IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Case Number: **M43/2018**

In the matter between:

MINING FORUM OF SOUTH AFRICA	1st Applicant
BLESSINGS LEHLOHONOLO ANSWER RAMOBA	2nd Applicant
and	
MINISTER OF MINERAL RESOURCES	1st Respondent
BAPO BA MOGALE TRADITIONAL COUNCIL	2nd Respondent
PREMIER: NORTH WEST PROVINCE	3rd Respondent
MEC: NORTH WEST PROVINCIAL DEPARTMENT OF LOCAL GOVERNMENT & HUMAN SETTLEMENT	4th Respondent
LONMIN PLC	5th Respondent
WESTERN PLATINUM LIMITED	6th Respondent
EASTERN PLATINUM LIMITED	7th Respondent
and	
BAPO BA MOGALE UNEMPLOYMENT FORUM	1st Intervening Applicant
TSHEPO MOLAOLWE	2nd Intervening Applicant

JUDGMENT

LEEUW JP

Introduction

[1] The applicants approached this Court seeking the following order in terms of the Notice of Motion:

> "1. An order declaring that the First Respondent has acted in breach of his statutory obligations, imposed by the Mineral and Petroleum Resources Development Act 28 of 2002, by failing to act against the Fifth Respondent for its failure to implement the Social and Labour Plans over the period 2014 until 2017; and
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> 2. An order declaring the conduct of the First, Fifth, Sixth and Seventh Respondents, separately alternatively jointly, to be unlawful and inconsistent with section 24(b)(iii) of the Constitution of the Republic of South Africa; and
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> 3. An order directing the First Respondent to suspend the mining right(s) and/or permit(s) granted to the Fifth, Sixth and Seventh Respondents, in respect of its Marikana operations, until such time as the Fifth, Sixth and Seventh Respondents have complied with obligations in terms of the Social and Labour Plan for 2014 – 2018; and
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> 4. An interdict restraining the Fifth, Sixth and Seventh Respondents from disposing, ceding and/or transferring the mining right(s) and/or permits(s) granted by the Department of Mineral Resources in respect of its Marikana operations, pending the implementation of its obligations arising from the Social and Labour Plan 2014 – 2018; and
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> 5. That the First, Fifth, Sixth and Seventh Respondents separately alternatively jointly be ordered to pay costs of this application in the event of the matter being opposed."

[2] The application is opposed by the first, fifth, sixth and seventh respondents. The second, third and fourth respondents did not enter appearance and there is no order sought against them. The first and second Intervening applicants only filed a founding affidavit deposed to by the second Intervening applicant, however neither party filed heads of argument nor made oral submissions before Court.

Parties

[3] The first applicant, the Mining Forum of South Africa (the Mining Forum) is a registered non-profit organization established in terms of the Non-Profit Organization Act.[1] The Mining Forum was appointed by Bapo-Ba-Mogale Traditional Council to represent the interests of its communities in relation to compliance with the Social and Labour Plans submitted by all mines operating in the land of the Bapo-Ba-Mogale tribe.[2]

[4] The second applicant, Blessings Lehlohonolo Answer Ramoba (Ramoba) is the president of the Mining Forum, who states that he is acting on behalf of the Mining Forum, having been duly authorized through a resolution taken by the Governing Board thereof. Although the Mining Forum is an entity distinct from its members, Ramoba attests that he is also cited in these proceedings in his personal capacity. The reason thereof is not clear.

[5] The first respondent is the Minister of Mineral Resources (the Minister) who is the executive head of the Department of Mineral Resources (the Department) has been cited in his representative capacity as prescribed by Section 2 of the State Liability Act 20 of 1957.[3] Reference to the Minister will interchangeably be referred as the Department or officials of the Department.

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[1] Act No. 71 of 1997.
[2] See para 23 below.
[3] Section 2 provides that:

> "**Proceedings to be taken against executive authority of department concerned**
>
> (1) In any action or other proceedings instituted by virtue of the provisions of section 1, the executive authority of the department concerned must be cited as nominal defendant or respondent.

[6] The second respondent is the Bapo-Ba-Mogale Traditional Council (the Traditional Council). The third respondent is the Premier of the North West Province (the Premier) and the fourth respondent is the Member of the Executive Council of the North West Provincial Department of Local Government and Human Settlement (the MEC).

[7] The fifth respondent, Lonmin PLC (Lonmin) is a duly registered public company incorporated in terms of the Company Laws of the United Kingdom and conducts business at Melrose North, Gauteng Province and Marikana.

[8] The sixth respondent, Western Platinum Limited (Western Platinum); and the seventh respondent (Eastern Platinum) are also duly registered public companies, whose principal place of business is at Middlekraal Farm in Marikana within the North West Province.

[9] First intervening applicant, the Bapo-Ba-Mogale Unemployment Forum (Unemployment Forum), represented in these proceedings by the second intervening applicant, Tshepo Molaolwe (Molaolwe), alleges that the Unemployment Forum is "an unincorporated association of the young persons who are children of the members of the community of Bapo-Ba-Mogale." They also state that Molaolwe is the Chairperson thereof and that it has a substantial interest in these proceedings in that they have raised several concerns with the governance of the Premier relating to lack of employment or job opportunities for the young people within the Bapo-Ba-Mogale communities.

Background

[10] Lonmin, the Western and Eastern Platinum are holders of various mining right licences as defined in Section 5 of the Mineral and Petroleum Resources

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(2) The plaintiff or applicant, as the case may be , or his legal representative must, within seven days after a summons or notice instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that summons or notice on the State Attorney."

Development Act, (the MPRDA)[4] which licences were issued by the Department. These entities will cumulatively be referred to as Lonmin.

