CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 195/19

In the matter between:

NORMANDIEN FARMS (PTY) LIMITED Applicant

and

SOUTH AFRICAN AGENCY FOR PROMOTION OF PETROLEUM EXPORTATION AND EXPLOITATION (SOC) LIMITED First Respondent

RHINO OIL AND GAS EXPLORATION SOUTH AFRICA (PTY) LIMITED Second Respondent

MINISTER OF MINERAL RESOURCES Third Respondent

Neutral citation:	*Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5
Coram:	Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Mhlantla J (unanimous)
Heard on:	26 November 2019
Decided on:	24 March 2020
Summary:	Mineral and Petroleum Resources Development Act 28 of 2002 — application for exploration right — mootness — interests of justice — punitive costs

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is dismissed.
2. The applicant must pay the costs of the application including costs of two counsel, on an attorney and client scale.

JUDGMENT

MHLANTLA J (Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal.[1] That Court upheld an appeal by the second respondent, Rhino Oil and Gas Exploration South Africa (Pty) Limited (Rhino), and set aside the decision of the High Court of South Africa, Western Cape Division, Cape Town (High Court).[2]

[1] *Rhino Oil and Gas Exploration SA (Pty) Limited v Normandien Farms (Pty) Limited* [2019] ZASCA 88; 2019 (6) SA 400 (SCA) (Supreme Court of Appeal judgment).

[2] *Normandien Farms (Pty) Limited v The South African Agency for Promotion of Petroleum and Exploitation SOC* 2017 JDR 0831 (WCC) (High Court judgment).

Factual background and legislative scheme

[2] On 12 April 2016, pursuant to section 79 of the Mineral and Petroleum Resources Development Act (MPRDA),[3] Rhino, a technology driven independent oil and gas exploration and development company focused on Africa, applied for an exploration right. An exploration right is a right to search for petroleum on land, which may at times be over land that belongs to other landowners.[4] An exploration right is a broad right, defined in sections 5(1) and (3) of the MPRDA as a land right

[3] Act 28 of 2002. Section 79 of the MPRDA provides that:

> "(1) Any person who wishes to apply to the Minister for an exploration right must lodge the application—
>
> (a) at the office of the designated agency;
>
> (b) in the prescribed manner; and
>
> (c) together with the prescribed non-refundable application fee.
>
> (2) The designated agency must, within 14 days of the receipt of the application, accept an application for an exploration right if—
>
> no other person holds a technical cooperation permit, exploration right or production right for petroleum over the same land and area applied for.
>
> (a) the requirements contemplated in subsection (1) are met;
>
> (b) no other person holds a technical cooperation permit, exploration right or production right for petroleum over any part of the area; and
>
> (c) no prior application for a technical cooperation permit, exploration right or production right over the same mineral, land and area applied for has been accepted.
>
> (3) If the application does not comply with the requirements of this section, the designated agency must notify the applicant in writing within 14 days of the receipt of the application and provide reasons.
>
> (4) If the designated agency accepts the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing to—
>
> (a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental report as required in terms of Chapter 5 of the National Environmental Management Act, 1998; and
>
> (b) submit the relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998, within a period of 120 days from the date of the notice.
>
> (5) Any technical cooperation permit in respect of which an application for an exploration right has been lodged in terms of subsection (1) shall, notwithstanding its expiry date, remain in force until such right has been granted or refused."

[4] In terms of section 5(1) of the MPRDA an exploration right is defined as "a limited real right in respect of the mineral or petroleum and the land to which such right relates".

which may extend to "entering the land to which such right relates together with his or her employees" with a view to "build, construct or lay down any . . . infrastructure which may be required for the purpose of . . . exploration". The exploration right applied for by Rhino related to its intention to recover oil and gas through non-invasive techniques and the drilling of boreholes.

[3] The exploration right application in this matter covered various farms including farms owned by the applicant, Normandien Farms (Pty) Limited (Normandien) in Northern KwaZulu-Natal.[5] Normandien conducts timber farming on its properties and has also established a bottling plant. On 15 April 2016, the first respondent, the South African Agency for Promotion of Petroleum Exportation and Exploitation (PASA), which is the agency designated to perform the functions in Chapter 6 of the MPRDA on behalf of the Department of Mineral Resources, accepted Rhino's application for an exploration right.

