THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: J2688/18
& JR1948/18

In the matter between:

Bon Accord Environment Forum **Appellant**

And

The Department of Mineral Resources:
Chief Inspector of Mines (Gauteng Region) **First Respondent**

FOUR RIVERS TRADING 263 (PTY) LTD **Second Respondent**

In re

BON ACCORD ENVIROMENTAL FORUM **Applicant**

THE DEPARTMENT OF MINERAL RESOURCES:
CHIEF INSPECTOR OF MINES (GAUTENG REGION) **First Respondent**

PRINCIPAL INSPECTOR
OF MINES (GAUTENG REGION) **Second Respondent**

FOUR RIVERS TRADING 263 (PTY) LTD **Third Respondent**

Heard: **29-30 October and 10 – 11 December 2020**

Delivered: **13 January 2021**

Summary: Appeal in terms of section 58 of Mine Health and Safety Act, No. 29 of 1996 (MHSA). Jurisdictional powers of the Labour Court in terms of the MHSA considered. Review in terms of section 6 of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). The Labour Court lacks jurisdiction to entertain a PAJA review in this instance. An appeal in terms of section 58 of the MHSA is the only prescribed remedy for the exercise of powers emanating from the MHSA or where a decision is taken in terms of section 57 (3) of the MHSA.

Section 82 of the MHSA is there specifically for disputes about *interpretation and application* of the MHSA. Interpretation and application of the MHSA does not involve a review in terms of PAJA. Where exercise of power is involved the issue is whether the functionary exercised the powers correctly and purposefully or not. The Principal Inspector exercised the powers emanating from the regulations correctly, thus the appeal must fail. Section 57 (3) appeal – the decision to refuse to entertain the appeal was correct since the appeal was lodged outside the prescribed time period.

However, the refusal to entertain the appeal in of itself involves an exercise of statutory powers and appealable to the Labour Court. Equally, the Chief Inspector was correct in exercising the refusal powers. Held: (1) The Labour Court lacks jurisdiction to entertain a PAJA review. Held: (2) The appeal is dismissed. Held: (3) The appellant/applicant to pay the costs which includes the costs of a senior counsel.

JUDGMENT

MOSHOANA, J

Introduction

[1] In this matter the applicant/appellant elected to challenge effectively the same decision using two processes. It lodged an appeal in terms of section 58 of the Mine Health and Safety Act[1] (MHSA) against the decision to refuse and or not set aside on internal appeal the decision of the Principal Inspector in granting the mine, Four Rivers Trading 263 (Pty) Ltd (Four Rivers) permission to blast. It also launched a review application in terms of section 6 of the Promotion of Administrative Justice Act[2] (PAJA) challenging the decision to grant Four Rivers permission to blast. What is involved in this matter is the granting of the permission to blast, which permission was granted on 18 October 2017. Both the appeal and the review application are opposed by the Inspectors and Four Rivers.

Background facts

[2] The applicant/appellant Bon Accord Environmental Forum (the BAEF) is a voluntary non-profit organization established with the aim to promote and embrace sustainable and ethical environmental practices within the Bon Accord community. Suffice to mention at this stage that in terms of section 38 (1) (c) of the Constitution of the Republic of South Africa, 1996 (the Constitution), anyone acting as a member of, or in the interest of, a group or class of persons may approach a Court. The BAEF is such a person. There are about 18 individual home owners who joined the Court proceedings.

[3] Pertinent to the present application/appeal, the essential facts are that on or about 13 July 2017, Four Rivers sought permission to conduct blasting operations within a horizontal distance of 500 meters as required by the applicable regulations. On or about 31 July 2017, Mr F J Nkuna in his official capacity as the Principal Inspector issued the permission sought. Shortly thereafter the BAEF raised a complaint with the Principal Inspector. On 28

[1] No. 29 of 1996
[2] No. 3 of 2000

August 2017, through its attorneys of record, the BAEF lodged a formal complaint through a letter. Largely, the BAEF complained about the distances from the area where the blasting will occur or had occurred on the strength of the first permission.

[4] Owing to the complaint lodged, the Principal Inspector suspended the permission granted pending the investigation of the distances recorded in the supporting documentation. This suspension was viewed by Four Rivers as a reviewable irregularity. However, the decision to suspend the permission granted was never formally challenged. For a period of almost three weeks there were various engagements, in the form of meetings and correspondence amongst the relevant parties. Ultimately on 18 October 2017, the Principal Inspector issued another permission to conduct blasting operations (the impugned decision).

[5] On 18 December 2017, the BAEF lodged an internal appeal against the decision of the Principal Inspector granting permission to conduct blasting operations. Owing to the fact that the prescribed 30 days' period had elapsed, the BAEF sought condonation as well. On 6 June 2018, the Chief Inspector issued a decision to the following effect: "*I hereby dismiss your appeal and further refuse to condone your late filing of the appeal. You failed to provide valid appeal grounds. I also refuse to condone your late filing of the appeal because you don't have any prospects of succeeding on the grounds that you have provided.*"

[6] Aggrieved by the above decision, on or about 7 August 2018, the BAEF lodged an appeal in terms of section 58 of the MHSA. Consequent upon that on or about 18 September 2018, the BAEF launched a review in terms of section 6 of PAJA. Both the appeal and the review are opposed by the three respondents.

Preliminary issues

[7] The BAEF took a point that the answering affidavits of all the respondents are late and it objected to them in a replying affidavit. Since they have not sought condonation the affidavits should not be taken into account and the application for review should be heard on an unopposed basis, it was submitted. In opposition to the point, all the respondents argued that since there was no objection within the contemplation of the practice manual, a condonation application is not required. In retort, the BAEF submitted that an objection was raised in a replying affidavit and on the strength of the decision of *Temba Big Save CC v Mlamli Kunyuza and others*[3], condonation was required. This Court extemporaneously ruled that the answering affidavits are admitted nonetheless.

[8] Briefly, the reasons for that ruling are as follows. In terms of the practice manual the objection ought to be made within 10 days of receipt of the offending affidavits after which time the right to object shall lapse. In terms of the filing sheet, the first and second respondents delivered their answering affidavit on or about 21 July 2020. There is no indication as to when this answering affidavit was received by the BAEF. However, the replying affidavit was deposed to on 3 September 2020. In it, it is only alleged that the answering affidavit was served very late. The only assumption to make is that the very late must mean 21 July 2020, since the review application was launched in September 2018. In the replying affidavit it is mentioned that due to the lockdown period, there was a delay in replying to the answering affidavit and condonation was sought. Contrary to the submission made, there is no indication of any objection to this answering affidavit. On this basis alone, there was no need for the first and second respondents to seek condonation. In any event the time period within which to object had long lapsed when the replying affidavit itself was ironically served out of time.

[9] With regard to the answering affidavit of Four Rivers, according to Michelle Smit, the deponent to the replying affidavit, the answering affidavit was delivered on 23 September 2020. The BAEF served the replying affidavit onto

[3] Case JA40/2015 dated 28 June 2016 (LAC)

Four Rivers on 14 October 2020. According to the submissions made in Court the objection was raised in the replying affidavit, thus the objection was lodged on 14 October 2020. The prescribed objection period lapsed on 8 October 2020. The period having lapsed, the right to object lapsed. On this basis alone, there was no condonation required from Four Rivers.

[10] For the sake of posterity, it is important to clarify the judgment of *Temba Big Save.* On the facts of that judgment, the objection was raised in the form of a *point in limine* in a replying affidavit. Although it is unclear from the facts of that case, it can be safely assumed that the replying affidavit was filed 5 days from the day on which an answering affidavit was delivered as required by rule 7 (5) (a) of the Labour Court Rules. At that time the prescribed 10 days for a valid objection would not have lapsed. In *casu*, the BAEF did not necessarily object. The deponent simply stated that neither of the respondents sought condonation after being more than 2 years late in opposing the matter.

[11] Thereafter the deponent humbly stated that on that basis alone the respondents should not be allowed to oppose the matter. In my view this does not constitute an objection. In law, the dictionary meaning of *objection* is the formal registration of protest against admission of a piece of evidence on the grounds of some legal defect. Regard being had to the text of clause 11.4.2 of the practice manual, the objection must be to the late filing of the offending affidavit. It is required that the other party must be given notice of the objection. The importance of the notice is that only then would the other party know that there is a protest and for that party to only then seek condonation. In my view, the clause anticipates a clear and unequivocal notice of protest. The Shorter Oxford English Dictionary sixth edition volume 2 defines *objection* to mean the action or an act of stating something in opposition or protest; counter-argument; an adverse reason or statement, feeling of disapproval or reluctance. To my mind, owing to the grammatical meaning of the word, an objection must be clear, unambiguous and unequivocal.

[12] In as much as this Court accepts that a valid objection may be raised in a replying affidavit, it must be noted that in a replying affidavit, a party replies to the allegations made in an answering or opposing affidavit. In my view, answering to the allegations is inconsistent with the grammatical meaning of the word objection. In delivering a reply there is no indication of a feeling of disapproval or reluctance. Stealing from the provisions of rule 30 of the Uniform Rules, the answering affidavit that is to be objected to would constitute an irregular step as it were[4]. In terms of rule 30 (2) (a) an aggrieved party is prevented from applying to Court to set aside an irregularity if that party has taken a further step in the cause with the knowledge of the irregularity. Similarly, in my view, where a party has replied to the allegations in the answering affidavit, such a party is not entitled to thereafter or symbiotically object to the replied to affidavit[5]. As it is often times said, water is under the bridge at that time. One of the factors to be considered in a condonation for late filing is prejudice. A party who has answered to the allegations would be hard-pressed, in my view, to demonstrate any prejudice.

[13] Perhaps a word of caution is not out of line. In order to give the clause its intended effect and purpose, parties should object to the affidavit in a clear and unambiguous manner in a formal notice without necessarily replying to the allegations made in the affidavit objected to[6]. Practically, once the Court grants the condonation and admit the offending affidavit, the five days' period begins to run after an order granting condonation. Axiomatically, if the Court refuses condonation, there is logically no reason to reply.

[4] *University of North-West Staff Association and Others v Campus Rector of the University of North-West and Others* [2007] ZANWHC 51 (27 September 2007), where Mogoeng JP (as he then was) held that filing of an answering affidavit without condonation for the late filing constituted an irregular step in terms of rule 30. See also *Ardnamurchan Estates (Pty) Ltd v Renewables Cookhouse Wind Farms 1 (Pty) Ltd and Others* [2020] ZAECGHC 132 (1 December 2020) at para 26 where Kroon AJ correctly held, in my view, that where an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of rule 27 (1) to afford a respondent an extension for the delivery of the answering affidavit.

