is fully authorised to respond to an answering affidavit on behalf of the 2nd and 3rd Respondents. According to the letters referred to annexed as FA8, 12 and 13,¹⁹ the 1st Respondent was, as a Regional Manager, directly involved in the matter and dealing with DBCM on a personal basis. It is therefore possible to draw inferences from those letters as explained in *African Bank Ltd* that he has authority, due to his knowledge of the facts to reply and do that on behalf of the 2nd and 3rd Respondents.

¹⁶ at paragraph [19].

¹⁷ 1996 (4) All SA 156 (SE)

¹⁸ *Ibid* at 159.

¹⁹ Caselines 000-a10, 14 and 15.

[105] Accordingly, the argument that the first respondent has no authority to file an opposing affidavit on behalf of the Respondents has no merit.

Non-joinder

[106] According to the Respondents, given that they have specialist expertise in their respective fields, the following parties are directly and profoundly involved in this matter: The Minister of Limpopo Economic Development, Environment and Tourism (MEC: LEDET), Department of Environmental Affairs, Minister of Water and Sanitation, Blouberg Local Municipality, Limpopo Heritage Resources Authority (LHRA), Chief Inspector of Mines and adjacent landowners in the application before this court. With reference to the *Bator Star*²⁰ the Respondents advocates allowing the specific parties the autonomy to make findings in the area of their expertise. The CC in that matter held that “a decision that requires an equilibrium between a range of competing interests or considerations and which is to be taken by a person or an institution with specific expertise in that area must be shown respect by the courts.”

[107] In *casu*, the determining legislation being subsections 43 (5) and (12) of the MPRDA as it deals with the issuing of the Mine closure certificate, the Respondents argued that, on the ground of failure to join these parties, the review application before this court should be dismissed. In terms of s 45 (3) (12) these parties are liable for verification and expected to file reports in relation to the health and safety, rehabilitation of the environment, water and other relevant considerations prior the granting of the report.

[108] In contrast, DBCM submitted that, the argument of non- joinder should be rejected as the several ministers and other relevant parties mentioned by the Respondents are not required to participate in the present action and not necessary to join them, because the relief sought in the application deals with the 1st Respondent's decision to refuse to grant DBCM the closure certificate and the failure by the Minister to make a decision on the internal appeal. However, the decision to grant a closure certificate cannot be made unless the parties mentioned have

²⁰ *Bator Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)*

confirmed in writing that the certain related issues have been addressed. There is also the issue of the game farmer to whom DBCM is looking to cede the environmental liabilities.

[109] DBCM has also argued that the issue of non-joinder can only arise depending on what is the court's decision on the declaratory order sought, which is that the application of the amended s 43 of MPRDA was not retrospective. If the issue is decided in DBCM's favour that its Application is to be determined in terms of the old s 43, then the issue of joinder will not arise, only if the court decide otherwise will there be a need to deliberate the non-joinder point.

[110] Joinder is a procedure by which multiple parties or multiple causes of action are joined together in a single action. There are two forms of joinder of parties: joinder of convenience and joinder of necessity. In order for the applicant to succeed with an application to join the respondent in necessity it should prove that the respondent has a direct and substantial interest in the subject matter of the pending litigation.²¹ A party is joined of convenience because there is a legal tie between the party to be joined and the applicant, which on the ground of equity, the saving of costs, or the avoidance of multiplicity of actions, the Court will deem it in the interest of justice that the matters should be heard together.²²

[111] In *Judicial Service Commission and Another v Cape Bar Council and another*²³ the Court held that:

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party

²¹ *Ronnie Dennison Agencies (Pty) Ltd t/a Water Africa SA v SABs Commercial Soc Ltd* [2014] ZAGPPHC 998.

²² *Rabinovich and Others NNO v Med: Equity Insurance Co. Ltd* 1980(3) SA 415 (W) at 419 E.