[4] At the heart of this matter lies the complex process of applying for an exploration right under section 79 of the MPRDA. At a high level of abstraction, that legislative process entails four steps. First, the acceptance by PASA of an application for an exploration right; second, the publication of the acceptance of the application; third, the filing of various reports with PASA as proof of legislative conformity (including an environmental impact assessment (EIA) and a Scoping Report); and fourth, if appropriate, the granting of an exploration right itself.

[5] The crux of the case is the consequence of formal defects in the acceptance and publication of the application, that is steps one and two of the process outlined above. On the one hand, Normandien argues that it suffered prejudice by virtue of the failure of PASA to properly publish the acceptance of the application, and that it could challenge this failure immediately, regardless of the fact that the exploration right had not yet been granted. In other words, Normandien posits that it can challenge errors in

[5] The farmlands owned by Normandien comprise 870 000 hectares of land overall.

steps one and two without having to wait until the grant of the exploration right, as envisaged under step four, occurs. On the other hand, Rhino argues that the challenge was premature, and that Normandien should have first awaited the granting (if any) of the exploration right in question. Rhino further argues that, on the facts of this case, Normandien has not suffered any prejudice because there was substantial compliance with the relevant requirements and, in any event, Rhino has since withdrawn its exploration right application.

[6] I now proceed to examine the legislative process and facts, in greater detail.

Step one: the acceptance of the application

[7] When PASA accepted Rhino's application for the exploration right on 15 April 2016, it was required by section 79(2) of the MPRDA "within 14 days of the receipt of the application" to accept Rhino's exploration right application if the conditions in section 79(1) were met. One of the conditions set out in section 79(1)(b) is that any person who wishes to apply for an exploration right must lodge an application in the "prescribed manner".

[8] The "prescribed manner" referred to in section 79(1)(b) is defined in the Mineral and Petroleum Resources Development Regulations (MPRD Regulations).[6] Regulation 2 states, amongst other things, that "any application for any . . . right made in terms of the MPRDA must be lodged by submitting an appropriately completed form contained in Annexure I". That the relevant title deeds are required is confirmed by regulation 28(2)(f) which states that "the application . . . must contain . . . a certified copy or copies of the title deed or deeds, where applicable, in respect of the area to which the application relates".

[9] It is common cause that certified copies of the relevant title deeds were not provided with the application by Rhino. Normandien argues that this failure meant

[6] GN R527 *GG* 26275, 23 April 2004.

that PASA was unable to ascertain whose land might be adversely affected by the exploration right, and that those parties would therefore not be able to participate effectively or at all in the ensuing consultation process. Accordingly, Normandien alleges that PASA acted unlawfully in accepting an application which was not made in the "prescribed manner" within the meaning of section 79(1)(b) of the MPRDA, read with regulations 2 and 28 of the MPRD Regulations.

Step two: publication of the acceptance

[10] PASA then published the acceptance of Rhino's application. Again, this is what it was required to do. Section 10(1) of the MPRDA provides that "within 14 days after accepting an application . . . [PASA] must in the prescribed manner" both "make known that an application for [an exploration right] has been accepted" and "call upon interested and affected persons to submit their comments".[7]

[11] That "prescribed manner" is to be found in regulation 3 of the MPRD Regulations, entitled "[c]onsultation with interested and affected persons".[8]

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[7] Section 10 of the MPRDA provides:

> "(1) Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner—
>
> (a) make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and
>
> (b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.
>
> (2) If a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon."

[8] Regulation 3 of the MPRD Regulations provides:

> "(1) The Regional Manager or designated agency, as the case may be, must make known by way of a notice, that an application contemplated in regulation 2, has been accepted in respect of the land or offshore area, as the case may be.
>
> (2) The notice referred to in subregulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be, that is accessible to the public.
>
> (3) In addition to the notice referred to in subregulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods—
>
> (a) publication in the applicable Provincial Gazette;

[12] The notices were sent to various Magistrates' Courts to be placed on their noticeboards.[9] However, these notices were not sent to all the relevant magisterial districts.

