A MISSED OPPORTUNITY

Report on an investigation into the alleged improper prejudice suffered as a result of the Department of Mineral Resources’ refusal to grant an application for mineral prospecting rights

Report No: 10 of 2013/14
REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE DEPARTMENT OF MINERAL RESOURCES' REFUSAL TO GRANT AN APPLICATION FOR MINERAL PROSPECTING RIGHTS
INDEX

Executive summary

1. INTRODUCTION 3

2. THE COMPLAINT 7

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT 7

4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR 8

5. THE INVESTIGATION 9

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION 10

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION 13

8. LEGAL AND REGULATORY FRAMEWORK 23

9. ANALYSIS AND CONCLUSION 26

10. FINDINGS 31

11. REMEDIAL ACTION 33

12. MONITORING 35
Executive Summary

(i) "A missed opportunity" is the report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector's Act, 1994.

(ii) The report communicates the Public Protector’s findings and directives on remedial action following an investigation into a complaint lodged by Mr S Mdluli on 15 February 2011, alleging prejudice suffered by Cathula Mining CC (his company) as a result of maladministration involving unjustified refusal of the Department of Mineral Resources (formerly Department of Minerals and Energy) to grant its application for mineral prospecting rights. The Complainant alleged that he submitted an application for mineral prospecting rights in May 2005, to which he did not receive a refusal letter and that upon enquiring he was told to re-apply. He further alleged that he submitted another application on 15 September 2005 which was rejected and another in 2007 to which he was told that the mineral rights had been granted to a third party. He allegedly appealed to the Minister of Mineral Resources and his appeal was rejected.

(iii) The Public Protector considered and investigated the following issues:

(a) Was the Department’s handling of the Complainant’s company’s Applications improper?

(b) Was the Minister’s handling of the Complainant’s company’s appeal improper?

(c) If the answer to any of the above issues is in the affirmative, it must be established whether the Complainant was prejudiced by the improper conduct or maladministration.
(iv) The Public Protector makes the following findings:

(a) Was the Department’s handling of the Complainant’s company’s applications improper?

(aa) The Department failed to provide the Complainant with timely, accessible and accurate information regarding his company’s first and second applications; and

(bb) The Department’s conduct violated section 195(1)(g) of the Constitution which provides that public administration must be governed by democratic values and principles enshrined in the Constitution including that transparency must be fostered by providing the public with timely, accessible and accurate information. Such conduct constitutes maladministration.

(cc) The Department admitted that it failed to deal with the Complainant’s company’s first and second applications in accordance with section 16(2)(a) and (b); section 6(1); and section 17(a) and (b) of the Act, and such failure constitutes maladministration;

(dd) The Department dealt with the Complainant’s company’s third application and Isibaya Mining Resources (Pty) Ltd’s application in the order in which they were received;

(b) Was the Minister’s handling of the Complainant’s company’s appeal improper?

(aa) The Minister failed to afford the Complainant an opportunity to make representations regarding his company’s appeal; and
(bb) The Minister’s conduct in this regard violated section 3(2)(b)(ii) of PAJA which provides for the right to be provided with an opportunity to make representations regarding administrative action. Such conduct constitutes maladministration.

(c) Did the Complainant suffer prejudice due to the conduct of the Minister and the Department?

(aa) The Complainant’s company was prejudiced by the Department’s failure to deal with its initial application in terms of section 16(a) and (b); section 6(1); and section 17(a) and (b) of the Act;

(bb) The Complainant’s company was prejudiced by the Minister’s failure to deal with its appeal in terms of section 6(1) of the Act read with section 3(2)(b) of PAJA; and

(cc) The Complainant’s right to administrative action that is lawful, reasonable and procedurally fair was infringed.

(v) The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is that:

(a) The Director-General of the Department should write a letter to the Complainant within 30 days from the date of this report and apologise for the manner in which his company’s applications for mineral prospecting rights were handled;
(b) The Minister should write a letter to the Complainant within 30 days from the date of this report and apologise for the manner in which she handled his company’s appeal; and

(c) The Department should consider assisting the Complaint’s Company to identify an alternative mineral prospecting opportunity and provide the necessary support in that regard.
REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE DEPARTMENT OF MINERAL RESOURCES’ REFUSAL TO GRANT AN APPLICATION FOR MINERAL PROSPECTING RIGHTS

1. INTRODUCTION

1.1 "A missed opportunity" is the report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to the Minister of Mineral Resources, Ms S Shabangu and Dr T Ramontja, Director-General of the Department of Mineral Resources (the Department), in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report is also provided to the Complainant in terms of section 8(1) of the Public Protector Act.

