Unravelling the mare’s nest? The Constitutional Court interprets the duty to exhaust internal remedies in the mining setting

Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd 2014 5 SA 138 (CC)

Abstract

This Constitutional Court case involved an application by Dengetenge Holdings (Pty) (Ltd) (a junior mining company) for leave to appeal against a decision of the Gauteng North High Court setting aside the award of a prospecting right to Dengetenge, and the decision of the Supreme Court of Appeal (SCA) refusing to condone the company’s late filing of its heads of argument in its appeal against the High Court’s decision.

1 History of the legal dispute between Dengetenge and its competitors

A complex litigation history preceded the Constitutional Court’s consideration of Dengetenge’s application. At the centre of a protracted dispute between Dengetenge and mining competitors[1] Rhodium Reefs Ltd (Rhodium)[2] and Southern Sphere Mining and Development Co Ltd (Southern Sphere), were two properties situated in the Limpopo province on the eastern limb of South Africa’s platinum belt, namely Boschkloof 331 KT (Boschkloof) and Mooimeisjesfontein 363 KT (Mooimeisjesfontein). Under the apartheid dispensation, the properties in question fell within the self-governing territory of Lebowa and the mineral rights

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[1]Note that Abrina was also a party to this dispute, but the fight was essentially between newcomer Dengetenge and Southern Sphere and Rhodium as the senior, more established, mining companies.

[2]Rhodium Reefs Ltd (Rhodium) is currently a subsidiary of Eastplats Limited, a Canadian-based company specialising in Platinum Group Metals; see file:///C:/Users/a0032217/Downloads /rhodraft_eia_submitted_withfigures_small_part1.pdf; http://eastplats.com/about_us/corporate _profile/ (accessed 2015-01-09).

were vested in the Lebowa Mineral Trust in terms of section 12(1) of the Lebowa Minerals Trust Act 9 of 1987 (LMT).[3] Southern Sphere and Rhodium entered into a notarial lease agreement and a mineral agreement with the LMT in respect of the two properties.[4]

For several years prior to the commencement of the Constitution, Rhodium had been involved in a prospecting project in the Steelpoort Valley which included the southern parts of Boschkloof, the farm De Goedeverwachting, and a number of other farms. When the Constitution came into operation De Goedeverwachting and Boschkloof fell under the jurisdiction of the province of Limpopo while the other farms fell under Mpumalanga. In 2002, the Director of Mineral Development (DMD) for Limpopo delegated jurisdiction over De Goedeverwachting and Boschkloof to the DMD for Mpumalanga in respect of the administration of mineral rights. This may in part account for the administrative bungling that subsequently occurred.

On 15 August 2001, Rhodium obtained a prospecting permit under the Minerals Act in respect of the southern parts of Boschkloof.[5] Ten months following Rhodium's application for a renewal of its prospecting right, on 30 April 2004, the Mineral and Petroleum Resources Development Act (MPRDA) came into effect.[6] On 29 June 2004, Rhodium was advised by the Regional Manager (RM) of Mpumalanga that the application would be processed under the MPRDA.[7] Rhodium supplied the additional information requested.[8] However, on 14 September 2005 Rhodium was informed by the RM that its application had been refused.[9] Rhodium responded by informing the RM in writing that it was considering taking the refusal on judicial review and sought a written undertaking that no third party applications would be processed pending the outcome of such a review.[10] On 17 October 2005, Rhodium instituted an urgent application to interdict the RM: Mpumalanga from accepting any applications in terms of sections 16 or 22 of the MPRDA and the Minister and her delegate from granting any rights in terms of sections 17 or 23 of the MPRDA in respect of the portion of Boschkloof to which Rhodium was laying claim.[11] The High Court granted this interdict pending the finalisation of the review proceedings and it operated from

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[3] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* 2 All SA 251 (SCA) para 2.
[4] *Ibid*.
[5] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd* 2014 5 SA 138 (CC) para 11.
[6] 28 of 2002. *Id* para 12.
[7] *Id* para 13.
[8] *Id* para 14.
[9] *Ibid.*
[10] *Id* para 15.
[11] *Id* para 16.

