Reportable:	Yes/ No / NO
Circulate to Judges:	Yes/No / NO
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: 1252/2010

HEARD ON: 28/11/2011

DELIVERED: 04/05/2012

In the matter between:

GERT VAN DEN HEEVER	APPELLANT
and	
THE MINISTER OF	
MINERALS AND ENERGY	1st RESPONDENT
THE DIRECTOR GENERAL:	
DEPARTMENT OF MINERAL RESOURCES	2ndRESPONDENT
TRANSHEX MYNBOU BEPERK	3rdRESPONDENT
TRANS HEX OPERATIONS (PTY) LTD	4th RESPONDENT
RICHTERSVELD MUNICIPALITY	5th RESPONDENT

CORAM: KGOMO JP*et* HUGHES-MADONDOAJ

JUDGMENT

HUGHES-MADONDO, AJ

1] In these review proceedings the applicant seeks the relief as is set out in thefollowing amended notice of motion:-

1.1 Declaring that the third respondent,Trans Hex Mynbou

Beperk, had on 26 January 2001 abandoned its right to mine for minerals, more particularly, diamonds on two contiguous portions of land on the Farm Richtersveld No 11, Namaqualand, Northern Cape, as depicted in yellow on the original sketch plan which was annexed to the notice of motion, marked "A", in respect of which the applicant had applied for permits to mine diamonds;

1.2 Declaring as invalid and of no legal force and effect the notarial deed of cession concluded on 8 May 2011 between the third and fourth respondents (Trans Hex Operations (Pty) Limited) insofar as the said cession purports to cede, assign, transfer and make over to and in favour of the fourth respondent and the third respondent's supposed and/or ostensible right to mine for minerals, more particularly, diamonds on the portions of land referred to in paragraph 1.1 above;

1.3 Reviewing and setting aside the decision taken by the second respondent on 25 September 2001 in terms of which he registered and/or allowed to be registered in the Mining Titles office at Pretoria under the Mining Title number 21/2001 the cession referred to in paragraph 1.2 above insofar as the said registration purports to validate and/or legalise that part of the cession in terms of which the third respondent purported to assign, transfer

and make over to and in favour of the fourth respondent the third respondent's supposed and/or right to mine for minerals, more particularly, diamonds on the land set forth in paragraph 1.1 above;

1.4 Reviewing and setting aside the decision taken on 16 June 2009, alternatively, on 27 August 2009 by the first respondent, alternatively, the second respondent, alternatively, by the Deputy Director-General acting within the course and scope of his employment with the first respondent, the Minister of Minerals and Energy, alternatively, the second respondent, in terms of which he converted the fourth respondent's so-called old order mining right in respect of the property referred to in paragraph 1.1 above, previously abandoned by the third respondent, into a right as contemplated in terms of Schedule ii of the Mineral and Petroleum Resources Development Act (No 28 of 2002) in favour of the fourth respondent;

1.5 Reviewing and setting aside the decisions taken on 16 March 2010 by the second respondent in terms of which he rejected the applicant's appeals against the decisions taken on 29 October 2008 by the Regional Manager: Northern Cape Region: Department of Minerals and Energy ("the Regional

Manager") in terms of which the latter rejected the applicant's applications for mining permits in respect of the two portions of contiguous properties referred to in paragraph 1.1 above;

1.6 Referring back the applications by the applicant for permits to mine diamonds on the two portions of contiguous properties, referred to in paragraph 1.1 above, to either the Regional Manager, alternatively, the second respondent, for his re-consideration in light of this Court's orders in terms of paragraphs 1.1 to 1. 5 above;

1.7 Costs of suit against any of the respondents who oppose this application, jointly and severally, the one paying the other/s to be absolved.

RELEVANT BACKGROUND FACTS

2] The applicant decided to access the mining industry. To this end on 15 October 2008 he applied to the Regional Manager: Mining Regulation of the Northern Cape Regionin terms of Section 27(2) of the Mineral and Petroleum Resources Development Act 28 of 2002("MPRDA"). The applicant sought two permits to mine diamonds on two adjoining pieces of land situated on a portion of the farm Richtersveld No.11, in the district of Namaqualand, Northern Cape.