[11] The MPRDA prescribes that a holder of a mining right must amongst others, submit a Labour and Social Plan which is in line with the objectives of the MPRDA, and behoves the holder of mining rights to contribute towards the socio economic development of the areas within which they are operating.[5]

[12] It is common cause that Lonmin submitted its Social and Labour Plan to the Department, for the period **October 2013** to **September 2018**. The Department received complaints from the community in relation to allegations of Lonmin's non-compliance with the Social and Labour Plan. Consequently, on the **19** and **26 July 2017**, a meeting was held between the representatives of the Traditional Council, Lonmin and the officials of the Department to address concerns raised by the community in that regard. Pursuant to the meeting, the Department conducted a Social and Labour Plan audit on **10** and **11 August 2017**. The audit revealed that Lonmin failed to meet its targets in respect of, amongst others, the Human Resources Development Programme and that Lonmin was behind schedule with regard to the implementation of the Local Economic Development Programme.

[13] Lonmin was directed by the Department to submit, within a period of 14 working days, a detailed action plan, on how it intended to address the backlog and all other issues identified, which amongst others, included the projects on bakery and brickmaking. Lonmin was also directed to provide a list of local contractors employed to implement the local Economic Development Projects at the Mnxekazi Junior Secondary School, and submit verification of non-fronting in respect of procurement which was inadequate.

[14] Lonmin conceded that it had not fully complied with its Social and Labour Plan, the reasons being amongst others, that it experienced a "steep decline on financial results" occasioned by the "slump in commodity prices and increased costs and the

[4] Act 28 of 2002.
[5] See Section 2(i) of MPRDA in para 28 below and Section 25(2)(f) & (h) of MPRDA in para 29 below.

protracted strike actions which adversely impacted on its total revenue." These and other factors resulted in Lonmin's net cash balance falling from 201 million US dollars as at **30 September 2013**, to a net debt of 29 million US dollars as at end **September 2014**.

[15] Furthermore, the tough operating environment persisted into 2016 which compelled Lonmin to apply austerity measures aimed at preserving the company. However, despite the financial constraints experienced, Lonmin committed itself to implementing some of the non-viable projects which it had intended to replace. Lonmin intended to apply for an amendment of its Social and Labour Plan, which amendments were to be discussed with the Department. Lonmin and the officials of the Department continued with engagements relating to the Social and Labour Plan. Consequently, Lonmin submitted its revised action plan on two different occasions which action plans were not accepted, because of certain shortfalls identified by the Department.

[16] As a result on **28 November 2017**, the Department issued a notice in terms of Section 93(1)(b)(i) of the MPRDA, (Section 93 Notice)[6] wherein Lonmin was directed to suspend all mining activities with immediate effect, and also directed Lonmin to address the issues raised in the notice. Lonmin was warned that failure to remedy the concerns before **5 December 2017** would result in the invocation of the provisions of Section 47 of the MPRDA.[7] In response Lonmin made

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[6] Section 93 provides that:

"(1) If an authorized person finds that a contravention or suspected contravention of, or failure to comply with –

…

(b) any term or condition of any right, permit or permission of any other law granted or issued or an environmental authorisation issued, has occurred or is occurring on the relevant reconnaissance, exploration, production, prospecting mining or retention area or place where prospecting operations or mining operations or processing operations are being conducted, such a person may –

(i) order the holder of the relevant right permit or permission, or the person in charge of such area, any person carrying out or in charge of the carrying out of such activities or operations or the manager, official, employee or agent of such holder or person to, take immediate rectifying steps." And also see Section 91(4) para 30 below.

[7] Section 47 provides that:

representations per letter dated **1 December 2017**, wherein it undertook to comply with the requirements set out in the template as provided by the Department in the Section 93 notice. On the same day, **1 December 2017,** the Acting Chief Director of the Department, purporting to act in terms of Section 103(1) of the MPRDA[8], and

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"(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit or retention permit or holders of old order rights or previous owner of works if the holder or owner thereof—

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
(b) breaches any material term or condition of such right, permit or permission;
(c) is contravening any condition in the environmental authorisation; or
(d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purpose of the application or in connection with any matter required to be submitted under this Act.

(2) Before acting under subsection (1), the Minister must—

(a) give written notice to the holder indicating the intention to suspend or cancel the right;
(b) set out the reasons why he or she is considering suspending or cancelling the right;
(c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and
(d) notify the mortgagee, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

(3) The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.

(4) If the holder does not comply with the direction given under subsection (3), the Minister may act under subsection (1) against the holder after having—

(a) given the holder a reasonable opportunity to make representations; and
(b) considered any such representations.

(5) The Minister may by written notice to the holder lift a suspension if the holder—

(a) complies with a directive contemplated in subsection (3); or
(b) furnishes compelling reasons for the lifting of the suspension." Also see para 31 below.

[8] Section 103 provides that:

"(1) The Minister may, subject to such conditions as he or she may impose, in writing delegate any power conferred on him or her by or under this Act, except a power to make regulations or deal with any appeal in terms of section 96, and may assign any duty so imposed upon him or her to the Director-General, the Regional Manager or any officer.

(2) The Minister may, in delegating any power or assigning any duty under subsection (1), authorise the further delegation of such power and the further assignment of such duty by a delegatee or assignee.

(3) The Director-General, the Regional Manager or any other officer to whom a power has been delegated or to whom a duty has been assigned by or under this Act, may in writing delegate any such power or assign any such duty to any other officer.

(4) The Minister, Director-General, Regional Manager or officer may at any time—

read with Section 93(2)[9] of the MPRDA withdrew the Section 93 notice. He, however directed Lonmin to submit a revised action plan by not later than **16 January 2018**.