[5] See *Mynhardt v Mynhardt* 1986 (1) SA 456 (T)

[6] *Ardnamurchan* at para 27

[14] I do mention in passing that this is an important matter for the parties involved. It would certainly have offended the provisions of section 34 of the Constitution to have not admitted the answering affidavits, particularly in the absence of demonstrable prejudice. Thus, when objecting, litigants must keep at the back of their minds the provisions of section 34 read with section 1 (d) (iv)[7] of the LRA.

Evaluation

Jurisdiction of the Labour Court

[15] During oral submissions this Court *mero motu* raised the issue of jurisdiction and directed the parties to address it accordingly. The applicant, BAEF supported by Four Rivers on the issue, argued that this Court retains jurisdiction on the PAJA review application. The Inspectors argued that this Court lacks jurisdiction to entertain the PAJA review. There is no dispute that the Labour Court has appeal jurisdiction over the refusal to set aside the decision of the Principal Inspector during an internal appeal or the exercise of any powers in terms of the MHSA. The only concern raised *mero motu* by this Court was in relation to the jurisdictional powers of the Labour Court on the PAJA review application. Parties were afforded an opportunity to submit further written submission on the issue of jurisdiction in order to augment oral submissions made in Court after the invitation by the Court. The parties duly submitted written arguments. The BAEF placed heavy reliance on the decision of the Labour Appeal Court in *Merafong City Local Municipality v SAMWU and another*[8]*.* In my view, this case does not support the argument that the Labour Court retains jurisdiction in a PAJA review. In that case section 158 (1) (h) of the LRA was involved. The Court, correctly in my view, concluded that where reference is made to any grounds permissible in law in the section, such reference also includes grounds under PAJA. This matter is

[7] To promote effective resolution of labour disputes.
[8] [2016] 8 BLLR 758 (LAC) at para 38.

not brought in terms of section 158 (1) (h) for a simple reason that the State or its organ for that matter is not featuring in its capacity as an employer.

[16] In addition, reference was made to the decision of this Court by my brother Van Niekerk J in *AMCU v Minister of Mineral Resources and Energy and others*[9]. In this matter, the Mineral Council and AMCU reached consensus on the terms of the order. The draft order provided to my brother, required the Court to determine two issues; viz, reviewability of the chief inspector's decisions and the costs issue. That judgment did not squarely deal with the issue of the jurisdiction of the Labour Court. It simply stated that AMCU relied on section 6 of PAJA. The provisions of section 7 (4) of PAJA were not considered in that judgment. In my view, this is the section that implicates the jurisdiction of the Labour Court[10]. My brother only stated the following:

> '[45] …Although AMCU sought to invoke this court's constitutional jurisdiction in respect of the constitutional validity of the regulations issued under the DMA and the DMRE minister's directions, the matter was ultimately proceeded and was decided on the basis of the court's jurisdiction in terms of s 82 of the MHSA, which confers exclusive jurisdiction of this court to determine any dispute about the interpretation or application of any provisions of the Act, except where the Act provides otherwise.'

[17] It is apparent that AMCU sought to invoke section 157 (2) of the LRA jurisdictional powers. Based on the above, Van Niekerk J did not uphold the

[9] Case J427/2020 delivered on 4 May 2020.

[10] Mr Ramaepadi SC, appearing for the Inspectors submitted that section 7 (4) of PAJA does not confer jurisdiction but only confirms jurisdiction conferred by section 169 of the Constitution. He correctly submitted that the jurisdiction of the Labour Court arises from section 157 (1) and (2) of the LRA. In as much as I agree with the submission, in my view, the import of section 7 (4) ought to be understood from the provisions of section 7 (3) of PAJA. Until the rules are in place, only the High Court retains jurisdiction for judicial review under the Act. Other Courts like the Labour Court can assume jurisdiction once jurisdiction is conferred to them by the rules or law. He correctly submitted that the Constitutional Court in *Gcaba v Minister for Safety and Security and others* 2010 (1) SA 238 (CC) resolved the jurisdictional tussle between the High Court and the Labour Court. Until recently, this Court was of a view that the issue is finally resolved. However, the Constitutional Court in *Baloyi* stated the following: "[24] Crucially, section 157 (1) does not afford the Labour Court general jurisdiction in employment matters and as a result, the High Court's jurisdiction will not be ousted by section 157 (1) simply because a dispute is one that falls within the overall sphere of employment relations. This statement suggests to me that the issue of section 157 (1) and (2) of the LRA on jurisdiction is not fully settled.

constitutional jurisdiction plea. Of course it is unclear from the judgment whether the invocation of section 82 of the MHSA was by agreement between the parties and the judge or not. However, as it shall be demonstrated later in this judgment, section 82 of the MHSA only applies to issues of interpretation and application of the MHSA and nothing more. It is interesting to note that the order made by Van Niekerk J related to costs only. By necessary implications although section 82 of the MHSA was mentioned, the Court did not exercise jurisdictional powers emanating from the section but exercised section 162 (1)[11] of the LRA powers.

[18] Therefore, in my view, this judgment is not authority for the proposition that the Labour Court retains jurisdiction under PAJA. Thankfully, Mr Watson, appearing for Four Rivers, brought to my attention the decision of the High Court in the matter of *Rustenburg Platinum Mines Ltd v Chief Inspector of Mines and another*[12]*.* In my view, this judgment is on point. The issue of the Labour Court's jurisdiction squarely arose before De Vos J. The learned judge arrived at the following conclusion, which I respectfully associate myself with:

> '[11] It was argued on behalf of the respondents that there is no justification in reading into section 7 (4) of PAJA that the jurisdiction of the Labour Court is expressly or by necessary implication ousted. It seems to me however that the words "must be instituted in a High Court" have a clear and unambiguous meaning, namely that all applications for judicial review based on PAJA must be instituted in a High Court. This does not mean "a High Court or a court of similar status" as contended by the respondents. This simply means the High Court…It is clear to me that until such time as the rules of procedure for judicial review in terms of section 7 (3) have been implemented, the Labour Court does not have jurisdiction to hear review applications based on PAJA.'

[19] In an attempt to disagree with this clear statement of law, Mr Watson submitted that since section 82 of the MHSA affords the Labour Court

[11] (1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
[12] [2006] JOL 16553 (T).

exclusive jurisdiction, this Court also assumes jurisdiction under PAJA. I disagree. It must be remembered that the grounds of review under PAJA were not magically ushered in by PAJA. They existed in common law decades before being consolidated and legislated in PAJA. Thus in a common law review anticipated in for instance section 158 (1) (g) and (h) a party, as correctly found in *Merafong supra* may rely on those grounds because they are now recognised by the statutory law in PAJA. Such reliance does not axiomatically mean that section 7 (4) of PAJA is inconsequential. Later in this judgment, I shall deal with the provisions of section 82 of the MHSA.

[20] Another judgment relied on is that of Acting Justice Venter in the matter of *Glencore Operations South Africa (Pty) Ltd v Minister of Mineral Resources and others.*[13] Similarly, in this judgment, the learned Acting Justice did not pointedly address the issue of the jurisdiction of the Labour Court under PAJA. The closest the learned Acting Justice came to the jurisdiction issue, in an epilogist manner in my view, was when he concluded as follows:

> '[42] As no internal remedy is provided, the applicant is entitled to approach this court[14] and seek the review and setting aside of the administrative action in terms of PAJA.'

[21] It is apparent that the above conclusion was actuated by the learned Acting Justice's reading of section 57 (1) of the MHSA. The Acting Justice resorted to the section in order to avert the provisions of section 7 (2) (a) of PAJA. The Acting Justice departed from the premise that an appeal contemplated in the section is an available internal remedy. It is indeed correct that an appeal in terms of section 57 (1) constitutes an internal remedy. I am unable to agree that where an internal remedy is unavailable, then *ex hypothesi* the Labour Court retains jurisdiction to review. The primary jurisdiction in a PAJA review is that of the High Court and another Court clothed with jurisdiction. In my view, this judgment too is not authority for the proposition that the Labour Court retains jurisdiction.

[13] JR 91/2014 delivered on 3 February 2016
[14] This Court being the Labour Court.

[22] The last judgment relied upon is that of my brother Lagrange J in the matter of *Impala Platinum Ltd v Mothiba N.O and others*[15]*.* Other than assuming jurisdiction under PAJA, my brother did not in his judgment deal with the issue of the jurisdiction of the Labour Court. It is apparent that my brother departed from the premise that the Labour Court does have jurisdiction under PAJA. Nowhere in the judgment does my brother deal with the provisions of section 7 (4) of PAJA. He did not remotely suggest that the judgment of De Vos J, which is a binding authority was wrongly decided. Again I take a view that this judgment too is not authority for the proposition that the Labour Court retains jurisdiction.

[23] To my mind, jurisdiction does not depend on whether a Court has in the past erroneously assumed jurisdiction, but it depends on whether the statute or the law in general does afford the Court jurisdiction. This is different from where certain jurisdictional facts must exist before jurisdiction is exercised. Under such circumstances an assumption may be made that such facts did exist before a Court exercised jurisdiction. Where a Court is a creature of statute, like the Labour Court is and the statute that begot it does not afford it jurisdictional powers, then jurisdiction cannot be exercised. In *Evans v Oregon Short R. R. Co*[16], the following was said:

> "If a court has no jurisdiction of the subject of an action, a judgment rendered therein does not adjudicate anything. It does not bind the parties, nor can it thereafter be made the foundation of any right. It is a mere nullity without life or vigour. The infirmity appearing upon its face, its validity can be assailed on appeal or by motion to set it aside in the court which rendered it, or by objection to it when an effort is made to use it as evidence in any other proceedings to establish a right."

[24] On application of the principle *stare decisis et non quieta movere*, only the *ratio decidendi* is binding[17]. Where a decision is such that legal consequences

[15] JR2567/13 delivered on 16 September 2016.
[16] [1915], 51 Mont 107
[17] *R v Nxumalo* 1939 AD 580.

follow from certain facts, the decision will be binding in similar matters[18]. A decision on questions of fact is not binding[19]. The conclusion I reach is that all the above decisions relied upon lack binding effect on the issue of the jurisdiction of the Labour Court under PAJA.

[25] The judicial review pathway chosen by the BAEF is one in section 6 of PAJA. Section 6 (1) of PAJA provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. There is no dispute amongst the parties before me that the actions of the Inspectors amount to administrative actions within the meaning of section 1 of PAJA. Later during argument, Mr Ramaepadi SC suggested that the concession was wrongly made since the implicated decision does not meet parts of the definition of an administrative action, in particular the phrase, '*which adversely affects the rights of any person and which has a direct, external legal effect'*. Given the view I take at the end; it is unnecessary to give this argument any consideration. Mr Ramaepadi SC, rightly conceded that should this Court decline jurisdiction, it becomes abstract for the Court to authoritatively answer the legal question.