3] Having received written rejections to both permits from the Regional

Manager on 29 October 2008, the applicant lodged appeals in respect of both matters on 24 November 2008 to the Department of Mineral Resources, the second respondent. Both appeals were dismissed on 16 March 2010.

4] In a nutshell the refusal to grant the applicant's applications for mining permits and the dismissal of the applicant's appeals were based on the fact that the mining permits sought by the applicant had already been issued in favour of the third and fourth respondents, being Trans Hex Mynbou Beperk and Trans Hex Operations (PTY) LTD, respectively.

THE ISSUE

5] The applicant contends that the third respondent abandoned its **mining rights** by way of correspondence to the second respondent dated 26 January 2001.On 1 October 1993 these **mining rights** had been converted to a **mining licence**.This**mining licence**pertained to certain portions of land that formed part of a**mining lease**whichincluded the two portions of adjoining land that the applicant sought the mining permits for.

6] The applicant maintained that the third respondent had abandoned its mining and mineral rights as at 26 January 2001 more specificallythose mineral and mining rights in relation to diamondson the two adjoining portions of land on the Farm Richterveld No. 11. It is contended that

due to the aforesaid abandonment, the applicant's mining permit applications in respect of the two adjoining portions should not have been rejected.

7] The abandonment is the focal issue in these proceeding. If successful on the abandonment issue a further issue exists: viz the cession of the mining lease from the third respondent to the fourth respondentand the conversion thereof to a mining licence in terms of section 9(1) of the Minerals Act 50 of 1991. Further, whether the cession could have materialised at all in light of the provisions of section 13 of the Minerals Act.

THE RELEVANT MINING LEGISLATION

8] In terms of section 2 of the Precious Stones Act 73 of 1964, the right to mining for and disposal of precious stones was vested in the State. By virtue of section 21 of the said Act, the state was entitled to lease its right to mining and disposal of precious minerals. Such a mining lease existed between Mynbou and the state.

9] In terms of this **mining lease**Mynbou had the sole right to mine precious stones and could only exercise mining activities on the leased portions to the satisfaction of the Minister of Mineral, Energy and Public Enterprise, who represented the state. Amendments to the mining lease were permissible by consent of the parties.

10] On 1 January 1992 the Minerals Act 50 of 1991 came into effect. It repealed the Precious Minerals Act. The crucial aspect that arose as a result of the repeal was that the state was no longer vested with the **right to mining**. In accordance with section 5 of the Minerals Act **the holder of the right to any minerals** in respect of land, in order to mine for such minerals, had to attain the **necessary authorisation** to do so. Thus the **mineral rights holder**could exercise this right subject to section 9 of the Minerals Act which sets out the terms for issuing the necessary **mining authorisation**.

11]Section 9 (1) deals with the provision of a mining authorisation and reads as follows:

> *" The Director-Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization in the prescribed form for a period determined by him authorizing the applicant to mine for and dispose of a mineral in respect of which he-*
> *(a) is the holder of the right thereto; or*
> *(b) has acquired the written consent of such holder to mine thereto on his own account and dispose thereof, ...in respect of the land or tailings, as the case may be, comprising the subject of the application."*

12]Therefore, in terms of section 9 subsections (1)(a) and (1)(b) the

mineral rights holder can only mine the minerals if he had the necessary authorisation to do so from the Director-Mineral Development.

13]Section 9 subsections(3)(d) and (3)(e) goes on to set out the prerequisites for the mining authorisation:

> *"No mining authorisation shall be issued in terms of subsection (1),unless the Director-Mineral Development is satisfied-*
>
> *(d) that the mineral concerned in respect of which* ***a mining permit*** *is to be issued-*
>
> *(i) occurs in limited quantities in or on the land or in tailing, as the case may be, comprising the subject of the application; or*
>
> *(ii) will be mined on a limited scale; and*
>
> *(iii) will be mined on a temporary basis; or*
>
> *(e) that there are reasonable grounds to believe that the mineral concerned in respect of which* ***a mining licence*** *is to be issued-*
>
> *(i) occurs in more than limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or*
>
> *(ii) will be mined on a larger than limited scale; and*
>
> *(iii) will be mined for a longer period than two years."*(Emphasis added)

14]A reading of section 9(3)(d) and (e) reflects that there are two types of mining authorisation:

(1) a mining permit; and,(2) a mining licence.