²³ 2013 (1) SA 170 (SCA)

*to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.*²⁴(my emphasis)

[112] In *DE van Loggerenberg and E Bertelsmann Erasmus: Superior Court Practice Erasmus*, in the commentary on Uniform Rule 10, the issue of non-joinder is discussed. The following is stated:

*"... the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. A mere financial interest is an indirect interest and may not require joinder of a person having such interest . . . The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined."*²⁵

[113] The Court in *Gordon v Department of Health: KwaZulu –Nata*²⁶ held that "If an order or judgment sought cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."²⁷ In the *Minister of Finance v Afri Business NCP* the court stated that "A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests. The interest must generally be a legal interest in the subject matter of the litigation and not merely a financial interest."²⁸ The word "interest" has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he or she can be said to have *locus*

²⁴ *Ibid* at par [12].

²⁵ (RS 19, 2022) at D1-124–D1-126.

²⁶ 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA)

²⁷ *Ibid* at para 9.

²⁸ 2022 (4) SA 362 (CC) para 23.

standi in such a matter or before such a person may be joined or be allowed to be joined in proceedings.²⁹

[114] The important fact to this contestation is that according to DBCM the joinder of the mentioned parties is not relevant to the relief it seeks in this Application, which is an order challenging the 1st Respondent's failure/refusal to grant its Application for a closure certificate and or 2nd Respondent's failure to decide on its appeal. However, the process that the Applicant is required to comply with, prior to being issued with a closure certificate is relevant and impacts on the relief sought. DBCM has confirmed that one of the purpose for applying for closure certificate is to transfer the environmental liabilities to the game farmer. As a result, the relevance of the issue of non-joinder would be determinable and apparent when considering the legislation that outlines the requirements an Application for an closure has to meet prior to the granting of the closure certificate.

[115] As a result, *prima facie* I am of the view that indeed some of the parties mentioned by the Respondents have a pivotal role and a substantial interest that will be adversely affected by part of the orders sought. However, it is not necessary to confirm at this early stage whether their non-joinder fatal to the application because in as much as some were to be involved in the events leading to the application for closure certificate and others being apparent stakeholders, this application is for a review of the decisions by the cited Respondents. The legislation and the process applicable is in contention and still has to be determined, which will then give a complete perspective to the issue of non-joinder.

[116] The Respondents also argued that a declaratory order on a point taken or raised that has already been decided by a competent court cannot be granted. Reference is made to a fact that the Supreme Court of Appeal (SCA) has already decided that directives or instructions already issued by the Regulatory State Department *in casu* the DMRE, against the holder of a mining right persists even after the Oaks Mine properties are sold to the game farmer and that prior owner has lost its connection with the land. The order for a declaratory order must be refused.

²⁹ Lebea v Menye and Another 2023 (3) BCLR 257 (CC) para 30.

The application of s 43 of the Mineral and Petroleum Resources Development Act (MPRDA) (whether it should be prospective or retrospectively).

[117] DBCM's first EMP was approved on 24 June 1998 and subsequently an amended EMP approved in 2003, a year prior to 1 May 2004, the date of the commencement of the MPRDA. At the time, section 39 of the Mining Act was the relevant legal framework governing the approval of the amended EMPs. The current legal framework is now laid down in s 43 of the amended MPRDA. It is common cause that 1st Respondent refused to grant the closure certificate and insisted that the open pit be closed as part of the rehabilitation plan in line with s 43 as amended, which however is not in accordance with the rehabilitation plan as per DBCM's amended EMP that was approved in terms of section 39 of the repealed Minerals Act. The 1st Respondent applied the amended s 43 of the MPRDA retrospectively, since the Act came into effect in 2013 when the Application was submitted on November 2009.

[118] DBCM argued that the mining license had by then lapsed as it was not converted to the new order right and s 39 of the repealed Mining Act should therefore be the applicable framework. The initial and 2003 Amended EMP, remained valid and enforceable in accordance with item 10 of the transitional arrangements in schedule II of the MPRDA. As a result the 1st Respondent incorrect assumption that the changes contained in section 43 applied retrospectively has led to a material error of law and incorrect decision.

