FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3244/2009

In the appeal of:

JUAN PIETER SONNENBERG Applicant

and

THE MINISTER OF MINERALS AND ENERGY 1st Respondent
THE DIRECTOR, MANAGER, DEPARTMENT OF MINERALS AND ENERGY 2nd Respondent
THE REGIONAL MANAGER, MINERAL REGULATION: FREE STATE REGION: DEPARTMENT OF MINERALS AND ENERGY 3rd Respondent
MZWANDILE SHWABABA 4th Respondent

CORAM: CILLIé, J *et* MOCUMIE, J

JUDGEMENT: CILLIé, J

HEARD ON: 10 MAY 2010

DELIVERED ON: 24 JUNE 2010

INTRODUCTION

[1] The applicant is the owner of the Remainder of the Farm

Diamant 631 situated in the magisterial district of Boshof, Free State Province. Per Notarial Deed dated the 9th of February 2009 a prospecting right in terms of section 16 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) was granted to the fourth respondent over the said property. Who of the first, second or third respondent exactly it was that granted that right to the fourth respondent falls for decision in a point *in limine* taken by Mr Grobler on behalf of the fourth respondent. I will herein later deal therewith. The applicant on various grounds seeks the revision and setting aside by this court of the prospecting right granted to the fourth respondent. The first respondent (The Minister of Minerals and Energy), the second respondent (The Director General: Department of Minerals and Energy) and the third respondent (The Regional Manager, Mineral Regulation: Free State Region) abides the court's decision and did not file opposing affidavits. The fourth respondent resists the application.

IN LIMINE

[2] The fourth respondent raises *in limine* that the applicant failed

to exhaust its remedies in terms of MPRDA more particularly section 96 thereof. That section reads as follows:

> "96. Internal appeal process and access to courts, - (1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to –
>
> (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer, or
>
> (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.
>
> (2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.
>
> (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.
>
> (4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section."

[3] Read with section 7 of the Promotion of Administrative Justice Act, no 3 of 2000 (PAJA) the applicant was obliged to appeal to either the Minister or the Director General, so the argument ran. This necessitates consideration for whose administrative decision it was that brought about the granting of the prospecting right. Mr Grobler submits that the decision was that of one T K Moloto, the regional manager, Free State, at the time (third respondent) and therefore it falls to be dealt with on appeal by the second respondent. This argument is not novel. It has been dealt with in three as yet unreported judgments of this court. In the first of these being **MOFSCHAAP DIAMONDS (PTY) LTD v MINISTER OF MINERALS AND ENERGY AND OTHERS**, case number 3117/2006, Free State, 14 June 2007 Kruger J and Van der Merwe J after dealing with the principles of delegation of powers concluded as follows:

> [13] It is clear therefore that the first respondent has both the power to revoke the delegation to the third respondent in

> question and to exercise the power delegated herself and the power to exercise control over the exercise of the delegated power. In our view the delegation to the third respondent in question took place in a scheme of deconcentration of public power. It follows that when the third respondent refused to grant a prospecting right to the applicant, the third respondent acted on behalf of the first respondent, that the first respondent acted through the third respondent and that the decision to refuse must be regarded as the decision of the first respondent. On this basis no appeal in terms of section 96 of the Act is available to the applicant."

[4] It is clear from the reading of this judgment that in that matter exactly the same delegation to the same third respondent was at stake as in the present matter. This judgment was followed in this court in **GLOBAL PACT TRADING 207 (PTY) LTD v MINISTER OF MINERALS AND ENERGY AND OTHERS**, case number 3118/06, 14 June 2007 and in **DE BEERS CONSOLIDATED MINES v REGIONAL MANAGER MINERAL REGULATION, FREE STATE AND OTHERS**, case number 1590/2007, Free

State, 15 May 2008. In both of these matters the same delegation was also under consideration. Mr Grobler invited the court to reconsider the correctness of these three judgments. He submitted that the Act authorises both the delegation of the administrative power and the internal remedy of an appeal. This argument however begs the question: The question is not what was delegated but as whose decision *in jure* it was to be regarded. I remain unconvinced that the mentioned three judgments are incorrect. The point *in limine* can therefore not be upheld.

[5] For the sake of completeness it is necessary to mention that the fourth respondent in his answering affidavit raised a further point that is in the nature of a point *in limine*. This is that the application is out of time. Section 7 of PAJA obliges an applicant to institute judicial proceedings within 180 days after the date of which he was informed of the administrative action which he wishes to be reviewed. Mr Grobler in argument however correctly

conceded that the applicant is well within the time limit. It is therefore not necessary to deal with this.

MERITS

[6] Mr Van Niekerk on behalf of the applicant relied on four irregularities in the process when the prospecting right was applied for, considered and granted which allegedly contaminated the whole process to such an extent that the granting of the right by the first respondent should be set aside. The irregularities relied on are:

6.1 Non-compliance with section 16(4)(b) of MPRDA;

6.2 Non-compliance with section 10 of MPRDA;

6.3 Lack of a proper signature on the Notarial Deed granting the prospecting right; and

6.4 The deletion in the Notarial Deed of the terms and conditions on which the prospecting right was granted, thus rendering the ambit of the right confusing and uncertain.