The former is for a period not exceeding two years, mining less quantity of deposits on a limited scale. The latter is for mining for a period exceeding two years, mining more than a limited quantity of deposits and mining on a larger than limited scale. What is distinct between the two is that the permit cannot be granted for a period of more than two years whilst the licence may be granted for a period longer than two years.**See A GUIDE TO THE MINERALS ACT 1991 by M KAPLAN and M O DALE (Kaplan and Dale) at page 78-79**.

15]Now section 47 (1)(a)(iii) of the Minerals Act ensured the retention of the **mining rights** that Mynbou held under section 21 of the Precious Stones Act,that is under the mining lease, which was in place prior to the enactment of the Minerals Act. These mining rights weresubject to the terms and conditions under which they had been acquired.

16]In terms of section 47(1)(e) the holder of any **mining right** shall for a period of two years be deemed to be the holder of a **mining authorisation**. On expiration of the aforesaid two year period a**mining authorisation** would have to be obtained from the Director- Mineral Development in terms of section 9.

17]Section 47 (1) (f) goes further to provide that the holder of a **mining right**may abandon the said right wholly or in part at anytime, by written notice to the Director-Mineral Development. Such mineral right is deemed to have lapsed from the date of the said notification.

18]As is evident from the aforegoing, to hold a **mining authorisation**, "...it is first necessary to hold or acquire a right to prospect and mine(which means acquiring the common law rights), having done so, then one is able to obtain an authorisation for the exercise of the right obtained."**See Kaplan and Daleat page 80 paragraph 4.26.2.**

In other words, the prospecting results inform the question whether the mineral deposits are vast or limited.

19]Section 11of the Minerals Act deals with the duration and termination of a**prospecting permit or mining authorisation**. Section 11(2) specifically provides that a holder of any **prospecting permit or mining authorisation**can by written notification to the Director-Mineral Development, at anytime, abandon the prospecting permit or mining authorisation or any portion of land pertaining to it. The effect would then be that the prospecting permit or mining authorisation would lapse from the date of such written notification. Further, section 11(3) stipulates that the aforesaid notification ofabandonment should be accompanied by a sketch plan indicating the portion so abandoned.

[20] **Section 96 (3) of The Mineral and Petroleum Resources Development Act (MPRDA)**

Section 96 reads as follows:

> "(1) Any person whose legitimate expectations have been materiallyand adversely affected or who is aggrieved by any

administrative decision in terms of this Act may appeal in the prescribed manner to –

a) The Director-General, if it is an administrative decision by a Regional Manager or officer or

b) The Minister, if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsections (1) does not suspend the administrative decision, unless it is suspended by the Director-General or Minister, as the case may be.

(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 Administration of Justice Act 3 of 2000, apply to any court proceedings contemplated in this section."

[21] The Mynbou and Trans Hex Operations raised a *point in limine* thatthe applicant failed to appeal against the decision of the Director-Generalto the Minister of Mineral Resources as is contemplated by sections 96(1)(a)and(b) of the MPRDA and as such was not entitled to proceed by way of review ashe had failed to exhaust all internal remedies available to him. However, when the matter was before us theyabandonedtheir *point in limine.* Mr G L Grobler SC intimated that the abandonment was for tactical reasons as the appeal to the Minister was obligatory where the Director-General has already taken a decision. I agree. In the landmark case of **BENGWENYAMA**

MINERALSVGENORAH RESOURCES 2011(4) SA 113(CC) the Constitutional Court decided that Section 96 of the Mineral and Petroleum Resources Development Act 24 of 2008 provides landowners and lawful occupiers who are aggrieved by a decision to award prospecting rights in respect of the land owned or occupied by them with an internal appeal against that decision. Any person whose rights or legitimate expectations have been materially and adversely affected by any administrative decision made in terms of the Act may appeal in the prescribed manner to the director- general of the department if it is an administrative decision by a regional manager or officer; or to the minister if it is an administrative decision by the director-general or designated agency. **See paragraphs [50] and [55] at 133D-F and 136A.** We are therefore at large to deal with the merits of the application.

