

terms of section 96(1) of the Mineral and Petroleum Resources Development Act, 28 of 2002 (*“the MPRDA”*) read with regulation 74 of the applicable regulations ¹ against the grant of a coal mining right by the Second Respondent, the Director-General of the Department of Mineral Resources (*“the DG”*), to the Third Respondent, William Patrick Bower (Pty) Ltd (*“WPB”*).

2. The Minister and the DG have not delivered notices of intention to oppose. Despite having delivered a notice of intention to oppose, ² WPB has failed to deliver an answering affidavit. The application has, accordingly, been enrolled for hearing on the unopposed roll. ³

LEGAL FRAMEWORK

3. Section 33 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The decisions impugned in this application constitute administrative action reviewable in terms of section 6 of PAJA. PAJA also sets out in section 8 the remedies in proceedings for judicial review.
4. The MPRDA was amended by the coming into operation of Act 49 of 2008 on 7 June 2013 (*“the Amendment Act”*). ⁴ References to provisions of the MPRDA

¹ MPRDA Regulations (GN R527 in GG26275 of 23 April 2004) (*“the Regulations”*).

² The notice of intention to oppose is at notices bundle 7 record pp. 1- 5.

³ The notice of set down is at notices bundle 7 record pp. 39 - 41.

⁴ The commencement of the operation of specified provisions of Act 49 of 2008 was suspended by a Notice 17 in *Government Gazette* 36541 of 6 June 2013. Those provisions commenced on 7 December 2014.

in these heads of argument are, unless expressly stated otherwise, references to the MPRDA as amended.

5. The MPRDA expressly incorporates principles of administrative justice. Section 6(1) provides that, subject to PAJA, any administrative process conducted or decision taken in terms of the MPRDA must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Section 6(2) provides that any decision contemplated in section 6(1) must be in writing and accompanied by written reasons for such decision.

6. Section 23(1) of the MPRDA empowers the Minister to grant a mining right. That power has been delegated to the DG.⁵ In terms of section 23(1) read with section 23(3), the DG is obliged when deciding on a mining right application to refuse to grant a mining right if the application does not meet all the requirements set out in section 23(1) of the MPRDA. At the time that the mining right was granted,⁶ section 23(1)(d) of the MPRDA provided that the Minister must grant a mining right if the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.

7. Section 96 of the MPRDA governs the internal appeal process under the MPRDA. Section 96(1)(b) provides that:

⁵ Founding affidavit para 7 record p. 8 (bundle 1). See also Dale South African Mineral and Petroleum Law MPRDA – 604.

⁶ Prior to the coming into effect of the Amendment Act.

“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 [sic] aware of such administrative decision in the prescribed manner to the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency”.

8. The underlined portion (my emphasis) was introduced by the Amendment Act. Prior thereto, the 30 day period was already provided for in regulation 74(1) in terms of which any person who appeals in terms of section 96 of the MPRDA, must within 30 days after he or she has become aware of, or should reasonably become aware of, the administrative decision concerned lodge a written notice of appeal with (in this case) the Minister. The Minister may, in his or her discretion and on such terms and conditions as he or she may decide condone the late noting of an appeal.⁷
9. After the receipt of the notice of appeal, the Minister must dispatch copies thereof to the person responsible for the decision concerned (“the decision maker”)⁸ and any other person who may in the opinion of the Minister be affected by the outcome of the appeal (“the affected person”).⁹ The decision maker must submit the reasons for the decision to the Minister within 21 days of receipt of the notice of appeal (“the reasons”).¹⁰
10. The affected person must within 21 days of receipt of the notice of appeal submit a replying submission to the Minister.¹¹ The Minister must dispatch the reasons and the replying submission to the appellant and request the

⁷ Regulation 74(4).

⁸ Regulation 74(5)(a) (i)

⁹ Regulation 74(5)(a)(ii).

¹⁰ Regulation 74(6).

¹¹ Regulation 74(7).

appellant to respond thereto in writing within 21 days of receipt thereof.¹² The regulation does not stipulate a time period within which the Minister must dispatch the reasons and replying submission to the appellant.