[17] An action plan was submitted on **16 January 2018**, which was still found to be wanting by the Department. Lonmin submitted a further revised action plan on **26 January 2018.** The Department was satisfied with the revised action plan and found that it addressed the concerns raised in the Section 93 notice. Henceforth, Lonmin was operating in terms of the amended Social and Labour Plan of the **26 January 2018,** which was approved by the Department.

Submissions

[18] Applicant, through Ramoba, submits that:

"(a) the Minister "failed to take positive steps to ensure that Lonmin complies with its obligations". He provided a list of projects stipulated in the Social and Labour Plan, which it alleges were commitments not fulfilled by Lonmin;

(b) Lonmin did not comply with the Section 93(1) notice and that the Minister was obliged to act in terms of Section 47 of the Act, to either suspend or cancel the mining rights authorizing the mining operations conducted by Lonmin. He further submits that failure by the Minister to

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(a) withdraw a delegation or assignment made in terms of subsection (1), (2) or (3), as the case may be; and
(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be: Provided that no existing rights of any person shall be affected by such withdrawal and amending of decision."

(5) The Minister, Director-General, Regional Manager or officer is not divested of any power or exempted from any duty delegated or assigned by him or her."

[9] Section 93(2) provides that:

"The Director-General must confirm or set aside any order contemplated in subsection (1) *(a)* or *(b)*." See also para 30 below.

act in accordance with the Act makes him guilty of contravening the obligations imposed by the Constitution of the Republic of South Africa;

(c) Lonmin's failure to comply with the Social and Labour Plan has negatively prejudiced the community of the Bapo-Ba-Mogale Community, who are experiencing lack of adequate housing and school and are living in conditions of squalor, caused by the mushrooming informal settlement within the community; and

(d) That Lonmin is running away from its responsibility as stated in the Social and Labour Plan by disposing 'of its interest in the Marikana operations' to Sibanye Gold Limited (Sibanye-Stillwater) whose shareholders are the executive directors of Lonmin. As a result, applicant is seeking an interdict restraining Lonmin from disposing of or transferring or ceding its mining rights in respect of the Middlekraal Farm. Some of those obligations relate to an undertaking by Lonmin to the community that it would sell two of its disused shafts to the community for a total amount of R7 Billion, and that Lonmin reneged on its commitment and has offered to sell its entire operations to Sibanye-Stillwater, at a total amount of R6 Billion."

[19] The intervening parties raised similar concerns raised by the applicants namely that, Lonmin has not complied with its undertakings and commitments contained in the Social and Labour Plan. They have neither filed any replying affidavit nor heads of argument. They also are of the impression that Lonmin intends transferring its mining permit to Sibanye-Stillwater, the motive being to avoid its responsibilities in the Social and Labour Plan. Consequently, I will admit them as *amici* in these proceedings.

[20] Thabo Mokoena (Mokoena) who is the accounting officer of the Department, submits:

"(a) That the applicant is seeking a declaratory order against the Department for its alleged failure to act in accordance with a statutory duty, (in that it neglected or failed to take action against Lonmin for its failure to implement the Social and Labour Plan). That failure by the Department to act constitutes an administrative action in terms of Section 1 of the Administrative Justice Act 3 of 2000 (PAJA).[10] Furthermore, that the applicants ought to have approached the court through a judicial review process prescribed by Section 6(1) of PAJA;[11]

(b) That the applicants are not the beneficiaries of the benefits arising from the Social and Labour Plan, and consequently there is no dispute arising between the applicants on the one hand and Lonmin and the Department on the other;

(c) That Lonmin made financial provision for all the necessary programs required to be included in the Social and Labour Plan and that in making the financial commitments, it also included a clause indicating that: 'These commitments are based on the current business plan and are subject to change as and when operational or other changes impact upon these. When changes are required to the above, these will be reported on as required';

(d) That the Department, in considering the part non-compliance with the Social and Labour Plan, has not been oblivious to the financial challenges and that negatively impacted on Lonmin's ability to meet its obligations and commitments set out in the Social and Labour Plan. He

[10] Section 1(a) provides that:

"In this Act, unless the context indicates **otherwise**- **'administrative action'** means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when -
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation"

[11] Section 6(1) provides that:
"Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

further states that despite its failure to fully comply with the Social and Labour Plan, it is evident from the reports submitted that Lonmin spent considerable amounts of money in an effort to meet its financial obligations as per the Social and Labour Plan;

(e) That the Department continuously monitored the implementation of the Social and Labour Plan by way of annual audits and by responding to complaints as when they are lodged by interested and affected parties, including the present complaint that was lodged by the Bapo-Ba-Mogale Community, which culminated in the Section 93 notice being issued;

(f) That based on the engagements undertaken between the Department and Lonmin relating to compliance with the Social and Labour Plan, the Department was satisfied with the progress made towards compliance and consequently accepted the revised Social and Labour Plan in a letter dated **13 March 2018**, in which Lonmin was informed that it will be subjected to constant supervision by submitting quarterly reports on the progress made;

(g) That the Department took an administrative decision as contemplated in Section 1 of PAJA, which decision remains binding until set aside through a judicial review in terms of PAJA; and

(h) That the applicants should have made a request for information relating to their supervisory role from the Department, before they could approach this Court, which information would have been provided to them."