THE ALLEGED ABANDONMENT

22]The parties are in agreement that the central issue is whether the third respondent abandoned its mining rights by way of the memorandum of 26 January 2001. It is prudent that I set out in full the contents of the memorandum that the Managing director, P D Danchin, wrote on behalf of Trans Hex Mynbou Bpk to the Director: Mineral Development:

"**VERKLEINING VAN RICHTERSVELD MYNHUURGEBIED: TRANS HEX MYNBOU**

Trans Hex Mynbou onderhandel reeds geruime tyd met die Richtersveld Oorgangsraad (nou die Richtersveld Munisipaliteit) vir die be skikbaarstelling van verskeie stukke

grond vir besproeiingsdoeleindes langs die Oranjerivier.Oor eenkoms is nou bereik dat 13 afsonderlike [stukke], wat gesamentlik 363,14 hektaar beslaan, aan die Oorgangsraad oorhandig sal word. Die stukke grond maak tans deel uit van die Richtersveld mynhuur wat in terme van mynhuur 2/91 aan Trans Hex toe geken is (sien meegaande plan met koördinate).

Die stukke grond wat uitgesluit moet word beslaan vier afsonderlike stukke in die Swartwater/Koeskopbegied (gesamentlik ongeveer 122, 57 hektaars groot), drie aaneenlopende stukke in die Sanddrifgebied (gesmentlik ongeveer 24, 67 hektaar groot), een aaneenlopende stuk in die Stofbakkies (gesamentlik ongeveer 103, 37 hektaar groot), vier alleenstaande stukke in die Bloeddrifgebied (gesamentlik ongeveer 1100,94 hektaar groot), en een stuk in die Jakkelsberggebied, die sogenaamde Reuning besproeiingsef (ongeveer 11,59 hektaar groot).

U word dus versoekom die 13 stukke grond, waarvan die omvang in detail deur middel van koördinate op meegaande plan gedefinieer word, uit die bestaande mynhuurgebied uit te sluit, en die wysiging so by die Mynbriewekantoor in Pretoria te laat registreer.

'n Kopie' van die oorspronklike notariele mynhuurdokument 2/91 gaan hiermee saam vir die nodige endossement. Die

besluit om die mynhuurgebied te verklein word bekragtig deur meegaande direksiebesluit gedateer 24 Januarie 2001."

23]On examination of the memorandum I fail to observe the words **abandon** translated in Afrikaans to **afstanddoen** or any similar wording appearing therein. In fact what does emerge is a request for an amendment discerned from the following: *"U word dus versoek om die dertien stukke grond, waarvan die omvang in detail deur middel van koördinate op meegaande plan gedefinieer word, uit die bestaande mynhuurgebied uit te sluit, en die wysiging so by die Mynbriewekantoor in Pretoria te laat registreer."*

24]Adv G L Grobler SC, for Mynbou and Trans Hex Operations, in his heads of argument makes the following submission:

"The request could not be affected unilaterally. The requested amendment would have had to be acceded to by the Minister, because the notarial mining lease is a bilateral agreement between Trans Hex on the one hand and the State on the other hand. Although the mining lease was a statutory grant, it was a bilateral agreement. **See ONDOMBOBELEGGINGS V MINISTER OF MINERAL AND ENERGY AFFAIRS 1991 (4) SA 718 (A) 724A-725H.**A notarial mining lease could not be amended unilaterally...agreement on the amendment would only have been the first step. Once agreement has been reached to amend the lease, such agreement would have had to be notarially executed and registered..."

I fully endorse what counsel propounds.

25]Adv R Madlanga SC, for the Minister and the Department, submitted that the memorandum, if viewed in totality, does not constitute everything that the parties intended to convey. Further that, in the circumstances of this matter, extrinsic evidence can't be excluded. Of relevance Mr Madlanga referred to what **Schreiner JA**statedin**JAGGA V DONGES 1950(4)SA653 AD at 662H:**

"'The context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background."