[26] In order to deal with this jurisdictional question so raised, the best place to start is the provisions of the MHSA. Section 58 provides as follows:

> '58. Right to appeal Chief Inspector of Mines' decision
> (1) Any person adversely affected by a decision of the Chief Inspector of Mines, either in terms of section 57 (3) or in the exercise of any power under this Act, may appeal against the decision to the Labour Court.
> (2) …
> (3) …'

[27] In terms of this section the only prescribed remedy for a decision in terms of section 57 (3) or an exercise of any power under the MHSA is an appeal.

[18] *Shepherd v Mossel Bay Liquor Licensing Board* 1954 (4) SA 852 (C)
[19] *R v Wells* 1949 (3) SA 83 (A).

Ordinarily, every statutory appeal is in a nature of a review.[20] In *Metal and Allied Workers Union v Minister of Manpower*[21], Leon J concluded that an appeal in terms of section 16 (5) (b) of the defunct Labour Relations Act[22] is to be determined as if the Court is a Court of first instance. In terms of section 57 any person adversely affected by a decision of an inspector may appeal. Section 57 (3) specifically provides as follows:

> '57. Right to appeal inspectors' decisions
> (1) …
> (2) An appeal under subsection (1) must –
> (a) be lodged with the Chief Inspector of Mines within 30 days of the decision, or such further period as may be prescribed;
> (b) …
> (3) After considering the grounds of appeal and the inspector's reasons for the decision, the Chief Inspector of Mines must as soon as practicable –
> (a) confirm, set aside or vary the decision; or
> (b) substitute any other decision for the decision of the inspector.'

[28] The first observation to be made is that as pointed out above, the appeal powers are exercisable by this Court in an instance where an appeal against the decision of the Chief Inspector is either confirmed, set aside or varied. The second instance arises when the Chief Inspector exercises any power approbated to him or her by the MHSA. This Court in *Assmang (Pty) Ltd v The Chief Inspector of Mines*[23] had an occasion to say the following:

> '[12] … Section 58 (1) anticipates two types of decisions that may be brought before this Court. The first is where there is a decision in terms of section 57 (3). The second is where an exercise of any power has happened.'

[20] *Klipriver Licensing Board v Ebrahim* 1911 AD 458, 462 *per* De Villiers CJ.
[21] 1983 (3) 238 (N)
[22] 28 of 1956
[23] Case J764/15 dated 22 February 2019

[29] Strictly speaking an appeal against an exercise of any power in terms of the MHSA is akin to a legality review or even a review in terms of PAJA. In a legality review what is involved is the lawfulness and the rationality of the exercise of power. Section 1 (c) of the Constitution states that the Constitution is supreme and the rule of law applies. A functionary who exercises statutory powers is expected to act within the law. In terms of section 1 of PAJA an administrative action means any decision taken by an organ of state when exercising public power or performing public function in terms of any legislation or empowering provisions. There can be no doubt that in considering an appeal, the Chief inspector is performing public function in terms of the MHSA and in exercising any power in terms of the MHSA, the Chief Inspector and or the Principal Inspector performs a public function in terms of the MHSA. In other words, in any Court as defined in PAJA, an adversely affected person may seek a judicial review of the exercise of public function in terms of the MHSA.

[30] However, when it comes to the Labour Court the prescribed remedy in terms of the MHSA is an appeal as opposed to a judicial review. I hold a firm view that where an appeal is provided for statutorily, which appeal requires the appeal Court to reach a decision on the merits, without making provision for the keeping of a record by the administrative authority, a review contemplated in PAJA does not lie[24]. In terms of section 166 of the LRA an appeal against any final judgment of the Labour Court, where it exercises exclusive jurisdiction lies only at the Labour Appeal Court. That being the case, if a PAJA review was anticipated, then the appeal to the Labour Court within the contemplation of section 58 (1) of the MHSA will be relegated to an internal remedy, which section 7 (2) of PAJA requires that it must be exhausted first before any PAJA review. Such a situation is untenable in my view. An appeal

[24] In *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) Van Winsen AJA stated that the law requires a party with a single cause of action to claim in one and the same cause of action whatever remedies the law accords him upon such cause. This is the *ratio* underlying the rule that, if a cause of action has previously been finally litigated between the parties, then subsequent attempt by the one to proceed against the same cause for the same relief can be met by an exception *rei judicatae vel litis finitae*.

in terms of section 58 (1) of the MHSA is not an internal remedy as contemplated in section 7 (2) of PAJA.

Applicability of section 82 of the MHSA

[31] An argument was advanced that the jurisdiction of the Labour Court to review under PAJA arises from section 82 of the MHSA. I disagree. The BAEF's pleaded case on jurisdiction is as follows:

> '5.1 I am advised that the decisions by the second respondents to issue the first and second permissions, amounted to an administrative action. Accordingly, the provisions of the Promotion of Administrative Justice Act…applies
> 5.2 It is furthermore pointed out that section 7 (4) of PAJA confers jurisdiction in relation to proceedings for judicial review to either the High Court or another Court having jurisdiction.
> 5.3 This is to be read together with the provisions of section 82 of the MHSA…'

[32] Section 82 of the MHSA provides as follows:

> '82. Jurisdiction of Labour Court
>
> (1) The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provisions of this Act except where this Act[25] provides otherwise.'

[33] The section is very specific, the exclusive jurisdiction is for any disputes about the interpretation and application of any provisions of the MHSA. This simply implies that if parties are in dispute about the interpretation of any provisions or application of any provisions of the MHSA they should approach the Labour Court to resolve that dispute. In my view a declaratory relief contemplated in section 158 (1) (a) (iv) is anticipated in section 82. A judicial review is not a

[25] This being the MHSA.

dispute about interpretation or application of the MHSA. It is a wrong reading of the section to separate "*any dispute*" from "*about the interpretation or application*". A generous suggestion that "*any dispute*" literally means any dispute without linking it to the about interpretation or application is, in my view, wrong in law. Conceptually, a judicial review is a remedy and not a dispute. It is fundamentally wrong to read in section 82 a PAJA review and colour it as 'any dispute'. In instances where a judicial review is anticipated as a form of an available remedy the legislature expressly states so. Recently, the Constitutional Court in interpreting the provisions of section 157 (1) of the LRA, in the matter of *Baloyi v Public Protector and Others*[26], stated the following:

> '[44] The exclusive jurisdiction of the Labour Court is engaged where legislation mandates it, or where a litigant asserts a right under the LRA or relies on a cause of action based on a breach of an obligation contained in that Act.'

[34] Section 82 of the MHSA mandates the Labour Court to exclusively deal with a specific cause of action – any dispute about interpretation and application of any provisions of the MHSA. In *Williams v Benoni Town Council*[27], Roper J said:

> "A dispute exists when one party maintains one point of view and the other party a contrary view or a different one. When that position has arisen, the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any less a dispute."[28]

[35] In a judicial review what is required is a decision whereas in an interpretative and application dispute no decision is anticipated but only a dispute in a form

[26] [2020] ZACC 27 (4 December 2020)
[27] 1949 (1) SA 501 (W)
[28] Followed in *Newu v Sithole & Others* [2004] 11 BLLR 1085 (LAC). In *Edgars Stores Ltd v SACCAWU and another* [1998] 5 BLLR 447 (LAC) the Labour Appeal Court approved of a *dictum* in *Durban City Council v Minister of Labour & others* 1953 (3) SA 708 (A) at 712A namely, a dispute "must as a minimum …postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions".

of a disagreement between the parties around interpretation or application of the MHSA[29]. Incidental in the review application as well as the appeal is the interpretation and application of the implicated regulation. Therefore, the issue of the correct interpretation becomes an issue in the dispute but not an issue in dispute – reviewability of the impugned decision. In other words, in order to resolve the dispute – reviewability of the impugned decision - this Court must not simply interpret and apply the regulation[30], but must say something about the decision under attack. Whenever the Labour Court interprets the provisions of the implicated regulation, it does so in order to resolve the issue of lawfulness, rationality and procedural fairness of the impugned decision.

[36] Section 1 of PAJA defines a decision to mean any decision of an administrative nature made, proposed to be made, or required to be made under an empowering provision. An administrative action must be a decision as defined and not a disagreement between parties. It was argued ever so passionately that where section 82 refers to except where this Act provides otherwise it encapsulates the appeal process contemplated in section 58 of the MHSA and the review process contemplated in PAJA. I disagree. The exclusive jurisdiction referred to in the section is specified as that which involves a dispute about the interpretation and application of the provisions of the MHSA and not any other legislation. The exception mentioned in the section refers to section 40 of the MHSA. Section 40, which also deals with jurisdictional powers, provides as follows:

> **'40. Disputes concerning this Chapter**
>
> (1) Any party to a dispute <u>about the interpretation or application of any provisions of this Chapter</u>, other than dispute contemplated in section 26 (8) or 39, may refer the dispute in writing to the commission.'

[29] I agree with Mr Ramaepadi SC when he submitted that the case before me is not about interpretation and application of regulation 4. 16 (2) but about the lawfulness, rationality and procedural fairness of the decision to grant the permission to blast. Put differently, the cause of action is one of a review as opposed to application and interpretation of an Act.

[30] See in this regard *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council* [2010] 6 BLLR 594 (LAC) at para 11 of the judgment.

[37] It is to be observed that the Commission for Conciliation, Mediation and Arbitration (CCMA) has jurisdiction to deal with certain specified disputes about interpretation and application of the MHSA. Therefore, the Labour Court lacks jurisdiction over such specified disputes. To buttress this point section 157 (5) of the LRA, expressly provides that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if any employment law requires the dispute to be resolved through arbitration. This Court does accept that the MHSA is not listed as employment law in section 213 of the LRA and its administration falls under the Minister of Minerals and Energy as opposed to the Minister of Employment and Labour. However, where reference is made to a commission, such means the CCMA established in terms of section 112 of the LRA.[31] Section 40 (4) of the MHSA anticipates arbitration to resolve the dispute. As to what the phrase *interpretation and application* mean, Professor Chang-fa Lo[32] stated the following:

> 'Treaty interpretation is a process of discovering the proper meaning of treaty terms through various interpreting methods; however, treaty application is a process of identifying the source of law and applying it.'

[38] Similarly, Sir Frank Berman[33] has remarked that in international law:

> "There is a virtually inseparable link between interpretation and application; jurisdictional clauses in treaties invariably cover, as a portmanteau category, "disputes over interpretation or application of the present treaty" in such a way that a competent tribunal is not required to distinguish the one from another."