11. In terms of regulation 74(9), the Minister is obliged to decide the internal appeal within 30 days from the receipt of a responding statement.
12. An internal appeal does not automatically suspend the operation of the decision appealed against.¹³ However, the Minister is empowered to grant such a suspension.¹⁴

FAILURE TO DECIDE EEPOG APPEAL WITHIN THE STATUTORY TIME PERIOD

13. On 10 December 2012, the DG granted a coal mining right to WPB in respect of portions 6 and 23 of the farm Groenvlei 353 JT and portion 12 of the farm Lakenvlei 355 JT in the Magisterial District of Belfast in Mpumalanga Province (*“the mining right”*).
14. The First Applicant, Escarpment Environment Protection Group (*“EEPOG”*), became aware of the grant of the mining right on 4 March 2013.¹⁵ EEPOG, (together with three other parties) lodged an internal appeal timeously on 25 March 2013 (*“the EEPOG appeal”*).¹⁶

¹² Regulation 74(9).

¹³ Section 96(2).

¹⁴ As above.

¹⁵ EEPOG appeal paragraph 3 record p. 207 (bundle 3).

¹⁶ The EEPOG appeal is Annexure “JPP12” to the founding affidavit record pp. 206 – 338 (bundle 3). The reference to 25 March 2012 in paragraph 40 of the founding affidavit record p. 16 (bundle 1) and at the foot of the last page of the EEPOG internal appeal record p. 271 (bundle 3) is clearly an error and should be 25 March 2013.

15. When the internal appeal was lodged, EEPOG requested the Minister, in terms of section 96(2) of the MPRDA, to suspend the decision of the DG to grant a mining right to WPB, pending the finalisation of the internal appeal and to furnish the reasons for the grant of the mining right.¹⁷
16. More than a year later, on 7 June 2013, WPB's legal representatives submitted WPB's replying submission in terms of regulation 74(7) to the EEPOG appeal.¹⁸ On 28 January 2015 EEPOG submitted its responding submission to the Minister.¹⁹ Accordingly, the Minister was obliged to decide the EEPOG appeal within 30 days²⁰ of 28 January 2015, i.e. by 11 March 2015.

FAILURE TO DECIDE BIRDLIFE APPEAL WITHIN THE STATUTORY TIME PERIOD

17. On 30 July 2013 the Centre for Environmental Rights ("*CER*") lodged an internal appeal on behalf of the Second Applicant, BirdLife South Africa ("*the BirdLife appeal*").²¹

¹⁷ Founding affidavit para 24 record pp. 12-14 (bundle 1), "JPP2" para 3 record p. 44 (bundle 1).

¹⁸ Founding affidavit para 40 record p. 17 (bundle 1).

¹⁹ Founding affidavit para 42 record p. 17 (bundle 1). The responding statement is annexure "JPP14" record pp. 406 – 413 (bundle 5).

²⁰ "*Day*" is defined in the MPRDA as meaning a calendar day excluding a Saturday, Sunday or public holiday and when any particular number of days are prescribed for the performance of any act, those days must be reckoned by excluding the first and including the last day.

²¹ Founding affidavit para 11 record p. 9 (bundle 1). The Birdlife appeal is Annexure "JPP2" to the founding affidavit record pp. 43 – 147A (bundles 1 and 2).

18. When the appeal was lodged, Birdlife also requested the Minister, in terms of section 96(2) of the MPRDA to suspend the decision of the DG to grant a mining right to WPB, pending the finalisation of the internal appeal.²²
19. The BirdLife appeal also included a request for condonation of the late noting of the appeal as contemplated in regulation 74(4) of the Regulations.²³
20. On 3 February 2014, approximately 6 months after the BirdLife appeal was lodged, BirdLife received a replying submission from WPB's attorneys.²⁴ On 24 February 2014 BirdLife submitted a responding statement to WPB's replying submission.²⁵
21. Accordingly, the Minister was obliged to decide the BirdLife within 30 days from 24 February 2014, i.e. by 7 April 2014.

