

SOUTH AFRICA / JUDGMENT

Mpilo and Zen Holdings (Pty) Ltd v Centurion Mining Company (Pty) Ltd and Others (2815/2023) [2023] ZAMPMBHC 43 (26 July 2023) [2023] ZAMPMBHC 43

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse AJ

CASE / FILE NUMBER

2815/2023

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REPUBLIC OF SOUTH
AFRICAIN THE HIGH COURT OF
SOUTH AFRICA, MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 2815/2023

In the matter

between:

MPILO
AND ZEN HOLDINGS (PTY) LTD
Applicant
and
CENTURION
MINING COMPANY (PTY) LTD
First Respondent
THE MINISTER OF
MINERAL RESOURCES AND ENERGY,
MR SAMSON GWEDE
MANTASHE

Second
Respondent
THE MINISTER OF
AGRICULTURE AND LAND REFORM,
MRS

ANGELA THOKOZILE DIDIZA

Third

Respondent

This judgment was handed
down electronically by circulation to the parties' legal
representatives by email and release to

SAFLII. The date and time for
hand-down is deemed to be at 11h00 on 26 July 2023.

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] This application concerns mine dumps, also referred to as tailings (“tailings”) situated on a portion of the remaining extent of the farm Camelot Lot 320 JU (“the property”). The tailings are a by-product of previous mining activities that have taken place on the property.

[2] A proper perspective on these tailings is important for purposes of this application. Mpilo’s[1] geologist estimates the extent of the tailings to be three hundred and thirty thousand tons. To put this in further perspective,

during argument counsel for Mpilo informed the court that a truck used for purposes of removing material such as the tailings is able to take 35 tonnes at a time. This means that it would take approximately ten thousand truck loads to remove the tailings from the property. In addition to the substantial volume of the tailings, the tailings is also extremely valuable because the tailings contain gold. The gold in the tailings is estimated to be worth approximately R 435 million.

[3] The property belongs to government and is under the control of the third respondent (“the Minister of Agriculture”) through the Department of Agriculture, Rural Development, Land and Environmental Affairs (“DARLLD”).

[4] The facts of this matter are un-complicated - the law is not.

[5] The applicant (“Mpilo”) is the holder of a mining permit that was issued in terms of section 27 of the Mineral and Petroleum Resources Development Act 28 of 2002 (“the MPRDA”) (“the permit”). The permit was issued by the Minister of Mineral Resources[2] on 25 January 2023. The permit grants Mpilo the right to mine for gold ore on the property.

[6] The first respondent (“Centurion”) appealed the decision to grant the permit to Mpilo in terms of section 96 (1) of the MPRDA. The primary basis of Centurion’s appeal is that it is the owner of the tailings. The appeal is still pending. Centurion’s ownership of the tailings forms the subject matter of the pending appeal.

[7] Despite the pending appeal, Mpilo endeavoured to get access to the property pursuant to the permit by engaging with DARLLD. DARLLD

refused to grant Mpilo access to the property because the DARLLD was of view that the permit was subject to Centurion’s right to the tailings.

- [8] On 10 May 2023, Mpilo was informed that the Regional Manager of the Mpumalanga Regional office of the Mpumalanga Department of Mineral Resources (“DMRE”) has declared that Mpilo is the owner of the tailings on the property.
- [9] Mpilo, through its attorneys, challenged DARLLD and the Regional Manager’s decisions because through the decisions, Mpilo was prevented from exercising its mining rights on the property.
- [10] The Chief Director of the Mpumalanga Provincial Office of DARLLD granted Centurion access to the property for purposes of removing the tailings thereon. Mpilo challenged this decision and sought an undertaking from DARLLD that DARLLD will take the necessary steps to ensure that the tailings are not removed from the property pending the outcome of the appeal, failing which the applicant would seek an urgent interdict. No undertaking was given.
- [11] Mpilo approached this court for an urgent interim interdict. In its notice of Motion, Mpilo seeks an interim interdict against the respondents aimed at preventing the removal of the tailings from the property pending a review application Mpilo intends to institute within 90 days after granting of the interim interdict.
- [12] Centurion and the Minister of Mineral Resources oppose the application. Only Centurion delivered and filed an answering affidavit.