1.4 The report relates to an investigation into a complaint of alleged improper prejudice suffered by Cathula Mining CC as a result of the refusal of the Department of Mineral Resources (formerly Department of Minerals and Energy) to grant its application for mineral prospecting rights.

2. THE COMPLAINT

2.1 On 15 February 2011, Mr S Mdluli (the Complainant) lodged a complaint with the Public Protector in which he alleged that his company was improperly prejudiced by the refusal of the Mpumalanga Regional Office of the Department of Mineral Resources’ (the Department) to grant its application
for mineral prospecting rights in relation to the Three Sisters Mine (Three Sisters JU 256 Farm) situated in the District of Barberton, Mpumalanga.

2.2 The Complainant made the following allegations:

2.2.1 The letter of rejection from the Regional Office was signed by someone who did not have authority to do so and who is unknown within the Regional Office;

2.2.2 Two of the three files relating to his Applications were missing i.e. File no 580PR and File no.833PR;

2.2.3 Some of the documents that were supposed to be in the third file i.e. File no 2007PR were missing and his company's name was cancelled on the file and another company's name written thereon;

2.2.4 He was told by some officials at the Regional Office that some of his company's documents were given to the company that had its application approved; and

2.2.5 The letter from the National Office might not be genuine as it seems that no thorough investigation was done before responding to their appeal and they were not called to make representations in person.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector was established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
3.2 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector is further empowered by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The Department of Mineral Resources is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.

3.5 The jurisdiction of the Public Protector was not disputed by any of the parties.

4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

4.1 The Public Protector considered and investigated the following issues:

4.1.1 Was the Department’s handling of the Complainant’s company’s Applications improper?

4.1.2 Was the Minister’s handling of the Complainant’s company’s appeal improper?
4.1.3 If the answer to any of the above issues is in the affirmative, it must be established whether the Complainant was prejudiced by the improper conduct or maladministration.

5. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.

5.1 Key sources of information

5.1.1 Correspondence

5.1.1.1 Consultation with the Complainant dated 15 February 2011;

5.1.1.2 Telephonic and written correspondence with the Complainant;

5.1.1.3 Various correspondence and enquiries with the Department of Mineral Resources;

   i. Adv S Nogxina, the then Director-General of the Department of Mineral Resources dated 13 April 2011;


   iii. Mr N Miyen at the National Office of the Department of Mineral Resources dated 3 October 2011, 12 January 2012 and 10 February 2012;
iv. Mr M Mphuthi at the National Office of the Department of Mineral Resources dated 13 March 2012;

v. Telephonic communication with Ms N Qwanyashe dated 10 June 2011 and 29 September 2011;

vi. Telephonic communication with Mr N Miyen dated 3 October 2011, 12 January 2012 and 24 January 2012;

vii. Telephonic communication with Mr B Nemagovhani, Chief Audit Executive: Audit Services of the Department of Mineral Resources dated 24 January 2012 and 12 March 2012; and

viii. Telephonic communication with Mr M Mphuthi dated 16 March 2012.

5.1.2 Documentation

5.1.2.1 The following voluminous documents:

i. Written correspondence between the Complainant, Barberton Mines (Pty) Ltd and the owners of the farm Three Sisters;

ii. The Complainant's application for mineral prospecting rights dated 19 November 2007;

iii. Written correspondence between the Complainant and the Department of Mineral Resources regarding his company's applications;

v. Prospecting Work Programme for gold prospects on the Farm Three Sisters compiled by the Council for Geological Science;

vi. Copy of the Complainant's application dated 26 September 2005 from the Department of Mineral Resources;

vii. Internal Audit Report of the Department's Mpumalanga Regional Office; and

viii. Copy of the Complainant's Company's undated letter of appeal to the Department of Mineral Resources.

5.2 Legislation and other prescripts

5.2.1 The Constitution, 1996;

5.2.2 Promotion of Administrative Justice Act 3 of 2000 (PAJA);

5.2.3 Mineral and Petroleum Resources Development Act 28 of 2002 (MPRD);

5.2.4 Mineral and Petroleum Resources Development Regulations of 2004 (MPRD Regulations); and

5.2.5 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama-ye Maswati Royal Council Intervening) 2011 3 BCLR 229 (CC).
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Complainant’s submission

6.1.1 The Complainant alleged that his company was given permission by Barberton Mines (Pty) Ltd to mine the Three Sisters Mines on 13 September 2004. He alleged that one of the conditions attached thereto was to obtain a Mining Authorisation from the Department before commencing any mining operations on the site. The other condition was that the Complainant’s company agreed to sell all the gold to Barberton Mines (Pty) Ltd for treatment.