[119] On the other hand, the 1st Respondent denied that there was any material error of law as to his decision, submitting that NEMA³⁰ was applicable as well as the amended MPRDA which has a retrospective effect. Further that DBCM is subject to the principles of duty of care and the obligation of 'the polluter to pay' in NEMA. The Respondents argued that the court should apply s 43 of the MPRDA and s 24R (1) NEMA in connection with an application for closure. The 1st Respondent insisted that, even if the mine has been bought by a game farmer, DBCM remains liable for environmental pollution or degradation plus loss of biodiversity.

³⁰ Act 107 of 1998, came into operation on 29 January 1999

[120] Section 38 of the Minerals Act on the “Rehabilitation of the Surface of the Land” provided that:

“The Rehabilitation of the surface of the land concerned in prospecting or mining shall be carried out by the holder of the prospecting permit or mining authorisation concerned-

- (a) “in accordance with the rehabilitation programme approved in terms of section 39 if any:*
- (b) as an integral part of the prospecting or mining operations concerned simultaneously with such operations, unless determined otherwise in writing by the regional director and to the satisfaction of the regional director concerned”.*

[121] In addition, section 39 of the Minerals Act titled “Layout Plan and Rehabilitation Programme” stated that:

- (1) A layout plan and rehabilitation programme in respect of the surface of land concerned in any prospecting or mining operations or such intended operations shall be submitted by the holder of the prospecting permit or mining authorisation concerned to the regional director concerned for his approval before any such operations are commenced,*
- (2) The regional director may on application in writing and subject to such conditions as may be determined by him, exempt the holder of any prospecting permit or mining authorization from one or more of the provisions of subsection (1) or approve of an amended layout plan or rehabilitation programme,*
- (3) Before the regional director approves any layout, plan and rehabilitation programme referred to in subsection (1) or any amended plan or rehabilitation programme referred to in subsection (2) or grants any exemption under subsection (2), he shall consult as to that with the officers designated for that purpose by the Minister of Agriculture and the Minister of Environment Affairs, respectively.*

[122] On 1 May 2004 the MPDRA came into effect, replacing the Minerals Act. So therefore at the time DBCM submitted its closure plan, s 43 of the MPRDA was the provision that then dealt with mine closure. Subsection (1) thereof states that the holder of a mining permit:

"remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to the conditions of the environmental authorisation and the management and sustainable closure thereof, until the Minister has issued an closure certificate in terms of this Act to the holder or owner concerned".

[123] The section imposes an obligation upon the holder of a mining right for rectification of any adverse impact on the environment as a result of the mining operations until a closure certificate is issued. The obligations remaining even after the cessation of mining operations. It further provides in subsection (2), (3) and (4) for a set of procedures to be followed, and the submission of information, plans, and reports as required by the MPRDA and NEMA. The holder therefore required to plan for, manage, and implement such procedures and requirements at mine closure as may be prescribed. Regulation 57 specifies what is required upon submission of an application for a closure certificate. This includes a closure plan and an environmental risk report in terms of Regulation 62.³¹ Section 43(5) requires that the holder of a mining permit be issued with a closure certificate subject to confirmation in writing by the Chief Inspector and the Department of Water Affairs and Forestry that the provisions pertaining to health and safety and management of potential pollution to water resources have been addressed. Further, section 43 (5) of the MPRDA states that:

"No closure certificate may be issued unless the Chief Inspector and each government department charged with the administration of any law which relates to any matter affecting the environment have confirmed in writing that the provisions pertaining to health and safety and management [of] pollution to water resources, the pumping and treatment of extraneous water and compliance to the conditions of the environmental authorisation have been addressed".

[124] In as far as DBCM's amended EPM is concerned, it was already approved when the MPRDA came into effect in 2004, therefore post 2004 prior closure, it was to be dealt with in

³¹ Mineral and Petroleum Resources Development Regulations, GNR 446 in GG 38855 (3 June 2015)

accordance with item 10 in schedule II of the Transitional Arrangements MPRDA that reads:

10. Continuation of approved environmental management programme

(1) Any environmental management programme approved in terms of section 39 (1) of the Minerals Act and in force immediately before this Act took effect and any steps taken in respect of the relevant performance assessment and duty to monitor connected with that environmental management programme continues to remain in force when this Act comes into effect.