URGENCY

- [13] I do not deem it necessary to dwell too much on the issue of urgency. In respect of urgency Mpilo alleges in paragraph 57 of its

founding affidavit as follows:

‘Considering that the first respondent’s attorneys have expressly stated that their client is in the process of operations regarding the tailings at the property, we all understand operations to be that the first respondent will comments (if not already commenced) to the removal of the tailings from the property.’

- [14] In its answering affidavit, Centurion does not deny this allegation. Centurion merely alleges that the requirements for urgency not have not been met by Mpilo. In the argument before me the lack of urgency was not seriously contested. I therefore find

that the matter is urgent and the application is enrolled as such.

MERITS

- [15] The decisions Mpilo seeks to set aside is the decision of the Regional Manager of the DMRE, dated 9 May 2023 (“the DMRE decision”) and the decision of Chief Director of DARLLD, dated 12 June 2023 (“the DARLLD decision”).

The DMRE decision

[16] On 9 May 2023, the Regional Manager of DMRE communicated to Mpilo as follows:

‘Centurion Mining Company has provided the information to the Department of mineral resources. The documents that were submitted clearly shows that Barend Daniel Jordaan was the holder of various permits issued under provision [sic] 161 of the Mining Rights Act of 1967. There was a transaction wherein Barend Daniel Jordaan entered into a sale agreement with Norse Mining Company (Pty) Ltd (now known as Centurion Mining Company (Pty) Ltd to sell the various permits and one of the permits is Permit 42/75 issued on Camelot 320 JU [the property] to retain possession and treat tailings.

Centurion Mining Company has therefore submitted proof that they are the owners of the dump as they are in possession of the claim licence for base metals on Camelot 320 JU.

In terms of the precedence set out in the case of De Beers Consolidated Ltd v Ataqua Mining (Pty) Ltd and Others, the court ruled that historical mining dumps that were created before the enactment of the Minerals [sic] and Petroleum Resources Development Act 28 of 2002 (referred to as the MPRDA) are not regulated by the MPRDA the ownership thereof must be dealt with in terms of common law and the Minerals Act.’

[17] After Mpilo challenged the decision, the Regional Manager reaffirmed his position set out above and also recorded that “... the Department does not have jurisdiction over those dumps and you are welcome to Institute legal proceedings in the High Court of South Africa for reviewing of the letter as it is within your right.”

The DARLLD decision

[18] On 12 June 2023, the Chief Director of DARLLD informed Mpilo as follows:

‘We wish to indicate that Mpilo and Zen Holdings (Pty) Ltd (Mpilo and Zen) and Centurion Mining Company (Pty) Ltd where in dispute regarding the ownership of the tailings dam on our subject property [the property].

The matter was referred to the Department of mineral resources and energy (DMRE) as the competent authority.

DMRE has concluded the matter by deciding that Centurion Mining Company has submitted proof that it is the owner of the tailings dump [the tailings] as they are in possession of the claim licence for base metals on Camelot 320 JU.

Based on the decision by DMRE we have granted Centurion access to the property for purposes of removing their tailings dump.

Your clients (Mpilo and Zen) are welcome to engage with the Department (DALRRD) on gaining access in line with their mining permit, the Departmental procedures will be followed.

We wish to advise that we consider the matter on our part as settled.’

- [19] The DARLLD decision was clearly premised upon the DRME's decision that Centurion is the owner of the tailings.
- [20] Mpilo, seeking an interim interdict pending a review of the DRME and DARLLD decisions. Such review is still to be instituted by Mpilo.
- [21] An interim interdict does not involve a final determination of the rights of the parties (See: *Apleni v Minister of Law and Order and Others*; *Lamani v Minister of Law and Order and Others*.[3])
- it merely serves to preserve the status quo pending the final determination of the parties' rights. Mpilo seeks to protect

the tailings pending a determination of its and Centurion's rights to the tailings. This is what this dispute in essence is all about. To the extent that I will be making findings in this judgment over the ownership of the tailings, I do so in order to consider whether Mpilo has a prima facie right worthy of protection against an imminent infringement.

- [22] Mpilo must prove on a balance of probabilities four requirements for an interim interdict to be granted to it: a prima facie right; a reasonable apprehension of harm; balance of convenience; and no alternative remedy. I proceed to deal with these requirements in turn.