[39] In another scholarly article[34], the following was mentioned:

[31] Section 102 of the MHSA definitions.
[32] Article captioned "*The difference between treaty interpretation and treaty application and the possibility to account for non-WTO treaties during WTO treaty interpretation*" published in IND. INT'L & COMP. L. Vol 22.1
[33] F Berman, 'International Treaties and British Statutes' (2005) 26 Statute LRev 1, 10.
[34] Journal of International Dispute Settlement Vol 2 No 1 (2011): *The distinction between interpretation and application Norms in international Adjudication.*

> "The scenario would include, for an example, what has been characterised as a relatively straightforward question of the interpretation and application of a treaty, in the sense that the international tribunal tends to first determine what a treaty provision means and then apply it to the circumstances of the case."

[40] In *Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*[35], the Labour Appeal Court stated the following:

> '[17] …What then, can possibly be the dispute *about the application of the collective agreement?*
>
> [25] In my view the phrase "interpretation or application" are not disjunctive terms and ought to be read as being related; i.e., disputes about what the agreement means and what it is applicable to.'

[41] According to John Grogan in his work, *Collective Bargaining*[36] a dispute over the interpretation exists if the parties disagree over the meaning of a particular provision and a dispute over application arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances. In short where parties disagree about the meaning of a section in the MHSA and also disagrees about its application in a particular situation, parties are said to be in dispute about the interpretation and application of the MHSA and they can invoke the exclusive jurisdiction of the Labour Court under section 82 of the MHSA.

[42] The conclusion I reach is that a judicial review is not about interpretation and application of the MHSA as such the Labour Court does not attract exclusive jurisdiction under section 82 of the MHSA. In my view the argument that section 82 contemplates a review under PAJA is convoluted and circuitous in nature. It seems illogical for a PAJA review, which stems from section 33 of the Constitution to be housed in another legislation other than PAJA. The MHSA is enacted to provide for the protection and promotion of health and safety of persons at Mines. Whilst PAJA is enacted to give effect to the

[35] [2016] 37 ILJ 1839 (LAC)
[36] [2007] Juta Cape Town.

fundamental rights in section 33 of the Constitution. The two pieces of legislation serve diametrically opposed purposes as it were.

[43] As pleaded it was argued on behalf of the BAEF that section 7 (4) of PAJA contemplates the Labour Court as a Court with jurisdiction. I disagree. Section 7 (4) is specific. It refers to a court having jurisdiction. The provision is peremptory. It states that all proceedings for judicial review in terms of section 6 (1) must be instituted in a High Court or another Court having jurisdiction. This simply entails that the primary jurisdiction under PAJA is that of the High Court. Another Court must first demonstrate that it has jurisdiction. A Court like the Labour Court is as pointed out above a creature of a statute. Thus, it must derive its jurisdiction from the statute that begets it. Section 151 of the LRA establishes the Labour Court. The Labour Court has authority, inherent powers and standing, in relation to matters under its jurisdiction which is equal to that of the High Court. The jurisdiction of the Labour Court emanates from section 157 of the LRA. It has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or any other law are to be determined by it. It has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right arising from employment and from labour relations or an administrative act or conduct of the State in its capacity as an employer and application of any law the administration of which the Minister of Employment and Labour is responsible.

[44] This matter does not involve employment or labour relations. It is indeed so that the BAEF alleges breach of section 33 of the Constitution but the said breach does not arise from employment or labour relations. The MHSA is a legislation to which the Minister of Minerals and Energy is responsible. Clearly section 157 (2) does not afford the Labour Court jurisdiction in the PAJA review. This much was intimated by my brother Van Niekerk J in the *AMCU* matter *supra*.

[45] When it comes to judicial review, the LRA affords the Labour Court review powers under sections 158 (1) (g) – which provides that subject to section

145, the Labour Court can review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law or section 158 (1) (h) – which provides that review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. Before me there is no State in its capacity as an employer. The only occasion where an administrative act of the State may be scrutinized by the Labour Court is where the State features in the capacity of an employer. To that extent, the Labour Court does not have jurisdiction and section 7 (4) of PAJA does not grant the Labour Court jurisdiction.

[46] In light of the above, the conclusion to reach is that the Labour Court lacks jurisdiction to entertain a section 6 (1) of PAJA review application. It is only the High Court that has jurisdiction over the present review application. It was submitted that the Labour Court has an inherent jurisdiction over the matter since it is a superior Court. I disagree. In terms of section 173 of the Constitution, the inherent power of a High Court or Court of similar status is to protect and regulate its own process and not to approbate to itself jurisdiction that it does not have. In any event, section 151 (2) specifically provides that the inherent powers of the Labour Court are in relation to matters under its jurisdiction and not matters outside its jurisdiction. Inherent powers are there to ensure justice[37]. The inherent powers can only be invoked to support the provisions of a statute and not to override or evade other express provisions of a legislation. Quintessentially, the argument of the Labour Court having inherent powers does not assist the BAEF in this regard.

[47] A further argument was advanced that section 158 (1) (j) of the LRA affords the Labour Court jurisdictional powers. I disagree. Properly interpreted, the subsection permits the Labour Court to deal with as opposed to hear and determine all matters necessary and incidental to performing its statutory functions. It must follow that where the Labour Court is not statutorily mandated, it cannot simply deal with a matter. Grammatically, the phrase ‘deal with’ means to take action on. What that means is that whilst performing

[37] See *Ex Parte Millsite Investments Co (Pty) Ltd* 1965 (2) SA 582 (T).

its statutory functions, the Labour Court may deal with all matters necessary and incidental. A matter becomes incidental if it is subordinate in nature. The first principle to observe is that where there is no jurisdiction, a power cannot be exercised. I agree with a submission by Mr Watson to the effect that "*it follows that where an Act of Parliament specifically confers jurisdiction on the Labour Court, that encompasses all necessary or incidental matters and the Labour Court has the power grant effective relief in respect of matters over which it has jurisdiction*".

[48] Section 158 is captioned 'powers of the Labour Court'. Once the Labour Court has jurisdiction, it can deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law. Where the Labour Court does not have jurisdiction it cannot invoke section 158 (1) (j) powers. Dealing with an appeal in terms of section 58 of the MHSA is a matter which is necessary in terms of any other law[38]. Therefore, in this judgment, this Court will only entertain the appeal and not the PAJA review for want of jurisdiction.

[49] One last aspect, the LAC in *Merafong* suggested that section 158 of the LRA is a section that confers jurisdiction over the Labour Court. In my view, that finding does not suggest that the apparent wide powers in section 158 (1) (j) grants the Labour Court jurisdiction even where it is not necessary or incidental to the statutory functions of the Labour Court[39]. I do not believe that it is necessary nor incidental for the Labour Court exercising its exclusive jurisdictional powers under section 82 to at the same time usurp as it were the High Court powers contrary to section 7 (4) of the PAJA. I venture to say that there is no conflict between PAJA and the LRA to necessitate invocation of section 210 of the LRA.

[38] See *Mine Health and Safety Law* W P Le Roux Volume 1 LexisNexis Issue 1 Com – 183 part 10

[39] In *De Beer v The Minister of Safety and Security/ Police and others* [2013] 34 ILJ 3083 (LAC), at paragraph 29 stated the following: "In my view, it was correctly noted in *Maropane*…that if the Labour Court has jurisdiction to hear and determine a matter it would have the power to grant an appropriate remedy, but the mere fact that the Labour Court does have the power to grant a remedy does not mean it has jurisdiction to hear and determine the issue between the parties". (approved *in Booysen v Minister of Safety and Security and others* [2011] 1 BLLR 83 (LAC)

The Appeal.

[50] The appeal contemplated in section 58 of the MHSA is an appeal in a strict sense which involves a re-hearing of the merits but limited to the evidence or information on which the decision under appeal was given; and in which the only determination is whether the decision is right or wrong.[40] As pointed out above section 58 anticipates two types of appeals. In the one where a decision is involved – confirmation, variation or set aside, often times there exists a record in such appeals. In one where there was a simple exercise of any power, there may not be a record. In such instances the Labour Court may go wider and in the exercise of its discretion admit further evidence in considering such an appeal. *Lawrence Baxter* in his work, *Administrative Law,* second impression 1994, states the following:

> "At one end of the spectrum is the so-called 'wide appeal', in terms of which the court is empowered to rehear the matter completely, receiving fresh evidence if necessary, and to decide the issue anew on the merits. Such jurisdiction is most likely to be conferred where judges are as well qualified and in as good a position as the public authority itself to adjudicate upon the matter. If the legislation has not specifically stated that the court may receive fresh evidence and decide the matter afresh, this jurisdiction might be inferred from the fact that: - the legislation expressly requires the appeal court to reach a decision on the merits yet makes no provision for the keeping of a record by the administrative authority.[41]

[51] There is always a difficulty in determining the exact nature of the process where the legislature prescribed an appeal. This difficulty was observed by Trollip J in *Tikly & Others v Johannes, N.O., & others*[42] and he stated that the word "appeal" can have different connotations. Relevant to the matter that was before him it may have meant (a) wider sense appeal; (b) stricter sense

[40] See *V v Passenger Rail (PRASA) and others* (P60/2018) [2020] ZALCPE 6 (7 February 2020].
[41] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.
[42] 1963 (2) SA 588 (T).

appeal or (c) a review guided by honesty and properness. At the end he concluded thus:

> "In view, however, of the fact that after the amplified ruling of the revision court was handed in, the proceedings were then directed solely towards determining the correctness or otherwise of that ruling, I think that the best course would be to give an order declaring that that ruling is correct.

[52] In *Shenker v The Master and Another*[43] De Villiers J A had the following to say:

> "In any case, the word *appeal* in section 107 if and in so far as it relates to sec. 34 (2), is obviously used in an inaccurate and loose sense, and not in its ordinary sense… Now in the case of an appointment of an executor under sect. 34 (2) there is evidently no record of the case upon which an aggrieved party can come into Court, nor does the Act make any provision for the recording of the proceedings. Indeed, there is no case to record and there is no court below. It seems to me for all these reasons that the word *appeal* in section 107, if and in so far as it relates to appointments made under sec. 34 (2) is not used in the sense of, or with the intention of, empowering the Court to retry the merits of an appointment made by the Master under sec. 34 (2) and to exercise afresh the discretion committed to him and to him alone by that subsection. In the present case, therefore, if the courts below were ever requested by the appellant so to retry the merits of the appointment made by the Master, they were justified in refusing the request."