26 October 2005 until it was discharged by operation of law on 6 December 2006.[12] On 2 December 2005, Rhodium launched its judicial review application without opposition from the state respondents, and on 6 December 2006, the High Court set aside the decision to refuse Rhodium's prospecting rights application and directed the Minister and Deputy Director-General to issue a prospecting right to Rhodium in respect of the southern section of Boschkloof.[13]

Some six months prior to the launch of Rhodium's interdict proceedings, in June 2005, senior miner Southern Sphere lodged an application for prospecting rights, inclusive of the parts of Boschkloof that Rhodium considered as falling within its domain. On 4 October 2006, while the interdict was still operative, the DMR notified Southern Sphere that it had been granted a prospecting right over Portion 1 and the Remaining Extent of Boschkloof and the Remaining Extent of Mooimeisjesfontein. Portion 2 of Boschkloof was omitted due to a typographical error.

On 7 February 2006, another company, the relatively unknown Dengetenge, lodged an application for prospecting rights over portion 1 of Boschkloof and Portion 1 and the Remaining Extent of Mooimeisjesfontein.[14] Dengetenge was awarded a prospecting right over portion 1 of Boschkloof and the remaining extent of Mooimeisjesfontein but not portion 1 of Mooimeisjesfontein.[15]

Despite the overlap in the rights granted over Boschkloof and Mooimeisjesfontein, the Department did not inform Rhodium about Southern Sphere and Dengetenge's applications,[16] or that review proceedings were pending.[17] The result was that Rhodium was not able to give them notice to enable them to intervene in the review proceedings. The High Court accordingly decided Rhodium's review application without joining Southern Sphere and Dengetenge.[18]

Once it had been brought to the Department's attention that prospecting rights over some of the portions had been awarded to multiple proponents, the Department called a meeting with the three affected companies in what was described by the High Court judgment as an attempt to 'unravel the mare's nest' it had created. Rhodium did not however attend. The meeting was inconclusive with the Department requesting the parties to resolve the problem between them.

However, in an effort to comply with the review order granted by the High Court in favour of Rhodium, the Minister, acting in terms of section 103(4) of the MPRDA, decided to withdraw Southern Sphere's prospecting right to the extent

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[12] *Ibid*.
[13] *Id* para 17.
[14] *Id* para 19.
[15] *Ibid*.
[16] *Ibid*.
[17] *Id* para 20.
[18] *Ibid*.

that it overlapped with Rhodium's.[19] In a letter directed to Southern Sphere, reproduced in the judgment in the Supreme Court of Appeal,[20] the Minister articulated the reasons for her decision. Primary amongst them was the fact that the Department had been interdicted from granting any prospecting rights in respect of the properties forming the subject of Rhodium's application, and had in fact been directed by the Court to grant the right to Rhodium. The granting of the prospecting right to the 'Rhodium properties' was thus an 'unfortunate error' in contravention of both orders of Court and could ground the institution of contempt of Court proceedings against the Minister. The only way in which to legally rectify the situation was therefore to withdraw the overlapping right under the authority of section 103(4). This stance of the Minister was critical in the Constitutional Court's later finding that no useful purpose would have been served by requiring Southern Sphere to exhaust internal remedies.[21]

Wishing to challenge the Minister's decision to restrict its prospecting right, Southern Sphere launched a High Court review application in August 2007. Critically it did not lodge an appeal in terms of section 96 of the MPRDA,[22] and thus did not exhaust the internal remedy established by this provision. It also failed to apply to Court for exemption from the obligation to exhaust internal remedies.[23]

In the High Court, the Minister, the RM: Mpumalanga and the RM: Limpopo had authorised the deputy director-general (DDG) to depose and file an affidavit explaining the circumstances in which the decisions to grant prospecting rights had been taken, and the reasons for those decisions. In the affidavit the DDG 'apologised' on behalf of the respondents, saying that it had never been their intention to act in contempt of Court.[24] He also admitted that there had been 'confusion and divergence of views' within the Department and the office of the State Attorney about how to respond to the various Court applications that were being launched by the mining companies. In addition to the option of withdrawing the rights, another view was that the Department should file an affidavit explaining