Prima facie right

- [23] For establishing a prima facie right, Mpilo relies upon the permit which, according to Mpilo, gives it a right to mine the tailings. The essence of Mpilo's case is that in terms of the definitions of mining and mineral in the MPDRA and the fact that

it has been issued with a mining licence in the respect of the property which includes the tailings thereupon, gives it a prima

facie right to protection pending a final decision in intended review.

- [24] Centurion's stance is that the mining permit does not give Mpilo a right to deal with the tailings as same is owned by Centurion. For this stance, Centurion relies upon the unreported decision in *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd & Others*[4] ("De Beers"). In *De Beers* it was essentially found that tailings constitute movables which are owned by the person who created the tailings through severing the tailings from the natural earth and, that tailings are not regulated by the MPRDA. The first respondent further alleges that the applicant did not challenge the *De Beers* decision.

The relevant provisions of the MPRDA

- [25] The permit is a mining permit. A mining permit is defined in the MPRDA as follows:

"mining permit" means a permit issued in terms of section 27(6)

[26] Section 27(7) of the MPRDA sets out what a person to whom a mining permit issued in terms of section 27(6) may do. Section 27(6),

in relevant part, reads:

‘(7) The holder of a mining permit—

- (a) may enter the land to which such permit relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for purposes of mining;
- (b);
- (c);
- (d) may mine, for his or her own account on or under that mining area for the mineral for which such permit relates.
- (e)’

[27] “Mine” is defined in the MPRDA as follows:

“mine” means, when—

- (a) used as a noun—
 - (i) any excavation in the earth, including any portion under the sea or under other water or in any residue deposit, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral;
 - (ii) any other place where a mineral resource is being extracted, including the mining area and all buildings, structures, machinery, residue stockpiles, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or extraction or processing of such mineral resource; and
- (b) used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area;’

[28] Tailings are therefore included in the definition of the noun of mine. Similarly, the mining of tailings is included in the definition under definition of mine as a verb.

[29] A mineral is defined as follows:

“mineral” means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes—

(a) water, other than water taken from land or sea for the extraction of any mineral from such water;

(b); or

(c);’

[30] Gold is a mineral as defined in the MPRDA. It is common cause that the tailings contain gold – after all, it is the gold in

the tailings that Mpilo and Centurion are after.

[31] Mining area is defined as follows:

“*mining area*”—

(a) in relation to a mining right or a mining permit, means the area on which the extraction of any mineral has been authorised and for which that right or permit is granted;

(b) in relation to any environmental, health, social and labour matter and any residual, latent or other impact thereto, including—

(i) any land or surface adjacent or non-adjacent to the area as contemplated in subsection

(i) but upon which related or incidental operations are being undertaken;

(ii) any surface of land on which such road, railway line, powerline, pipe line, cableway or conveyor belt is located, under the control of the holder of such a mining right or a mining permit and which such holder is entitled to use in connection with the operations performed or to be performed under such right or permit; and

(iii) all buildings, structures, machinery, residue stockpiles, or objects situated on or in the area as contemplated in subsections (ii) (a) and (ii) (b);’

[32] The mining area in respect for which the permit was issued for the property therefore includes the tailings and there can be no doubt that the MPRDA also regulates the mining of tailings in terms of a mining permit that was issued in terms of section 27(6) read with section 27(7) of the MPRDA.

[33] Therefore, in terms of the permit, Mpilo is entitled to mine the tailings for gold.

[34] Centurion wants to prevent Mpilo to mine the tailings in terms of the permit, not because Centurion is presently permitted to mine

the tailings but because, so it alleges, Centurion owns the tailings.

[35] For its claim to ownership of the tailings, Centurion alleges that in February 1978 various permits, one of which pertains to the property, were sold to an entity then known as Norse Mining Company (Pty) Ltd[5] which entitled Centurion to retain the tailings. Centurion attached to its answering affidavit a Power of Attorney to Give Transfer of Permit No 42/75,

issued under the provisions of section 161 of the Mining Rights Act, 1967 “... To retain possession and treat or otherwise utilise any tailings, slimes, waste rock or other residue situated on...[the

property]. Centurion attached a permit that was issued to Centurion to the answering affidavit that was issued in terms of section 161 of the Mining Rights Act on 5 October 1993. The permit was valid from 1 October 1993 to 31 December 1993. This therefore means that

Centurion’s right to mine the tailings ended on 31 December

1993. This permission constituted an old order mining right, i.e a mining right that existed before the commencement of the MPRDA on 1 May 2004.