[13] Normandien complains about this failure and argues that PASA was required by legislation not to accept the application on that basis. As a result, Normandien contends that the exploration right application is a nullity.

[14] To this, the following must be added. On 21 December 2016, after Normandien's application to the High Court had been served on PASA, the latter published a notice in the Provincial Government Gazette of KwaZulu-Natal. It recorded its acceptance of the exploration right application. Calls for objections were required to be lodged by 3 February 2017. However, this notice came too late, as section 10(1)(a) required this notice to have been published within 14 days after PASA's acceptance of the application.[10]

Step three: the EIA and Scoping Report

[15] On 3 June 2016, Rhino submitted an application to PASA for environmental authorisation in terms of section 79 of the MPRDA. PASA instructed Rhino to conduct the Scoping Report and EIA.[11] Rhino then conducted a public consultation process in respect of the draft Scoping Report and draft EIA.

(b) notice in the Magistrates' Court in the magisterial district applicable to the land in question; or

(c) advertisement in a local or national newspaper circulating in the a[rea] where the land or offshore area to which the application relates, is situated."

[9] See further section 10 of the MPRDA which sets out the publication requirements alongside regulation 3 which in-turn sets out in greater detail about how that publication is to be effected, and includes publication in the applicable Provincial Gazette, or by placing notices in the Magistrates' Courts notice boards in the magisterial district applicable.

[10] It was further deficient because it seems that some of the farms are situated in the Free State Province and no notice was issued in the relevant Gazette for the Free State Province.

[11] See further the Environmental Impact Assessment Regulations, GN R982 *GG* 38282, 4 December 2014. In particular: regulation 21 titled "Submissions of Scoping Report to Competent Authority"; regulation 22 titled

Step four: the granting of the exploration right

[16] For reasons that will be discussed below, the exploration right in question was never granted by PASA. This is because it was formally withdrawn by Rhino on 24 July 2019.

[17] Normandien takes issue with the fact that the prescribed public participation process in terms of section 10 of the MPRDA, as well as regulation 3 of the MPRD Regulations, had not been complied with. In particular, Normandien is critical of the process followed by Rhino and alleges that the acceptance of Rhino's exploration right application by PASA was irregular and invalid. Normandien alleges further that it did not receive the notice from PASA and had no knowledge of the fact that an application had been lodged.

[18] Normandien claims that it was only in December 2016 that it became aware of Rhino's exploration right application. And by then, the public participation process relating to the EIA was already at an advanced stage. Normandien thus claims that it was prejudiced as a result of the failure to follow the mandatory provisions in the legislative scheme; specifically, the requirement that title deeds be attached to the form for the application for an exploration right at stage one of the process; and that acceptance of the application for the exploration right be properly published at stage two of the process.

"Consideration of Scoping Report"; regulation 23 titled "Submission and Consideration of Environmental Impact Assessment Report and Environmental Management Programme"; and regulation 24 titled "Decision on Scoping and Environmental Impact Report Application".

Litigation history

High Court

[19] On 13 December 2016, Normandien applied, on an urgent basis, to the High Court for an order setting aside the acceptance by PASA of the application for an exploration right lodged by Rhino.

[20] The High Court, per Dlodlo J, held that sections 10(1)(a) and (b), and 79(1) of the MPRDA, read with regulation 3 of the MPRD Regulations, are prescriptive in form and do not constitute administrative action that falls within the meaning of the Promotion of Administrative Justice Act[12](PAJA).[13] The "prescribed manner" referred to in section 79(1)(b), which references regulation 28, read with Form M of Annexure I to the MPRDA, only requires PASA to ascertain whether the requirements have been met. This includes the mere scrutiny of documents submitted – which does not involve any decision-making. In terms of the Scoping Report, PASA is required to exercise its discretion as to whether to accept or refuse it.[14] Although the use of this discretion constitutes a decision, it is not the kind of decision that would adversely affect the rights of any interested parties at that stage; it is a mere phase of the multi-stage process required for environmental authorisation.