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[19] *Id* para 25.
[20] (N 3) para 7.
[21] (N 5) para 69.
[22] Section 96(1) of the MPRDA provides that '[a]ny person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner' to either the Minister, or the Director-General, depending on which official took the initial decision. Section 96(2) further provides that no person may apply to a Court for the review of an administrative decision until that person has exhausted the internal remedy. Finally, s 96(4) holds that '[s]ections 6, 7(1) and 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), apply to any Court proceedings contemplated in this section'.
[23] (N5) para 28.
[24] *Id* para 71.

their decisions, giving reasons for their decisions, and asking the Court to decide the claims itself. The motivation for this option was that if the Minister decided to withdraw the prospecting right on the basis of section 103(4), that decision would also be challenged in Court (as had in fact materialised). The Minister and the other state respondents accordingly took the view that 'it would be more expedient and efficient for the entire matter to be resolved by means of appropriate orders granted by [the Court]'.[25] To assist the Court in this purpose, the state respondents indicated which relief they supported and which they opposed in regard to the various claims.[26]

Before the High Court all parties conceded the following: First, only one prospecting right could be granted over a single territory, second, any award of a prospecting right would be invalid if another party had already been granted a prospecting right over that territory and, third, that no application for a prospecting right could be accepted by the RM or granted by the Minister during the period in which the interdict in favour of Rhodium was in effect. At the beginning of the Court hearing, counsel for Dengetenge conceded that the right granted to it was unlawful as it was contrary to the interdict. Tuchten J therefore dealt with the matter on the basis that Dengetenge was not opposing Southern Sphere on the merits, subject to submissions on a just and equitable remedy. Dengetenge therefore did not pursue its contention that Southern Sphere had failed to exhaust internal remedies.

Unsuccessful in the High Court, Dengetenge appealed to the Supreme Court of Appeal (SCA). Its appeal lapsed due to the company's failure to file its written argument timeously and its application for condonation was refused.[27] It then approached the Constitutional Court, appealing against both the decision of the SCA on condonation and the decision of the High Court on the merits.

2 A split Court: the duty to exhaust internal remedies

The Constitutional Court was faced with a number of issues. First, the Court had to decide whether to grant Dengetenge condonation for its failure to deliver its application for leave to appeal and written submissions timeously.[28] The second issue was whether the matter fell within its jurisdiction, which at that time was still

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[25] *Id* para 73.
[26] *Id* paras 74-75.
[27] *Id* paras 34-41.
[28] *Id* para 42.

limited to constitutional matters.[29] Third, the Court had to decide whether to grant leave to appeal against both the decisions of the SCA and High Court respectively.[30] Fourth, the Court had to decide whether the High Court had been competent to hear the matter due to Southern Sphere's failure to exhaust internal remedies.[31] And finally, the Court had to decide whether Southern Sphere had delayed unreasonably in instituting its review application following the lapsing of the 180 days prescribed by section 7(1) of the PAJA.[32] For the purposes of this case note, however, the focus falls on the fourth issue – whether Southern Sphere should have exhausted internal remedies. We focus on this issue due to the implications of the Court's finding for just administrative action (administrative justice) and the fact that the Court was split in its decision.

On the question of the exhaustion of internal remedies, the overwhelming majority of the Constitutional Court justices[33] essentially agreed that no useful purpose would have been served by exhausting the section 96 remedy, and that the failure to do so could not disrupt the merits of the decision in the High Court. The reasons for this decision, however, differed between the main (Zondo J with Mogoeng CJ concurring) and the concurring (Jafta J with Moseneke DCJ, Madlanga J, Mhlantla AJ, Nkabinde J and Skweyiya J concurring) judgments. With the majority of the justices behind it, the reasoning in the concurring judgment prevailed.