(2) Subitem (1) does not prevent the Minister from directing the amendment of an environmental management programme in order to bring it into line with the requirements of this Act.

(3) Any person exempted in terms of section 39 (2) (a) of the Minerals Act before this Act took effect and whose exemption does not otherwise remain in force in terms of this Act must apply for an exemption in terms of this Act within one year from the date on which this Act took effect, otherwise the exemption lapses.

(4) If the holder of an old order prospecting right or old order right mining right or the owner of previous works ceases the relevant prospecting or mining operation works, the holder must apply for a closure certificate in terms of section 43.

[Subitem (4) substituted by s. 86 (a) of Act 49 of 2008 (wef 1 May 2004).]

(5) Sections 38, 41 (2) and 45 apply to a holder of an old order prospecting right or old order mining right. [Subitem (5) substituted by s. 86 (a) of Act 49 of 2008 (wef 1 May 2004).]

(6) If no application for a certificate contemplated in section 12 of the Minerals Act has been made, the holder referred to in that section, who remains liable for complying with the relevant provision of that Act, must apply for a closure certificate in terms of section 43

[125] It is noteworthy that in terms of item 10 (4), the holder of an old mining right is required to apply for a closure certificate in terms of s 43 (amended in 2008) when he ceases the mining operation works. Section 43 makes provision for previous holders of an old older right, owners of works that have ceased to exist to remain responsible

for environmental liabilities. The holder therefore cannot be expected to apply in terms of the existing s 43 for a closure certificate but have his application considered in terms of a different regime. Clearly the Application will be considered in terms of the applicable law that is consistent with its purpose. And purposively so, seeing how crucial it is that the holder fulfil his obligations in relation to rectifying the adverse impact to the environment and the land caused by the mining operations, especially as such liability is not extinguished by the lapse of the right or cessation of operations. Moreover, the Minister is empowered and not prevented from directing the amendment of an environmental management programme that has so remained per s 39 of the Mineral Act, in order to bring it into line with the requirements of the MPRDA of NEMA. The fact that the closure application was in 2009 is of no assistance to DBCM.

[126] The court in *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy and Others* held that-

"The legislative purpose is to ensure that environmental impacts, whether positive or negative, are identified, assessed, and managed. In the case of mining activity this includes the impacts and consequences of all aspects of mining operations. It is to achieve this purpose that the cessation of mining operations and the closure of a mine is extensively regulated".³² The word "responsible" in its ordinary meaning means "having an obligation to do something", or "having control over something or someone". It also means, being the cause of something, or having to account for or be answerable for something or to someone. It covers a broader ambit than the word "liable". The latter, in its ordinary sense, connotes that which is obligated by law".³³

[127] Section 24R of NEMA has as its heading "Mine closure on environmental authorisation". It provides:

(1) Every holder, holder of an old order right and owner of works remain responsible for any environmental liability, pollution or ecological degradation, the pumping and treatment of polluted or extraneous water, the

³² 2023 JDR 1815 (SCA) at 29.

³³ *Ibid* at 34.

*management and sustainable closure thereof notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the [MPRDA] to the holder or owner concerned”.*³⁴

(2) When the Minister . . . issues a closure certificate, he or she must return such portion of the financial provision contemplated in section 24P as the Minister may deem appropriate to the holder concerned but may retain a portion of such financial provision referred to in subsection (1) for any latent, residual or any other environmental [impact], including the pumping of polluted or extraneous water, for a prescribed period after issuing a closure certificate”.

[128] On the face of it, s 24 R (1) of NEMA extends responsibility beyond issuing of a closure certificate when compared with MPRDA s 43 (1). This section addresses the post closure situation and the financial provisions set out in s 24 P of NEMA, especially s 24P (5) that requires the holder to maintain and retain the financial provision from which a portion as may be required to rehabilitate the closed mining operation in respect of latent or residual adverse environmental impacts may be retained. The requirement remains in force notwithstanding the issuing of the closure certificate. It is based on the principle of “polluter pays” as defined in s 2 (4) of NEMA.³⁵

[129] In *Bareki NO and another v Gencor Ltd and others* the court had to decide whether NEMA applied retrospectively, the court held that:

*“at common law the prima facie rule of construction is that a statute should not be interpreted as having retrospective effect. That presumption against retrospectivity may be rebutted, either expressly or by necessary implication, by provisions or indications to the contrary in the enactment under consideration”.*³⁶ *The basis of the presumption is “elementary considerations of fairness (which) dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly”*³⁷

³⁴ *Supra* note 22 above.

