Reportable: Yes / No
Circulate to Judges: Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 499/07

Date heard: 2007/12/13

Date delivered: 2008/02/08

In the matter of:

DOE RUN EXPLORATION SA (PTY) LTD **FIRST APPLICANT**

HENDRIK CHRISTIAAN BRITS **SECOND APPLICANT**

HENDRIK CHRISTIAAN BRITS N.O. **THIRD APPLICANT**

JOHANNES JACOBUS BRITS N.O. **FOURTH APPLICANT**

HELENA BRITS N.O. **FIFTH APPLICANT**

versus

MINISTER OF MINERAL & ENERGY **FIRST RESPONDENT**

THE REGIONAL MANAGER: MINERALS & ENERGY: NORTHERN CAPE **SECOND RESPONDENT**

THE DEPUTY DIRECTOR GENERAL: MINERAL REGULATION **THIRD RESPONDENT**

SAMBER TRADING 103(PTY) LTD **FOURTH RESPONDENT**

Coram: **MAJIEDT J *et* OLIVIER J**

JUDGEMENT

MAJIEDT J:

INTRODUCTION AND RELIEF SOUGHT

1. This is a review application which relates to prospecting

rights on four different properties, but which was brought in one application for the sake of convenience. I intend adopting in this judgment the *modus operandi* employed by both counsel, namely Mr Van Heerden (assisted by Ms Smit) for the Applicants and Ms Nkosi-Thomas for the Respondents, namely to adjudicate the application by separate reference to the various properties.

2. In their Amended Notice of Motion (amended further during argument and not opposed by the Respondents), the Applicants seek the following relief (my translation):

"PART A:

1.1 That the First and Second Applicants be exempted from compliance with the requirements set forth in s7(2)(a) of Act 3 of 2000 and s96(3) of Act 28 of 2002.

1.2 That the decision of the Deputy Director-General, Mineral Regulation, to grant a prospecting right for copper, lead and zinc, dated 14 December 2006, Protocol No 1483/2006 with Registration Number 95/2007, to Samber Trading 103 (Pty) Ltd with regard to the farm Glencard 525, district Hay, Northern Cape Province ("*Glencard*"), be reviewed and set aside and that the said prospecting right be declared invalid.

1.3 That the First, Second and Third Respondents be ordered to process and to finalise the application of the First Applicant dated 15 December 2005 for a prospecting right, in terms of s17 of the Mineral and Petroleum Resources Development Act, 28 of 2002 ("*the Act*") for copper, lead, zinc and silver with regard to Glencard, within 30 days of the issuing of an order.

1.4 That the First, Second and Third Respondents be ordered to pay the costs of the First and Second Applicants with regard to pars 1.1, 1.2 and 1.3 of the application, jointly and severally, including the costs of two counsel.

PART B:

2.1 That the First, Second, Third, Fourth and Fifth Applicants be exempted from compliance with the requirements set forth in s7(2)(a) of Act 3 of 2000 and s96(3) of Act 28 of 2002.

2.2 That the decision of the Deputy Director-General, Mineral Regulation, dated 14 December 2006, Protocol 1483/2006 with Registration Number 95/2007, to grant a prospecting right for copper, lead and zinc to Samber Trading 103 (Pty) Ltd, with regard to the remainder and portion 1 of the farm Bushy Park No 556, District Hay, Northern Cape Province ("*Bushy Park*") be reviewed and set aside and that the said prospecting right be declared invalid.

2.3 That the decision of the First, Second and Third Respondents to refuse the application of the First Applicant for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to Bushy Park, be reviewed and set aside.

2.4 That the First, Second and Third Respondents be ordered to grant the application of the First Applicant dated 15 December 2005, for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to Bushy Park, within 30 days of the issuing of an order.

2.5 That the First, Second and Third Respondents be ordered to pay the costs of the First, Second, Third, Fourth and Fifth Applicants with regard to pars 2.1, 2.2., 2.3 and 2.4 of the application, jointly and severally, including the costs of two counsel.

PART C:

3.1 That the First Applicant be exempted from compliance with the requirements set forth in s7(2)(a) of Act 3 of 2000 and s96(3) of Act 28 of 2002.