[21] Thandeka Tosana Ncube (Ncube), who is the Executive Vice President on behalf of Lonmin, submits that the relief sought by the applicants, that the Minister and Lonmin should be held accountable for non-compliance with the Social and Labour Plan, is misguided, unsubstantiated and irregularly sought in that:

"(a) The applicants do recognize the actions taken by the Department in enforcing compliance with the Social and Labour Plan which culminated in the issuance of the section 93(1) notice, and yet take the view that the Minister should have acted against Lonmin without following the mechanisms and procedures prescribed by the MPRDA;

(b) since the applicants wish to hold the Minister accountable for his alleged failure to take an administrative decision, they should apply for the review of his action in accordance with the procedure set out for that purpose by the PAJA, which would enable the Court to have the benefit of a proper review process by obtaining the reasons from the Minister in terms of section 5 of PAJA; [12]

(c) Section 24(b)(iii) of the Constitution has no bearing on the Social and Labour Plan in that, it pertains to the securing of ecologically sustainable. That even if a connection were to be drawn between the two, the principle of subsidiarity would prevent the applicants from seeking this form of relief, especially because the relief sought under this section is wide and non-specific;

(d) no case has been made out for the relief sought in the form of an interdict, in that the applicants' fear, that the Sibanye-Stillwater all share offer might result in a transfer or cession of Lonmin's mining rights, and consequently excuse Lonmin from its Social and Labour Plan's obligations, is misplaced, wrong and incompetent;

(e) the applicants, in particular Ramoba, has an ulterior personal motive in launching this application, in that Lonmin previously rejected two of his proposals wherein he sought to personally gain:

[12] Section 5(1) of PAJA provides that:

> "Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."

(i) *during **March 2017** the applicants submitted a training programme which was carried out by Murray and Roberts Training Academy and funded by the Mining Qualification Authority, in which Lonmin was expected to absorb the people trained as graduates for a period of a minimum of two to three months, at an expense which Lonmin would not afford to carry, in view of their prevailing economic circumstances; and*

(ii) *the second proposal related to a Social and Labour Plan Intelligent Unit, which was proposed by Ramoba, which entailed the appointment of people including Ramoba as the project manager at an annual salary of R420,000 for a period of 5 years with an annual increase of 10%. The overall implementation of the proposal would have cost Lonmin R33 million."*

[22] In order to gainsay Lonmin's assertion that it was impossible to fully comply with the Social and Labour Plan undertakings because of its financial constraints, Ramoba filed a replying affidavit and an additional affidavit by Nsindiso Mkhize without having been granted leave by this Court. Lonmin was granted leave to file an additional or fourth affidavit by Professor Harvey Elliot Weiner, who gives an overview of the financial status of Lonmin.

[23] Ramoba referred to some of the findings of the Farlam Commission of Inquiry (the Commission) appointed by the President of the Republic of South Africa, on **12 September 2012.**[13] The Commission recommended amongst others, that the Department should investigate Lonmin's failure to fulfil its commitments in the Social and Labour Plan;

[24] He also analyzed Lonmin's financial report for the year ending **September 2017** which is available on its website. He submits that according to the Remuneration

[13] To investigate the tragic incidents that occurred at the Lonmin Mines in Marikana, where several people died and other injured and arrested by the police.

Committee Report ended **30 September 2017**, the executive directors of Lonmin have continually been granted an increase in payment for the past five years; that a detailed analysis of the income statement indicates that Lonmin generated total assets which are significantly greater than its total liabilities and is thus running a solvent business. This also indicates that it is a financially healthy company that has the ability to finance its liabilities and fulfil its obligations and undertakings in the Social and Labour Plan.

[25] Ramoba concedes that applicant should have approached this Court through the procedures prescribed in PAJA. He avers that the public has a "clear right" to demand contribution towards socio-economic development and that the Social and Labour Plans comprise "undertakings to the public as a *quid pro quo* for the extraction of mineral deposits on our land". He refers to public in the context contemplated in Section 1 of PAJA;[14] that consequently any decision to amend, adopt, abandon or withdraw a Social and Labour Plan by the Minister, which materially and adversely affects the rights of the public, must be procedurally fair and comply with the law, PAJA and the regulations promulgated thereunder.

[26] He further states that he is alive to the fact that the agreement between Lonmin and Sibanye-Stillwater does not at this stage transfer mining rights, but avers that "Lonmin should not dump its obligations on the community under the guise of the Sibanye-Stillwater deal"; and that the alleged proposal he made to Lonmin, were submitted at the request of Lonmin. He however denies that he requested or sought employment from Lonmin.

Issues

[27] The issues to be decided are:

(a) Whether the applicants have the necessary legal standing to institute these proceedings;

[14] Section 1 of PAJA provides that:

" 'public' for the purpose of section 4, includes a group or class of the public".

(b) Whether PAJA is applicable in these proceedings? If the answer to this question is yes, whether the applicants should nonetheless be granted the declaratory and other orders sought in the notice of motion;

(c) Whether section 24 of the Constitution is relevant; and

(d) Costs.

The Law

[28] Section 2 of the MPRDA prescribes that the objectives of this Act are amongst others to-

> *"…*
>
> *(c)* promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
>
> *(d)* substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
>
> *(e)* promote economic growth and mineral and petroleum resources development in the Republic particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;
>
> *(f)* promote employment and advance the social and economic welfare of all South Africans;
>
> *(g)* provide for security of tenure in respect of prospecting, exploration, mining and production operations;
>
> *(h)* give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."[15]

[29] Furthermore, the MPRDA provides in Section 25(2)(f) and (h) in relation to the rights and obligations of holders of mining rights, that:

"The hold

(f) comply

(h) submit the prescribed annual report, detailing the extent of the holder's compliance with the provisions of section 2(d) and (f), the charter contemplated in section 100 and the social and labour plan."

[30] Section 91(1) of the MPRDA allows the Minister to designate to the persons mentioned in this Section his functions contemplated in subsection (4)[16] and Section 92.

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[15] See also Section 3 (1) of the Act which provides that:

"Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans."