³⁵ *Ezulwini Mining Company (Pty) Ltd supra* note 24 above at 45.

³⁶ 2006 (1) SA 432 (T) at 438.

³⁷ *Ibid* at 439.

[130] In *S v Mhlungu & Others*³⁸ the court held that:

[65] *First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, namely which affects transactions completed before the new statute came into operation. See Van Lear v Van Lear 1979 (3) SA 1162 (W). It is legislation which enacts that "as at a past date the law shall be taken to have been that which it was not". See Shewan Tomes & Co Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A) at 311H per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations by for example in validating current contracts or impairing existing property rights. See; Cape Town Municipality v F Robb & Co Ltd 1966 (4) SA 345 (C) at 351 per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.*

[66] *There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried "no matter when such case began or when the cause of action arose" – Curtis v Johannesburg Municipality 1906 TS 308 at 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively. See Yew Bon Tew v Kenderaan Bas Mara (1983) 1 AC 553 (PC) at 563; Industrial Council for Furniture Manufacturing Industry, Natal v Minister of Manpower and Another 1984 (2) SA 238 (D) at 242.*

[67] *There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings. See Bell v Voorsitter van die*

³⁸ 1995 (3) SA 867 (SCA); 1995 (7) BCLR 793 CC

Rasklassifikasieraad en Andere 1968 (2) SA 678 (A); Bellairs v Hodnett and Another 1978 (1) SA 1109 (A) at 1148.”

[131] In this matter there were no legal proceedings pending, however apparent was that if the legislation is not applied retrospectively it will affect vested rights and not be in sync with their intended purpose. Furthermore, in *Kaknis v ABSA Bank Limited; Kaknis v MAN Financial Services SA (Pty) Limited*, the court held that-

“the reasoning behind the presumption against the retrospective application of legislation is premised upon the unwillingness of the courts to inhibit vested rights. In the pivotal authority in this respect Innes CJ stated in the case of Curtis v Johannesburg Municipality 1906 TS 308: “the general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation”.³⁹

[132] In light of the above, one should note that the purpose of s 43 of the MPRDA is to ensure that environmental impacts, whether positive or negative, are identified, assessed, and managed by the persons who are legally responsible. This purpose should be read hand in hand with s 2 NEMA principles applying retrospectively. Applying the legislation only prospectively would lead to a situation where environmental statutes are conflicting. For instance, NEMA contains duty of care and polluter pays principles. Accordingly, s 2p (6) of NEMA requires the holder, as far as practicable to rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to the land use that conforms to the generally excepted principle of sustainable development. These principles apply retrospectively and s 43 and other sections of the MPDRA gives effect to such provisions. If s 43 is only applied prospectively, it would not be in sync with NEMA provisions that apply retrospectively. DBCM’s claim that s 43 was incorrectly applied is misguided. After all, as it has been alluded, rehabilitation of the environment is an ongoing process that remains post the cessation of operation and or closure certificate and the law is there to make sure that such a responsibility is realised. Section 43 (5)

³⁹ 2017 (2) All SA 1 (SCA) para 12.

prohibits the issuing of closure certificate unless environmental issues have been addressed. Moreover, as it can be argued that although it is a prima facie rule that a statute should not be interpreted as having retrospective effect, it is not a strict rule. A statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties find themselves cannot have a bearing on the status of the provisions of a statute under attack.⁴⁰