3.2 That the First, Second and Third Respondents be ordered to process and finalise the application of the Applicant dated 15 December 2005 for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to the remainder as well as portions 1 and 2 of Farm No 44, District Hay, Northern Cape Province, within 30 days of issuing of the order.

3.3 That the First, Second and Third Respondents be ordered to pay the costs of the First Applicant with regard to pars 3.1 and 3.2 of the application, jointly and severally, including the costs of two counsel.

PART D:

4.1 That the First Applicant be exempted from compliance with the requirements set forth in s7(2)(a) of Act 3 of 2000 and s96(3) of Act 28 of 2002.

4.2 That the application (namely, that the decision of the Deputy Director-General, Mineral Regulation to grant a prospecting right to a Third party with regard to portion 1 of the farm Rockwood No 555 and portion 2 Annex Vreemdelingsrust No 563, District Hay, Northern Cape Province, be reviewed and set aside), be postponed *sine die* and that costs be reserved.

4.3 That the First, Second and Third Respondents be ordered to process and finalise the application of the First Applicant dated 15 December 2005 for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to portion 1 of the farm Rockwood No 555 and portion 2 Annex, Vreemdelingsrust No 563, District Hay, Northern Cape Province, within 30 days of the issuing of an order.

4.4 That the First, Second and Third Respondents be ordered to pay the costs of the First Applicant with regard to pars 4.1 and 4.3 of the application jointly and severally, including the costs of two counsel."

3. In this judgment the different properties relating to the relief sought in the Amended Notice of Motion will be referred to as follows:

a) Part A of the Amended Notice of Motion – "Glencard"

b) Part B thereof – "Bushy Park"

c) Part C thereof – "Farm 44"

d) Part D thereof – "Rockwood".

DESCRIPTION OF THE PARTIES

4. The First Applicant, a registered South African mining exploration company, is a subsidiary of the Doe Run Resources Corporation of the USA. I shall refer to the First Applicant herein simply as *"Doe Run*".

5. The Second Applicant is the owner and occupier of the Glencard Farm and he also farms on Bushy Park, which in turn is owned by a Trust, the trustees whereof are Third, Fourth and Fifth Applicants and who have been cited in the said capacity.

6. The First Respondent represents the State as custodian of the country's mineral and petroleum resources and is vested in that capacity with the power to grant, issue, refuse, control, administer and manage various permits relating, for the present purposes, to mining (s3(2) of the Act).

7. The Second and Third Respondents are officials of the Department of Mineral and Energy. As their titles describe, the Second Respondent manages the Department's operations in the Northern Cape Province and the Third Respondent heads the mineral regulation section of the Department's Head Office.

8. The Fifth Respondent is a registered South African

company with a direct and material interest in the matter, since a prospecting permit had been issued to it in respect of the Glencard and Bushy Park properties.

BACKGROUNDFACTS

9. The facts are mostly common cause between the parties and I summarise same accordingly:

9.1 Doe Run has conducted extensive operations in South Africa since approximately 1995. These operations entailed prospecting activities on approximately fifteen farms in the Griqua Town area to determine whether there are viable deposits of copper, lead, zinc and silver. These operations were conducted under, *inter alia,* prospecting permits PP 59/2000 and PP 56/2000 on the same farms which form the subject matter of this review application (i.e. Parts A-D of the Amended Notice of Motion set forth above). An amount of more than R50 million is said to have been spent on such prospecting activities. A feasibility study was compiled and handed in to the Department of Mineral and Energy, in which 4.5 million ton ore was identified plus a further reserve of approximately 6 million ton in respect of the abovementioned minerals.

9.2 Doe Run applied for a prospecting right in terms of the provisions of the Act in respect of 16 farms, but this was declined on 14 September 2005. On 15 December 2005 Doe Run again applied for prospecting rights with regard to copper, lead, zinc and silver in respect of the 16 farms on which it had been prospecting as aforementioned.