[21] The High Court held that the application for an exploration right and other aspects of the process, in terms of the MPRDA and the MPRD Regulations, are couched in peremptory terms. Since Rhino's application for an exploration right had been accepted on 15 April 2016, it would be impossible for PASA to comply with the peremptory terms of sections 10 and 79 of the MPRDA. It held that the application was not made in the prescribed form and therefore PASA was required not to accept it, and that the publication of the acceptance of the application was also not effected in the prescribed form. The effect was that the actions taken by PASA were unlawful

[12] 3 of 2000.

[13] High Court judgment above n 2 at para 22.

[14] Id.

and should be set aside on the basis of an illegality.[15] The High Court held that the acceptance was invalid as the mandatory statutory requirements in the MPRDA and MRPD Regulations had not been complied with. It was argued further by Normandien that the process (including the process of the Scoping Report) also constituted an illegality and should be set aside.

[22] The High Court agreed with Normandien that it had been prejudiced since it did not have an opportunity to object to the acceptance of the application and remarked that "one must always treat matters falling under the MPRDA with the sensitivity deserved".[16] The High Court set aside PASA's acceptance of Rhino's application as well as the notices published by PASA and its acceptance of a Scoping Report submitted to it by Rhino. It further interdicted Rhino from submitting the EIA and Environmental Management Program to PASA. Rhino was granted leave to appeal this decision to the Supreme Court of Appeal.

Supreme Court of Appeal

[23] The Supreme Court of Appeal, per Plasket AJA, overturned the findings of the High Court.[17] In sum, the Supreme Court of Appeal upheld the appeal with costs on the bases that Normandien had not suffered any prejudice and that the matter was not ripe for adjudication.

[24] The Supreme Court of Appeal reasoned that the matter could be dealt with "anterior to the merits".[18] It noted Normandien's contention that the acceptance of the application for an exploration right was not administrative action.[19] And while failures to comply with statutory duties are reviewable under the common law, it held

[15] Id at paras 24 and 28. Also see reference to *Democratic Alliance v Ethekwini Municipality* [2011] ZASCA 221; 2012 (2) SA 151 (SCA).

[16] High Court judgment above n 2 at para 30.

[17] Concurred in by Ponnan JA, Mbha JA, Mathopo JA and Van der Merwe JA.

[18] Supreme Court of Appeal judgment above n 1 at para 27.

[19] Id at para 28.

that Normandien was required to show that the failure gave rise to prejudice, which it neglected to do.[20]

[25] Critical to this conclusion was that Normandien's rights had not been adversely affected by the process thus far, and that it could point to no prejudice on its part at this stage.[21] The Court noted that, as a general rule, based on trite legal principles, "a challenge to the validity of an exercise of public power that is not final in effect is premature [and] an application to review the action will not be ripe and cannot succeed on that account".[22] The Supreme Court of Appeal noted that Normandien had approached the High Court before a decision had been made (before the exploration right had been granted), "and before it had suffered any prejudice on account of the actions complained of".[23] It held that Normandien ought to have waited until the exploration right was granted, and then launch its challenge. The Supreme Court of Appeal put the point as follows:

> "It launched a pre-emptive strike against Rhino. It may perhaps have been best advised to 'husband its power' in anticipation of the battle that may (or may not) lie ahead."[24]

In this Court

[26] Normandien seeks leave to appeal to this Court. Since the filing of the application on 10 July 2019, there have been some key developments in the matter.

[20] Id at para 30. This principle is distilled from *Jockey Club of South Africa v Feldman* 1942 AD 340 at 359 and has been followed in *Rajah and Rajah (Pty) Ltd v Ventersdorp Municipality* 1961 (4) SA 402 (A) at 407H-408A and *Buffalo City Municipality v Gauss* [2004] ZASCA 148; 2005 (4) SA 498 (SCA) at para 14. See further Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2015) at 584-5.

[21] Supreme Court of Appeal judgment above n 1 at para 32.

[22] Id at para 33.

[23] Id at para 34.

[24] Id.

[27] First, the application for the exploration right was withdrawn. After the Supreme Court of Appeal judgment, Rhino formally withdrew its exploration right application by way of a letter dated 24 July 2019. On the same day, Rhino informed Normandien of the withdrawal. However, this development was only disclosed to this Court on 4 October 2019, when the record was filed.