[16] Section 91(4) of the MPRDA provides:

"An authorised person may, on the authority of a warrant issued in terms of subsection (5)—

(a) in order to obtain evidence, enter any reconnaissance, prospecting, mining, exploration, production or retention area or any place where prospecting operations or mining operations are being conducted where he or she has reason to believe that any provision of this Act has been, is being or will be contravened;

(b) direct the person in control of or any person employed at such area—

(i) to deliver or furnish any information, including books, records or other documents, in the possession of or under the control of that person that pertains to the investigation; and

(ii) to render such assistance as the authorised person requires in order to enable him or her to perform his or her functions under this Act;

(c) inspect any book, record, statement or other document including electronic records, documents or data and make copies thereof or excerpts therefrom;

(d) examine any appliance or other material or substance found in such area;

(e) take samples of any material or substance and test, examine, analyse and classify such samples; and

Section 92 deals with the power to enter a prospecting, mining or retention area, and provides as follows:

> "Any authorised person may without a warrant –
>
> (a) enter any reconnaissance, prospecting, mining production or exploration or retention area or any place where prospecting, or mining, exploration or production are being conducted in order to inspect any activity, process or operation carried out in or upon the area or place in question; and
>
> (b) require the holder of the right, permit or permission or in question or the person in charge of such area or place or any person carrying out or in charge of the carrying out such activities, process or operations to produce any book, record, statement or other document including electronic documents, information or data relating to matters dealt with in this Act for inspection, or for the purpose of obtaining copies thereof or extracts therefrom."

[31] Furthermore, in terms of Section 8 of the MPRDA, the Director-General must designate an officer in the service of the Department as regional manager in those areas divided into regions by the Minister. The Section provides that:

> "The Director-General must, subject to the laws governing the public service, designate an officer in the service of the Department as regional manager

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(f) (i) seize any material, substance, book, record, statement or other document including electronic records, documents or data which might be relevant to a prosecution under this Act and keep it in his or her custody;

(ii) the person from whom the control of any book, record or document including electronic records or data has been taken, may, at his or her own expense and under the supervision of the authorised person make copies thereof or excerpts therefrom."

for each region contemplated in Section 7 who must perform the functions delegated or assigned to him or her in terms of this Act or any other law."

Section 7 of the MPRDA provides that:

"For the purposes of this Act the Minister must, by notice in the *Gazette*, divide the Republic, the sea as defined in section 1 of the Sea-shore Act, 1935 (Act No. 21 of 1935), and the exclusive economic zone and continental shelf referred to in sections 7 and 8 respectively, of the Maritime Zones Act, 1994 (Act No. 15 of 1994), into regions."

[32] Section 93 of the MPRDA provides that:

"(1) If an authorized person finds that a contravention or suspected contravention of, or failure to comply with –

(a) any provision of this Act; or

(b) any term or condition of any right, permit or permission of any other law granted or issued or an environmental authorisation issued, has occurred or is occurring on the relevant reconnaissance, exploration, production, prospecting mining or retention area or place where prospecting operations or mining operations or processing operations are being conducted, such a person may –

(i) order the holder of the relevant right permit or permission, or the person in charge of such area, any person carrying out or in charge of the carrying out of such activities or operations or the manager, official, employee or agent of such holder or person to, take immediate rectifying steps; or

(ii) order that the reconnaissance, prospecting, exploration, mining, production or processing operations or part thereof be suspended or terminated, and give such other instructions in connection therewith as may be necessary.

(2) The Director-General must confirm or set aside any order contemplated in subsection (1)(a) or (b).

(3) The Director-General must notify the relevant holder or other person contemplated in subsection (1) in writing within 60 days after the order referred to in subsection (1)(a) or (b) has been set aside or confirmed, failing which such order shall lapse."

[33] Section 47 of the MPRDA provides as follows in respect of the Minister's power to suspend or cancel rights, permits or permission:

"(1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit or retention permit or holders of old order rights or previous owner of works if the holder or owner thereof—

(a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;

(b) breaches any material term or condition of such right, permit or permission;

(c) is contravening any condition in the environmental authorisation;

(d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in

connection with any matter required to be submitted under this Act.

(2) Before acting under subsection (1), the Minister must—

(a) give written notice to the holder indicating the intention to suspend or cancel the right;

(b) set out the reasons why he or she is considering suspending or cancelling the right;

(c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and

(d) notify the mortgagor, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

(3) The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.

(4) If the holder does not comply with the direction given under subsection (3), the Minister may act under subsection (1) against the holder after having—

(a) given the holder a reasonable opportunity to make representations; and

(b) considered any such representations.

(5) The Minister may by written notice to the holder lift a suspension if the holder—

(a) complies with a directive contemplated in subsection (3); or

(b) furnishes compelling reasons for the lifting of the suspension."

[34] Section 96 of the MPRDA makes it imperative for a person who is aggrieved by an administrative act or decision of an authorized official, to appeal the decision through the internal processes of the Department, namely that:

"(1) any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days becoming aware of such administrative decision in the prescribed manner to –

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

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

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

(b) Any subsequent application in terms of this Act must be suspended pending the finalisation of the appeal referred to in paragraph (a).

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

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

Procedure in terms of PAJA

[35] An action or decision taken by the authorized person excluding the executive power or function of the Minister, is an administrative action, defined in Section 1 of PAJA as follows-

"In this Act, unless the context indicates **otherwise**-

"administrative action" means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

…

(bb) the executive powers and functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution''.

[36] Section 6 of PAJA, provides the following grounds for judicial review of an administrative action, amongst others:

"**Judicial review of administrative action**

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

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

(a) the administrator who took it-

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

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

(iii) was biased or reasonably suspected of bias;

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

(c) the action was procedurally unfair;

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

(e) the action was taken-

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

(ii) for an ulterior purpose or motive;

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

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

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself-

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

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty, to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,
institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is
required to take that decision; and

(iv) the administrator has failed to take that decision before the expiration of that period,
institute proceedings in a court or tribunal for judicial review of the 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."