REVIEW ON GROUND OF FAILURE TO DECIDE THE INTERNAL APPEALS

22. The CER, on behalf of both BirdLife and EEPOG, addressed a letter of demand to the Minister on 28 October 2015 that he make a decision by 11 November 2015, failing which BirdLife and EEPOG would launch review proceedings in the High Court and seek appropriate relief.²⁶ The CER did not receive a response to this letter.²⁷

²² Founding affidavit para 24 record pp. 12-13 (bundle 1), "JPP2" para 3 record pp. 44 (bundle 1).

²³ "JPP2" para 6 record p. 45; paras 128 – 140 record pp. 87 – 91 (bundle 1).

²⁴ Founding affidavit para 31 record p. 14 (bundle 1). The replying submission is annexure "JPP7" record pp. 161 – 191 (bundle 2).

²⁵ Founding affidavit para 33 record p. 15 (bundle 1). The responding statement is "JPP9" record pp. 193 – 201 (bundles 2 and 3).

²⁶ Founding affidavit para 45 record p. 18 (bundle 1) and "JPP15" record pp. 414-415 (bundle 5).

²⁷ Founding affidavit para 45 record p. 18 (bundle 1).

23. The Applicants were entitled to launch the review in terms of section 6(3)(b), read with section 6(2)(g), of PAJA. In terms of section 6(2)(g) a court has the power to judicially review an administrative action if the action consists of a failure to take a decision.

24. In terms of section 6(3)(b) if a person relies on the ground of review in section 6(2)(g) (i.e. a failure to take a decision) where:-

24.1 an administrator has a duty to take a decision;

24.2 a law prescribes a period within which the administrator is required to take a decision; and

24.3 the administrator has failed to take that decision before the expiration of that period

the person may institute proceedings for judicial review of a failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

25. The only remaining issue is what the appropriate remedy is that should be awarded for the infringement of the Applicants' rights to lawful administrative action.

**PRIMARY RELIEF SOUGHT: MINISTER TO DECIDE INTERNAL APPEALS
WITHIN 30 DAYS OF COURT ORDER**

26. The remedies in respect of proceedings for judicial review in terms of section 6(3) of PAJA (i.e. a failure to take a decision) are provided for in section 8(2) of PAJA.²⁸
27. Section 8(2) entitles a court when deciding cases in terms of section 6(3) to make ***any order that is just and equitable*** including orders:-
- (a) *Directing the taking of the decision;*
 - (b) *Declaring the rights of the parties in relation to the taking of the decision;*
 - (c) *Directing any of the parties to do, or refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties;*
 - (d) *As to costs.*
28. It is submitted that the Applicants are entitled, at the least, to an order directing that the Minister decide the internal appeals and that he do so within 30 days of the Court's order.²⁹ That relief is sought by the Applicants in prayer 1 of the notice of motion.

FURTHER RELIEF SOUGHT: DEEMED DISMISSAL OF INTERNAL APPEALS

29. The Applicants also seek further relief in terms of section 8(2) of PAJA. In prayer 2 of the notice of motion they seek an order directing that a failure by

²⁸ Section 8(1) provides for the remedies in respect of the grounds of review other than a failure to take a decision.

²⁹ Founding affidavit paras 58 – 59 record pp. 21-22 (bundle 1). See *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) at [39] and [44](b).

the Minister to timeously comply with an order compelling the determination of the internal appeals shall be deemed to be a dismissal of the Applicants' internal appeals and that, in such an event, the Applicants shall be entitled to approach this Honourable Court on these papers (supplemented to the extent necessary) and under the same case number for orders:-³⁰

29.1 reviewing and setting aside the deemed dismissals of the internal appeals; and

29.2 upholding the internal appeals and setting aside the grant by the DG of the mining right.

30. The provisions of section 8(2) of PAJA are referred to above. It applies when judicial review concerns an action consisting of a failure to take a decision. The court is vested with a wide discretion to make just and equitable orders and to do justice between the parties.³¹

31. The proper approach is a matter for the Court's discretion but its powers are, in principle, wide, extending to any just and equitable order. Indeed, the powers probably extend to the court taking the decision itself. As held by Plasket J in *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, EC 2007(6) SA 442 (CkHC)* at para 42, albeit *obiter*.