9.3 On 12 October 2006 Doe Run was informed by the Second Respondent that its application had been granted in respect of 9 of the farms. Nothing was mentioned about the other 7 farms applied for and enquiries were directed to the Department in this regard on 1 November 2006 and 3 November 2006. Subsequently a meeting was also held on 20 November 2006 by Doe Run's representatives with the Department in Kimberley.

9.4 The present application was launched on 10 May 2007 and it was served on all the Respondents on 15 May 2007.

9.5 The First, Second and Third Respondents oppose the relief sought, save in respect of Part C of the Amended Notice of Motion, *supra*.

THE ISSUES

10. As can be seen from the terms of the Amended Notice of Motion, *supra*, the Applicants seek the review and setting aside of decisions in respect of Glencard and Bushy Park as well as a *mandamus* in respect of each of these properties in Parts A and B of the Amended Notice of Motion. With regard to Part C, the Applicants simply ask for a *mandamus* in respect of Farm 44 (the relief sought herein has been conceded by the Respondents). In respect of

Part D, relating to the farms Rockwood and Vreemdelingsrust, the Applicants ask that their application for review be postponed *sine die* and they proceed only with relief sought in respect of a *mandamus* with regard to these two properties. Furthermore, in all four parts of the Amended Notice of Motion, the Applicants seek an order for an exemption from the requirements contained in s7(2)(a) of Act 3 of 2000 and s96(3) of Act 28 of 2002 as well as costs orders, including the costs of two counsel.

11. For ease of reference I refer in this judgment to the First, Second and Third Respondents as "*the Respondents*". They have raised a number of points *in limine*. The Fourth Respondent does not oppose the relief sought and has not filed any papers in this application.

12. The points in *limine* are the following:

a) That the Applicants have failed to institute their review application within the 180 day period required in s7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*").

b) That the Applicants have failed to exhaust the internal remedies set forth in s96 of the Act.

c) That the Applicants should have joined Rockwood (Pty) Ltd which has a prospecting right in respect of the farms Rockwood and Vreemdelingsrust, referred to in Part D of the Amended Notice of Motion and therefore has a direct and material interest in the proceedings.

13. During the hearing we called upon the parties to address the third point *in limine,* namely the non-joinder of Rockwood (Pty) Ltd, first because we had taken the view that this may necessitate a postponement of the matter, should we form the view that Rockwood (Pty) Ltd should indeed have been joined by the Applicants. I propose adopting the same approach and will make a finding on this aspect first.

NON-JOINDER OF ROCKWOOD (PTY) LTD

14. It has been argued on behalf of the Respondents that Rockwood (Pty) Ltd has a direct and substantial interest in this review application, by virtue of it having been awarded a prospecting right in respect of the relevant properties (Rockwood 555 and Vreemdelingsrust 563).

15. On 8 February 2006 the Second Respondent advised Rockwood (Pty) Ltd in writing that its application for a prospecting right in respect of the remainder and portion 1 of Farm 555 (Rockwood) and portion 2 of the Farm Annex Vreemdelingsrust 563 had been awarded for unspecified minerals. It is important to note that this grant was

conditional and that it was recorded as follows by the Second Respondent in the aforementioned notice of grant:

> "Please note that the right has been granted on the condition that you fulfil the following requirements prior to execution:
>
> a) In terms of s17(4) of the Act you are required to provide BEE shareholding of not less that 51%;
>
> b) Specify the mineral applied for."

In the concluding paragraph of the said communication to Rockwood (Pty) Ltd, the Second Respondent recorded as follows:

> "…… in terms of s19(2)(b) of the Act, prospecting activities must commence within 120 days from the date in which the prospecting right comes into effect, a failure of which the Minister may cancel such right in terms of s47 of the MPRDA".

16. On behalf of the Applicants, Mr Van Heerden submitted that, due to the fact that the prospecting right was not executed in a notarial deed between the parties, no right had in fact been conferred on Rockwood (Pty) Ltd. It is common cause that no execution had taken place in the form of a notarial deed between Rockwood (Pty) Ltd and the Minister or her representatives.