[53] What is required in a matter like the present one is to determine whether the powers under regulation 4.16 were exercisable by the relevant functionary[44]. In the definition section of the MHSA, the Act includes the regulations. Where reference is made to the exercise of any powers in terms of the Act reference includes powers under the regulations. The relevant regulation implicated in this matter provides as follows:

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[43] 1936 AD 136.

[44] See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)

'General precautions

4.16 The employer must take reasonable measures to ensure that:

4.16 (1) in any mine other than coal mine, no explosives charges are initiated during the shift unless –

(a) …

(b) …

(c) …

4.16 (2) no blasting operations are carried out within a horizontal distance of 500 metres of any public building, public thoroughfare, railway line, power line, any place where people congregate or any other structure, which it may be necessary to protect in order to prevent any significant risk, unless –

(a) risk assessment has identified a lesser safe distance and any restrictions and conditions to be complied with;

(b) a copy of the risk assessment restrictions and conditions contemplated in paragraph (a) have been provided for approval to the Inspector of Mines;

(c) Shot holes written permission has been granted by the Principal Inspector of Mines; and

(d) any restrictions and conditions determined by the Principal Inspector of Mines are complied with.

[54] Basically, the regulation imposes certain obligations on the part of Four Rivers as an employer – owner. Ordinarily when an entity obtains mining rights, such an entity is entitled to mine lawfully. Section 102 of the MHSA defines a *mine* when used as a verb to mean the making of any excavation or borehole referred to in paragraph (a) (i), or the exploitation of any mineral deposit in any other manner, for the purposes of winning a mineral, including prospecting in connection with the winning of a mineral. *Prospecting* is defined to mean intentionally searching for any mineral by means that disturbs any tailings or the surface of the earth, including the portion of the earth that is under the sea or under the water, by means of excavation or drilling but does not include mining as a verb. The dictionary meaning of the word *blast* is an

explosion, a destructive wave of highly compressed air spreading outwards from an explosion.

[55] The regulation defines primary and secondary blasting, but in both definitions there is breaking of ground and destruction of rocks. Section 1 of the Mineral and Petroleum Resources Development Act (MPRDA)[45] defines *mining right* to mean a right to mine in terms of section 23 (1). The MPRDA define the words *mine* and *prospecting* almost similar to the MHSA. MPRDA further defines *mining operations* to mean any operation relating to the act of mining and matters incidental thereto. One of the conditions to grant the mining rights is a demonstration that the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally.

[56] Regard being had to the above statutory definitions, blasting as an operation is an inherent and incidental process in mining and or prospecting. Therefore, Four Rivers, obtained the right to blast when it obtained the mining rights. A detailed plan of blasting is an operational issue regulated by the MHSA and is not a requirement during the granting of mining rights.[46]

[57] It is important to note that the regulation states that "no blasting operations" as opposed to "before blasting operations". The word "no" literally means a refusal or denial. When used in a statute or regulation it must mean a denial as opposed to a condition. The significance of using *no* as opposed to *before* is that owing to the fact that blasting is incidental to mining operations, it became necessary to regulate blasting within certain distances. That being said the obligation to ensure that blasting is performed as opposed to permitted in a safe manner lies solely with Four Rivers.

[45] Act 28 of 2002

[46] See *Schimper N.O and others v Director General: Department of Mineral Resources –Free State Province and others* Case 5769/2015 delivered on 11 December 2017. The Court rejected an argument that the mining activities will include blasting with explosives and it did not appear that the applicant mine (applying for mining rights in terms of section 22 of the MPRDA) submitted any tenable plans as to how it would manage threats so caused.

[58] This Court observes that the powers exercisable by the Principal Inspector in terms of the above regulation are to (a) approve a copy of the risk assessment restrictions and conditions; (b) determine and impose restrictions and conditions and (c) permit shot holes in writing. The applicable principle is that functionaries may exercise no power and perform no function beyond that conferred upon them by law. Every incident of public power must be inferred from a lawful empowering source, usually legislation.[47] In this appeal it must be the duty of this Court to determine whether the statutory powers were exercised correctly and if exercised correctly confirm that exercise and if not correctly exercised set aside or vary the exercise.

[59] It is a different question for this Court to determine whether Four Rivers is performing the permitted blasting in accordance with the regulations. It being an appeal and not an interdict, this Court is not empowered to deal with that question. In any event, no interdictory relief has been sought by the BAEF. The central focus for this Court is the exercise of the power or duty and not the consequences thereof. As correctly submitted by the respondents' counsel, a mine may be permitted to blast but may decide against it. That being the case, there will be no consequences that may follow. Thus even if there are no consequences, a challengeable exercise of statutory power is one that is unlawful and irrational once taken. The task of a Court where the powers exercised emanates from a statute is to interpret the provisions including its implications in order to decide whether the powers have been duly exercised[48]. In *Rex v Padsha*[49], Kotze J A stated the law as follows:

> "It is a generally accepted rule of universal application that a power must be exercised within the prescribed limitations and for the purpose intended and no other. It has been well said by Alexander Hamilton that 'there is no position which depends on clearer principles than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void…And it is equally incontrovertible that it is the peculiar and exclusive

[47] See B Beinart 'Administrative Law' (1948) 11 THRHR 204 at 215.
[48] *Mustapha & another v Receiver of Revenue Lichtenburg* 1958 (3) 343 (A)
[49] 1923 AD 281

> province of the courts to declare and expound the law, and to determine whether in any given case, where the authority of a Minister of the Crown, in exercising a power conferred upon him by a statute, is questioned, to test the exercise of this power by the terms in which the Legislature has chosen to confer it."

[60] De Villiers J.A, in the same judgment also echoed the following sentiments:

> "The function of the Court is to ascertain what was the intention of the Legislature as expressed in the Act, and then simply to test the Minister's notice in the light of that intention. I agree that the Minister is not to go outside the limits of his powers … As a general proposition it may be laid down that when a person travels outside his powers, the Court will set him right.

[61] In *R v Lusu*[50], Centlivers C J stated the following:

> "The principles laid down … apply both to acts which public officials claim to have the right to perform and to regulations which may be made under statutory authority. In each case the enquiry is whether the matter questioned falls within the authority of the statute concerned…"

[62] The decisions referred to above are still useful to this day even though they predate our Constitution. In the present constitutional era, section 1 (c) of the Constitution provides that the Republic is one democratic state founded on the supremacy of the Constitution and the rule of law. Thus any interpretation of any law must be done within the prism of the fundamental rights. In the present era, section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 39 (2) of the Constitution provides that when interpreting any legislation every Court must promote the spirit, purport and objects of the Bill of Rights. Even though this Court has taken a view that it does not have jurisdictional powers under PAJA, there can be no doubt that an exercise of statutory powers amounts to an administrative act and if not that exercise is

[50] 1953 (2) 484 (A)

circumscribed by the doctrine of legality as commanded by section 1 (c) of the Constitution. The Constitution requires that every exercise of statutory power must be lawful[51] and be within purpose[52].

[63] In other jurisdictions like in Canada[53], the exercise of statutory power is aptly referred to as "*statutory power of decision*". In that jurisdiction, when a right of appeal is afforded in the empowering legislation, the Court's powers are limited to matters of law and jurisdiction. However, the approach of the Courts to appeals from administrative decisions has been strongly influenced by the law governing judicial review. In that process judicial review supervises statutory decision makers to ensure that the decision is within the legal authority (jurisdiction) of the decision maker, and made in accordance with the law. An observation was made that judicial reviews engages the rule of law[54].

[64] It is worth emphasising that judges, where necessary, must show deference to the expertise of the administrative decision maker[55]. Relevant to this matter, it will be wrong, in my view, for a judge to conclude that a risk assessment copy should not have been approved. The Court lacks expertise when it comes to assessments of risk in a mining operation, whilst a Principal Inspector is better placed to decide that question of fact. Similarly, it will be wrong for a judge to determine what the appropriate restrictions and conditions to impose when granting written permission to conduct blasting operations are. Of paramount importance is the provisions of section 48 of the MHSA, which provides that the Minister must appoint an officer, with suitable mining qualifications and appropriate experience in health and safety at mines to be a Chief Inspector of Mines.

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[51] *State Information Technology Agency SOC Ltd v Gijima Holding (Pty) Ltd* 2018 (2) BCLR 240 (CC)
[52] *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC); *DA v President of the RSA* 2013 (1) SA 48 (CC); *Albutt v CSVR and others* 2010 (3) SA 93 (CC).
[53] The Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 told us that foreign law may be used as a tool in assisting the Court in coming to decisions on the issues before it. Recourse may be had to comparative law but there is no obligation to consider it. Page 203 at para 28.
[54] See *Dunsmuir v New Brunswick 2008 SCC 9* and Professor Lorne Sossin at (CanLII) Admin L.R. (4th) 1.
[55] See *Bell Canada v Canada* (CRTC) [1998] 1 SCR 1722 and *Caswell v Alexandra Petroleums* [1972] 3 WWR 706.

[65] What the law requires is that such an incumbent must demonstrate suitability and appropriate experience in health and safety at mines. A Principal Inspector of Mines gets appointed by the Chief Inspector of Mines to be specifically in charge of health and safety. The safety is that at the mines. Equally, a person in charge of health and safety at the mines should as a matter of logic be appropriately qualified on issues of health and safety at the mines. In fact, in terms of section 49 (1) (c) of the MHSA, a Chief Inspector is obligated by law to appoint officers with the prescribed qualifications and experience as inspectors[56]. Taking all of this into account, it is difficult to appreciate how a judge, not qualified in health and safety issues at the mines could substitute an approval of a risk assessment copy or better still determine the appropriate restrictions and conditions to conduct blasting operations. The better approach is that in these types of appeals, Courts become guardians of the rule of law for the purposes of compelling administrative functionaries and ensuring that laws falling outside their core expertise are properly interpreted. It must be accepted that Courts have more expertise on issues of law, particularly questions of construction and interpretation of statutes.

[66] When it comes to interpretation of the implicated regulation, this Court can do no better than to defer to the *locus classicus.* In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[57], the Supreme Court of Appeal had aptly stated the following:

> 'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provisions appear; the apparent

[56] See *Notyawa v Makana Municipality and Others* [2019] ZACC 43 (21 November 2019) – where the Court was to consider the suitability of a municipal manager in terms of section 54A of the Systems Act.
[57] 2012 (4) SA 593 (SCA).

purpose to which it is directed and the material known to those responsible for its production'. [My underlining and emphasis].