[133] With regard to the Guidelines, DBCM had argued that their application is not peremptory but merely directory in nature. DMRE published the guidelines as contemplated in Regulation 54 (1) of the MPRDA Regulations titled "the Guideline Document for the Evaluation of Quantum Closure Related Financial Provision provided by a mine (the 2005 guidelines). The purpose of their issuing was to make sure that, the rehabilitation of the environment is aimed at and in line with the restoration of the environment or land to its pre- mining production potential. The guidelines introduced to holders of old order mining rights guidance on how to comply with the stringent requirements of the new mining legislation (MPRDA) to achieve this goal. DBCM was directly affected by these guidelines introduced in 2005 as an operator of an open cast pit. Section C of the guidelines on the Generally Accepted Closure Method provides that DBCM when rehabilitating the Oaks Mine must ensure that:

[133.1] the excess material from the open cast pit is deposited in close proximity to the pit for in filling of the open cast pit once the ore body has been removed.

[133.2] the open cast pit perimeter wall must still be rendered safe for humans and domestic animals.

[134] This is in line with s 37 of the MRPDA provisions that confirms that the environmental management principles as set out in s 2 of NEMA, apply to all prospecting and mining operations as the case may be and any matter of activity relating to such operation. Also serving as guidelines for the interpretation,

⁴⁰ *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC). par 26

administration and implementation of environmental requirement of this Act. Lastly it is to be noted that also s 37 (2) provides that:

“Any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating socio economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.”

Whether the applicant should first exhaust the internal remedies before approaching the court.

[135] It being common cause that this is an administrative decision, s 96⁴¹ of the MPRDA provides for the internal process and access to courts. Section 96(1) confers a right of appeal to either the Minister or the Director General, as the case may be, upon any person whose rights or legitimate expectations have been materially and adversely affected, or who is aggrieved by any administrative decision made in terms of the MPRDA. Then section 96(3) precludes any person from applying to court for the review of an administrative decision contemplated in section 96(1), until that person has exhausted his or her remedies in terms of that subsection.

[136] Section 96(4)⁴² provides that sections 6, 7(1) and 8 of PAJA apply to any court proceedings contemplated in section 96. Section 6(1) of PAJA makes provision for any person to institute review proceedings in respect of administrative action. Section 6(2) and (3) sets out the grounds upon which an administrative decision may be reviewed. Section 96(4) does not expressly say that section 7(2) also applies to any court proceedings contemplated in section 96. However, section 7(1)(a), to which section 96(4) refers, includes the words —subject to subsection 2(c) and, therefore, incorporates by reference the provisions of section 7(2)(c). section 7(2)(c) applies to

⁴¹ See Ibid 6 on page 23

⁴² The section reads (4) *Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section.*

section 96 because of the reference to section 7(1). Section 8 of the PAJA empowers a court to make a just and equitable order in proceedings for judicial review.

[137] Section 7(1) of PAJA reads as follows: —

(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded;
(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[138] Section 7(2) of PAJA creates an obligation upon applicants to exhaust all internal remedies before a court or tribunal may review any administrative action. The section reads:

“(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.”⁴³

[139] Therefore 7 (2) precludes a court from reviewing any administrative action in terms of the PAJA lest any internal remedy provided for in any other law has first been exhausted, unless there are exceptional circumstances upon which the court deems it to be in the interest of justice. In this matter DBCM had not exhausted the internal

⁴³ Act 3 of 2000.

remedies available. The appeal against the 1st Respondent's decision is still pending before the 2nd Respondent.

[140] The court in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as amicus curiae)* encouraged the exhaustion of internal remedies before approaching the court, stating as follows in paragraph 37 and 38, that:

“Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, 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. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy 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 wide 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”.⁴⁴ Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.”

[141] It is in the context of the fundamental constitutional value requiring a democratic system of government to ensure accountability, responsiveness and openness,⁴⁵ and the basic values and principles governing public administration⁴⁶ that the issue of delegation and internal appeals and remedies should be assessed.⁴⁷ Those values and principles are enhanced by an internal appeal process.⁴⁸ Comity between the

⁴⁴ [2009] ZACC 23 para 37–38; 2009 (12) BCLR 1192 (CC) par 35-36.

⁴⁵ S1(d) of the Constitution

⁴⁶ S195 of the Constitution. In

⁴⁷ Compare Elliott et al (eds) *Administrative Law: Text and Materials* 3ed (Oxford University Press, Oxford 2005) 162-6.