17. The Respondents have attached to their papers as annexures, firstly a power of attorney in favour of Rockwood (Pty) Ltd in respect of the relevant properties signed by the Third Respondent and dated 7 December

2005. This power of attorney authorises the Second Respondent to sign a prospecting right contemplated in terms of s17(1) of the Act in favour of Rockwood (Pty) Ltd in respect of the relevant properties. Pursuant to this power of attorney, the letter of grant referred to in the preceding paragraph was issued by the Second Respondent to Rockwood (Pty) Ltd on 8 February 2006. A further annexure attached by the Respondents to their answering affidavit is an unsigned notarial deed for a prospecting right. This document was clearly intended to be the notarial deed in execution of the prospecting right granted to Rockwood (Pty) Ltd. It is, as I have stated, however, unsigned. Although the document is unsigned, the following terms thereof are of some significance:

a) In the definitions part of the deed, "*minerals*" is stated to be "*as defined in the Act and specifically in relation to this means Zinc and associated base minerals*".

b) The commencement date of the prospecting right and the duration thereof was not specified in the deed.

18. Mr Van Heerden has argued that since Rockwood (Pty) Ltd has no existing prospecting right, it does not have a direct and substantial interest in the matter. This submission was made, notwithstanding the fact that both in the Supplementary Affidavit on behalf of the Applicants (filed after production of the record by the Respondents as

required in Rule 53(1)(b)) and in the Replying Affidavit, the Applicants had stated their intention to join Rockwood (Pty) Ltd as a party to the proceedings. Mr Van Heerden's explanation in this regard was that upon proper perusal of the documentation so discovered, it became apparent to the Applicants that Rockwood (Pty) Ltd had in fact not obtained a right, due to the fact that the notarial deed for the prospecting right had not been signed by the parties and that joinder was therefore not necessary in the circumstances.

19. Mr Van Heerden relied strongly on the decision of this Court in the matter of **Sechaba v Kotze and others [2007] 4 All SA 811 (NC).** In that matter Lacock J and Olivier J were called upon to consider, *inter alia,* when exactly the prospecting right had been granted to the Applicant in that matter as contemplated in the Act. The submission was made in that case on behalf of the Applicant and the Third and Fourth Respondents (the Minister and the Department) that the prospecting right had been conferred on the Applicants when the Deputy Director-General for Mineral Regulation had approved and signed the recommendation for the grant of the right. It was also submitted by the said parties that the signing by the Regional Manager of the Northern Cape of a notarial deed for a prospecting right thereafter, merely amounted to an administrative formality whereby the grant of the right by

the Deputy Director-General was confirmed and formalised. The learned Judges expressly rejected this contention and held that the Deputy Director-General had merely approved a recommendation to grant a prospecting right to the Applicant at a future date for a period of two years, subject to terms and conditions which still had to be determined. The learned Judges held further that the Applicant had in fact not acquired any rights as a holder of prospecting right at the time of approval of the aforementioned recommendations by the Deputy Director-General and before any terms or conditions in respect of the prospecting right as well as the period of its validity had been determined. At par 46.3 (830 b-c), the learned Judges held as follows:

"The right can only be granted once the terms and conditions had been determined and communicated to an applicant for his acceptance. …………… This was done in this matter when the notarial deed referred to above was executed by the Regional Manager and the representative of (the Applicant)"."

20. Ms Nkosi-Thomas had not argued before us that the **Sechabav Kotze** matter was wrongly decided, and correctly so. I am of the view that the learned Judges were correct in their finding for the reasons mentioned in that judgment. In the present matter, the power of attorney issued by the Third Respondent in favour of Rockwood (Pty) Ltd and referred to hereinabove, dated 7 December 2005, was accompanied by a recommendation signed by the said Third Respondent. That recommendation was

worded as follows:

"a) Granting a prospecting right to Rockwood (Pty) Ltd for base minerals only in accordance with s17(1) of the Act for a period of two years subject to terms and conditions as may be determined.

b) Granting permission to Rockwood (Pty) Ltd to remove and dispose of s20(2) of the Act for such holder's own account.

c) Signing the attached power of attorney, authorising the Regional Manager, Northern Cape Region, to sign a prospecting right contemplated in terms of s17(1) of the Act in favour of Rockwood (Pty) Ltd."