2.1 The main judgment

Zondo J began his judgment by outlining the relevant provisions of the MPRDA. Section 96(1) which confers a right of appeal against the decision to award a prospecting or mining right to the Minister or Director General, depending on the official who initially took the decision; section 96(3) which renders judicial review of an administrative decision contemplated in section 96(1) subject to the exhaustion of the internal remedy; and section 96(4) which provides that sections 6, 7(1) and 8 of PAJA apply to any Court proceedings contemplated in the section.[34] He found that the provisions of the MPRDA and PAJA correlated with one another and that section 7(2)(c) of PAJA, which allows for an applicant to be

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[29] Following the institution of Dengetenge's appeal to the Constitutional Court, the Constitution Seventeenth Amendment Act 72 of 2013, which accorded the Constitutional Court general jurisdiction, came into effect. The parties however, presented their arguments, on the basis that the previous position – ie, that the Court's jurisdiction was confined to constitutional matters – prevailed (*id* paras 43-45).
[30] *Id* paras 53-61 and 52.
[31] *Id* paras 62-95 (per Zondo J) and 115-136 (per Jafta J).
[32] *Id* paras 96-108 (per Zondo J) and 137-140 (per Jafta J).
[33] Froneman J (Cameron J and Van der Westhuizen J) decided against granting leave to appeal and did thus not consider the question of the exhaustion of internal remedies (paras 141-145).
[34] *Id* paras 63-64.

exempted from the requirement to exhaust internal remedies in exceptional circumstances, and where the interests of justice permit, applied to appeals under section 96 by virtue of section 7(1), which essentially incorporates section 7(2)(c).[35] He noted that section 7(2)(a) did not bar a person applying to Court for a review of administrative action pending the exhaustion of internal remedies. Rather it barred a Court from reviewing any administrative action unless internal remedies were exhausted.[36]

Zondo J disagreed with Dengetenge's position for two main reasons. First, the Minister had already indicated, in her reasons for the decisions subject to challenge that she intended to withdraw the decision to award prospecting rights to Dengetenge and another company in terms of section 103(4)(b) of the MPRDA and that she regarded the initial granting of the rights as an administrative oversight.[37] Given that the outcome of the internal remedies was a foregone conclusion, Zondo J reasoned that no purpose would be served by the Southern Sphere exhausting internal remedies or by the Court insisting that it do so.[38]

The second reason advanced by Zondo J, however, marked the major marked division between his judgment and that penned by Jafta J. Zondo J held that the Minister had waived the *right* to have internal remedies exhausted.[39] The evidence in support of this conclusion was the DDG's affidavit, which stated that the department had ultimately resolved to file an affidavit explaining how each decision was taken and requesting the Court to decide the claim.[40] He thus characterised the exhaustion of internal remedies as a right inhering in the Minister and her department.

Zondo J drew on the decision of the House of Lords in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[41] (*Kammins*) to support his position that the internal remedies requirement in terms of section 96 could be waived.[42] That case concerned a provision of the English Landlord and Tenant Act (LAT), which allowed a tenant, in the event that the landlord gives notice of its opposition to a new lease, to approach the Court for a new lease, 'not less than two nor more than four months after the giving of the landlord's notice …'. Zondo J stated that there were two common features between the LAT and section 96(3), first each provision was couched in clear language, and each did not appear to allow any exceptions.[43] In *Kammins* the tenant had applied to the Court prematurely, but the

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[35] *Id* paras 65-66.
[36] *Id* para 67.
[37] *Id* paras 68-69.
[38] *Id* para 69.
[39] *Id* para 70.
[40] *Id* paras 71-75.
[41] [1970] 2 All ER 871 (HL).
[42] (N 5) from para 76 and further.
[43] *Id* para 78.

landlord did not raise this point until much later in the litigation process.[44] The question arose as to whether the landlord could waive this requirement – and the majority of the House of Lords concluded that he or she could.[45]

Zondo J considered it necessary to canvass the reasons put forward by the various Law Lords to uphold the decision that the landlord could waive the requirement for the tenant to desist from instituting court proceedings prior to the lapse of a certain period of time.[46] The reasons it found most persuasive included the distinction between statutory requirements that are procedural and not jurisdictional. Whereas a jurisdictional requirement ousts the Court's jurisdiction to hear a matter under any circumstances in the absence of a condition, a procedural requirement exists to provide 'an orderly sequence' of procedural steps that do not oust the Court's jurisdiction to hear the matter in all circumstances. Second, Zondo J was persuaded by the Law Lords' reasoning that the requirement existed only for the benefit of the party to whom notice is given and could thus be waived.[47] Thus where a requirement on party A was present in a statute regulating the rights and interests of private persons (rather than the rights and interests of the public), and the requirement existed solely for the benefit of party B, no harm could result from allowing party B to decide not to require the satisfaction of this condition.