[36] In respect of old order mining rights, see Limpopo Economic Development Agency v Klopper NO & 10 Others[6] where the following was set out over old order mining rights and its conversion.

[6] Item 7 of Schedule II [of the MPRDA] provided for the conversion of old order mining rights to new order mining rights issued in terms of the MPRDA. It did so by preserving the validity of old order mining rights for a period, during which holders were given the opportunity to apply for the conversion of their rights.

[7] Item 7(3) placed an obligation on the Minister of Minerals and Energy to convert old order mining rights into mining rights under the MPRDA if the formal requirements of an application, set out in item 7(2), were complied with; if a holder ‘has conducted mining operations in respect of the right in question’; if they undertake that they will continue with those mining operations once their right has been converted; if they have an approved environmental management program; and if they have paid the prescribed conversion fee.

An old order mining right is defined in item 1 of Schedule II of the MPRDA as ‘any mining lease, mynpachten, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted’.

[8] In terms of item 7(7), on the conversion of the right and its registration, the old order right ceases to exist. In terms of item 7(8), if a holder does not apply for conversion before the expiry of the period of grace referred to in item 7(1), the old

order mining right ceases to exist.’

[37] Centurion relies upon the provisions of section 161 of the Mining Rights Act which reads (in relevant part):

‘any permit issued under paragraph (a) may upon application by the holder thereof and payment in advance of the fee prescribed by that paragraph, be renewed from time to time by the mining commissioner for a period not exceeding three months at a time, but shall lapse if such fee is allowed to become a 3 months in arrear.’

[38] Centurion has not converted its old order mining right in respect of the tailings. No evidence of a renewal of the section 161(1) permit and no further current permissions to mine issued in terms of the MPDRA are attached or mentioned by Centurion. I therefore find that Centurion presently does not have any existing right to mine the tailings.

Ownership of the tailings

[39] The permit Centurion purchased in 1978 was “... to retain possession and treat or otherwise utilise any tailings, slimes, waste rock or other residue situated on...[the property]. Centurion did not create the tailings whereby it could possibly have become movables and as a consequence thereof, became the owner of the movables. Centurion purchased the right to possess the tailings and to extract gold from the tailings. Centurion (or Norse) did not purchase the tailings itself. It purchased a right to work the tailings. Possession does not equate to ownership. Ownership is “....in principle a comprehensive right embracing not only the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the thing (*ius abutendi*),¹ but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it (*ius vindicandi*) and or to resist any unlawful invasion of the thing (*ius negandi*).[7]

[40] De Beers did not lay down the principle that all tailings are transformed to movables. Each case must still be considered on its own facts. This is clear from *Konstanz Properties (Pty) Ltd v WM Spilhaus en Kie (WP) Bpk*[8] (“Konstanz”) upon which the court in *De Beers* relied. Konstanz sets out as follows:

‘Whether movables become fixtures by attachment, depends on circumstances. No single criterion can provide for all cases. That is why Innes CJ in the leading decision, *MacDonald Ltd v Radin N O and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 466, first emphasised that ‘each case must depend upon its own facts’ before mentioning the different circumstances which are normally taken into consideration, to wit, (a) the nature of the movable which is attached— with the emphasis on its capacity of acceding to the immovable; (b) the manner of attachment— with the emphasis on the integration of the movable with the immovable and whether the movable can be removed without damaging the one or the other; (c) the intention with which the attachment occurred— with the emphasis on whether the attachment was intended to be permanent (cf further, *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 564-6; *Van Wezel v Van Wezels Trustee* 1924 AD 409 at 414; *Standard-Vacuum Refining Co of S A (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) at 677E-678C; *Theatre Investments (Pty) Ltd and Another v Butcher Bros Ltd* 1978 (3) SA 682 (A) at 688D-H).