'I see no reason why a failure to decide an application for a licence or permit, for instance, may not, in an appropriate case, be remedied by an order

³⁰ Prayer 2 of the Notice of Motion.

³¹ I. Currie The Promotion of Administrative Justice Act: A Commentary (2ed) at para 9.7 p. 195.

granting the licence or permit where its grant is a foregone conclusion and no purpose would be served in referring the matter back to the administrative decision-maker: a failure to decide may sometimes amount to a constructive refusal.'

32. In making this observation, Plasket J referred to the SCA's well-known decision in *Pharmaceutical Society of South Africa v Tshabalana Msimang 2005(3) SA 238 (SCA)* at para 38 in which the delay in deciding an application for leave to appeal was held to be '*so unreasonable in fact that it could only be interpreted as a refusal of leave.*'
33. It is submitted that in a case such as the present it would be just and equitable for the Court to grant prayer 2.
34. The Applicants included that prayer in the notice of motion because they were of the view that there is a substantial risk that the Minister would ignore a court order to determine the appeals with 30 days (prayer 1 of the notice of motion) because:- ³²
- 34.1 BirdLife and EEPOG are aware of instances where the appeal authority in terms of the MPRDA has ignored court orders to decide an internal appeal within a specified period; and
- 34.2 there has been a blatant disregard displayed in this matter for the legal processes in respect of the determination of internal appeals.

³² Founding affidavit paras 60 – 62 record p. 22 (bundle 1).

35. I first outline the disregard for legal processes and incompetence in respect of the internal appeals, including in the review proceedings.

The failure to provide written reasons for the grant of the mining right before the review was launched

36. The right to be furnished with written reasons for an administrative decision is a fundamental component of the right to administrative justice. In terms of section 33(2) of the Constitution everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. That right is given effect to in section 5(1) of PAJA. The Applicants are entitled to written reasons for the grant of the mining right in terms of section 6(1) of the MPRDA and regulation 74(8), read with 74(6), of the MPRDA Regulations.
37. Before the BirdLife appeal was lodged, the CER addressed a letter to the Minister requesting the Minister to furnish BirdLife with written reasons for the Minister's decision to grant the mining right to WPB.³³ The CER did not receive a response to that letter. It transpired thereafter that the mining right had not been granted by the Minister.³⁴
38. The Minister did not comply with the obligation in regulation 74 (8), read with regulation 74(6), of the Regulations to furnish the reasons for the grant of the mining right to BirdLife and EEPOG after they had lodged their respective

³³ Founding affidavit para 22 record p.12 (bundle 1), "JPP1" record pp. 40-42 (bundle 1).

³⁴ Founding affidavit para 23 record p.12 (bundle 1).

internal appeals. They, accordingly, submitted their respective responding statements to WPB's replying statements in the absence of the reasons.³⁵ In its responding statement in the EEPOG appeal, EEPOG recorded its attempts to obtain the reasons and that the failure to comply with the law has caused, and continues to cause, significant prejudice to the interested and affected parties.³⁶

Delays in the internal appeal process

39. There were extraordinary delays on the part of the DMR and the Minister in the internal appeal process.³⁷ The applicable process and timeframes are outlined in paragraphs 9 to 11 above.
40. The BirdLife appeal was lodged on 30 July 2013.³⁸ The CER followed up with the DMR telephonically on 8 October 2013³⁹ and in writing on 9 October 2013,⁴⁰ 12 November 2013⁴¹ and 28 November 2013.⁴² The CER did not receive any responses to its letters.⁴³ On 3 February 2014, approximately 6 months after the BirdLife appeal was lodged, BirdLife received a replying submission from WPB (it was obliged to file its replying statement within 21

³⁵ Founding affidavit para 33 record p. 15, para 38 record p. 16, para 41 record p. 17 (bundle 1).

³⁶ "JPP14" record p. 406 (bundle 5).

³⁷ Founding affidavit para 102 record p. 37 (bundle 1).

³⁸ Founding affidavit para 25 record p. 13 (bundle 1).

³⁹ Founding affidavit para 28 record pp.13-14 (bundle 1).