Drawing on this analogy, Zondo J argued that the internal remedy requirement in section 96 was for the benefit of the Minister and the DG.[48] He further cited the Court's decision in *Bengwenyama*[49] as support for the contention that the duty to exhaust internal remedies fell away when the Department made it clear that the matter should be decided by a Court.[50] In this case the community had lodged an internal appeal but had brought the interdict application pending the determination of the appeal, following advice from the Department to seek a review.[51]

2.2 The concurring (majority) judgment

In contrast to Zondo J, Jafta J emphasised the transformative impact of PAJA on the previous common-law position whereby the mere existence of an internal appeal did not necessarily require that such appeal should be exhausted prior to instituting judicial review proceedings. Post-PAJA, where provision for an internal

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[44] *Id* para 79.
[45] *Id* para 80.
[46] *Id* para 82.
[47] *Id* paras 83, 85.
[48] *Id* para 87.
[49] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC).
[50] *Id* para 91.
[51] (N 5) para 88.

remedy had been made, as was the case with section 96 of the MPRDA, the Court was obligated to satisfy itself that such remedies had been exhausted. If it was not satisfied, it had to decline to adjudicate the matter until the applicant had either exhausted such remedies or had been granted an exemption by the Court.[52] Citing the SCA's decision in *Nichol v Registrar of Pension Funds*,[53] which the Constitutional Court had endorsed in *Nichol v Minister for Home Affairs (Lawyers for Human Rights as amicus curiae*),[54] Jafta J pointed out that the two pre-conditions to the granting of an exemption were (i) the existence of exceptional circumstances; and (ii) the interests of justice.[55] He also reiterated some of the reasons for upholding the requirement of exhausting internal remedies, articulated by the Court in the *Koyabe*[56] matter – the enhancement of procedural fairness; the capacity for internal remedies to provide immediate and cost-effective relief; the greater accessibility of internal remedies when compared to court processes; and the opportunity internal remedies provided for the executive to remedy (and hopefully thereby learn from) its own irregularities; the importance of not undermining the autonomy of the administrative process, or usurping the executive role and function; and allowing the executive to craft specialist administrative procedures suited to the particular administrative action in question.[57]

Jafta J critiqued Zondo J's reliance on *Kammins* due to the significant differences between the context and statutory authority of each case. *Kammins* was concerned with a provision regarding the renting of property and not the duty to exhaust internal remedies.[58] Second, the relevant section of the MPRDA did not impose a time bar nor confer a benefit on the functionaries considering the appeal. Instead it imposed an obligation on the aggrieved party to exhaust internal remedies with the corollary being the functionaries' duty to decide the appeals.[59] The wording of the two provisions in the LAT and MPRDA respectively was also distinct,[60] and Jafta J cautioned against using foreign cases to interpret legislation passed by the South African parliament.[61]

He also distinguished *Bengwenyama*[62] from the case at hand, as in that case the Court had 'assumed that the failure to decide an internal appeal meant that

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[52] *Id* para 119.
[53] 2008 1 SA 383 (SCA) (*Nichol*).
[54] 2009 12 BCLR 1192 (CC).
[55] (N 5) para 120.
[56] 2009 12 BCLR 1192 (CC).
[57] (N 5) para 122.
[58] *Id* para 128.
[59] *Id* para 129.
[60] *Id* para 130.
[61] *Ibid*.
[62] (N 49).

the internal process had been concluded' and solely for the propose of assessing whether the 180 day period following the conclusion of internal remedies had been complied with, not for the purpose of assessing compliance with the internal remedies rule.[63]