21. From the aforegoing it will be observed that the facts of this case are similar to those in the **Sechaba v Kotze** matter with regard to this particular aspect under discussion. Here too, the recommendation (and the subsequent power of attorney) was to the effect that a prospecting right was to be granted for a period of two years **subject to terms and conditions to be determined.** In my view it cannot be said that this conferred a right to prospect on Rockwood (Pty) Ltd. Such right, as was correctly held in **Sechaba v Kotze**, *supra*, was to be conferred at the time when the conditions and terms as well as the period of validity were formally determined by way of a notarially executed deed between the Minister (or her representatives) and Rockwood (Pty) Ltd. Since this has never occurred, no right has in fact come into existence.

22. Mr Van Heerden has also drawn our attention to another matter which creates some difficulty for the Respondents

in respect of this non-joinder argument. In the recommendation approved by the Third Respondent, referred to above, the prospecting right granted was for base minerals. In the unsigned notarial deed relating to this power of attorney, however, the minerals were described as "*zinc and associated base minerals*". The notice to Rockwood (Pty) Ltd by the Second Respondent, dated 8 February 2006, however, refers to "*unspecified minerals*". It will be recalled that this particular communication set out certain conditions which still had to be met, one of which was that the mineral applied for had to be specified. Mr Van Heerden is correct in pointing out firstly that the present Act does not contain anything like "*base minerals*" in its definitions clause, nor did it appear in the 1991 Minerals Act. The description of "*base minerals*" did appear in the 1967 Act which was of course repealed by the 1991 Minerals Act. The second point that he correctly raised was that the nature of the minerals with regard to these two properties (Rockwood and Vreemdelingsrust) and the right awarded to Rockwood (Pty) Ltd, changed continuously as is clear from the aforementioned exposition of the facts. Furthermore, Mr Van Heerden is correct when he submits that the two year period mentioned in the recommendation and in the power of attorney, may well have lapsed by now.

23. In summary therefore, following on the decision in **Sechaba**

v Kotze, *supra*, where this point was pertinently decided by this Court, I hold that no right had been conferred in Rockwood (Pty) Ltd and that consequently, it has no direct and substantial interest in this review application at this stage, which would have required it to have been joined in these proceedings. It must be borne in mind that at this juncture, the Applicants merely seek a postponement of the review part of their application in respect of Rockwood and Vreemdelingsrust (Part D of the Amended Notice of Motion) and only ask for relief with regard to the *mandamus* part thereof. Consequently I am of the view that the point *in limine* regarding the non-joinder of Rockwood (Pty) Ltd has no merit and it ought to be dismissed.

SECOND POINT IN LIMINE: SECTION 7(1) OF PAJA

24. Sections 7(1) and 7(2) of PAJA reads as follows:

> "(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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

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

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

25. Section 17(3) of the Act provides that in the event that the Minister refuses to grant a prospecting right, the Minister must, within 30 days of the decision, in writing notify the Applicant of the decision with accompanying reasons. The Respondents have not been able to show, either on their papers, or in their written and oral argument, where such a decision had been communicated in writing by the Minister to the Applicants in respect of the properties. It will be recalled that the Applicants had been advised of the successful outcome of their applications in respect of nine of the sixteen properties applied for. Certain correspondence then followed to enquire about the other seven properties not mentioned by the Department. It seems to me that the Respondents' case is that the 180-day period referred to in s7(1) of PAJA is to be reckoned from the date of the communication in respect of the nine properties. This contention cannot be correct. In the subsequent communications, it was expressly enquired on behalf of the Applicants whether the corollary of the said

communication is to be understood to mean that the Applicants have been unsuccessful with regard to the applications in respect of the other seven properties. A meeting was also held on 15 November 2006 with the Department to obtain clarity in this regard. Thereafter the Applicants received a letter from the Department, dated 21 November 2006, in terms whereof the Department gave notice of the excluded areas in respect of the prospecting right application. In a further letter dated 7 December 2006 the Applicants' attorneys specifically enquired whether the aforementioned letter of 21 November 2006 is to be regarded as a notice of refusal of the Applicants' application in respect of those properties which the Department has not made mention of in its earlier letter. No response was forthcoming in respect of this letter. Consequently, if the period of 180 days is to be determined from the date of this letter, namely 7 December 2006 (as I believe it should), a period of 159 days had expired when these review proceedings before us had been instituted. Even if the period is to be determined from the date of the meeting, being 15 November 2006, the application still falls within the 180 day period set forth in s7(1) of PAJA. It therefore follows that there is no merit whatsoever in this point *in limine* and it ought to be dismissed.