One view (described as the ‘traditional approach’) is that (c) only matters where (a) or (b)³ viewed objectively, are ambiguous; likewise, that (c) can do nothing to alter the matter where (a) or (b) are not ambiguous. Another view (described as the new approach) is that (c)³ the subjective intention, sometimes expressed as the *ipse dixit*, is decisive and that (a) and (b) as a question of degree are merely indicative of (c) (cf *Van der Merwe Sakereg* 2nd ed at 254-5; *Silberberg and*

Schoeman *The Law of Property* 3rd ed at 209-11). A further variant is the omnibus approach of Van Zyl J in *Sum atie (Pty) Ltd v Venter and Another* N N O 1990 (1) SA 173 (T), which is criticised by Silberberg and Chemin (op cit at

212) on the basis thereof that the sources cited do not support the

proposed formulation and that it is doubtful whether the proposed formulation will really contribute to a practical solution

of this type of problem. (Cf also Van der Merwe 1990 *Annual Survey of South African Law* at 216.)

Following on the different approaches the further question arises: whose intention? That of the owner of the movables, that of the annexor or that of the owner of the land?

In numerous dicta, as in the MacDonald case itself, supra at 466, reference is made to the intention of the annexor. (See for example, to refer only to decisions of this Court, *Newcastle Collieries Co Ltd v Borough of Newcastle* (supra at 564); *R v Mabula* 1927 AD 159 at 161; *Pettersen and Others v Soroaag* 1955 (3) SA 624 (A) at 628A-D; *Standard-Vacuum Refining Co of S A (Pty) Ltd v Durban City Council* (supra at 678C.) *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* (supra at 688D—F.) On the face of it this makes sense because after all the inquiry is directed at the circumstances relating to the attachment as such. There is therefore something to be said for it that his point of view ought to be relevant when there is a dispute whether a particular attachment [282] was intended to be permanent or merely of a temporary nature. The owner of the movables is not necessarily involved in the attachment as such; indeed he may possibly, as in the present case, not even be aware thereof.

In none of the cases mentioned supra, except for the MacDonald case supra, did it matter on the facts whose intention had to be examined, because in all the cases the annexor was at the same time also the owner of the movables. Thus in *Trust Bank of Africa Ltd v Western Bank Ltd and Others* N N O 1978 (4) SA 281 (A) at 295E, reference is made for example to the owner-annexor. MacDonald (supra) was an exceptional case in so far as the seller-owner of the movable, a 12 ton refrigeration apparatus with accessories, carried out the installation thereof at the instance of the hire purchase-purchaser but was still not regarded as the annexor. {Cf however, *Commissioner for Inland Revenue v Le Sueur* 1960 (2) SA 708 (A) at 712H.) The apparatus was installed in such a manner that it could easily be removed. When the hire purchase-purchaser went bankrupt before payment, the question arose: who was entitled to the apparatus, the appellant, as seller with reservation of ownership, or the respondent on whose land the apparatus was installed? The Trial Court decided the latter, this Court the former. Both Courts held the view that the hire purchase-purchaser was the actual annexor who in this regard merely made use of the services of the seller. According to Innes CJ the intention of the owner of the movables is decisive:

‘Were it otherwise, the ownership of the property would be dependent upon the mental attitude of a man to whom it did not belong (the hire purchase- purchaser), and who did not intend to deprive the true owner of his rights.’ (At 469 .)

Some of the authors, such as Van der Merwe (op cit at 257) and Carey Miller *The Acquisition and Protection of Ownership* at 32-3, point out that in the case of accessio by rights one is not dealing with a derived form of transfer of ownership. The view that it is the intention of the owner of the H movables rather than the intention of the annexor which is relevant, was nevertheless followed in later cases without criticism (cf however, *Cape Town & District Gas, Light & Coke Co Ltd v Director of Valuations* 1 949 (4) SA 197 (C) at 202) (cf further *Land and Agricultural Bank of SWA v Howaldt and Vollmer* 1925 SWA 34 at 36-8; *Cham pions Ltd v Van Staden Bros and Another* 1929 CPD 330 at 333; *Cla rke v Uhlman* 1943 CPD 124 at 127; *Van Rooyen v Baumer Investments (Pty) Ltd* 1947 (1) SA 113 (W) at 117; *Bester v Marshall* 1947 (3) SA 206 (SR) at 208-9; *Trust Bank of Africa Ltd v Western Bank Ltd and Others* N N O (supra at 295E); *Falch v Wessels* 1983 (4) SA 172 (T) at 179D-180A). The Court a quo was bound by this decision and based its judgment on it.’