However, while holding that the duty to exhaust internal remedies could not be waived and despite the absence of an exemption to the rule granted by the High Court, Jafta J held that since the High Court would almost certainly have granted the exemption, ordering a remittal would be a waste of time and resources.[64]

3 Discussion

This is not the first time the Constitutional Court has considered the interpretation of section 96 of the MPRDA. In the *Bengwenyama*[65] case, the Court was faced with the question whether an internal appeal existed at all, following decisions in the High Court where the logic had prevailed that since the MPRDA empowered the Minister to grant prospecting rights, the decision to grant such remained the Minister's notwithstanding delegation of this authority to subordinate officials. Hence the Minister could not decide an appeal against what was, in theory, her own decision.[66] The Court rejected this reasoning, holding that allowing for an internal appeal under section 96 would enhance administrative autonomy, provide for immediate and cost-effective relief, and allow for the Minister to develop guidelines for the proper application of the Act in future decisions.[67] The question of the impact the Minister's power to delegate authority to grant prospecting rights had on the existence of an internal appeal, the Court decided, had to be decided against the backdrop of the constitutional provisions relating to public administration. These had been shaped by the fundamental constitutional values of 'requiring a democratic system of government to ensure accountability, responsiveness and openness'.[68] These values were enhanced by recognising an internal appeal.

While the Court had previously been occupied with whether an internal appeal under section 96 existed at all, it could be argued that the significance of their deliberations in *Dengetenge* centred on reinforcing this decision in *Bengwenyama*, undergirding all the reasons for recognition of an internal appeal by narrowly circumscribing the conditions for initiating judicial review of

[63](N 5) para 133.
[64]*Id* paras 135-136.
[65](N 49).
[66](N 49) para 44.
[67]*Id* para 50.
[68]*Id* para 52.

administrative action in the absence of exhausting internal remedies. The case can certainly be read in this light and we are pleased that the line of reasoning in *Nichol* and *Koyabe* was sustained by the concurring, majority judgment.

In our view, however, one of the key sites of contestation in *Dengetenge* was the *characterisation* [emphasis added] of the right to an internal appeal and the exhaustion of internal remedies, and we are concerned that neither the main nor the concurring judgment adequately considered the context established by the constitutional values of a democratic system of government aimed at ensuring accountability, responsiveness and openness. This is not only a question of the role of internal appeals within an integrated system of administrative law, but also a question of for whom a right to an internal appeal exists. Secondly, we are fascinated by the manner in which the internal appeal process is functioning as a site of contestation in itself – not only amongst mining companies scrambling for a piece of the riches of the platinum belt, but between the Minister/DMR and such mining companies, and between the Minister/DMR and the Courts. Our comments in the discussion accordingly address these aspects of the judgment.

3.1 Who has a right to an internal appeal?

In the main judgment, Zondo and Mogoeng JJ characterise the exhaustion of internal remedies as a right inhering in the Minister and Department. In the concurring judgment, Jafta *et al* disputed this characterisation, arguing that the requirement to exhaust internal remedies did not confer a benefit on the functionaries considering the appeal, but rather a duty to decide the appeal. While we believe the first characterisation is clearly wrong, the second is also not entirely accurate.

In light of the *rationale* for recognising an internal appeal cited above, such a process does confer benefits upon the Minister and the Department. It provides an opportunity for the administrative authorities to correct decisions, especially administrative bungling of the sort that constituted the 'mare's nest' in the *Degentenge* case. It establishes a form of internal feedback that may, over time, strengthen the administrative capacity of the Department and move towards 'a well-developed machine with the necessary expertise to run the affairs of the state'.[69] As the debacle in *Degentenge* demonstrates, the South African public administration, at least in its mineral division, still falls far short of this ideal.

But these benefits, as the concurring majority rightly pointed out, do not go so far as to confer a right upon the authorities to hear internal appeals or to waive the requirement that they should be exhausted before judicial remedies are instituted. Rather, the articulation of an internal appeal process in section 96 of the MPRDA creates a duty to hear such appeals in a manner that gives the effect to the

[69] Burns and Beukes *Administrative law under the 1996 Constitution* (2006) 471.

provision of efficient and cost-effective relief envisaged by the bench in both *Nichol* and *Koyabe*. Rights vest in other agents.