The grounds of appeal

[67] In terms of section 58 (2) of the MHSA, an appeal to this Court must be lodged in terms of the rules of the Labour Court. Rule 9 provides that a notice of appeal is required; which notice must set out (a) the particulars of the decision that is the subject of the appeal; (b) the findings of fact that are appealed against; and (c) the conclusions of law that are appealed against. In a notice served and filed around 8 August 2018, the appellant exhibited the following grounds of appeal:

67.1 By incorrectly holding that the appellant failed to provide [in]valid appeal grounds;

67.2 By incorrectly holding that the appellant held no prospects of success on appeal, on the grounds provided;

67.3 By failing to grant condonation to the appellant for the late filing of the appeal to the second respondent in terms of section 57 of the MHSA, 1996

67.4 By failing to consider that the blasting permit issued to the second respondent (Four Rivers), dated 31 July 2017 issued in terms of Regulation 4.16 (2) (c) of the MHSA, 1996 was issued *contra* to the provisions of the Regulations, and / or incorrectly holding that such was issued in compliance with the Regulations;

67.5 By failing to consider that the blasting permit issued to the second respondent dated 18 October 2017, issued in terms of Regulation 4.16 (2) (c) of the MHSA, 1996 was issued *contra* to the provisions of the Regulations, and / or incorrectly holding that such was issued in compliance with the Regulations;

67.6 By failing to consider that the issuing of the blasting permit stated in paragraph 2 *supra* amounted to an amendment of the blasting permit stated in paragraph 1 *supra*, contrary to the provisions of the

Regulations, and / or incorrectly holding that such amendment occurred in terms of the Regulations;

67.7 By failing to consider that the second respondent's application for the issuing of a blasting permit(s) stated incorrect distances from the blasting site to surrounding dwellings and or surface structures;

67.8 By failing to consider that the authorisation of blasting in terms of the aforesaid blasting permit(s) endangered lives and or dwellings and or surface structures and or livestock situated in the vicinity of the blasting site, and or by incorrectly finding that the issuing of the blasting permit(s) would not endanger lives, dwellings, surface structures, livestock situated in the vicinity of the blasting site;

67.9 By failing to consider that the second respondent, in applying for the issuing for the blasting permit(s) stated in paragraphs 1 and 2 *supra*, failed to adequately perform and submit a survey, alternatively an adequate survey, on the integrity of the structures in the surrounding area to the blasting site, and or by incorrectly holding that an adequate survey was performed and or submitted;

67.10 By failing to consider that the second respondent failed to correctly identify the structures situated within 500 meters blasting zone from the blasting site, and or by incorrectly holding that all such structures were correctly identified;

67.11 By failing to consider that the second respondent failed to submit a correct and adequate mine surveyor plan indicating the blasting area, and or incorrectly holding that the second respondent did submit such;

67.12 By failing to consider that the second respondent failed to consult with the affected parties situated in the blasting area, and or incorrectly holding that such consultation did occur;

67.13 By failing to consider that the second respondent failed to submit, in relation to the blasting permit stated in paragraphs 1 and 2 *supra*, a proper application for blasting permit(s), and or incorrectly holding that such application(s) were submitted;

67.14 By failing to consider that, in relation to the issuing of the permits stated in paragraphs 1 and 2 *supra*, the affected parties situated in the vicinity

of the blasting site were not consulted and or allowed an adequate opportunity to submit comments in relation to the application for the issuing of blasting permits;

67.15 By holding that the limitations stated in the blasting permits stated in paragraphs 1 and 2 *supra* set forth adequate limitations and or prescriptions (restrictions) pertaining to intended blasting activities in terms of the blasting permit(s);

67.16 By failing to consider that the second respondent failed to submit an adequately prepared risk assessment, and or by incorrectly holding that the second respondent submitted an adequately prepared risk assessment.

Grounds considered

[68] Section 58 (3) of the MHSA requires the Labour Court to consider the appeal. Regard being had to the grounds set out *supra*, it is perspicuous that the BAEF appeals against the decision of the Chief Inspector dated 6 June 2017 and also against the exercise of powers under the MHSA by the Principal Inspector on behalf of the Chief Inspector. For the purposes of the MHSA, the decision of the Principal Inspector ultimately becomes the decision of the Chief Inspector. The Chief Inspector appoints a Principal Inspector. It must follow that when performing any function in terms of the MHSA, the Principal Inspector does so with the blessing and permission of the Chief Inspector, hence s/he has powers to either confirm, vary or set aside decisions of the Principal Inspector.

[69] I therefore read section 58 (1) of the MHSA to mean exercise of any powers by the Principal Inspector on behalf of the Chief Inspector. Once a decision of the Principal Inspector is confirmed, particularly where he or she was exercising powers emanating from the MHSA, ultimately the decision of the Chief Inspector becomes his or hers. Parties agreed that the permit of 31 July 2017 has since become irrelevant in these proceedings. For that reason, any exercise of power in relation to it would not be discussed and considered in

this judgment. I must state that later on Ms Wilson submitted that on the strength of the judgment of the *MEC for Health Eastern Cape and another v Kirkland Investments (Pty) Ltd*[58]*,* this Court is obliged to still set the 31 July 2017 decision aside. I disagree. The first and the second decisions are effectively one. Both sought to give Four Rivers permission to blast. The one (31 July 2017 decision) was suspended whilst investigations were being conducted. On application of the mootness principle, making a decision on the replaced decision will have no practical effect to the parties. On the exercise of powers by the Principal Inspector, it is apparent from the grounds, supported by the written and oral submissions in Court that the BAEF laments the incorrect or purposeless exercise of the powers in regulation 4.16 (2).

[70] In order to give meaning and context to the implicated regulation, regard must first be had to section 50 (2) (h) of the MHSA. In terms thereof, an Inspector, which means a Principal Inspector as well, may for the purposes of monitoring or enforcing compliance with the Act perform any other prescribed – as prescribed by a regulation - function. It is apparent to this Court that the purpose of the discretionary power in the regulation is to enforce compliance and ultimately to ensure prevention of any significant risk. Actually what is involved herein is the exercise of mechanical powers. These powers are in the nature of duties. It becomes the duty of a Principal Inspector to approve a copy of the risk assessment; determine conditions and restrictions and to permit blasting operations. In these duties, it is implied, a duty to act according to minimum standards of legality and good administration.[59] In *Affordable Medicines Trust v Minister of Health*[60], Ngcobo J stated that where broad discretionary powers are conferred, such powers must be constrained by the empowering statute as well as the policies and objectives of the empowering statute.

[58] [2014] ZACC 6 (25 March 2013)
[59] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)
[60] 2006 (3) SA 247 (CC)

[71] A while ago the Constitutional Court held that our Constitution requires a purposive approach to statutory interpretation.[61] It is beyond question that people and structures are to be protected from any significant risk. This purpose is buttressed by the requirement of a risk assessment. The purpose of providing the functionary with a risk assessment copy is for him or her to satisfy himself or herself, given his or her expertise[62], that there is no significant risk. If significant risk is identified, then place restrictions and conditions. To a greater extent prevention of a significant risk must be a primary consideration at all times when the exercise of statutory power emanating from the regulations happens. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[63], the Constitutional Court stated the following:

> '[32] The gravamen of the applicant's complaint … is that the Chief Director paid insufficient attention to the requirements of section 2 (j) as repeated in section 18 (5) of the Act. The question to be considered is the proper interpretation of section 2 (j) taking into account section 18 (5) and, in particular, the nature of the obligations imposed upon the Chief Director by these provisions.'

[72] As part of an interpretation process, words employed by the legislature must be given either their grammatical or special meanings. In terms of section 102 of the MHSA, the word *risk* is defined to mean the likelihood that occupational injury or harm to persons will occur. Therefore, the idea behind the provisions is to ensure prevention of significant likelihood of occupational injury or harm to persons and structures. Put differently, blasting must be conducted in such a manner that it avoids significant harm to persons and structures. Again it must follow that the purpose of determining and placing the restrictions and conditions is aimed at preventing the significant risk. The grammatical meaning of the word *approval* is an official approbation. What the Principal inspector must approve at his discretion is the copy of the assessment of the

[61] See *ACDP v Electoral Commission and others* 2006 (3) SA 305 (CC) and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC)
[62] See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53.
[63] 2004 (4) SA 490 (CC).

likelihood of the harm to persons and structures that may occur. In practical terms, this statutory function or duty implies that a document must be placed before the Principal Inspector in order to give it an official approbation. In this matter, there is no dispute that a copy was placed before the Principal Inspector for official approbation.

[73] This Court does not read into the regulation any obligation to ensure that risk does not happen at all. Surely such will be an impossible duty. Inherent in any mining operations is a risk to health and safety. All that can be done is to seek to prevent, where possible, and to minimise the risk. In my view, the issuing of the blasting permit is constrained by the requirement to place conditions and restrictions. These are the statutory constraints in the exercise of the wide discretion that Ngcobo J spoke about. It must be so that there is a significant difference between a statutory power and a statutory duty. Professor Walter B Kennedy[64] aptly puts the position thus:

> "On this point, at least, the position is thus fairly clear. Unless the statute imposes upon a public authority a clear duty designed to protect a class of persons…, the Courts firmly refuse to fetter the administrative discretion of the authority and to interfere with the proper constitutional process of administrative supervision by the higher executive authority, through a conversion of the statutory power into a statutory duty.

[74] However, before me, the BAEF bemoans the strength of the document placed before the Principal Inspector. In its ebullient view the risk assessment copy is weak and not adequate. In considering this view regard must be had to the provisions of the MHSA. In terms of section 11 thereof every employer must assess the risk to health and safety. Risk assessment is nothing more than careful examination of what could cause harm to people, so that one can weigh up whether enough precautions have been taken to prevent or minimise harm. Risk assessment can be done by way of a number of

[64] Professor of Law and Acting Dean, Fordham University School of Law New York City in an article: *Statutory Powers and Legal Duties of Local Authorities* published in Morden Law Review March, 1945.

techniques, which include physical inspections, management and employee discussions, safety audits, job safety analysis, hazard and operability studies and accidents statistics. The legal duty and responsibility for risk assessment and management thereof is that of the owner, in this instance, Four Rivers.

[75] A breach of risk assessment and management responsibility constitutes a criminal transgression. In terms of section 55A, a Principal Inspector may recommend that an administrative fine be imposed to an employer who has failed to comply. Given the arduous legal responsibility on the part of Four Rivers, the approval of the risk assessment copy expected from the Principal Inspector is not one that requires extensive application of mind as argued. What is required is the minimum standard of legality and good administration. The regulations do not prescribe the manner by which the approval must happen. It follows that the manner in which approval must happen is left largely to the discretion of a decision-maker. In *Wotton v State of Queensland*[65], the majority accepted this well-crafted, I must remark, proposition by counsel, S J Gageler SC:

> " …the issue presented is one of a limitation upon legislative power; whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by statute, is valid is not a question of constitutional law; rather, the question is whether the repository of power has complied with the statutory limits; if, on proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case, …, does not raise a constitutional question, as distinct from a question of the exercise of the statutory power."