6.1.2 The Complainant also alleged that his company was also given permission by the farm owner, on 26 October 2005, to conduct its mining business on the farm. The Complainant alleged that an Application was submitted to the Department in May 2005 and File no. 580PR was opened by the Department. The Complainant alleged that he was informed that his company was required to provide the Department with proof of financial aid and technical ability.

6.1.3 He further alleged that his company did not receive a refusal or rejection letter thereafter. He was allegedly informed of the aforesaid requirements when he made enquiries two months after submitting the application on behalf of his company. He was allegedly then advised to re-apply and provide the said financial aid and proof of technical ability.

6.1.4 The Complainant alleged that another application dated 15 September 2005 was submitted with proof of financial aid and technical ability. Allegedly, the second Application as per File no.833PR was rejected on the ground that the proof from the Department did not reflect the financial aid
amount as the starting capital. It was also alleged that the rejection was not communicated to him for a period of one year until he made enquiries and at which stage he was advised to re-apply.

6.1.5 According to him, the third application was submitted in November 2007 as per File no 2007PR. Allegedly on that occasion, the application was rejected on the grounds that the rights had already been granted to another applicant in respect of the same land. He also alleged that he was informed that the other company was already conducting its mining business on the same land. He was adamant that he had been to the site and there was no mining activity taking place there.

6.1.6 The Complainant alleged that he submitted an appeal to the National Department on 3 March 2009, after he could not get a response from the Chief Director at the Mpumalanga Regional Office where the respective applications were made. The Complainant provided the Public Protector with a copy of an undated letter, which purported to be an appeal to the Department against the decision taken by the Minister regarding the refusal of a prospecting right application submitted by his company dated 3 February 2009.

6.1.7 The letter of appeal alleged that the Complainant's Company had all the rights to mine the Three Sisters (256 JU) Farm. It further alleged that the Company had the certificate of deed of grant which was granted by the owner. The letter of appeal also alleged that if there are other parties involved there must be an infringement somehow, because the deed of grant is only issued once and that the original certificate is with the Complainant's Company.
6.1.8 The Complainant allegedly received a letter from the Minister dated 2 December 2009 in response to his company's appeal confirming the rejection of his application by the Regional Office.

6.1.9 The Complainant provided the Public Protector with a copy of the Minister's letter referred to above. The last paragraph of the Minister's letter indicated that the Minister's decision to dismiss the appeal was that a right was granted to Isibaya Mining Resources (Pty) Ltd over the same property for the same minerals prior to the Complainant's Company's application.

6.1.10 In response to the Public Protector's provisional report, the Complainant did not make any substantive submissions except to commend the Public Protector for investigating the matter.

6.2 The Department's Audit Services Report

6.2.1 In response to the Public Protector's enquiries the Department's Audit Services allegedly conducted a review of the Mpumalanga Regional Office, to determine whether Cathula Mining CC’s (the Complainant's company) allegations of improper processing and unfair treatment of their application could be substantiated. It also had to determine whether there was collusion and manipulation of the Complainant's company's application amongst officials and the competing applicants' officials.

6.2.2 The Public Protector was provided with an audit report in which the following findings were made from the Audit Services' investigation of the matter:

6.2.2.1 The Department failed to observe and consider proof of consultation with Barberton Mines (Pty) Ltd submitted by the Complainant's company;
6.2.2.2 The motivation to reject the application submitted by the Complainant’s company was not in compliance with section 16(2) (b) of the Act;

6.2.2.3 The Complainant’s company’s Application (580 PR) was handled unfairly and due professional care was not exercised because the Department failed to explore and exhaust other measures of correspondence. The resultant delays compromised the equal opportunity that the Complainant’s company was supposed to enjoy with regard to administrative fairness as stated in section 10(1)(a) of PAJA. The decision appears to have prejudiced Cathula Mining CC;

6.2.2.4 The Small Scale Mining Directorate failed to provide proof of financial and technical ability which complies with section 17(a) and (b) of the Act as it failed to provide accurate and reliable guidance to the Complainant’s company as a small scale miner. It was found that there was lack of due diligence by the Small Scale Mining Directorate in the evaluation of the application;