⁴⁰ Founding affidavit para 29 record p.14 (bundle 1), "JPP4" record pp. 157 – 158 (bundle 2).

⁴¹ Founding affidavit para 30 record p. 14 (bundle 1), "JPP5" record p. 159 (bundle 2).

⁴² Founding affidavit para 30 record p.14 (bundle 1), "JPP6" record p. 160 (bundle 2).

⁴³ Founding affidavit paras 29 – 30 record p. 14 (bundle 1).

days of receipt of the notice of appeal).⁴⁴ On 24 February 2014, BirdLife submitted its responding statement to WPB's replying submission.⁴⁵

41. The EEPOG appeal was lodged on 25 March 2013.⁴⁶ WPB submitted its replying submission more than a year later. EEPOG only submitted its responding statement to WPB's replying submission on 28 January 2015 because it had waited (to no avail) for the reasons for the grant of the mining right to be furnished by the Minister.
42. As outlined above, the Minister failed to decide the internal appeals after the respective responding statements were delivered.

The review: failure to file the Rule 53 records and continued inaction of the Minister and DG

43. Given the Minister's extraordinary delay in determining the internal appeals the CER, on behalf of both BirdLife and EEPOG, addressed a letter of demand to the Minister on 28 October 2015 that he make a decision by 11 November 2015, failing which BirdLife and EEPOG would launch review proceedings in the High Court and seek appropriate relief.⁴⁷ The CER did not receive a response to that letter.⁴⁸ The Applicants accordingly launched the review.

⁴⁴ Founding affidavit para 31 record p. 14 (bundle 1).

⁴⁵ Founding affidavit para 33 record p. 15 (bundle 1).

⁴⁶ Founding affidavit para 40 record pp. 16-17 (bundle 1).

⁴⁷ Founding affidavit para 45 record p. 18 (bundle 1).

⁴⁸ As above.

44. The Minister and DG have not appointed attorneys of record and have not filed a notice of opposition in the review application.
45. In terms of Rule 53(1)(b) of the Uniform Rules of Court, the Applicants' Notice of Motion called upon the Minister and DG to despatch, within fifteen (15) days of receipt of the Notice of Motion, to the Registrar of this Honourable Court, the records of decision in respect of the grant of the mining right and the internal appeals, together with such reasons that each of them desires to give or is in law required to give, and to notify the Applicants that they have done so.
46. Accordingly, the respective Rule 53 records were required to be dispatched to the Registrar by 12 February 2016.⁴⁹ Despite a letter dated 15 February 2016,⁵⁰ a notice in terms of Rule 30A(1) and an application to compel having been set down for 29 June 2016, the Minister and the DG have still not delivered the Rule 53 records, including reasons. To avoid further delays, the Applicants withdrew the application to compel.
47. On 15 August 2016 the CER addressed a letter to the Minister and the Acting DG urging the Minister to decide the internal appeals so as to avoid unnecessary litigation and incurring wasteful costs and to advise the Minister that if no such decisions are forthcoming, CER's instructions are to place this letter before the Court and to proceed to seek substitutionary relief on the

⁴⁹ Further affidavit para 12 record p. 506 (bundle 6).

⁵⁰ Further affidavit para 13 record p. 506 (bundle 6), annexure "JPP22" record pp. 517 – 518 (bundle 6).

basis that there is a systemic failure on the part of the Minister to decide internal appeals under the MPRDA.

48. In the letter the CER also requested the DG once again to furnish the reasons for the grant of the mining right (which despite many requests were never furnished during the internal appeal processes as legally required under the MPRDA Regulations) as well as the Rule 53 records pertaining to the internal appeals and the DG's decision to grant the mining right.⁵¹
49. On 13 March 2017 the CER, on behalf of the Applicants, addressed a letter to the Minister and DG, copying Messrs Pieter Alberts and Johan Nieman of the Legal Services Department of the DMR, communicating that the Applicants have provisionally enrolled the review application on the unopposed roll for hearing on 18 April 2017 and attaching a notice of set down in respect of this hearing.⁵² The Applicants also reiterated their requests in their letter of 15 August 2016 that the Minister decide the internal appeals so as to avoid unnecessary litigation and incurring wasteful costs and that the Minister and DG despatch the records of decision and proceedings pertaining to the DG's decision to grant the mining right and the internal appeals, together with any reasons.⁵³

⁵¹ As above.