[76] Similarly, this Court endorses and accepts the above proposition. In my view, it is not too dissimilar to the views expressed by the old Appellate division in the authorities dealt with earlier in this judgment. The question to consider is what process if any did the Principal Inspector follow in giving approval. The regulation is silent on how to effect an approval. To the extent that the BAEF

[65] [2016] FCA 1457

laments lack of consultation, such is not envisaged in the regulation. It is only when a consultation process is prescribed by the enabling law would a Court conclude that the power was exercised unlawfully.[66] It is important to note that consultation as a process is fundamentally different from what is known as procedural fairness or *audi alteram partem* as a rule of natural justice. At the time of application for mining rights, section 23 (4) (b) of the MPRDA requires the Regional Manager to notify the applicant for mining rights in writing to notify and consult with interested and affected parties within 180 days of the notification.

[77] This obligation on the part of the Regional Manager accords with the rules of natural justice since it takes into account the affected parties. As pointed out earlier, blasting is inherent in mining operations, it shall be inconsistent with the purpose of the rules of natural justice that at all times when blasting – part of mining operations – happens, the affected parties must be given a hearing again and again. In my view, this is not what Ngcobo J meant in the minority judgment of *Masetlha v President of the Republic of South Africa*[67] and the majority judgment of *Albutt v CSVR*[68] and *Minister for Justice and Constitutional Development v Chonco*[69]. Having been consulted when the process of the issuing of the mining rights happened, I do not believe that by permitting blasting within a particular distance and the approval of the risk assessment copy affected the rights of the BAEF in a different adverse manner which requires a separate and distinct consultation process. In any event, the persons to be affected are those that live within 500 meters of the blasting area. The contention suggests that those persons as agreed in the meeting with the relevant parties were consulted.[70]

[78] I hasten to mention that the alleged agreed consultation process was not one prescribed or legislated. It was one designed by the Principal Inspector in

[66] See *CETA and another v Minister of Higher Education, Science and Technology and Others* (J113/20) [2020] ZALCJHB 52 (25 February 2020)
[67] 2008 (1) SA 566 (CC)
[68] 2010 (3) SA 293 (CC)
[69] 2010 (4) SA 82 (CC)
[70] See in this regard *Minister of Safety and Security v Nombungu* 2004 (4) SA 392 (Tk)

order to deal with the complaint raised before him. The bespoken process identified parties to be consulted. Strictly speaking, given the powers of the Principal Inspector emanating from the implicated regulation, this amounts to the determination of conditions and restrictions. This, the BAEF interpreted to mean an obligation to consult with all and sundry. This cannot be. In terms of the implicated regulations, Four Rivers was obliged to comply with the determined conditions of consultation with specified persons. This appeal is predicated on the records that served before the Chief Inspector and no further evidence was led by the appellant. I hasten to mention that the evidence led in the PAJA review application cannot constitute further evidence in this appeal. The evidence was led in support of a different process, which this Court declined to exercise jurisdiction over.

[79] Returning to the material distinction between procedural fairness and consultation, the two may have the same consequences though – hear the other side. Where consultation – with a dictionary meaning of asking for advice and or seeking counsel or a professional opinion – is prescribed the statute must expressly say so. It is indeed so that where exercise of power or where a statute confers public power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless the rules are excluded by plain words of necessary intendment.[71] On proper construction of the regulation, the exercise of receiving a copy of a risk assessment and ultimately approving it does not defeat nor prejudice the BAEF or the 18 individual owners. The placing of restrictions and conditions on the contrary is aimed at protecting as opposed to destroying the interests of the BAEF and the community. It is indeed so that the BAEF believes that the Principal Inspector did not do enough and as a result, the community is exposed. The only way to answer that contention is to consider the ambit of the statutory powers. As indicated above, it is an almost impossible duty for the Principal Inspector to completely decimate the attendant risk.

[71] See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 and *Kioa v West* (1985) 159 CLR 550.

[80] As indicated above, these powers are exercised for the purpose of preventing a significant risk, something not inimical to any of the rights of the BAEF and the community. In regulating blasting within a certain distance, the intention of the legislature must have been to protect as opposed to defeating the interests of the BAEF. In my view reading in the observance of the rules of natural justice in the exercise of these powers would amount to nothingness as it will have no substantial content and purpose in an instance where there is no prejudice and or defeating of rights. A mere regard to the restrictions and conditions placed leads one to an irresistible conclusion that no prejudice was in the offing. On the contrary prevention of significant risk was in the offing.

[81] In *R v North and East Devon Health Authority; Ex Parte Coughlan*[72], the following was said:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposal to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken"

[82] The regulation does not create a legal requirement to consult before approving a copy of the risk assessment report and permitting blasting within 500 metres. Ms Wilson submitted that where a statute does not prescribe consultation, PAJA is a statute that has been enacted to inject such a requirement in the statute. I disagree. First and foremost, PAJA applies to administrative actions and not necessarily to all exercise of statutory powers. Where an administrative action is involved PAJA in its fullest form applies. Once PAJA finds application, the issue of procedural fairness is to be dealt with within the realm of section 3 of PAJA. Therefore, it becomes unnecessary

[72] [2001] QB 213.

to read in the legal requirement to consult where the enabling legislation does not prescribe consultation.

[83] With regard to the allegation that in exercising the power or duty, the Principal Inspector had an improper application to seek a permit which did not identify structures and was not supported by a surveyor plan, regard must be had to the text of the implicated regulation. As expounded above, the regulation does not require a surveyor plan and or identification of structures. In the copy of a risk assessment the issues of structures and safer distances are to be dealt with. The statutory duty of the Principal Inspector is to receive the copy and thereafter approve it. It must then follow that in so doing the Principal Inspector exercises some discretion. Where exercise of discretion is involved a Court is loath to interfere unless malice, capriciousness and application of wrong principles is shown to exist.

[84] As pointed out above, I take a view that the exercise of the discretion is constrained. Such that where a Principal Inspector issues a blasting permit without placing any conditions or restrictions, such an exercise would be unlawful. In dealing with the exercise of judicial discretion, the Court in *Notyawa v Makana Municipality and Others*[73] *per* Jafta J, writing for the majority stated the following, which in my view applies with equal fortitude in an exercise of discretion by any functionary.

> '[41] The test is whether the court [functionary] whose decision is challenged on appeal has exercised its discretion judicially. The exercise of this discretion will not be judicial if it is based on incorrect facts or wrong principles of law. If none of these two grounds is established, it cannot be said that the exercise of discretion was not judicial…'

[85] In the premises, there is no indication that in approving the copy of the risk assessment, the Principal Inspector was actuated by malice; capriciousness;

[73] [2019] ZACC 43 (21 November 2019).

based it on wrong facts and or applied wrong principles. I must point out that in an appeal like this one, a party is entitled to submit further evidence. Other than submitting the record that was placed before the Chief Inspector, the BAEF did not submit any additional evidence, and most importantly did not seek leave to submit further evidence. As pointed out above, it shall be improper, although convenient it may seem to appear, for this Court hearing an appeal to consider evidence led in the review application which this Court decided not to entertain.

[86] In any event Ms Wilson, appearing for the BAEF conceded that there is an enormous dispute of facts. The legal barometer is the incorrect facts as opposed to weak and inadequate facts. I also add, the relevant facts to the exercise of the statutory discretion. Parties challenging an exercise of discretion tend to nit-pick in order to demonstrate incorrect facts. Where a party alleges that a functionary predicated his or her decision on wrong facts, that party must submit evidence to prove that allegation. Where a party anticipates a dispute of fact, such a party must apply *in limine* for referral of the dispute to oral hearing. When Mr Paige-Green for the BAEF realised that the shoe was beginning to pinch, he submitted that it is within the discretion of this Court to either refer the dispute for oral evidence or set aside the impugned decision and remit to the Principal Inspector. This cannot be done.

[87] In *Law Society, Northern Provinces v Mogami*[74], Harms DP aptly stated the law to be the following:

> "An application for hearing of oral evidence must as a rule be made *in limine* and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal…

[88] In *De Reszke v Maras and others*[75] Comrie J stated the following:

[74] 2010 (1) SA 186 (SCA)
[75] 2006 (1) SA 401 (C)

> "Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing to assess on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits…

[89] I venture to suggest that where the Labour Court sits as a Court of appeal, like in this matter, it has powers similar to those of the Labour Appeal Court (LAC) as set out in section 174 (a) of the LRA although not specifically legislated. In terms thereof, the LAC is empowered to receive further evidence orally. *Baxter* considered an appeal where a record does not exist to be a wider one. The BAEF did not seek leave to lead any oral evidence so as to adequately deal with any dispute of facts, particularly on the manner in which the Principal Inspector exercised the statutory powers.[76] I also take a view that where a judge lacks particular expertise, he or she must be provided with some expert testimony in order to resolve the dispute before Court[77]. When it comes to the interpretation of the implicated regulation that is the sole preserve of this Court.[78]The conclusion to reach is that on the facts of this appeal the Principal Inspector exercised the statutory function correctly.

[90] With regard to the shot holes written permission, the impugned decision stated that "*In terms of regulation 4.16 (2) (c)…permission is hereby granted to Four Rivers…to carry out blasting operation … within a horizontal distance of 500 meters away...*". Similarly, the regulation does not prescribe the manner by which the permission must be made other than in writing. There is no dispute that the permission was given in writing. To that extent, there has been compliance with the statutory requirements. The regulations define *shot*

[76] See *National Scrap Metal (Cape Town) (Pty) Ltd and another v Murray & Roberts Ltd and others* 2012 (5) SA 300 (SCA), in particular the apt statement by Leach JA that "*In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might have appeared at first blush"* and *NDPP v Zuma* 2009 (2) SA 277 (SCA).
[77] See Hoffman and Zeffert: The South African Law of Evidence 4th Ed page 97.
[78] See *Asla Construction (Pty) Ltd v Buffalo City Metro Municipality* 2017 (6) SA 360 (SCA)

hole to mean any drill hole charged with or intended to be charged with explosives. Further the regulation defines *primary blasting* to mean blasting operations normally associated with the breaking of *in situ* ground for production purposes, including the blasting of big rocks, obstruction in ore passes or box holes or blasting operations where explosives are not contained in a shot hole.

[91] *Secondary blasting* means the blasting operations not associated with production from in *situ* ground which can take place at any time during a shift to remove obstructions or reduce big rocks in size, but excludes the blasting of shot holes. Having been granted blasting operation permission, regulation 4.6 provides as follows:

> **4.6 General precautionary measures when blasting**
> The employer must take reasonable measures to ensure that when blasting takes place, air and ground vibrations, shock waves or fly material are limited to such an extent and at such a distance from any building, public thoroughfare, railway, power line or any place where persons congregate to ensure that there is no significant risk to health or safety of persons.