Mr Madlanga submitted further that that dictum or proposition of law (*supra)* has been accepted by the courts. Counsel ends off by submitting that:

"Purposive interpretation is appropriate, not only when the wording of the contract is ambiguous, as in **VENTER v CREDIT GUARANTEE INSURANCE CORPORATION OF AFRICA LTD 1996 (3) SA 966 (A)**, but when the clear meaning of the words, if put into effect, would 'nullify the essential purpose of the contract' as in **TURNER MORRIS (PTY) LTD v RIDDELL 1996 (4) SA 397 (E) 404H-J**. The adoption of a purposive construction in such circumstances is consistent with the cases on absurdity, repugnancy and inconsistency..."Refer to **R HCHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 5TH EDITION at page 214.**

26]In terms of section 47 (1) (e) of the Minerals Act the mining lease holder, being Mynbou, was the holder of the mining authorisation. As

such section 47 (2) conferred upon the holder the same rights that were peculiar to a mining lease. Thus the terms and conditions would have remained the same as inthe lease agreement, and as such the lease would have had to remain in force in terms of section 47(1)(a).

27]As mining leases were normally granted for the duration of economic exploitation, termination of such a lease would only occur as a result of a breach or abandonment. The mining authorisation sought would be for a period in excess of two years. Therefore a mining licence instead of a mining permitted would have been issued as authorisation.**See Kaplan and Daleat page 102 paragraph 4.27.2.4**

28]The now repealed Minerals Act 20 of 1967 made provision for the lessee to the seek consent of the bondholder in case of the abandonment of such rights either in whole or in part. Section 47 (1) (f) of the Minerals Act does make provision for abandonment. However this section is silent on whether one would require the consent of the bondholder.

29]**Kaplan and Dale**mention that in considering abandonment a lessee will have to take into account additional considerations as well. These would be but limited to: whether it would amount to an earlier cessation of the obligation to pay the shares of profits or royalties that would otherwise have been payable to the state;whether the lessee was indeed the holder of the mining authorisation in terms of section 9 (1) (a); whether any surface or water rights which relate to the mining rights proposed to be abandoned will have to be considered to ensure

there is nothing in the title document, which indicates that it will lapse on the expiry of the relevant mining right. Further, the relevant mineral rights would have to be perused to observe the obligations therein arising from the abandonment. **See Kaplan and Dale at pages 18 and 19.**

30]The applicant's counsel, Adv M A Albertus SC, argued that the letter of 26 January 2001 was a clear and unequivocal indication that Trans Hex Mynbou Beperk decided to excise the 13 portions of land from its mining lease. Further, that there was a clear indication in the said letter that the exclusion of the 13 portions of land which formed the subject of the mining right had to be done from the existing mining lease area and that an endorsement against the title deed was sought from the Mining Titles Office in Pretoria.Counsel further argued that we should look at the letter of 26 January 2001 as it stands as it is not ambiguous and no extrinsic evidence was necessary to conclude that the letter constitutes an abandonment. In another breath he argues that if the letter is ambiguous then we should look to what preceded the letter, which would be the agreement of April 2000 between Trans Hex Mynbou Beperk and Die Richtersveld Oorgangsraad or Transitional Council acting on behalf of the Richtersveld Community. According to counsel this agreement, specifically clause 5.3 thereof denotes that the terms of "that particular agreement is consonant with the letter of January 2001on all fours." Having used this agreement to point out what is in favour of his argument, he sought to persuade us not to take into account Mr Madlanga's reliance on clause 6 of the same agreement, in respect of which he argued that if properly construed

clause 6 means that Mynbou were nevertheless still preserving their entire mining lease. Mr Albertus persisted by arguing that clause 5.3 precedes clause 6 and consequentlyregard should be had to clause 5.3 but not to clause 6. This would clearly amount to a contradiction in terms and I cannot endorse MrAlbertus's argument.

31]According to the applicant the sketch plan that was submitted with the letter was adequate in the circumstances to comply with section 11 (3); even though the section specifically states that it should be such that the notification of abandonment must be accompanied by a sketch plan "acceptable to the Director: Mining Development".

32]Mr Grobler submitted that the letter of the 26 January 2001 could not be interpreted or construed as having been an unequivocal abandonment. In his estimation the letter was merely a request to amend the terms of the mining lease to exclude the 13 defined portions of land from the mining lease which they desired to make available to the Richtersveld Transitional Council, for irrigation purposes. This contention is persuasive.

33]I cannot agree with the applicant's contention that the letter together with the sketch was sufficient to constitute abandonment. On a careful examination of section 11(3) it is evident that there would have to be *approval* from the Director: Mining Development on whether the sketch attached complied with the statutory requirements and therefore acceptable. The approval was lacking.