[28] Second, the parties attempted to settle the dispute. Normandien addressed a letter to this Court on 31 July 2019 stating that the parties were considering settling the dispute in terms of rule 27 of the Rules of the Constitutional Court.[25] In the letter, Normandien requested that the file not be allocated to a Judge as the matter may be withdrawn.[26] However, the letter was silent about the withdrawal of Rhino's exploration right application.[27]

[29] On 15 August 2019, Normandien's attorney wrote to Rhino's attorney as follows:

> "I wish to reiterate that, in principle, we agree that the underlying causa for the referral to the Constitutional Court is moot. We go on record to state that we will agree to 'withdraw the referral to the Constitutional Court' (my emphasis as we are not entitled simply to withdraw a matter as rule 27 prevails). Having taken instructions, we are amenable to having the Constitutional Court matter withdrawn in terms of rule 27 on the basis that each party pays its own costs."

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[25] Rule 27 of the Rules of this Court is titled "Withdrawal of Cases" and provides that:

> "Whenever all parties, at any stage of the proceedings, lodge with the Registrar an agreement in writing that a case be withdrawn, specifying the terms relating to the payment of costs and payment to the Registrar of any fees that may be due, the Registrar shall, if the Chief Justice so directs, enter such withdrawal, whereupon the Court shall no longer be seized of the matter."

[26] See letter by Normandien dated 31 July 2019, which states:

> "1. We refer to the above-mentioned case.
>
> 2. The parties are in negotiations regarding a rule 27 agreement.
>
> 3. In light of the aforegoing, kindly do not refer the matter to a Judge for consideration in the interim as it may well result that the matter is withdrawn.
>
> 4. We have not reached that point yet, but consider it a possibility."

[27] Id.

[30] Rhino explains that it has no intention or right to conduct exploration operations over the properties to which its exploration right application concerned. It follows, argues Rhino, that all the steps and processes that Normandien seeks to challenge in these proceedings have lapsed and can have no further outcome nor effect.

[31] As a result of these developments, questions surrounding the mootness of these proceedings and whether it is in the interests of justice to grant leave to appeal, in light of the mootness, have arisen. However, before turning to these, it is necessary to dispose of three preliminary issues, namely, condonation, jurisdiction and whether it is in the interests of justice to grant leave to appeal.

Condonation

[32] Normandien applies for condonation. The application for leave to appeal was filed on 22 July 2019 when it should have been lodged on 24 June 2019. Accordingly, it is out of time by 20 days. The reasons for the delay are, amongst others, that Normandien instructed a new firm of attorneys; it had to apply for funding to cover the legal expenses associated with the application to this Court; Normandien did not receive the funding sought; and that it therefore became necessary to convene a board meeting to authorise Normandien's expenses to fund this application. Rhino opposes the application on the basis that the explanation is inadequate.

[33] I disagree. The delay is minimal and the explanation provided is satisfactory. It is clear from the explanation that there are justifiable reasons for the delay. Furthermore, no prejudice will be suffered by Rhino. Therefore, condonation is granted.

[34] There is also an application for condonation for the late filing of Rhino's answering affidavit. Rhino explained that the delay was occasioned by the

negotiations between the parties after it had advised Normandien that it had withdrawn its exploration right application.

[35] The application is not opposed. Rhino's explanation is adequate. Condonation for the late filing of Rhino's answering affidavit is therefore granted.

Jurisdiction

[36] It is accepted that for leave to appeal to be granted, an applicant must show that the matter falls within the jurisdiction of the Court and that the interests of justice warrant the granting of leave.[28] This Court's jurisdiction is engaged when a matter raises a constitutional issue or an arguable point of law of general public importance that ought to be heard by this Court.[29]

[37] Normandien contends that this matter raises a constitutional issue. It submits that we are dealing with the interpretation of the MPRDA (section 10, section 79 and the MPRD Regulations), which "involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources".[30]

[38] It is accepted, more generally, that the interpretation and application of legislation specifically mandated by the Constitution is a constitutional matter.[31] Section 24 of the Constitution indicates that the State is under a constitutional

[28] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 35.

[29] Section 167(3)(b)(i) and (ii) of the Constitution.

[30] *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* [2013] ZACC 45; 2014 (2) SA 603 (CC); 2014 (2) BCLR 212 (CC) at para 37. See also the Preamble to the MPRDA, which states that—

> "Considering the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination".