Firstly, the right to an internal appeal vests in any applicant for a prospecting or mining right. These are persons having 'legitimate expectations' swirling around a prospecting or mining application, and whose expectations would quite clearly be dashed by the refusal of a right. Unfortunately, Dengetenge represents a stereotypical example of this sort of applicant: A junior miner initially granted a piece of the platinum pie and then later denied that possibility. Rhodium and Southern Sphere, similarly, had legitimate expectations around the granting and renewal of prospecting applications to the farms Boschkloof and Mooimeisjes-fontein respectively.

There is another class of agents, however, that is completely ignored in the Constitutional Court's deliberations, and that class is constituted by those persons whose *rights* have been materially and adversely affected by an administrative decision, or simply any persons who are 'aggrieved' by such decision.[70] It is trite that prospecting and mining affect a range of stakeholders in a manner that potentially impacts constitutional rights materially and adversely, the right to an environment not harmful to health and well-being;[71] freedom of trade, occupation and profession;[72] and the rights of cultural, linguistic and religious communities being foremost among them.[73] Section 96 confers a wide right to appeal upon such stakeholders: *Any person* falling within the defined class may institute an internal appeal. Prior to the recent amendments to the MPRDA and the National Environmental Management Act[74] (NEMA) which have created a separate route of appeal in respect of environmental authorisations to the Minister responsible for the environment,[75] the chance to submit an internal appeal under section 96 of the MPRDA was the first in a range of strategies communities and environmental 'warriors' could employ to compel more inclusive and broad-

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[70]Section 96(1) of the MPRDA.
[71]Section 24 of the Constitution.
[72]Section 22 of the Constitution. Prospecting and mining disrupt traditional communities' relationship to their land and thus their livelihoods and the trades and occupations inhering in such livelihoods.
[73]Section 31 of the Constitution. With the disruption of traditional livelihoods come ruptures in cultural practices.
[74]107 of 1998.
[75]Through a spate of legislative amendments extending back to 2008 and culminating in the NEMA Amendment Act 25 of 2014, and the National Water Amendment Act 27 of 2014, the statutory framework for environmental authorisations for mining has been transferred from the MPRDA to the NEMA. Implementing authority (ie, the authority to decide environmental applications for mining) still vests with the Minister responsible for mining, however appeals against such decisions now lie with the Minister responsible for environment (see s 43(1A) of NEMA). For an overview of these amendments see Humby 'One environmental system: Aligning the laws on the environmental management of mining in South Africa' (forthcoming 2015, *Journal of Energy and Natural Resources Law*).

ranging deliberation on the decision to allow prospecting or mining to go ahead. It was no doubt an imperfect tool in the arsenal of environmental activism as it did not suspend the operation of the right, but it was nevertheless extensively used. The right for this class of agents to challenge administrative decisions conferring prospecting or mining rights using an appeal process is still valuable, notwithstanding the creation of a separate appeals process for environmental authorisations under the NEMA, and gives effect to the constitutional principles supporting responsive democracy. It is for these reasons that characterising the exhaustion of internal appeals as a right inhering in the Minister and the Department is so wrong, for it would give the administrative authorities too great a strategic power over such class of agents. If the approach adopted by Zondo and Mogoeng JJ had prevailed, for instance, the administrative authorities could willy-nilly decide to dispense with their 'right' to hear the internal appeal, thus depriving this broader class of stakeholders from one of only a few avenues of real contestation.

One could also stress broader policy arguments in favour of characterising the exhaustion of internal appeals as a *duty* [emphasis added] resting upon administrative authorities. These relate to the maintenance of the constitutional order itself and preservation of the autonomy of the public administration. A duty to decide internal appeals efficiently and cost-effectively is integral to what Hoexter has described as an 'integrated system' of administrative law.[76] More particularly however, they relate to keeping a space open for broader participation in the policy objectives of granting prospecting and mining rights, which include imperatives such as transforming the racial and gender profile of the mining industry, ensuring ecologically sustainable development while promoting justifiable economic and social growth, and ensuring that the holders of prospecting and mining rights contribute to the socio-economic development of the areas in which they operate.[77] The Minister and the DMR have a far-reaching duty to ensure that when particular administrative decisions to grant prospecting or mining rights are made, these policy objectives receive proper consideration, and the broader public has a right to expect this.