6.2.2.5 The application was refused based on incorrect evaluation since the Mine Economics Directorate (MED) failed to evaluate and determine whether the Complainant’s company had access to financial and technical ability. It was further found that the MED failed to evaluate the Prospecting Work Programme in order to determine whether the estimated expenditure was compatible with the proposed prospecting operation and duration of the Prospecting Work Programme. Instead, the MED had requested information from the Complainant’s company that was already submitted. It further found that the Complainant’s company was not given an opportunity to remedy or prove financial and technical ability as administratively required by PAJA;
6.2.2.6 The Department failed to exercise procedural fairness when processing and evaluating the Complainant’s company’s application due to unjustified delays. The Department’s actions and/or lack thereof caused potential prejudice to the Complainant’s company’s application;

6.2.2.7 There was lack of cohesion within the Department branches in handling the Application;

6.2.2.8 The third Application was dealt with in accordance with section 9(1)(b) of the Act. In terms of the Department’s Audit Services Report and the available evidence the Complainant’s company’s third application was signed on 19 November 2007 and lodged with the Department on 29 January 2008. A letter of acceptance from the Department dated 11 February 2008 in that regard was received by the Complainant’s company.

6.2.2.9 On the other hand, Isibaya Mining Resources (Pty) Ltd.’s application was signed on 1 August 2007 and lodged with the Department on 27 August 2007. Its application was granted on 7 May 2008 and executed on 24 June 2008;

6.2.2.9 The Minister had the right to respond on behalf of the Chief Director with powers invested in her in accordance with section 103(4)(b) of the Act. The order and the process the Minister followed was fairly executed. The Minister’s letter was based on reasonable and justifiable circumstances around the Complainant’s company’s appeal and she did not need to invite any representation as stipulated in section 3(4)(a) of PAJA. Further, that the letter was from the office of the Minister and signed by the Minister, therefore, it was legitimate and authentic; and
6.2.2.10 The allegations relating to the illegal removal of the Complainant’s company’s documentation from the application file and missing files were unfounded and lacking substance to suggest that there was foul play.

6.2.3 The Audit Services made the following recommendations concerning its findings:

6.2.3.1 The Management of the Department (the Management) should implement quality review processes to ensure that all submitted information is considered and subjected to evaluation;

6.2.3.2 The Management should implement quality review processes to ensure that information communicated to mineral rights applicants and decision-makers is factually correct. Further, that the Complainant’s company’s case be reviewed with the intention to rectify identified non-compliance;

6.2.3.3 The Management should review all applications prior to them being deemed as accepted. Applicants should also be requested to submit their utility bills to ensure that the address including the postal code documented on the application forms is correct. This should be done in comparison to the address stated in the utility bill and on the application form to eliminate communication not reaching client destination. The onus will rest with the client to provide the correct address. The Department should exhaust all the contact details on the form provided by the applicants to ensure that all communiqués reach applicants on time;

6.2.3.4 The Management should implement quality review processes and encourage sound cohesion with other sections or directorates that are
involved in the processes to ensure that information communicated to mineral right applicants and decision makers is factually correct. Further, Management should consider the Complainant’s company’s case with the intention to rectify identified non-compliance and institute disciplinary action or counselling where necessary to processes owners to avoid non-compliance;

6.2.3.5 Application timeframes should be formally documented, approved and communicated to all parties including applicants;

6.2.3.6 The Management within the Small Scale Mining and Mineral Regulation Directorates should coordinate efforts to assist historically disadvantaged applicants who seek to conduct prospecting or mining operations and also to enforce compliance with regard to section 12(1) and (3)(a) & (b) of the Act when dealing with such applicants; and

6.2.3.7 No recommendations were made regarding the handling of the Complainant’s company’s third application as it was deemed to have been handled in accordance with section 9(1) of the Act, the Minister’s letter relating to the appeal and the issue relating to the alleged removal of the Complainant company’s documentation from the application file and the missing files as the allegations were found to be unfounded and not substantiated.

6.2.3.8 It has since been established that the Department has implemented the recommendations of its Audit Services except the recommendation that the Complainant’s company’s case be reviewed with the intention to rectify identified non-compliance.
6.2.3.9 The Department argued that it is not in a position to review the Complainant's company's application since the Complainant's company exercised its right to internal appeal as contemplated in section 96. The Department further argued that its records reflect that the Minister exercised her powers as contemplated in section 103 of the Act to deal with the appeal and confirmed the refusal decision.