[31] *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 23 and *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 at para 14.

obligation to take reasonable and legislative measures to ensure, amongst other things, sustainable development with natural resources along with justifiable social and economic development.[32] Based on this, the Constitution envisages the reform of the mining and mineral dispensation through various vehicles including the enactment of legislation such as the MPRDA.[33] Section 2(h) of the MPRDA provides that one of its objects is:

> "[To] give effect to section 24 of the Constitution by ensuring the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development".

[39] I therefore agree that the matter falls within our jurisdiction.

[40] However, that a matter engages our jurisdiction is not sufficient for leave to appeal to be granted. As was stated in *Paulsen* "[w]hether a matter will, in fact, receive our attention will depend on the interests of justice".[34]

Interests of justice and mootness

[41] Normandien submits that even if the application is moot, this Court has a duty to adjudicate the matter because the judgment of the Supreme Court of Appeal is incorrect and constitutes binding precedent, which would prejudice future litigants.

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[32] This Court noted, per Froneman J, in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 3 that "the MPRDA was enacted amongst other things to give effect to those constitutional norms". Also, in *Agri SA v Minister of Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) Mogoeng CJ stated at para 1 that "[t]o address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities in the mining industry."

According to Van der Walt *Constitutional Property Law* (Juta & Co Ltd, Cape Town 2005) at 378:

> "[Section 24] is sufficient in itself to justify reform that would promote access to natural resources such as mining and minerals. It can probably be argued that references to 'other reforms' in section 25(4) and 25(8) also support reforms intended to improve access to other natural resources such as mineral wealth."

[33] Van der Walt above n 32 at 378.

[34] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 18.

Normandien also raises the issue of the costs order against it, and contends that it is imperative that PASA conducts itself correctly in future matters and that the general public ought to know their rights. Normandien notes that PASA has accepted two further applications by Rhino for exploration rights.

[42] On the other hand, Rhino submits that the matter is moot in fact and in law. It contends that Normandien challenges steps in the process taken by PASA in respect of its acceptance of Rhino's exploration right application notwithstanding that the disputed application has been withdrawn. Rhino also submits that once the application for exploration rights was withdrawn, the issues raised by Normandien became wholly academic and, Rhino argues, there is therefore no live controversy between the parties.

[43] Rhino further contends that Normandien has conceded mootness. This is based on the letter (dated 15 August 2019) in which Normandien agreed with Rhino that the appeal is moot and that it has elected not to proceed with the appeal.[35] Rhino contends that the parties had agreed that the merits of the dispute are moot. But, Rhino alleges that after the matter was set down for hearing Normandien changed tack on the issue of mootness.

[44] Rhino submits that the appeal will have no practical effect, and contends that any issue on costs cannot cloak a moot matter as a live one. It submits that a costs order granted by the Supreme Court of Appeal cannot render a moot application live in the context of this matter.

[45] Rhino further submits that no interests of justice considerations militate in favour of granting leave to appeal in this matter. The Supreme Court of Appeal judgment was correctly decided; the environmental authorisation was never sought by

[35] See [29].

Rhino and, in any event, it has been abandoned and will not affect Rhino's other exploration activities (which are not subject to these proceedings).

Analysis

[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.

[47] Mootness is when a matter "no longer presents an existing or live controversy".[36] The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".[37]

[48] This Court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require".[38] This Court "has discretionary power to entertain even admittedly moot issues".[39]

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[36] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21 and fn 18.

[37] *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15. See also Loots "Standing, Ripeness and Mootness" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) at 7-19 and Du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 39.

[38] *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at para 44. See further *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 8; *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32; *Van Wyk v Unitas Hospital* (*Open Democratic Advice Centre as Amicus Curiae*) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29 and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg*) at para 9.

[39] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) at para 17 and *POPCRU* above n 38 at para 44. See further *South African Reserve Bank v Shuttleworth* [2015] ZACC 17; 2015 (5) SA 146 (CC); 2015 (8) BCLR 959 (CC) at para 27 and *Langeberg* above n 38 at paras 9 and 11.