34]**R H Christie, The Law of Contract in South Africa 5th Edition at pages 437-438,** discusses the contractual nature of abandonment and what is commonly known as waiver in these terms:

"**Grotius 3 41 7**, as usual, is like a breath of fresh air:

> *'In Roman Law release by way of gift required a certain form of words: but with us, as in contracting so in discharging an obligation, it is enough that such words should be used as important an abandonment by the releaser of his right, and that this should be accepted by the debtor or in his name.'*

In the concluding words of that passage Grotius makes an important point which is often overlooked or obscured by our modern terminology. When the parties to an existing contract come together in an agreeing frame of mind and formally or informally[1] agree to vary or discharge their contract we have no difficulty about describing what has happened as a variation or discharge by agreement, or a cancellation by agreement[2]. But when one of the parties, by his words, actions or inaction, has evinced an intention not to enforce one or more or all of his rights conferred by the contract[3] we select whichever word seem most appropriate from a list which includes abandonment[4], acquiescence[5], release[6], renunciation[7], surrender[8], election, relinquishing of a right[9] and waiver. Of these words by far the most commonly used is waiver, which is regarded in many of the cases[10] as interchangeable with any of the other words."

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1 See *Tredrea v Ward* 1933 GWL 16 24.

2Eg*Meyer and Meyer v Tainton* (1890) 4 SAR14*; Duncker v Paddon and Brock Ltd* 1903 TH 166 174; *Albu v Eloffand Witwatersrand Land and Exploration Co Ltd* 1903 TS 163 174*; Potgieter v Jaffe* 1911 EDL 397; *Van Gelderen v Schaff* 1912 CPD 76; *Van Steepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) 588-J. Discharge of the contract may or may not leave an arbitration clause unaffected. The cases are reviewed in *Gardens Hotel (Pty) Ltd v Somadel Investments (Pty) Ltd* 1981 3 SA 911 (W).

3 If there are no rights there can be no waiver, so a plea alleging the invalidity of the contract and waiver (not in the alternative) is excipiable: *EK Green and CO v Adkins 1930* CPD*253.* Cf*Trans-Natal SteenkoolkorporasieBpk v Lombaard*1988 3 SA 625 (A) 640.

4*Hiddingh's Executors v Hiddingh's Trustee (*1886) 4 SC 200 204.

5*Strachan v Lloyd Levy* 1923 AD 670; *North Eastern Districts Association (Pty) Ltd v Surkhey Ltd* 1932 WLD 181; *Dunbar v Rossmaur Mansions (Pty) Ltd* 1946 WLD 235 248-249.

6*Van der Poel's Executors v Malan* (1898) 15 SC 70 72; *Coronel's Curator v Coronel's Estate* 1941 AD 323.

7*Smith v Momberg*(1895) 12 SC 295; *Van Heerden v Pretorius* 1914 AD 69 76.

8*Van der Plank v Otto* 1912 AD 353 364-365.

9*ABSA Bank Ltd v The Master* 1998 4 SA 15 (N) 26J-27A.

10*Van der Plank loccit*being an isolated exception.

35]**Innes CJ** in **LAWS v RUTHERFURD 1924 AD 261** at page **263** said:

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her rights, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

36]As regards an inferred waiver **Nienaber JA** said in **ROAD ACCIDENT FUND v MOTHUPI 2000 (4) SA 38 (A)** at paragraphs **[16]-[17]**thatthe test to determine waiver is objective. The intention is thus firstly, adjudged by its outward manifestations; secondly, mental reservations not communicated are of non-legal consequence; thirdly, the outward manifestations are adjudged from the perspective of the reasonable other party concerned. Both parties' evidence on what they intended and believed at the time may be relevant but not necessarily conclusive.

37]As established above the onus rests with the applicant to prove that abandonment took place. The applicant's reliance on section 11 fails to demonstrate that abandonment in fact occurred. How can it be said that there was compliance with the requirements of abandonment when the reciprocal duty on the part of the Director: Mining Development to accept the sketch plan was still outstanding? This was not an instance in which one party was at liberty to act unilaterally. I cannot therefore agree that abandonment was indeed effected. That being the case, I have to conclude that even on the applicant's own version abandonment did not take place.