6.2.4 The Minister responded as follows to the Public Protector's provisional report:

6.2.4.1 The Minister alleged that although the appeal was not dealt with in terms of section 96(1) of the Act, it was dealt with in a procedurally fair manner and a substantive process was followed which ultimately yielded the same result. The Minister argued that according to the widely accepted interpretation of the legal position at that time, no appeal could be lodged with the Director-General or the Minister as the case may be. The Minister sought to rely on the decision of the High Court in the Bengwenyama Minerals case in which the court held that no internal appeal was available.¹

6.2.4.2 The decision of the High Court was based on the interpretation that since the powers delegated in terms of section 103(1) of the Act may be regarded as a delegation and not an assignment, the decision of the delegate is actually the decision of the Minister. Therefore where the Deputy-Director: Mineral Regulation has granted or refused a prospecting right in terms of section 17(1) or (20 of the Act, no internal appeal would be competent under section 96 of the Act.

6.2.4.3 The Minister submitted that had it not been for the provisions of section 103(4)(b) of the Act, a person aggrieved by the decision of the Deputy Director-General: Mineral Regulation had no internal remedy and could only approach a court of law for a review of the administrative action. The Minister submitted that section 103(4) of the Act, provided an alternative internal remedy, in that it afforded her the opportunity to reconsider, and where appropriate, withdraw or amend the administrative decision of the Deputy Director-General: Mineral Regulation or the Director-General, as the case may be.

6.2.4.4 The Minister further submitted that the refusal of the Complainant’s prospecting right was taken by the Deputy Director: Mineral Regulation and that subsequent to receiving the Complainant’s appeal, the Department requested a response from the Regional Manager as contemplated in Regulation 74. She further submitted that on receiving a response from the Regional Manager, it was established that the Deputy Director-General: Mineral Regulation had already granted a prospecting right to a third party.

6.2.4.5 The Minister contended that since that decision had been taken under delegated authority, she had become *functus officio*, and the matter could only lawfully be processed in terms of section 103(4) and she duly handled the matter as such.

6.2.4.6 The Minister contended that she did not exercise the discretion vested in her in terms of section 103(4) in favour of the Complainant since she had to have due regard to the principles of security of tenure, certainty, and finality of administrative decisions. She further contended that if the discretion was exercised in favour of the Complainant, she would have to cancel the vested rights of the third
party and that such a decision would have prejudiced the third party and created legal uncertainty.

6.2.4.7 The Minister submitted that the procedure followed in terms of section 103(4) of the Act was similar to the internal appeal procedure contemplated in section 96 of the Act, in that the Department executed the process in the manner set out in Regulation 74.

6.2.4.8 The Minister conceded that she did not provide the Complainant with the opportunity to make representations in regard to the reply from the Regional Manager. The Minister however submitted that a further invitation for comment would have served no purpose and occasioned unnecessary delay.

6.2.4.9 The Minister submitted that even if the section 96 appeal process was followed to the letter, the end result would have been exactly the same. She further argued that the Complainant could not have suffered any prejudice as a result of the purported failure to deal with the appeal in accordance with the provisions of section 96(1)(b) of the Act.

6.2.4.10 The Minister submitted that if she were to withdraw her decision and deal with the matter as directed in the remedial action proposed in the provisional report the result would be the same. The Minister further submitted that she had been advised that she is *functus officio* and is precluded by law from revisiting her own decision.
7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Was the Department’s handling of the Complainant’s company’s Applications improper?

7.1.1 It is common cause that the Complainant’s company submitted three applications for mineral prospecting rights at different intervals. The Department conceded that the Complainant was not provided with timely, accessible and accurate information regarding his company’s first and second applications.

7.1.2 The Department contended that the Complainant’s company’s third application (Application no. 2007 PR) was dealt with in accordance with section 9(1)(b) of the Act.

7.1.2.1 The evidence obtained indicates that the Complainant’s company’s third application was signed on 19 November 2007 and lodged with the Department on 29 January 2008. A letter of acceptance from the Department dated 11 February 2008 in that regard was received by the Complainant’s company. On the other hand, Isibaya Mining Resources (Pty) Ltd’s application was signed on 1 August 2007 and lodged with the Department on 27 August 2007.

7.1.2.2 The evidence obtained revealed that the applications were received on different dates and dealt with in the order in which they were received.
7.2  Was the Minister’s handling of the Complainant’s company’s appeal improper?

7.2.1  It is common cause that the Complainant lodged an appeal with the National Department on 3 March 2009, after he could not get a response from the Chief Director at the Mpumalanga Regional Office.

7.2.1.1  The available evidence indicated that the Complainant alleged irregularity in connection with the deed of grant issued by the owners with regard to the Three Sisters Farm 256 JU when his company submitted an appeal to the Department. The Complainant further alleged that there must have been an infringement in the granting of the mineral prospecting rights to Isibaya Mining Resources (Pty) Ltd in that the deed of grant is only issued once and that the original certificate was with his company.