[92] Once permission is granted – an exercise of statutory power – an obligation arises on the part of the employer to still take reasonable measures when blasting. Should an employer fail to do so, the Principal Inspector exercising statutory powers may recommend a fine and non-compliance with the provisions of the regulations attracts a criminal sanction – section 91 of the MHSA. The qualms of the BAEF arise from the alleged failures and contraventions by Four Rivers. The popular meaning of the words failure and contravention indicates at least negligence on the part of an accused[79]. The answer to the qualms does not lie on the challenge of the exercise of the statutory power but on the invocation of the provisions of section 91 or section 55A by way of a *mandamus*. In short there is nothing that prevents the BAEF

[79] See *Union Government v Mack* 1917 AD 731*; S v Arenstien* 1967 (3) SA 366 (A) and *S v De Blom* 1977 (3) SA 513 (A).

to lay criminal charges against Four Rivers and or compel the Inspector to act in terms of the statutory provisions (section 55A).

[93] For all the above reasons, the conclusion this Court reaches is that the Principal Inspector exercised the powers to grant blasting permission correctly. As pointed out above, the apparent purpose of the exercise of the power is to prevent a significant risk. When regard is had to the contents of the permission granted, it is clear that in exercising the power, the Principal Inspector had a risk prevention in mind. Such a perspicuous mind is apparent when regard is had to the conditions and restrictions imposed. He imposed no less than 30 restrictions and conditions, all of which have prevention of risk written all over them. Undoubtedly, the BAEF expected more conditions and restrictions. At the end of the day, the question will be how long is the short end of the stick? Clearly the legislature did not anticipate this. Legality as a principle is not based on whether a party is satisfied but it is based on whether what is done falls within the prescripts of the law. If it falls*, cadit quaestio*.

[94] The last but related power arising from the regulation implicated herein is the determination of conditions and restrictions and imposition thereof. Again there is no dispute that the Principal Inspector, *ex facie* the contents of the impugned decision – contained in the letter of 18 October 2018 – restrictions and conditions were determined and imposed. Again regard being had to the purpose of the regulations, risk prevention is uppermost. In this regard, the conclusion this Court reaches is that the power was exercised correctly and purposefully.

[95] Quintessentially, there is no basis in law to declare that the exercise of the statutory power offends the principle of legality. Thus the BAEF must fail on this front. With regard to purpose or rationality standard the Constitutional Court has already decreed. In *Minister of Defence and Military Veterans v Motau*[80] it was said:

[80] 2014 (8) BCLR 930 (CC)

'[69] The principle of legality requires that every exercise of public power, including every executive act, be rational. For the exercise of public power to meet this standard it must be rationally related to the purpose for which the power was given…'

[96] In *DA v President of the RSA*[81], Yacoob ADCJ, as he then was, stated the following about rationality:

'[27] The Minister and Mr Simelane accept that the 'executive' is constrained by the principle that [it] may exercise no power and perform no function that conferred… by law and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise the exercise of the power could be arbitrary and at odds with the Constitution. I agree.'

[97] It has been confirmed that rationality and reasonableness are conceptually different. Rationality is the first element of reasonableness[82]. In *Albutt v Center for the Study of Violence and Reconciliation and others*[83], the following was said:

'The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

[81] 2013 (1) SA 248 (CC)
[82] See *Batho Star supra* at para 43.
[83] 2010 (3) SA 293 (CC)

[98] I do not hesitate to reach a conclusion that the exercise of power involved herein is rationally related to the purpose for which the power was given by the regulations – approval of risk assessment, written permission and determination and imposition of restrictions and conditions. All are related to compliance and prevention of significant risk. A rational decision is one that is endowed with reasons. Fact that the appellant holds an ebullient view does not in itself suggests that the exercise of power is bereft of reasons. The test to evaluate the means employed is not subjective but objective.

The section 57 (3) decision

[99] As pointed out above section 58 (1) of the MHSA allows any person adversely affected by the decision in terms of section 57 (3) to appeal against that decision. Four Rivers takes a point that the BAEF do not have a standing to launch the present appeal. I cannot agree. It is common cause that the BAEF sought to overturn the decisions of the Principal Inspector in relation to the permissions he granted. It is also common cause that the Chief Inspector confirmed those impugned permissions. It logically follows that the appellant was aggrieved. In *Assmang*, this Court concluded as follows:

> "[14] The phrase adversely affected simply means being aggrieved, hurt. Ill-treated, impaired, injured or wronged…"

[100] A refusal to overturn the decision of the Principal Inspector most certainly injured the BAEF. It most certainly felt wronged by the decision of the Chief Inspector. In my view the BAEF has a standing to launch this appeal. The right implicated herein is one of failing to overturn the decision of the Principal Inspector. Any person affected by such a decision has a right to appeal same to the Labour Court.

[101] It is unclear whether the Chief Inspector determined the appeal on its merits or not. However, a determination of this issue becomes academic given the views expressed above. The question then becomes, was the Chief Inspector

on *terra firma* when he refused to entertain the appeal due to lateness? In order to answer that question, regard must be had to the enabling statute. No functionary can exercise powers he or she does not have. It must be remembered that the Chief Inspector derives powers to entertain an appeal from the MHSA. Therefore, entertaining and or refusing to entertain an appeal involves an exercise of statutory powers, which in of itself is appealable to this Court. Should a functionary exercise powers that he or she does not have, such exercise offends the entrenched principle of legality. Relevant to this question, section 57 (2) of the MHSA provides as follows:

> '(2) An appeal under subsection (1) must –
> (a) be lodged with the Chief Inspect of Mines within 30 days of the decision, or such further period as may be prescribed;
> (b) …

[102] It is common cause that the internal appeal with the Chief Inspector was lodged outside the legislated 30 days' period. A further period outside the 30 days has to be prescribed. The MHSA defines prescribed to mean prescribed by regulation. The power to issue regulations reside with the Minister of Minerals and Energy. Impliedly, the Minister is empowered to extend the 30 days' period by a regulation. The appellants sought condonation from the Chief Inspector. He refused to condone the non-compliance. That refusal was correct because he does not have powers to condone. There is no legal obligation on the part of the Chief Inspector to consider an appeal lodged outside the legislated period.

[103] It must be so that the refusal to consider an appeal does not leave an appellant remediless. Such a party may appeal to the Labour Court under the rubric of exercise of powers under the MHSA. I suppose, it was for that reason that the legislature deliberately did not give the Chief Inspector condonation and/or extension powers.

[104] Given the views expressed above, re-considering or considering the appeal that purportedly served before the Chief Inspector shall be academic since this Court, within its powers, already considered the exercise of powers by the Principal Inspector. The appropriate thing to do at this stage is to confirm the decision of the Chief Inspector to refuse to condone the late lodgement of the appeal, being his decision reached on 6 June 2018.

The impact of the refusal of the appeal.

[105] It is important to state that the exercise of MHSA powers by the Inspectors amounts to administrative action[84]. As pointed out above, section 33 entitles the BAEF to an administrative action that is lawful; reasonable and procedurally fair. On application of the principle of subsidiarity, the appellant cannot directly lay a claim to the fundamental right without having regard to the statute passed to regulate that right.

[106] The preamble of PAJA provides that it is there to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to written reasons for administrative action as contemplated in section 33 of the Constitution; and to provide for matters incidental thereto. One such incidental matter is the procedure for judicial review – section 7. This Court arrived at a conclusion that it does not have jurisdiction to undertake a judicial review under section 6 of the PAJA. In the appeal entertained earlier in this judgment, the impugned exercise of statutory powers was tested on its legality and purposefulness – rationality - by application of the principle of legality. Strictly speaking although there is a technical and normative difference between a legality review and a review under PAJA, both reviews achieve the same outcome with regard to lawfulness and purpose of the exercise of statutory public power.

[84] The High Court in *Highveld Steel and Vanadium Corporation Ltd v Mathebula and 4 Others* (Case 8967/2002) delivered on 18 February 2003 set aside the decision of a Principal Inspector to refuse to recuse himself and compelled the Chief Inspector to hear the appeal instead.

[107] With regard to procedural fairness, when applying the doctrine of legality, the question is does the statute require a consultation process? If it does and it was not afforded, then the doctrine of legality is offended. Therefore, issues related to reasonableness and procedural fairness relating to the exercise of statutory power are issues to arrest a Court with the necessary jurisdiction under section 7 of PAJA. Exercise of jurisdiction is not a matter of convenience but a matter legality. Similarly, an administrative decision which involves jurisdictional error is regarded, in law, as no decision.[85] An order issued without the requisite jurisdiction is *brutum fulmen* and invalid. In *Eskom v Marshall and others*[86], the following was said:

> "The authorities are trite that a court of law or a tribunal that issues an order where it has no jurisdiction to do so, acts *ultra vires*. The result is that the order is a nullity…" (Authorities cited omitted)

[108] In effect there is nothing that shall prevent the BAEF to approach a Court possessed with the necessary jurisdiction to test the reasonableness and the procedural fairness of the administrative actions. However, the appellants may have to contend with the time barriers imposed by the applicable legislation. That predicament is no basis in law for this Court to exercise jurisdiction it does not have.

The issue of costs.

[109] All the parties argued that costs must follow the results. I do not see how the principle applied in *Biowatch Trust v Registrar Genetic Resources and Others*[87] must apply in this matter. The parties before me are all strangers to each other. There is no reason why costs should not follow the results particularly where a four day motion Court was held at a Court lacking jurisdiction in the review application which consumed the substantial portion of the four days. The appropriate order to make is that costs must follow the

[85] See *Plaintiff S157/2002 v The Commonwealth* [2003] 211 CLR 476.
[86] [2002] 23 ILJ 2251 (LC)
[87] 2009 (6) SA 232 (CC).

results. This is a matter deserving of an order of the costs of a senior counsel to be included.

[110] In the results the following orders are made:

Order

1. The review application brought under case number JR 1984-18 is hereby dismissed for want of jurisdiction.
2. The appeal launched under case number J 2688-18 is hereby dismissed.
3. The BAEF to bear the costs of the proceedings, which costs shall include the costs of senior counsel.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant/Appellant:	Advocate K A Wilson with her Advocate Paige-Green
Instructed by:	Briel Inc, Pretoria.

For the First and Second Respondent:	Advocate M J Ramaepadi SC
Instructed by:	State Attorney Jhb.

For the Third Respondent:	Advocate D W Watson
Instructed by:	ENS Inc, Sandton