⁵² Further affidavit para 31 record pp. 511 – 512 (bundle 6).

⁵³ As above.

THE ENVIRONMENTAL SIGNIFICANCE OF THE SITE

50. The properties over which the mining right was granted are located in the Belfast district within the eMakhazeni Local Municipality and are situated approximately 15km north-east of Belfast and approximately 21km south of Dullstroom in Mpumalanga Province.⁵⁴ The area between Dullstroom and Belfast is environmentally sensitive. It has biodiversity and conservation significance.
51. The properties fall within the Dullstroom Plateau Grasslands (“DPG”)⁵⁵ and the Steenkampsberg Wet Grasslands (“SWG”) which is the subject of an application in terms of section 49 of the MPRDA for the Minister to prohibit mining.⁵⁶ That section empowers the Minister to prohibit mining in an area, having regard to the national interest, the strategic nature of the mineral in question and the need to promote the sustainable development of the nation’s mineral resources.
52. The DPG is listed as an endangered ecosystem in terms of section 52(1)(a) of the National Environmental Management: Biodiversity Act, 10 of 2004 (10 GN 1002 of 9 December 2011 in *Government Gazette* No. 34809) (“*Biodiversity Act*”).⁵⁷

⁵⁴ Founding affidavit para 66 record pp. 23 – 24 (bundle 1).

⁵⁵ Founding affidavit para 70.4 record p. 25 (bundle 1).

⁵⁶ Founding affidavit para 70.1 – 70.4 record p. 25 (bundle 1).

⁵⁷ Founding affidavit para 70.5 record p. 25 (bundle 1).

53. The properties also fall within the boundaries of the Steenkampsberg Important Bird Area.⁵⁸ The Important Bird Area programme was established to identify areas critical for the conservation of South Africa's Red Data and endemic bird species.⁵⁹
54. The "footprint" of the open-cast coal mine proposed by WPB lies directly adjacent to a wetland and development will take place to 100 meters of the perimeter from the delineated wetland areas.⁶⁰
55. The area is a National Freshwater Ecosystem Priority Area. To support the implementation of the National Water Act, 36 of 1998, the Biodiversity Act and the National Environmental Management: Protected Areas Act, 57 of 2003, a multitude of stakeholders led by the South African National Biodiversity Institute ("SANBI") and the Council for Scientific and Industrial Research have identified, categorised and described South Africa's freshwater ecosystems. The results of this research were published as the National Freshwater Ecosystems Priority Areas (NFEPA) project.⁶¹
56. The proposed mine is in the immediate vicinity of the Mpumalanga Drakensberg Strategic Water Source Area.⁶² The Strategic Water Source Areas were determined as part of the NFEPA project and are the 8% of South

⁵⁸ Founding affidavit para 70.6 record p. 26 (bundle 1).

⁵⁹ As above.

⁶⁰ Founding affidavit para 86 record p. 31 (bundle 1).

⁶¹ Founding affidavit para 70.7 record p. 26 (bundle 1).

⁶² Founding affidavit para 73 record p. 27 (bundle 1); further affidavit paras 8 – 10 record p. 505 (bundle 6).

Africa's land area that provide 50% of our surface water run-off.⁶³ Accordingly, they are critical for South Africa's water supply and security, particularly in the context of the current drought conditions in South Africa, and South Africa's status as a water scarce country.⁶⁴

57. The area is a critical terrestrial and aquatic biodiversity area under the Mpumalanga Biodiversity Conservation Plan endorsed by the MEC for Agriculture, Rural Development, Environmental Affairs and Tourism for Mpumalanga Province.⁶⁵
58. The proposed mining poses significant negative risk to the water quality and seasonal flow patterns or volumes of water in the wetland system located to the north of the properties. This risk together with the endangered status of the bird species affected by this risk constitute unacceptable ecological degradation or damage to the environment and ought to have precluded the grant of the mining right to WPB.⁶⁶

⁶³ Founding affidavit para 73 record p. 27 (bundle 1), further affidavit para 8 record p. 505 (bundle 6).