7.2.1.2  The Complainant’s Company received a letter from the Minister dated 2 December 2009 confirming the rejection of his application by the Regional Office. The letter indicated that the Minister’s reason for the decision to dismiss the appeal was that the right was granted to Isibaya Mining Resources (Pty) Ltd over the same property for the same minerals prior to the Complainant’s Company’s application. However, the letter did not indicate what the Minister’s response was to the allegation regarding the deed of grant in connection with Three Sisters Farm 256 JU.

7.2.1.3  The evidence indicated that Isibaya Mining Resources (Pty) Ltd’s application was signed on 1 August 2007 and lodged with the Department on 27 August 2007. Its application was granted on 7 May 2008 and executed on 24 June 2008;
7.2.1.4 It is therefore correct that at the time when the Complainant’s Company lodged an appeal with the Department and the Minister had considered it and responded thereto, the right had already been granted to Isibaya Mining Resources (Pty) Ltd.

7.2.2 In response to the Public Protector’s provisional report, the Minister conceded that the Complainant’s appeal was not dealt with in accordance with section 96(1) of the Act.

7.2.2.1 The Minister has correctly pointed out that at the time when she dealt with the Complainant’s appeal, there was no internal appeal available in terms of the judicial precedent applicable then. The Minister’s contention in this regard is confirmed in the High Court decision in the Bengwenyama Minerals\(^2\) case.

7.2.2.2 It is also correct that in terms of the *dictum* emanating from the case referred to above, the decisions taken in terms of delegated powers provided for in section 103(1) of the Act were regarded as those of the Minister.

7.2.2.3 The Minister dealt with the Complainant’s appeal in 2009 and the decision of the High Court in the Bengwenyama Minerals case that there is no internal appeal available in the Act was overturned by the Supreme Court of Appeal (SCA) in an appeal in 2010 and confirmed by the Constitutional Court in a further appeal in 2010.\(^3\)

7.2.2.4 The Minister alleged that although the appeal was not dealt with in terms of section 96(1) of the Act, it was dealt with in a procedurally fair

\(^2\) Supra.

\(^3\) Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd(formely Tropical Paradise 427 (Pty) Ltd) (Bengwenyama-ye- Maswati Royal Council Intervening) 2010 3 All SA 577 (SCA) and Supra n1 respectively.
manner in terms of section 103(4) and a substantive process was followed as set out in Regulation 74, which ultimately yielded the same result.

7.2.2.5 However, the Minister did not submit whether she had considered the Constitution or PAJA when dealing with the appeal. The Minister also did not indicate why she had considered the judicial precedent applicable then to the exclusion of the Constitution and PAJA.

7.2.2.6 The Minister did not dispute that the Constitution and PAJA is applicable to the appeal.

7.2.3 The Minister has correctly submitted that she is functus officio and is precluded by law from revisiting her own decision.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution

8.1.1 Section 2 provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

8.1.1.1 In terms of section 2 any law whether judicial precedent is invalid if it is inconsistent with the Constitution.

8.1.2 Section 33 provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33 also provides that national legislation must
be enacted to give effect to those rights and that legislation has been enacted in the form of PAJA.

8.1.2.1 The Minister was obliged to deal with the Complainant's Company's appeal in terms of section 33 of the Constitution and PAJA.

8.1.3 Section 195 provides that public administration must be governed by democratic values and principles enshrined in the Constitution including that a high standard of professional ethics must be promoted and maintained. Further that transparency must be fostered by providing the public with timely, accessible and accurate information.

8.1.3.1 In terms of section 195 the Complainant was entitled to be provided with timely, accessible and accurate information regarding his company's applications for mineral prospecting rights.

8.2 Public Protector Act, 1994

8.2.1 Section 7(9) of the Public Protector Act provides that:

"If it appears to the Public Protector during the course of investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

8.2.2 The Public Protector issued a provisional report in accordance with section 7(9) of the Public Protector Act on 12 December 2012. The provisional report
was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

8.2.3 The provisional report was submitted to the Minister of Mineral Resources, Ms S Shabangu and the Director-General of the Department of Mineral Resources, Dr T Ramontja. The Complainant was also provided with a copy of the provisional report.

8.3 Promotion of Administrative Justice Act, 2000 (PAJA)

8.3.1 Section 3(1) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Section 3(2)(b) provides among others that to give effect to this right, an administrator must give the person affected a reasonable opportunity to make representations. However, section 3(4)(a) provides that if it is reasonable and justifiable in the circumstances, an administrator may depart from giving the affected person such an opportunity.