[41] The particular circumstances with regards to the tailings were that Centurion’s predecessor/s were the annexors. The intention

with the tailings was to rework the tailings to extract the gold that was left. There is no indication on the papers that Centurion or any of its predecessors had the intention to remove the tailings. Further, the tailings are laying right on top of the surface area of the property. Even if the tailings is removable, I do not see how the tailings can be separated from the surface area of the property without an interference of the surface area under the tailings. In my view, having regard to the dicta and test set out in *Konstanz*, the tailings in this matter are immovable and part of the property. I find that Centurion had not established that it is the owner of the tailings.

Apprehension of harm

[42] In order to demonstrate that Mpilo has a reasonable apprehension of harm it relies upon the letter sent by DARLLD where in DARLLD’s official informed Mpilo that he has granted Centurion access to the property for purposes of removing “.... their [Centurion’s] tailings dump [tailings].” This, according to Mpilo is demonstrable of a direct infringement to Mpilo’s rights in respect of the tailings. Also, despite requesting an undertaking from Centurion that it will not remove the tailings or any part thereof from the property until the review application is determined, no such undertaking was given. In response to this allegation, Centurion confirms that it is not attempting to mine on the property but rather to remove and treat the tailings.

[43] In my view, having regard to Centurion’s response, Mpilo has established a reasonable apprehension of harm for Mpilo has acquired permission to mine the tailings for gold. If the tailings are removed by Centurion, Mpilo is deprived from the opportunity to exercise its right to mine the tailings.

No alternative remedy

[44] Mpilo alleges that it has no alternative remedy but for the interim interdict because it had sought to resolve the tailings issue

with Centurion, DMRE and DARLLD.

[45] Centurion alleges that Mpilo has alternative remedies the MPRDA. Centurion contends that Mpilo has failed to exhaust its MPRDA internal remedies. Centurion's point of view is that the envisaged review application being a review in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), has no prospect of success for Mpilo has not exhausted its internal remedies

as it was required to do.

Remedies in the MPRDA

[46] Section 54 of the MPRDA reads:

'54. Compensation payable under certain circumstances.—(1) The holder of a reconnaissance permission, prospecting right, mining right or mining permit must notify the relevant Regional Manager if that holder is prevented from commencing or conducting any reconnaissance, prospecting or mining operations because the owner or the lawful occupier of the land in question—

- (a) refuses to allow such holder to enter the land;
 - (b) places unreasonable demands in return for access to the land; or
 - (c) cannot be found in order to apply for access.
- (2) The Regional Manager must, within 14 days from the date of the notice referred to in subsection (1)—
- (a) call upon the owner or lawful occupier of the land to make representations regarding the issues raised by the holder of the reconnaissance permission, prospecting right, mining right or mining permit;
 - (b) inform that owner or occupier of the rights of the holder of a right, permit or permission in terms of this Act;
 - (c) set out the provisions of this Act which such owner or occupier is contravening; and
 - (d) inform that owner or occupier of the steps which may be taken, should he or she persist in contravening the provisions.
- (3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavor to reach an agreement for the payment of compensation for such loss or damage.

- (4) If the parties fail to reach an agreement, compensation must be determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by a competent court.
- (5) If the Regional Manager, having considered the issues raised by the holder under subsection (1) and any representations by the owner or occupier of land and any written recommendation by the Regional Mining Development and Environmental Committee, concludes that any further negotiation may detrimentally affect the objects of this Act referred to in section 2 (c), (d), (f) or (g), the Regional Manager may recommend to the Minister that such land be expropriated in terms of section 55.
- (6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the reconnaissance permission, prospecting right, mining right or mining permit, the Regional Manager may in writing prohibit such holder from commencing or continuing with prospecting or mining operations on the land in question until such time as the dispute has been resolved by arbitration or by a competent court.
- (7) The owner or lawful occupier of land on which reconnaissance, prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation, in which case this section applies with the changes required by the context.’