⁴⁸ 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC)

arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights.

[142] The court in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others*⁴⁹ held that:

[115] At common law, a party aggrieved by an administrative decision was not generally obliged to exhaust internal remedies before approaching a court provided for, the choice was that of the aggrieved party either to pursue those remedies before going to a court of law or to proceed straight to seek the review of the offending decision in court. The promulgation of PAJA has changed all this. It is now compulsory for an aggrieved party to exhaust internal remedies before approaching a court for review unless such party is exempted from this duty by a competent court.

[116] The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish "exceptional circumstances". Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted. Differently put, the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged.

[134] The question that arises is what should be done in the peculiar circumstances of this case. Ordinarily, if the court before which the review proceedings are brought is not satisfied that internal remedies have been exhausted, it must refuse to entertain the review until those remedies are exhausted or an exemption has been granted to the applicant. Here the High Court did not insist that section 96 of the MPRDA and section 7 of PAJA be complied with, probably because Dengetenge had withdrawn its opposition to the application".⁵⁰

⁴⁹ 2014 (3) BCLR 265 (CC).

⁵⁰ *Ibid* at 115, 116 & 134.

[143] Furthermore, one should be mindful that in certain circumstances as provided by section 8 (1) of PAJA,⁵¹ a court can overrule the decision made by the decision maker. This section reads as follows:

"(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders:

(a) directing the administrator -

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires.

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and -

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases -

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation".

[144] The court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*⁵² sets out the test to be applied in determining whether the Court may make a substitution order and step into the shoes of an RSDO. In paragraph 47 to 50 the court stated that:⁵³

"Given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional

⁵¹ Note 29 above.

⁵² 2015 (5) SA 245 (CC) para 47.

⁵³ *Ibid* at para 47-50.

circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required, and a court does not have all the pertinent information before it. This would depend on the facts of each case.

Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and 'it would merely be a waste of time to order the [administrator] to reconsider the matter'. Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion.

Even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator".⁵⁴ (my emphasis)

[145] It is common cause that DBCM sought the review of the decisions taken in terms of the MPRDA. Therefore, subject to an internal appeal in accordance with s 96(1). Even if s 96(3) did not exist, the duty to exhaust domestic remedies would have been triggered by the mere provision of the internal appeal. Applying the above principles in *casu*, the case law and the provisions of s 96 (1) of the MPRDA and s 7 of PAJA, DBCM is forbidden from applying for the review of decisions taken in terms of the MPRDA until the internal remedies have been exhausted. In *casu*, an internal appeal in terms of section 96 is pending.

[146] DBCM had argued that there are exceptional circumstances which on consideration by the court should be found to be in the interest of justice that the court hears the review. DBCM complained about the delay that the DRME has taken to decide the appeal and therefore plead that it should be exempted. Delay is just one of the factors to be considered. In the instance where *the decision* maker has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that a particular decision would have

⁵⁴ 2015 (5) SA 245 (CC) para 47-50.

been reached which decision is a foregone conclusion. It would be prudent to let the administrative process be finalised safeguarded by a proper order directing the process.

[147] Furthermore, DBCM's complain about delays is clouded by the fact that it is the one that has extremely delayed in responding to the decision of the 1st Respondent. The 10 years that DBCM has mentioned came about because of its unexplained period of 6 years of silence that followed the first decision of the 1st Respondent on 7 July 2011. The decision, with a comment or instruction on the flaws of the application, followed an assessment of the operations by the Mine and Health Directorate on May 2008, a closure plan assessment and site inspection on 15 April 2011. DBCM did not respond or indicate any difficulties with attending to the mentioned flaws. A further site inspection took place in 2012 and correspondence sent to DBCM thereafter was also ignored. On 5 November 2017, more than 5 years later DBCM replied. 1st Respondent responded to the reply by October 2018, rejecting for the third time the closure plan and not granting the closure certificate. DBCM submitted an update on the environmental assessment only on 25 May 2020 since the rejection of its closure plan 9 years ago. The 1st Respondent was given less than a month to convey its decision to the amended proposal which it did by 6 June 2020.