8.3.1.1 In terms of section 3(1) read with sub-section (2)(b), the Complainant was entitled to a procedurally fair administrative action regarding the refusal of his company’s applications for mineral prospecting rights.

8.3.1.2 He was also entitled to make representations regarding the refusal of his company’s applications for mineral prospecting rights.

8.4 The Mineral and Petroleum Resources Development Act, 2002 (the Act)

8.4.1 Section 6(1) of the Act provides that subject to the Promotion of Administrative Justice Act, 2000 (Act no 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted
or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

8.4.1.1 In terms of section 6(1) read with section 3(1) and (2)(b) of PAJA, the Complainant was entitled to a lawful, reasonable and procedurally fair administrative action regarding his company’s applications for mineral prospecting rights.

8.4.2 Section 9(1)(b) provides that if a Regional Manager receives more than one application, applications received on different dates must be dealt with in the order in which they were received.

8.4.2.1 In terms of section 9(1)(b), the Department was entitled to deal with Isibaya Mining Resources (Pty) Ltd’s application for mineral prospecting rights ahead of the Complainant’s company’s third application for mineral prospecting rights since it was received before that of the Complainant’s company.

8.4.3 Section 16(2)(a) and (b) of the Act provides that the Regional Manager must accept an application for prospecting if the requirements contemplated in subsection (1) are met; and no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

8.4.3.1 In terms of section 16(2)(a) and (b), the Department was entitled to accept Isibaya Mining Resources (Pty) Ltd’s application for mineral prospecting rights since no other person held such right with regard to the Three Sisters farm at that time.

8.4.4 Section 96(1)(b) of the Act provides that any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in
the prescribed manner to the Minister, if it is an administrative decision by
the Director-General or the designated agency.

8.4.4.1 In terms of section 96(1)(b), the Complainant was within his right to
appeal the decision refusing his company's third application for
mineral prospecting rights. However, in terms of the Bengwenyama
Minerals case no internal appeal was available to the Complainant at
the time of his company's appeal.

8.4.5 Section 103(4)(b) of the Act provides for the withdrawal or amendment
by the Minister, Director-General, Regional Manager or officer of a
decision made by a person exercising a power or performing a duty
delegated or assigned in terms of the Act.

8.5 The Mineral and Petroleum Resources Development Regulations of
2004 (the Regulations)

8.5.1 Regulation 74(5) provides that after receipt of notice of appeal, the Director-
General or the Minister as the case may be, must dispatch copies thereof to
the person responsible for the administrative decision concerned and any
other person whose rights may in their opinion be affected by the outcome of
the appeal and request such persons to respond as provided for in sub-
regulation (6) and (7).

8.5.2. Regulation 74(6) provides that the person responsible for the administrative
decision concerned must within 21 days from receipt of the notice of appeal,
submit to the Director-General or the Minister, as the case may be, written
reasons for the administrative decision appealed against.

8.5.3 Regulation 74(7) provides that a person whose rights may be affected by the
outcome of the appeal must within 21 days from receipt of the notice of
appeal, submit to the Director-General or the Minister, as the case may be, a
relying submission indicating the extent and nature of his or her rights; how
the outcome of the appeal may affect his or her rights; and any other
information pertaining to the grounds as set out in the notice of appeal.

8.5.4 Regulation 74(8) provides that the Director-General or the Minister, as the
case may be, must dispatch the documents contemplated in sub-regulations
(6) and (7) to the appellant by registered post and request him or her to
respond thereto in writing within 21 days from receipt thereof. Regulation
74(9) provides that the Director-General or the Minister, as the case may be,
imust within 30 days from the date of receipt of the response contemplated in
sub-regulation (8) either confirm, set aside, amend the administrative
decision concerned or substitute any other administrative decision for the
administrative decision concerned.

9. ANALYSIS AND CONCLUSION

9.1 Was the Department’s handling of the Complainant’s company’s
Applications improper?

9.1.1 Consequent to considering the Department’s Audit Services Report and its
findings, there was no need to deal with allegations dealt with therein as
those allegations are regarded as having been admitted.

9.1.2 The Complainant’s company’s initial applications should have been dealt
with in accordance with section 16(2) (b) and section 17(a) and (b) of the Act
as conceded by the Department.

9.1.3 The Complainant was not provided with timely, accessible and accurate
information regarding his company’s first and second applications for mineral
prospecting rights. This was not in accordance with section 195(1) (g) of the
Constitution which provides that public administration must be governed by
democratic values and principles enshrined in the Constitution including that
transparency must be fostered by providing the public with timely, accessible and accurate information.