⁶⁴ As above.

⁶⁵ Founding affidavit para 101.4 record p. 36 (bundle 1).

⁶⁶ Founding affidavit para 79 record p. 30 (bundle 1). This wetland system is home to 13 Red Data bird species, five of which (including the Critically Endangered Wattled Crane and White-Winged Flufftail) are specifically associated with the wetland system founding affidavit.

AMPLIFICATION OF GROUNDS OF REVIEW IN TERMS OF SECTION 6(1) OF PAJA AND SUBSTITUTIONARY RELIEF IN TERMS OF PRAYER 2.2

59. If prayer 2 is granted, and the Minister fails to decide the internal appeals within the 30 day period, the Minister will have been deemed to have dismissed both internal appeals.
60. The Applicants will then supplement their papers after receiving the Rule 53 records to amplify the grounds of review in terms of section 6(1) of PAJA and to provide a further basis for the substitutionary relief in prayer 2.2 of the notice of motion.
61. The principal grounds of review arise from the DG's non-compliance with section 23(1)(d) of the MPRDA, namely that the DG's decision is unlawful as provided for in sections 6(2)(b) (a mandatory and material procedure or condition was not complied with), 6(2)(f)(i) (the decision contravenes the law and is not authorised by the empowering provision) and 6(2)(i) (the action is otherwise unlawful) of PAJA.⁶⁷ The other grounds of review are that the DG's decision is also irrational (section 6(2)(f) of PAJA), and unreasonable (section 6(2)(h) of PAJA) and that the DG failed to take into account relevant considerations (section 6(2)(e)(iii) of PAJA).⁶⁸

⁶⁷ Founding affidavit paras 99 – 100 record p. 35 (bundle 1).

⁶⁸ Founding affidavit para 101 record pp. 36-37 (bundle 1).

62. The Applicants would also seek an order in terms of section 8(1) of PAJA upholding the internal appeals and setting aside the grant by the DG of the mining right (i.e. substitutionary relief). The Constitutional Court dealt with substitutionary relief in cases under section 8(1)(c)(ii)(aa) of PAJA in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*.⁶⁹ It held that, given the doctrine of separation of powers, there are two factors that should hold greater weight to a court in deciding whether to grant substitutionary relief. The first is whether the court is in as good a position as the administrator to make the decision. The second is whether the decision of the 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 the administrator. The ultimate consideration is whether a substitution order is just and equitable.⁷⁰
63. If prayer 2 is granted, the Applicants will in due course contend that a substitution order is just and equitable, including on the grounds that the decision is a foregone conclusion,⁷¹ delay on the part of the Minister and the DMR and incompetence.⁷²

⁶⁹ 2015 (5) SA 245 (CC).

⁷⁰ At [47].

⁷¹ Founding affidavit paras 64 – 101 record pp. 23 – 36 (bundle 1).

⁷² Founding affidavit para 102 record p. 37 (bundle 1).

EXTENSION OF THE TIME PERIOD FOR THE INSTITUTION OF THE REVIEW

64. In terms of section 7(1)(a) of PAJA any proceedings for judicial review in terms of section 6(1) must be brought within 180 days after the date on which proceedings for internal remedies have been concluded.⁷³ That section does not appear to apply in circumstances where there has been a failure to decide an internal appeal (in as much as the proceedings have not been concluded). Section 7(1)(b) also does not apply in as much as an internal remedy still exists.
65. Nevertheless, to the extent that the Applicants may have been required to launch a review without unreasonable delay and within 180 days of the date on which the Minister was obliged to have decided the internal appeals, the Applicants apply in terms of section 9(1)(b) of PAJA for an extension of the 180 day time period.⁷⁴ In terms of section 9(2) the court may grant such an application where the interests of justice so require.
66. The test for whether it is in the interests of justice is well established: it depends entirely on the facts and circumstances of each case. The relevant

⁷³ Section 7(1) of PAJA provides as follows: “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 section 2(c), on which any proceedings instituted in terms of remedies as contemplated in section 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”. Section 7(2)(a) provides as follows: “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”. Section 7(2)(c) empowers a court in exceptional circumstances and on application by the person concerned to exempt a person from the obligation to exhaust any internal remedies.