[37] The provisions of Section 7(1) and (2) of PAJA, which deal with the procedural issues relating to judicial review, prescribe that:

"Procedure for judicial review

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

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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

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

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

[38] Section 8 of PAJA provides for the remedies that the Court may grant in a judicial review in terms of Section 6(1).

"**Remedies in proceedings for judicial review**

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

(a) Directing the administrator-

(i) to give reasons; or

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

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

(c) setting aside the administrative action and-

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

(ii) in exceptional cases-

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

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

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdictor other temporary relief; or

(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant 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 to refrain from doing, any actor thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs."

Is the procedure prescribed by PAJA peremptory?

[39] It is trite law that the courts control the exercise of public powers by means of judicial review. In **Bato Star Fishing v Minister of Environmental Affairs and Tourism and others**[17], the court echoed the sentiments expressed by Chaskalson P (as he then was) in **Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa**[18] as follows:

> "[22] In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others,* the question of the relationship between the common law grounds of review and the Constitution was considered by this Court. A unanimous Court held that under our new constitutional order the control of public power is always a constitutional matter. There are not two systems of law regulating administrative action — the common law and the Constitution — but only one system of law grounded in the Constitution. The courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of PAJA and the Constitution." [footnotes omitted]

[40] In **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)**[19]**,**

[17] 2004 (4) SA 490 (CC) at para 22.
[18] 2000 (2) SA 674 (CC).
[19] 2006 (2) SA 311 (CC) at para 97.

Chaskalson CJ (as he then was) on behalf of the majority judgment, adopted with approval the view taken by Professor Hoexter who sums up the relationship between PAJA, the Constitution and the common law as follows:

> "The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act."

[41] In **State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd**[20] where Cachalia JA stated the following:

> "[33] It is necessary to distinguish between a PAJA review, on the one hand and a legality review, on the other. PAJA was enacted to give effect to the right to lawful administrative action in s 33 of the Constitution. And, as it was intended to be, and in substance is, a codification of the rights in s 33, so the Constitutional Court said in *New Clicks*, it was not possible for litigants to go behind it, by relying either directly on s 33(1) or on the common law, when reviewing unlawful administrative actions as this would undermine the very purpose for which it was enacted. So, PAJA covers administrative action while private (contractual) power remains reviewable at common law. In short, if the unlawful administrative action falls within PAJA's remit there is no alternative pathway to review through the common law." [footnotes omitted]

[42] The Supreme Court of Appeal, in **Minister of Home Affairs and Another v Public Protector**[21] reiterated the above principle and held that:

[20] 2017 (2) SCA 63 (SCA) at para 33.

"[28] An applicant for judicial review does not have a choice as to the 'pathway' to review: if the impugned action is administrative action, as defined in PAJA, the application must be made in terms of s 6 of PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review." [footnote omitted]

Analysis

Locus Standi of the applicants

[43] The Mining Forum was appointed by the Traditional Council per letter dated **19 October 2017**, to represent the interests of its communities in relation to compliance with the Social and Labour Plans submitted by all mines operating in the land of the Bapo-Ba-Mogale tribe. The applicants elected to cite the Traditional Council as respondents and not as co-applicants in these proceedings. I have already alluded above that the Traditional Council did not oppose this application

[44] The applicants do not allege that they were given authority to lodge this application by the Traditional Council. Furthermore, it is not clear as to why Ramoba, who is the President of the Mining Forum, should be cited in his personal capacity.

[45] Counsel for the applicant submitted that the applicants, have been appointed by the Traditional Council to represent the Bapo Ba Mogale Community and they have a public interest in the implementation of the Social and Labour Plan and consequently do have a right to approach

[46] Counsel for the respondents indicated that they were not pursuing the issue of *locus standi*. I will in the circumstances not deal further with this matter and make a finding that the applicants have the legal standing to lodge this application.

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[21] 2018 (3) SA 380 (SCA). Compare MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC); Merafong City Local Municipality v AngloGold Ashanti Ltd 2017 (2) SA 211 (CC); Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC).

Is PAJA applicable in these proceedings?

[47] From the onset, it can be assumed that the applicants acknowledge and concede that the Department did take action against Lonmin which resulted in the invocation of the Section 93(1) notices, in order to ensure that Lonmin complied with its obligations and commitments in the Social and Labour Plan. Furthermore, it is not in dispute and it is common cause that the Regional Manager of the Department conducted an inspection on the **10** and **11 August 2017**, at the Lonmin Mine in relation to the Social and Labour Plan compliance, which report was compiled consequent to the inspection, and that on **30 August 2017, t**he Section 93(1)(b)(i) notice was issued by the Regional Manager, who was duly authorized to do so in terms of this section. The Regional Manager directed Lonmin to take steps to rectify the concerns raised in the Section 93 notice and to submit an action plan within 14 days of the notice. When Lonmin failed to fully comply with the aforesaid Section 93(1)(b)(i) notice, the Regional Manager: Mineral Regulations, issued a Section 93(1)(b)(ii) order, wherein he suspended all mining activities of Lonmin with immediate effect. Having made the necessary representations and having complied with the issues raised, Lonmin submitted an action plan which was accepted by the Department. The amended Social and Labour Action Plan is presently in operation, and will remain applicable until set aside as provided in Section 96(2)(a) of the MPRDA.[22]

[48] The abovementioned common cause facts between the applicants and the respondents, takes care of the order sought in paragraph 1 of the Notice of Motion, namely that it is not necessary to grant a declaratory order, which is to the effect that the Minister failed to take positive steps to ensure that Lonmin complied with its obligations.

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[22] Section 96 (2)(a) provides that:

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

Also see: Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA).