[148] On the internal appeal lodged on 21 July 2020, the DBCM alleged that 2nd Respondent acted contrary to the DMRE statutory obligations as set out in s 6 of the MPRDA namely that "...any administrative process conducted or decision taken, in terms of this Act must be within a reasonable time or in accordance with the principle of lawfulness, reasonableness and procedural fairness. The allegation being that 6 months passed with 2nd Respondent failing to take a decision on the appeal. However, by 5 August 2020 the 1st Respondent filed its submissions on the matter. On 15 October 2020, the 2nd Respondent confirmed receipt of the appeal and it being under consideration. By the time DBCM launched its review application on 18 December 2020, a period of 4 months has passed. In view of the circumstances of this matter, whereupon the proceedings are to be in accordance with the principle of lawfulness, reasonableness and procedural fairness and also in considering the past conduct of DBCM in the matter, there is no merit for a conclusion that there was an unreasonable delay in dealing with the internal appeal.

[149] In addition DBCM argued that it had good prospects of success in respect of the review application which is an important fact to consider in determining whether it should be exempted from the obligation to exhaust internal remedies in the interest of justice. And any non-observance of the PAJA requirement not flagrant and gross. The prospects of success are not that easily determinable especially where the closure application seemingly falls short of the requirements of the applicable law and processes, and the merits not dealt with fully. The issues canvassed do not indicate an outright prospects of success in the matter. I therefore do not agree with DBCM that a finding that DBCM is exempted from the obligation to exhaust the internal remedy available to it is warranted.

[150] I am of the view that, the failure to have exhausted internal remedies is a structural impediment to the determination of the substantive questions posed by the review. This being constructed with a recognition that a court faced with a failure to take a decision will not be in a position to assess the merits on the basis of rationality or reasonableness, because no decision exist which can be subjected to scrutiny and review on those grounds. For that reason, it would be prudent for the matter to be returned to the 3rd Respondent to make a decision on the appeal lodged by DBCM.

[151] In relation to the application of MPRDA's section 43, it is instructive that even if this provision has been applied prospectively, NEMA continues to apply retrospectively. This implies that the principles of duty of care and polluter pays still applies to DBCM. It therefore would be realisable by the Application of s 43 as amended. There should therefore be compliance in terms of the new s 43 (3) and 15.

Costs

[152] In litigation, the general principle for costs is that costs follow the event. In that regard the losing party is to pay the costs of the winning party. The guiding principle is that *'...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either*

to initiate or to defend litigation, as the case may be. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.⁵⁵ In *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another*⁵⁶ the following was stated in respect of costs where merits were not fully decided, that:

'[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each party to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...'

[153] It is also the basic principle that the award of costs is in the discretion of the court. In *Ferreira v Levin NO*⁵⁷ and *Others* the Constitutional Court stated the basic rules to be the following :

The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.'

⁵⁵ *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; In re: *Anton Pillar and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2.

⁵⁶ [2015] JOL 32690 (KZD)

⁵⁷ 1996 (2) SA 621 (CC) at 624B—C (par [3]).

[154] The Applicant has not been successful in Prayers 2.1 to 2.6 of its Notice of Motion and on the point *in limine* it raised except for the order directing the appeal, if the matter is sent back for exhaustion of internal remedies, to be decided by the 3rd Respondent and within a certain period. Even though the merits have not been fully decided, the Applicant has for all intense and purposes not succeeded in its Application and therefore has to carry the costs.

It is therefore ordered that:

1. The Applicant is ordered to exhaust the internal remedies, and the matter is sent back to the 3rd Respondent who is directed to consider and decide Applicant's internal appeal within 30 days of the grant of this order, having regard to this Court's judgement and to communicate his decision to DBCM within 10 days of it being taken;
2. The decision on the Appeal is to be taken in line with the legislative framework applicable in respect of the Closure Applications as it presently exists (that is per s 43 of the amended MPRDA).
3. The Applicant to pay the costs of the Application including the costs of two Counsel.



N V Khumalo

**Judge of the High Court
Gauteng Division, Pretoria**

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