[47] Section 7(2) of PAJA reads:

‘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.’

[48] Only an administrative action as defined in section 1 of PAJA can be reviewed through PAJA. Section 7(2) only applies to a review

of an administrative action as defined in PAJA. An internal remedy has to do with the initial challenge to an administrative action.

Section 54 of the MPRDA does not constitute an internal remedy as contemplated in section 7(2) of PAJA. Section 54 provides for

possible compensation to the owner of a property over which permissions of rights in terms of the MPRDA have been granted and provides for the procedure to be followed by the Regional Manager. Only after the Regional Manager has taken a decision in terms of section 54(6), an appeal in terms of section 96 of the MPRDA may be engaged.

[49] The State is the owner of the property. DARLLD, who is in control of the land, is preventing access to Mpilo to the property. Section 54 does not constitute an internal remedy open to Mpilo in a PAJA review or even a legality review. A review of the DARLLD decision does not fall within the realm of the MPRDA. It lies within PAJA or a legality review.

Section 96 of the MPRDA

[50] Section 96 of the MPRDA provides for an internal remedy for administrative decisions taken in terms of the Act. It reads:

‘96. Internal appeal process and access to courts.—(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal 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.
- (2) (a) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.
- (b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).
- (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.’

[51] Section 96 is an internal remedy for a person described in section 96(1) namely “.....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...”. A person will have standing in terms of section 96 if the following requirements are met: (a) the decision sought to be challenged must be an administrative decision in terms of the MPRDA, (b) it must be a person whose expectations have been materially and adversely affected, or, (c) a person who is aggrieved by the decision.

[52] Requirements (b) and (c) are clearly met by Mpilo in this matter. Mpilo, who is the holder of the permit, has a legitimate expectation that it may proceed to exercise its rights in terms of the permit. Presently, Mpilo is aggrieved because it is prevented from exercising the permit because the DMRE has declared that Centurion is the owner of the tailings and the DARLLD granted permission to Centurion to remove the tailings.

[53] The more challenging decision to decide is whether the DMRE’s declaration that Centurion is the owner of the tailings constitutes

an “...administrative decision in terms of this Act...”.

[54] The Director-General of the DMRE declared that the tailings belong to Centurion. Section 8 of the MPRDA provides that the Director-General performs functions that are delegated or assigned to him or her. If the Director-General does anything that is not delegated or assigned to him or her in terms of the MPRDA, he or she acts ultra vires the MPDRA.

[55] Chapter 4 of the MPDRA provides for mineral and environmental regulation. Chapter 4 has to do with a host of issues relating licencing and permissions which are mostly dealt with by the Regional Manager. The Regional Manager has no power to make declarations as he

purported to do in respect of the ownership of the tailings. He acted ultra vires the MPDRA. The declaration is therefore not an

administrative decision in terms of the MPDRA. Requirement (a) has therefore not been met. As a consequence, the internal remedy

provided for in section 96 of the MPDRA is not open for Mpilo. Mpilo could therefore not and was not required to follow section 94 before it approaches the court for review, either in terms of PAJA or a legality review.

[56] The basis upon which Mpilo seeks to review and set aside the actions of the DMRE and the DARLLD are set out in paragraphs 46 and

47 of the founding affidavit as follows:

‘46. Furthermore, in writing, the first respondent as mentioned earlier, expressly stated that it has no rights to the tailings. The decisions made by the second and third respondents to reinstate possession of the property to the first responded after all these years without the latter possessing any legal right and/ or permit to gain access and undertake mining activity on the property is and/ or constitutes administrative action for purposes of the Promotion of Administration of Justice Act which will, no doubt, be reviewed and set aside replaced with a legitimate decision in due course.

47. The administrative action which the applicant seeks to impugn appears to have been taken:

47.1 For a reason not authorised by any powering provision;

47.2 For an ulterior purpose or motive;

47.3 Because irrelevant considerations were taken into account or relevant considerations were not considered;

47.4 Because of unauthorised or unwarranted dictates of another person or body;

47.5 In Bad Faith; or

47.6 Arbitrary or capriciously.’

[57] In response, Centurion alleges that the review application that is foreshadowed in the notice of motion has absolutely no prospects of success and the court will not even be able to hear it as Mpilo has failed to exhaust its internal remedies as provided for in the MPRDA and on Mpilo's own version the decisions sought to be reviewed were not authorised by any empowering provision. I have already found that no alternative remedy is situated within the MPRDA. Therefore Centurion's defence in this regard must fail.