9.1.4 Section 9(1)(b) of the Act provides that if a Regional Manager receives more than one application, applications received on different dates must be dealt with in the order in which they were received. It is clear from the evaluation of the evidence that the Complainant company’s application for prospecting right (Application no. 2007 PR) was received after that of Isibaya Mining Resources (Pty) Ltd (Application no. 1794 PR).

9.1.5 Therefore, the applications were dealt with in accordance with the order in which they were received in terms of section 9(1)(b) of the Act.

9.2 Was the Minister’s handling of the Complainant’s company’s appeal improper?

9.2.1 Section 6(1) of the Act provides that subject to the Promotion of Administrative Justice Act, 2000 (Act no 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. (own emphasis).

9.2.1.1 The Minister was obliged to consider PAJA in deciding the manner in which to deal with the Complainant’s Company’s appeal, notwithstanding the judicial precedent applicable to the matter at that time.

9.2.1.2 The Minister conceded that she did not provide the Complainant with an opportunity to make representations. Therefore even if there was no internal appeal in the Act as postulated by the Bengwenyama
Minerals case, the Minister was in terms of section 33 of the Constitution obliged to deal with the appeal in accordance with PAJA. Consequently the *dictum* in the Bengwenyama Minerals case could not have justified the Minister's failure to provide the Complainant with an opportunity to make representations regarding the appeal as provided for in section 3(2)(b)(ii) of PAJA. The deviation by the Minister from the provisions of section 33 of the Constitution read with section 3(2)(b)(ii) of PAJA constituted the violation of the constitutional supremacy clause in section 2 of the Constitution.

9.2.2 The fact that the Minister became *functus officio* after she issued her decision regarding the appeal, has the implication that any further appropriate remedy of review lies with the courts.

10. **FINDINGS**

The Public Protector makes the following findings:

10.1 **Was the Department’s handling of the Complainant’s company’s Applications improper?**

10.1.1 The Department failed to provide the Complainant with timely, accessible and accurate information regarding his company’s first and second applications; and

10.1.2 The Department’s conduct contravened section 195(1)(g) of the Constitution which provides that public administration must be governed by democratic values and principles enshrined in the Constitution including that transparency must be fostered by providing the public with timely, accessible and accurate information. Such conduct constitutes maladministration.
10.1.3 The Department admitted that it failed to deal with the Complainant’s company’s first and second applications in accordance with section 16(2)(a) and (b); section 6(1); and section 17(a) and (b) of the Act, and such failure constitutes maladministration;

10.1.4 The Department dealt with the Complainant’s company’s third application and Isibaya Mining Resources (Pty) Ltd’s application in the order in which they were received;

10.2 Was the Minister’s handling of the Complainant’s company’s appeal improper?

10.2.1 The Minister failed to afford the Complainant an opportunity to make representations regarding his company’s appeal; and

10.2.2 The Minister’s conduct in this regard contravened section 3(2)(b)(ii) of PAJA which provides for the right to be provided with an opportunity to make representations regarding administrative action. Such conduct constitutes maladministration.

a. Did the Complainant suffer prejudice due to the conduct of the Minister and the Department?

10.3.1 The Complainant’s company was prejudiced by the Department’s failure to deal with its initial application in terms of section 16(a) and (b); section 6(1); and section 17(a) and (b) of the Act;

10.3.2 The Complainant’s company was prejudiced by the Minister’s failure to deal with its appeal in terms of section 6(1) of the Act read with section 3(2)(b) of PAJA; and

34
10.3.3 The Complainant's right to administrative action that is lawful, reasonable and procedurally fair was infringed.

11. **REMEDIAL ACTION**

The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is that:

11.1 The Director-General of the Department should write a letter to the Complainant within 30 days from the date of this report and apologise for the manner in which his company's applications for mineral prospecting rights were handled; and

11.2 The Minister should write a letter to the Complainant within 30 days from the date of this report and apologise for the manner in which she handled his company's appeal.

11.3 The Department should assist the Complaint's Company to identify an alternative mineral prospecting opportunity and provide the necessary support in that regard.
12. MONITORING

12.1 The Minister and the Director-General of the Department must submit copies of letters of apology referred to at paragraph 11.1 and 11.2 within 30 days from the date of this report; and

12.2 The Department should submit a plan of action regarding the implementation of the remedial action taken at paragraph 11.3 within 60 days from the date of this report.

12.3 The Public Protector will monitor compliance with the remedial action taken.

[Signature]
ADV'T N MADUNSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
Date: 23/01/2013
Assisted by: Mr M I MATLAWE, SENIOR INVESTIGATOR: SERVICE DELIVERY