38]Even if one applies section 47 (1) (f), though this section does not make mention of seeking the bondholder's consent, there are still the other considerationsset out in paragraph [27] above that the lessee and bondholder have to consider before an abandonment can be confirmed. Here again, it requires both the lessee and bondholder's participation. This reaffirms my conclusion that the letter of 26 January 2001 could not have been an abandonment.

39]**In the result I am satisfied that the letter of 26 January 2001 does not constitute an abandonment.**

COSTS OF THE 29 APRIL 2011

40]The third and fourth respondents brought an interlocutory application on 29 April 2011 at 10h00.The notice of motion thereof is dated 28 April 2011 and was served on the applicant's correspondent attorneys on 28 April 2011 at 3.25pm. The basis upon which the costs for the 29 April 2011 are sought by the third and fourth respondent's is that the applicant had set down the main application on the unopposed roll for 29 April 2011, when in fact the matter was opposed.

41]A notice of set down for the hearing of the matter on the unopposed roll was received by the respondents on 12 April 2011, advising that the matter has been set down for hearing on 29 April 2011. Third

and fourth respondent filed a notice to oppose on 7 September 2010. On 13 April 2011 the respondents sought clarity telephonically and by way of correspondence, enquiring why the applicant had placed the matter on the unopposed roll knowing that the respondents are opposing it.

42]The applicant responded on 15 April 2011 stating that since the respondents had not filed their answering affidavits he was entitled to set the matter down on the unopposed roll in terms of Rule 6(5)(f) of the Uniform Rules of Court. Rule 6(5)(f) provides that if an applicant does not receive a respondent's answering affidavit within fifteen days after receipt of the respondent's notice of intension to oppose "the applicant may within five days of expiry thereof apply to the registrar to allocate a date for the hearing of the application."

43]After the respondent's intention to defend was servedthe applicant had to provide the respondents with the record before the respondents filed their answering papers. The record was served on 30 December 2010. The applicant contendsthat the respondents failed to file their answering affidavits within the required period of fifteen days, reckonedfrom 30 December 2010. Thus on 7 April 2011, the date of the notice of set down, the registrar allocated 29 April 2011 for the hearing of the matter.

44]As is evident from the respondent's notice dated 18 April 2011, the interlocutory application was brought in terms of Rule 30 (2)(b). On considering the facts that led up to the interlocutory application, can

it be said that the setting down of the application on the unopposed role constitutes an irregular proceeding? I am of the view that the answer here is in the negative.

45]It is clear that the respondents had filed their notice of intention to defend and were provided with the record by 30 December 2010, they still had fifteen court days to file their answering affidavit from 30 December 2010, in terms of Rule 6(5)(f).

46]When the applicant proceeded to set the application down on 7 April 2011 the fifteen day period had long lapsed. In terms of the Rules of court the applicant was therefore entitled to seek a date for the application to be heard.The applicant's actions do not, in the circumstances, constitute an irregular step and as such the respondents are not entitled to the costs of instituting the interlocutory application.On 29 April 2011 the presiding Judge did not hear argument but merely postponed the matter *sine die*in order that alternative dates could be arranged and reserved costs.

47]In light of what has been stated above on costs I conclude that no irregular procedural step was taken by the applicant when the matter was set down. The respondents would have had to appear in court on 29 April 2011 in any event. As suchthe respondents are not entitled to the wasted costs for their appearance on that date.

COSTS IN THIS APPLICATION

48]The costs in this application are to follow the result.

49]The cost due to the third and fourth respondents in respect of the appearance on 29 April 2011 would be costs occasioned by the matter being postponed *sine die* and not wasted costs as claimed.Therefore these costs would exclude costs related to the interlocutory application.

In the result the following order is made:

1. **The review application is dismissed with costs.**
2. **These costs are to include the costs consequent on the employment of two counsel.**

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W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

I concur

_____

F DIALE KGOMO

JUDGE-PRESIDENT

NORTHERN CAPE HIGH COURT, KIMBERLEY

On behalf of the Applicant:	**Adv ALBERTUS SC**
On behalf of the 1st& 2nd Respondent:	**Adv MADLANGA SC with Adv Nobanda**
On behalf of the 3rd& 4th Respondent:	**Adv GROBLER SC with Adv Geldenhuys**