[58] Section 6 of PAJA codifies the grounds of an administrative review. It reads (in relevant part):

'6. Judicial review of administrative action.—(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

- (cc) the information before the administrator; or
- (dd) the reasons given for it by the administrator;
- (g) the action concerned consists of a failure to take a decision;
- (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

the action is otherwise unconstitutional or unlawful....’

[59] Each one of Mpilo’s anticipated grounds of review are founded in section 6 of PAJA. I have already found that the Director-General of the DMRE was not empowered by the MPRDA to make a declaration over the ownership of the tailings. On this basis alone a review of the Director-General’s decision must succeed. I express no view over the pathway of the review of DARLLD’s decision to grant Centurion permission to remove the tailings. That is for Mpilo to decide when it launches its review application.

Balance of convenience

[60] The evidence before me demonstrates that for many years there has been no interest from Centurion in the tailings. In my mind, convenience favours Mpilo because its permit is new and was undoubtedly applied for with the view of mining the tailings. There will be less prejudice to Centurion if Centurion is forced to wait until the parties’ rights in respect of the tailings are finally determined. Mpilo satisfied the requirement that the balance of convenience favours it.

[61] The relief that is sought in paragraph 3 of the Notice of Motion is ancillary to the relief sought in prayers 1 and 2. There is no reason in my mind why Mpilo should not be afforded certainty that those orders that I will be granting are also reinforced.

[62] There is no reason why costs should not follow the result.

[63] In the premises, I made the following order:

- (a) The respondents and/ or their duly authorised representatives and/ or any other person/s is/ are interdicted from entering the property, more fully described as Portion of the Remaining Extent of the Farm Camelot Lot 320 JU as indicated on the plan attached to this order, marked “A” bearing number 12917MP (“ the property”) for any reason whatsoever and/ or to remove any debris, discard,

tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to any mining operation that was and/is conducted on the property and which is stockpiled, stored or accumulated for potential reuse;

- (b) In the event that the respondents refuse to comply with the order in paragraph 1 above, the applicant is hereby authorised to instruct the Sheriff of this court to attend at the property and do all things necessary including but not limited to utilising the services of the South African Police Services and/or locksmiths and/or security companies who are authorised to enforce the court order;
- (c) The orders in paragraph 1 and 2 (“the orders”) above shall stand as interim interdicts with immediate effect pending the outcome of review proceedings to be instituted by the applicant by no later than 30 August 2023, failing which the orders shall lapse.
- (d) The first respondent is ordered to pay the applicant’s costs.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 14 JULY 2023 DATE OF JUDGMENT: 26 JULY 2023

APPEARANCES

FOR THE APPLICANT:

Mr. N Alli on instructions of Madhi Attorneys

FOR THE FIRST RESPONDENT:

Mr. K Thobakgale on instructions of Beech Veldman Inc.

[1] The applicant.

[2] The second respondent.

[3]

[1989] 1 All SA 71 (A).

[4] (3215/06) [2007] ZAFSHC 74 (13 December 2007).

[5] Now known as Centurion.

[6] (Case no. 982/2020) [2022] ZASCA 73 (25 May 2022)

[7] See: LAWSAThings (Volume 27 - Second Edition), Author: CG VAN DER MERWE BA LLB BA (Hons) BCL (Oxon) LLD Advocate of the High Court Emeritus Professor of Civil Law, University of Aberdeen Last Updated: Reflects the law as at 31 January 2014 at paragraph 135.

[7] See: LAWSAThings (Volume 27 - Second Edition), Author: CG VAN DER MERWE BA LLB BA (Hons) BCL (Oxon) LLD Advocate of the High Court Emeritus Professor of Civil Law, University of Aberdeen

Last Updated: Reflects the law as at 31 January 2014 at paragraph 135.

[8]

[1996] ZASCA 28; 1996 (3) SA 273 (SCA).

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Prepared on 12 October 2026 · Esheria