⁷⁴ Founding affidavit paras 52 – 53 record p. 20 (bundle 1), read with founding affidavit paras 44 – 51 record pp. 17-20 (bundle 1) and founding affidavit paras 60 – 102 record pp. 22 – 37 (bundle 1).

factors in that enquiry generally include the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of the delay; the importance of the issues to be raised; and the prospects of success.⁷⁵

67. The Minister was obliged to decide the BirdLife internal appeal by 7 April 2014 and the EEPOG appeal by 11 March 2015. The review proceedings were launched on 14 December 2015.
68. As explained in the founding affidavit, BirdLife and EEPOG have been aware of each other's internal appeals, as well as a third appeal, lodged by Henk Strydom on behalf of HHD Plase (Pty) Ltd.⁷⁶ Mr Strydom is the owner of a property directly adjacent to the properties in respect of which the mining right has been granted. When the Minister had not decided the Birdlife appeal within the stipulated statutory timeframe, Birdlife and EEPOG assumed that the Minister may have decided to determine all the internal appeals simultaneously.⁷⁷ WPB had not secured all the regulatory approvals for it to commence mining and there was therefore no immediate urgency in respect of the determination of the internal appeals.⁷⁸ Given the Minister's extraordinary delay in determining the internal appeals the CER, on behalf of

⁷⁵ *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* (894/2016) [2017] ZASCA 23 (24 March 2017) at [11]; *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) at [17].

⁷⁶ Founding affidavit para 12 record p.10, para 44 record p.17 (bundle 1).

⁷⁷ Founding affidavit para 44 record pp. 17 – 18 (bundle 1).

⁷⁸ As above.

both BirdLife and EEPOG, addressed a letter of demand to the Minister on 28 October 2015 that he make a decision by 11 November 2015, failing which BirdLife and EEPOG would launch review proceedings in the High Court.⁷⁹

69. On 23 November 2015 WPB failed to give the CER an undertaking (pursuant to a request made on 9 November 2015) that it would give the Applicants 60 days written notice before commencing with any activities pursuant to the mining right.⁸⁰
70. The Applicants have excellent prospects of success in respect of the ground of review that the Minister has failed to decide the internal appeals within the statutory time period requiring him to do so. The Applicants also have good prospects of success in respect of the other grounds of review. In essence, they contend that the mining right should not have been granted because the requirement in section 23(1)(d) of the MPRDA was not met i.e. that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment.
71. Given the environmental sensitivity and significance of the area between Dullstroom and Belfast in which the properties fall, as recognised and protected under various environmental laws, the review raises important issues which affect the environmental right in the Constitution:⁸¹ *“Everyone*

⁷⁹ Founding affidavit para 45 record p. 18 (bundle 1), “JPP15” record pp. 414 – 415 (bundle 5).

⁸⁰ Founding affidavit paras 48 – 49 record p. 19 (bundle 1); “JPP16” record pp. 416 – 417 (bundle 5); “JPP17” record p. 418 (bundle 5).

⁸¹ Section 24.

has the right – (a) to an environment that is not harmful to their health or well-being; and right (b) to have the environment protected, for the benefit or future and present generations, through reasonable and legislative and other measures that – (i) prevent pollution or ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

CONCLUSION

72. In the circumstances, the Applicants ask for an order in terms of prayers 1, 2 and 2A of the Notice of Motion, as well as costs against the Minister on an attorney and client scale. The Applicants also seek orders in respect of the Rule 53 record and the further conduct of the matter as provided for in the draft order attached to the practice note.

C DE VILLIERS

Applicants' counsel

Chambers, Cape Town

7 April 2017

LIST OF AUTHORITIES

1. *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, EC 2007(6) SA 442*
(CKHC)
2. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC)*
3. *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases 2005 (6) SA 229 (SE)*