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.[40]

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter.[41] These include:

(a) whether any order which it may make will have some practical effect either on the parties or on others;
(b) the nature and extent of the practical effect that any possible order might have;
(c) the importance of the issue;
(d) the complexity of the issue;
(e) the fullness or otherwise of the arguments advanced; and
(f) resolving the disputes between different courts.

[51] I will now consider some of these factors in the context of the current matter.

[52] As a point of departure, an order by this Court in this matter will not have a practical effect. It must be borne in mind that the main relief sought by Normandien in the High Court was for the setting aside of the acceptance of Rhino's application by PASA. Now that Rhino's application has been withdrawn, there is nothing to set aside or interdict. There is no triable issue to consider and no party will receive any

[40] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27, this Court held:

> "We must however bring into the equation the question of mootness in the process of deciding the interests of justice issue . . . . The issues may well be moot. Nonetheless, there are two conflicting judgments on these issues and, if we do not consider this aspect of the case, the judgment of the Supreme Court of Appeal, with all its implications for future regulation would remain binding."

[41] These factors are listed in *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32, which cites the cases of *AAA Investments* above n 40 at para 27 and *Langeberg* above n 38 at para 11.

direct benefit or advantage as a result of an order on the merits by this Court. In terms of complexity, section 10 of the MPRDA is clear – there is no discrete legal principle that requires this Court to decide the case.

[53] It is necessary to consider whether it is in the interests of justice to grant leave to appeal in order to resolve disputes between courts and conflicting judgments. Indeed, the High Court and Supreme Court of Appeal did come to different conclusions. Normandien contends that Rhino will rely on the judgment of the Supreme Court of Appeal in future applications.

[54] I disagree. The judgment of the Supreme Court of Appeal will not be of assistance for the following reasons: first, the Supreme Court of Appeal did not decide Normandien's review application on the merits nor did it pronounce on the legality of the process.[42] It dismissed the matter on preliminary issues such as ripeness and lack of prejudice.[43] The complaint about the alleged non-compliance with the procedural requirements was not decided by the Supreme Court of Appeal. Second, the fundamental importance of public participation in the process for an exploration right application was not undermined by the Supreme Court of Appeal. Rather, the Supreme Court of Appeal stated that "while [*Bengwenyama*] concerned a prospecting right for minerals, the views expressed by Froneman J apply equally to exploration rights for petroleum".[44] This evinces the Supreme Court of Appeal underscoring the importance of public participation in the process of applying for an exploration right.

[42] See Supreme Court Appeal judgment above n 1 at para 27, where it was held:

> "As a result of the view I take of the matter, there is no need to engage with these arguments. The matter can be dealt with on another basis, anterior to the merits."

[43] Id at para 35.

[44] Id at para 19.

[55] Third, Rhino will have to bring a new application should it wish to apply for an exploration right in the future and comply with the provisions of the MPRDA. It cannot rely on the Supreme Court of Appeal's judgment to bypass the procedures that are set out in section 10 of the MPRDA.

[56] Based on this analysis, the various factors are not present in this matter. Therefore, there are no factors to trigger this Court to exercise its judicial discretion and consider that even though the matter is moot, it is in the interests of justice to grant leave to appeal. It is, therefore, not necessary to consider other issues raised such as ripeness, prejudice and peremption.

[57] For the purposes of appealing to this Court on the question of costs alone, the test is, again, whether the interests of justice permit this.[45] However, the facts of this case do not warrant this Court's interference in the costs order issued by the Supreme Court of Appeal and the High Court.

[58] In light of the above, while the matter engages this Court's jurisdiction, it is not in the interests of justice to grant leave to appeal. Accordingly, the application falls to be dismissed.

Costs

[59] Rhino asks for costs on an attorney and client scale. It submits that Normandien acted improperly and refused to withdraw the matter if the costs order by the Supreme Court of Appeal was not reversed. It contends that Normandien's dilatory tactics resulted in this matter being set down for hearing by this Court.

[60] It is trite that the award of costs is a matter that falls within the discretion of the Court. A punitive costs order is an extraordinary order which will be imposed only in

[45] See *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 34 and *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 11.

exceptional circumstances, having regard to the conduct of the parties throughout the litigation.[46]

[61] In this matter, I am persuaded that a punitive costs order is warranted. Without repeating what has already been stated, I think it is prudent that we revisit the pertinent facts.