[7] **NON-COMPLIANCE WITH SECTION 16(4)(b)**

7.1 Section 16(4)(b) provides as follows as to the procedure to be followed by an applicant when applying for a prospecting right:

> "6.4 If the regional manager accepts the application the regional manager must within 14 days from the day of acceptance notify the applicant in writing
>
> (a) ....
>
> (b) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of notice."

7.2 The purpose of this is clear. The land owner must be informed of the fact that application for a prospecting right over his property has been made in order to respond thereto.

7.3 To make this decision the land owner should at least be given sufficient details of the proposed prospecting activities including the extent, nature and locality thereof.

7.4 In the present matter a letter in the following terms

allegedly addressed by the fourth respondent to the applicant is the notification relied on. It reads as follows:

> "IS: TOESTEMMING OM OP PLAAS DIAMANT TE DELF
>
> Hiermee doen ek aansoek om op u plaas diamant te delf. Hoop dat die aansoek u goedgunstige oorweging sal geniet. Indien u enige navrae of reëlings het is u welkom om my te kontak by die volgende selfoonnommer: 082 3036807.
>
> Vriendelike groete.
>
> Nzwandile Shwababa"

7.5 Assuming for the moment that this letter was received by the applicant, a fact which is strenuously denied by him, the notification in any event falls significantly short of what is required by section 16(4)(b). See **MEEPO v KOTZE AND OTHERS** 2008 (1) SA 104 (NC).

7.6 Nothing in this letter serves to alert the reader thereof that an application for any kind of right has been submitted to the relevant authorities and no particulars of the proposed prospecting or mining activities are provided.

7.7 The fourth respondent followed this up with a letter to the

third respondent in the following terms:

> "I hereby notify the Department that the owner of the farm has not responded to a registered mail send to him on 19 June 2008, copies of correspondence are attached. Hoping and trusting that my letter reaches your favourable consideration. Yours truely.
>
> M Shwababa."

It is therefore clear that no consultation as envisaged in the Act took place.

7.8 If the notification letter does not comply with the said section the decision to approve the application and the granting thereof was based on incorrect factual information and therefore incompetent in terms of section 17(2) (4) (a) of the MPRDA. This section specifically provides that:

> "The Minister must refuse to grant a prospecting right if the application does not meet all the requirements referred to in the Act."

7.9 The granting of the prospecting right must therefore on this ground alone be reviewed and set aside as the applicant seeks in his notice of motion.

[8] Mr Van Niekerk, on behalf of the applicant, however submitted in the alternative that the granting of the prospecting right falls to be set aside on the further grounds set out in paragraph 3 supra. He made out a strong argument that there was non-compliance with the requirements of section 10 of the MPRDA as well. (Paragraph 6.2 supra).There may also be validity in the other two grounds of review relied upon by Mr Van Niekerk as set out in paragraph 6.3 and 6.4 supra. However, I do not find it necessary to deal with any of that as these grounds of review during argument by counsel for both parties became somewhat overshadowed and obscured by what I shall term the real ground for review as dealt with above. Anything which is said in regard to the alternative grounds of review would therefore be in the nature of obiter dicta. I therefore decline the invitation on behalf of the applicant to deal with those submissions as well.

[9] It is necessary to mention that the fourth respondent as applicant in an application numbered 4072/2009 applied for an order compelling the appellant (the respondent in that application) to grant him unfettered access to the farm Diamant in order to exercise the granted prospecting right. In response the applicant counter applied for an order that pending the outcome of the present application the fourth respondent be forbidden to act in terms of the prospecting right. The counter application was granted by Jordaan J. Mr Van Niekerk submits that the costs of that application should go against the fourth respondent as the fourth respondent should have realised that he omitted to "consult" with the applicant as his attitude was that it was not required of him. I see no reason why the costs of that application (4072/2009) should not follow the outcome of the present application.

[10] Mr Van Niekerk asked for an order of costs against first, second and third respondents jointly and severely occasioned by the present application. He submitted that it was not sufficient for

the first, second and third respondents to merely obey the court's decision but that they should have conceded the relief sought by the applicant. I do not agree with that. The first, second and third respondents' attitude was not the cause that this matter developed into a fully contested application. All of that was brought about by the fourth respondent's opposition to the sought relief. However, at least the costs of an unopposed application were caused by the irregular issue of the prospecting right.

[11] In the result, the following order is made:

1. **Paragraphs 1, 2 and 3 of the Notice of Motion are granted.**
2. **The fourth respondent is ordered to pay the costs of this application as well as the costs occasioned by application number 4072/2009.**
3. **The first, second and third respondents are ordered to pay the costs of this application jointly and severally with the fourth respondent but on the basis of an**

unopposed application only.

C. B. CILLIé

I concur.

B. C. MOCUMIE

On behalf of the applicant: Adv. J G van Niekerk SC
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of the respondents: Adv. Grobler
Instructed by:
Kramer, Weihmann & Joubert
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