[76]Hoexter *Administrative law in South Africa* (2012) 58. Hoexter situates administrative appeals as one of a number of methods to control administrative power. While judicial review used to be the dominant method for securing administrative justice and accountability, other methods such as the Office of the Public Protector, public participation and access to government information, alongside judicial review, now create an 'integrated system' of administrative law.
[77]See s 2 of the MPRDA.

3.2 *The internal appeal process as a site of strategic contestation*

Proper characterisation of the exhaustion of internal remedies is important, we submit, because it shapes the internal appeal process as a site of strategic contestation. While the extant legal curriculum is generally poorly designed to equip law students and their teachers with an understanding of legal text, structures and processes as sites of political struggle, the *Dengetenge* matter is a sterling example of the many levels at which this is taking place. There is clearly a level at which it functions in this manner between companies *inter se*, for example. One of Dengetenge's strategies was clearly grounded upon this – hoping to oust Southern Sphere from its prospecting entitlement on the basis of its failure to exhaust internal remedies.

Of greater interest, however, is the manner in which the *Department* [emphasis added] uses the internal appeal process, both as against prospecting and mining applicants, and as against the judiciary.

The manner in which the Department approaches the internal appeal process has not been consistent. If there is any consistency in respect of appeals submitted by the broader class of agents described above, it is probably that the Department ignores or takes very long to decide the appeal. This was the case in the *Bengwenyama*[78] matter, and in a number of other appeals submitted by traditional communities, for example, the appeal by the AmaDiba community in respect of mining rights granted to Transworld Energy and Mineral Resources (TEM) in the Xolobeni tenement area.[79] The Courts have shown some recognition of this strategic play of power on the part of the executive. In the *Koyabe*[80] matter the Constitutional Court held that administrators could not use the requirement to exhaust internal remedies to frustrate efforts of an aggrieved party or to shield the administrative action from judicial scrutiny.[81]

In the *Dengentenge* case one sees the Minister and Department doing something different: Throwing their hands in the air, claiming that any decision on appeal would be taken on judicial review anyway, and therefore requesting the Court to unravel the 'mare's nest'. There may indeed have been a valid motivation underlying this move: Instead of dealing with a variety of review processes instituted by the different stakeholders in the Boschkloof and Mooimeisjesfontein tenements, the Court's consideration of the matter could be consolidated into one.

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[78](N 49).

[79]In this case the community submitted an appeal on 2 September 2008 against the granting of a mining right to TEM. The Minister finally decided the appeal almost three years later – on 6 June 2011. See Centre of Environmental Rights *Mining and environment litigation review* (2011) 33.

[80](N 56).

[81]*Id* para 38.

However, we wish to foreground the power that this approach then afforded the executive *vis-à-vis* the judiciary, in terms of how they then sought to advise the Courts on how the rights should be allocated. This hardly seems to conform to the notion of internal appeals as part of an integrated system of administrative control, or indeed to the doctrine of the separation of powers. We are concerned that the strategic manner in which the Department is itself using the internal appeals process compromises its fairness and integrity.

4 Conclusion

The internal appeals process established by section 96 of the MPRDA could enhance South Africa's responsive democracy. Realising the value of this provision, however, requires that role-players clearly recognise the benefits, duties and rights inhering in this process. The law will always be a site of strategic contestation, but ensuring a fair playing field requires that the custodians of the process – the Minister and Department of Mineral Resources – attempt to apply the law consistently, with all due diligence. *Dengetenge* thus illustrates that the custodians of our mineral resources have room for considerable improvement.

Tracy Humby
Associate Professor
University of the Witwatersrand
and
Robert Krause
Centre for Applied Legal Studies,
University of the Witwatersrand