[62] On 24 July 2019, Rhino advised Normandien in writing that the application for an exploration right had been withdrawn. Rhino further advised that no exploration activity would occur pursuant to that application thus rendering the application for leave to appeal moot. In the same letter, Rhino requested that Normandien withdraw its application in this Court, with no order as to costs.

[63] On 26 July 2019, Normandien requested that Rhino provide it with proof from PASA that the application for exploration right had indeed been withdrawn irrevocably. Normandien agreed that, upon confirmation of the withdrawal the matter was indeed moot, but drew Rhino's attention to rule 27 of the Rules of this Court which requires an agreement between the parties before a matter may be withdrawn. Normandien informed Rhino that it would only withdraw its application in this Court, by agreement, if Rhino tendered its costs in the High Court, Supreme Court of Appeal and in this Court.

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[46] See *Nel v Davis SC NO* [2016] JDR 1339 (GP) at para 25, where Davis J stated:

> "A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation."

See further *Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA* [2016] ZALAC 39; [2016] 37 ILJ 2815 (LAC) at para 46, where it was held:

> "[T]he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

These cases have been endorsed by this Court in the minority judgment by Mogoeng CJ in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at paras 8 and 40.

[64] On 30 July 2019, Rhino refused to tender Normandien's costs. It indicated that if Normandien agreed to withdraw its application in this Court, by 12h00 on 1 August 2019, then it would agree that each party bears its own costs in relation to the application before this Court.

[65] On 31 July 2019, Normandien requested an indulgence of at least one week from Rhino to consult with its counsel. Not having heard from Normandien, Rhino again wrote to Normandien on 13 August 2019 and indicated that should Normandien fail to withdraw its application by 12h00 on 15 August 2019, Rhino would be forced to file its answering papers.

[66] On 13 August 2019, Normandien replied and again confirmed that the underlying *causa* in this matter had been rendered moot by Rhino's withdrawal of its application. Normandien, however, persisted in its position that the issue of costs in the High Court had to be settled before the application in this Court could be withdrawn. It requested Rhino to make submissions regarding the issue of costs in the High Court and the Supreme Court of Appeal.

[67] The following day, Rhino responded that it was not going to abandon its costs order in the Supreme Court of Appeal. Again, Rhino proposed a compromise: that Normandien withdraw its application in this Court by agreement, with each party paying its own costs, failing which Rhino would file its answering papers and seek a punitive costs order.

[68] This correspondence on the issue of costs continued until 11 September 2019, when this Court issued directions enrolling the matter for hearing. Thereafter, Normandien took a different approach and advised Rhino that it would be persisting with this application.

[69] I consider it to be highly inappropriate for Normandien to leave litigation pending before this Court with the knowledge that the case is moot on the facts. I am left with the impression that Normandien was using the proceedings in this Court as a pressure tactic to compel Rhino to pay its costs in the High Court, Supreme Court of Appeal and in this Court. Normandien knew that Rhino could not unilaterally withdraw this application before this Court and used this to its advantage in the hope that this would compel Rhino to pay its costs.

[70] Another factor is Normandien's lack of candour. On 31 July 2019, Normandien addressed a letter to this Court in which it explained that the parties were considering settling the dispute. However, that letter made no mention of the fact that the application for an exploration right had been withdrawn by Rhino. In the event that the Court had been made aware of the withdrawal of the application for an exploration right, it is unlikely that the application would have been set down for hearing.

[71] It is clear that Normandien's actions were merely a disguised attempt to recover costs.

[72] The effect of these factors is that Rhino, by Normandien's dilatory conduct, has been forced to pursue this litigation before this Court even though Normandien recognised that the case was moot. Normandien's conduct is reprehensible and an abuse of process which warrants a punitive costs order.

Order

[73] The following order is made:

1. Leave to appeal is dismissed.
2. The applicant must pay the costs of the application including costs of two counsel, on an attorney and client scale.

For the Applicants:	A J Dickson SC, M G Roberts SC and E Roberts instructed by Vinnicombe and Associates
For the First and Second Respondents:	A R Bhana SC and I Goodman instructed by Webber Wentzel