[49] The same approach must be applied to the order sought in paragraph 3 of the Notice of Motion, wherein the applicants seek an order directing the Minister to suspend the mining rights or permits granted to Lonmin respondents, until they have complied with the obligations in terms of the Social and Labour Plan for 2014 – 2018.

[50] I alluded that the Department suspended and later revoked the suspension of Lonmin's mining permit, and duly followed the procedure prescribed in Section 93 in that regard, the reason being that Lonmin should comply with its obligation in terms of the Social and Labour Plan.

[51] Section 47 empowers the Minister or an authorized person to cancel or suspend amongst others, any prospecting right or mining permit if the holder of the permit contravenes the Act.[23] Similarly, Section 93(1)(b)(ii)[24] empowers an authorized person to suspend or terminate prospecting or mining operations of a holder of the relevant right or permit if a contravention or suspected contravention of the provisions of the MPRDA is discovered.

[52] Both Sections 47 and 93 make it imperative for the Minister and the authorized official respectively, to first afford the holder of the right to a permit, reasonable opportunity to make representations and even remedy the contraventions complained about.

[53] Section 93 and 47 seem to be having the same effect, the difference being that in the former, the action is being taken by officials duly authorized whereas in the latter, the Minister or designated person is the one authorized to take action. Besides, the Minister, if he must invoke the provisions of Section 47, to request Lonmin to take certain remedial steps (same as in Section 93) before the permit can be suspended or cancelled.

[23] Id at para 33.
[24] Id at para 32.

[54] Counsel for the applicants, in his written and oral submissions raised an issue which is not supported by the applicants' founding papers, namely, that the official who withdrew the Section 93 notice was not authorized to do so in terms of the MPRDA. He argues that in terms of Section 93(2) of the MPRDA, the Director-General is the only official authorized to confirm or set aside any order contemplated in Section 93(1)(a) or (b). This submission flies in the face of the provisions of Section 103(3) which permits the Director-General to "delegate any power or assign any such, duty to any other officer". Furthermore in the letters setting aside the Section 93 notice and order addressed to Lonmin on **1 December 2017**, the Acting Chief Director: Western Region, states that he was duly authorized in terms of Section 103(1) of MPRDA to act as he did.

[55] The MPRDA clearly defines that any action taken by the authorized officials in terms of Section 93, falls within the purview of an administrative action as defined in Section 1 of PAJA.[25] The applicants' case took a different approach in the replying affidavit when they conceded that PAJA is applicable for the purpose of reviewing the administrative action taken by the officials of the Department. They even went further to state that the Minister should have invoked the provisions of Section 47 when Lonmin failed to comply with the Section 93 notices.

[56] Despite conceding in the replying affidavit that the Minister or the Director-General or their delegate exercised an administrative action as defined in PAJA and that failure to act in accordance with the statutory obligation by the Minister or Department officials renders the act reviewable in terms of the procedures prescribed by PAJA, counsel for the applicants submits that "the mandate of the Minister, which has its origins in the Constitution, is not administrative but executive."

[57] This submission is inconceivable in that this Court cannot prescribe to the executive arm of the State or the administrator of government to follow a procedure prescribed in either Section 47 or 93, which tend to achieve the same result. The Minister or the Department is empowered to monitor the implementation of the

[25] Id at para 35.

Social and Labour Plan. The Court must in this case avoid encroaching upon the executive functions and powers entrusted upon the Minister and the Department, and should in the circumstances exercise judicial deference.

See **Bato Star**[26] at paragraph [48] where the court said:

> "[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

[58] Counsel for the applicants submits that the Acting Chief Director had no authority to withdraw the Section 93 orders and sought to persuade this Court to set that administrative decision aside in order for the suspension order issued by the Acting Chief Director, which suspended the mining permit of Lonmin, to stand and remain applicable. In other words, he submits that the Section 93 order should be

[26] Bato Star above n17; compare Government of the RSA v Von Abo 2011 (5) SA 262 (SCA).

reinstated. This argument is not supported by the orders sought in the Notice of Motion and founding papers of the applicants. Furthermore, I wish to remark that some of the objectives of the MPRDA is to promote and enforce the implementation of the Social and Labour Plan.[27] Lonmin will not be in a position to fulfil its obligations in terms of the Social and Labour Plan if its mining operation is suspended or terminated, with dire consequences to the beneficiaries of the Social and Labour Plan.

[59] The Department has taken the necessary steps to ensure that Lonmin complies with its undertakings. It directed Lonmin to submit an amended Social and Labour Plan, whose implementation will be constantly monitored by it, to the benefit of the community of the Bapo-Ba-Mogale Community. I reiterate that suspending the mining permit will not benefit the community in that Lonmin will be incapacitated and deprived of the opportunity to mine and generate income. A declaratory order in that regard will not be appropriate. I am of the view that the applicants should be non-suited in respect of the orders sought in paragraphs 1 and 3 of the Notice of Motion.

Is Section 24(b)(ii) of the Constitution applicable?

[60] Section 24 of the Constitution provides that:

> "**Environment** – Everyone has the right –
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and

[27] See Section 2(d);(g) and(i) of the MPRDA in [28] above.

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[61] One of the objects of the MPRDA is to give effect to Section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. This objective, is occasioned by the provisions of Section 24(b)(iii) of the Constitution.

[62] The applicants do not seem to rely on Section 24(a). The power to enact legislative measures as prescribed in subsection (b) is vested in the Legislature and has no bearing on the Lonmin respondents. Furthermore, the applicants do not allege any failure by the Minister to enact legislation that prevents pollution and ecological degradation, promote conservation and secure ecologically sustainable development.

[63] Counsel for Lonmin respondents, referred to the various legislative enactments which aim at giving effect to Section 24(b)(iii) namely, the National Environment Management Act 107 of 1998 (NEMA) including the MPRDA. The right entrenched in Section 24 only plays a subsidiary or supporting role. See **My Vote Counts NPC v Speaker of the National Assembly and Others,**[28] where the court held that:

> "[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.'' (footnote omitted)

[28] 2016 (1) SA 132 (CC) at paras 53 and 160.

> "[160] Contrary to the suggestion in the minority judgment that our insistence on compliance with the principle puts form ahead of substance, this principle plays an important role. The minority judgment correctly identifies the 'interrelated reasons from which the notion of subsidiarity springs'. First, allowing a litigant to rely directly on a fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, 'would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation'. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, 'allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of two parallel systems of law'." (footnotes omitted)

[64] I am of the view that the order sought in paragraph 2 of the Notice of Motion is displaced and not substantiated by the applicants' founding papers. This order cannot be granted.

Interdict

[65] The applicants are also seeking an interdict against Lonmin restraining them from ceding and or transferring their mining rights to Sibanye-Stillwater, pending the implementation of its obligations arising from the Social and Labour Plan of 2014 to 2018.

[66] Once again, the order sought is not supported by any facts. There is nothing in the applicants' papers to substantiate the allegation that the purported transfer of the mining permit is a scheme aimed at avoiding the obligations contained in the Social and Labour Plan. Firstly, the allegation is factually incorrect in that the transaction is an all share purchase in terms of which Sibanye-Stillwater would purchase the issued shares in Lonmin and has no bearing on the Social and Labour Plan. This is conceded by Counsel for applicants.

[67] Secondly, the mining rights cannot be transferred or ceded or cannot be alienated without the written consent of the Minister as prescribed in Section 11 of the MPRDA.[29] Applicants have not established a prima facie right that would entitle them to interdict Lonmin from transferring or even ceding its issued shares. Counsel for the applicants argued that if the Court sets aside the administrative action by the Department officials taken in terms of the Section 93 notice, then in that case, the applicants will not pursue the restraining order sought in paragraph 4 of the Notice of Motion.

[68] I have already indicated above, that the applicants are not entitled to the declaratory orders sought. As a result, I assume that, the applicant will still persue the restraining application for an interdict. None of the elements for an interdict were alleged in the founding papers .Furthermore, the applicants' reliance on various factual scenarios, make it difficult for one to comprehend as to the exact order sought in the Notice of Motion. Applicants are seeking a declaratory order directing that the Department failed to take action against Lonmin for its failure to comply with the Social and Labour Plan; and consequently that the Department or the Minister should be ordered to suspend the mining rights permit, until such time that Lonmin has complied with the Social and Labour Plan. In the meantime Lonmin should also be restrained from transferring its shares to Sibanye-Stillwater, in order for Lonmin to comply with its undertaking in the Social and Labour Plan. I will in the circumstances assume that they are seeking a temporary interdict. The nature of the order sought is contradictory: Lonmin should be ordered to stop operating, and its mining licence should be suspended. Whilst its mining operation is being suspended, Lonmin should not be allowed to transfer it's issued shares and yet it is expected of Lonmin to generate income in order to comply with its Social and Labour Plan obligations.

[69] In considering an application for a temporary restraining order, together with all the orders sought in the Notice of Motion, the Court should be careful not to traverse

[29] Section 11(1) provides that: "A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies."

into the power and jurisdiction of the executive or legislature which stands to be determined to finality by a judicial review process. The applicants have not established grounds that would entitle this Court to interfere with the administrative actions adopted and applied so far by the Minister and the Department. Furthermore, the applicants have not established a prima-facie right, or that they will suffer any irreparable harm or a well-grounded apprehension of irreparable harm or that the balance of convenience favours them, and that they have no other satisfactory remedy available. To the contrary, I find that this court cannot in the circumstances of this case, prevent Lonmin from exercising its rights to take decisions that will enhance its business opportunities, which will in no way effect it obligation in terms of the Social and Labour Plan.

[70] The following remarks by retired Deputy Chief Justice Moseneke in **National Treasury and Others v Opposition to Urban Tolling Alliance and Others**[30] are apposite:

> "[26] A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds.[31] A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully. Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review except perhaps where the review has no prospects of success whatsoever."

[30] 2012 (6) SA 223 (CC) at para 26

[31] In England, the courts require an applicant seeking an interim injunction to prevent a statutory body from exercising its powers to establish a real prospect that the applicant will succeed in trial. See *Smith v Inner London Education Authority* [1978] 1 All ER 411. In Canada, the Supreme Court has held that a public body seeking to establish irreparable harm for the purpose of resisting an interdict will be subject to a less onerous standard than a private party. See *RJR- MacDonald Inc v Canada* [1994] 1 R.C.S. 311 at 346.

Costs

[71] The applicants approached this Court on a wrong procedure, when they were aware of the well-established principle of our law that they were to launch an application for a judicial review in terms of PAJA. The respondents have substantially succeeded in this application. I am of the view that costs should follow the result. There will be no order as to costs against the intervening applicants since they were only admitted as *amici*.

Order

The application is dismissed with costs, which costs shall include costs of two counsel.

_____
M M LEEUW
JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION

APPEARANCES:

Date of Hearing	:	26 OCTOBER 2018
Judgment Handed Down on	:	28 FEBRUARY 2019
Counsel for the Applicant	:	Adv Malana & Adv Sekwaeng
Counsel for the First Respondent	:	Adv Mphaga SC & Adv Rantho
Counsel for the Fifth to Seventh Respondents	:	Adv Loxton SC & Adv Milovanovic
Attorneys for the Applicant	:	Kgomo Attorneys
Attorneys for the First Respondent	:	State Attorney
Attorneys for the Fifth to Seventh Respondents	:	Van Rooyen Tlhapi & Wessels Inc.