THIRD POINT IN LIMINE: FAILURE TO EXHAUST INTERNAL

REMEDIES

26. Ms Nkosi-Thomas has not pursued this point *in limine* at all during oral argument. This approach is well founded. I am of the view that there is absolutely no merit in this particular point *in limine* either. Mr Van Heerden has relied strongly on two as yet unreported decisions of the Free State Division, but given the view that we have taken on this particular matter and in view of the fact that the Respondents appeared to have by implication abandoned this point, correctly so, I do not deem it necessary to deal with these judgments at all. In any event I am of the view that there are more than sufficient grounds for exemption under s7 of PAJA from the 180 day requirement. Consequently this third point *In limine* is also dismissed.

27. Having disposed of the points *in limine,* I now turn to a discussion of the merits of the review application and the contentions advanced by the Applicants. For the sake of convenience I deal with Parts C and D of the Amended Notice of Motion first and thereafter with Parts A and B thereof.

PART C OF THE AMENDED NOTICE OF MOTION: FARM 44

28. It will be recalled that the Respondents have conceded the relief sought in this part of the Amended Notice of Motion. According to the First Applicant it had first become aware of the fact that the Third Respondent had approved its application in respect of Farm 44 on 14 September 2006 already, once the record of the decision had been produced in terms of Rule 53. Prior to this the existence of this decision had never been communicated to the First Applicant. It is of some moment, furthermore, to have regard to the fact that the said record of the decision was only produced by the Respondents under threat of a contempt application to this Court. Eventually the said record was made available on 16 August 2007. It was only on this aforementioned date that the First Applicant became aware that it had been successful in its application in respect of Farm 44. All that remains to be considered is the matter of costs. Ms Nkosi-Thomas has, without much vigour it must be said, submitted that the Applicants are entitled to their costs only up until the stage when the concession in respect of Farm 44 was made by the Respondents in the answering affidavit. I am of the view Mr Van Heerden is correct in his submission that this would be inequitable and unfair towards the Applicants, given the fact that they had to approach this Court to seek the necessary relief. I am of the view that, in

the exercise of our discretion, costs should be awarded to the Applicants, including the costs subsequent to the filing of the answering affidavits of the Respondents. In the premises the Applicants are entitled to the relief sought in Part C of the Amended Notice of Motion.

PART D OF THE AMENDED NOTICE OF MOTION: ROCKWOOD

29. The Applicants merely ask for the postponement *sine die* of the relief in which they had sought the review and setting aside of a decision by the Respondents. Since, as I have already found in this judgment, no right has been conferred on Rockwood (Pty) Ltd as yet, or to any other party for that matter, the Applicants have adopted the approach of seeking a postponement *sine die* for this relief. The Respondents do not oppose this, nor has Ms Nkosi-Thomas during argument indicated that she is opposed to this course of action being adopted. I have, however, taken a slightly different view of the matter. It seems to me that, in the event that we dispose of this matter finally as is the case here, we should not make any order for postponement of that part of the application. In the event that a decision is made by the Respondents and if that decision does not favour the Applicants, nothing precludes them from taking such new decision on review. In my view, therefore, we should make no order on the review portion of Part D of the Amended Notice of Motion.

30. The First Applicant had submitted an application with the Respondents, which application was dated 15 December 2005 for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to Rockwood and Vreemdelingsrust. This application has not been processed, nor has the outcome thereof been conveyed to the Applicants. In the premises I am of the view that the Applicants' prayer for a *mandamus* in this regard should be granted. The Respondents do not appear to oppose this relief, nor has any submissions been made by Ms Nkosi-Thomas in this regard. The Applicants are therefore entitled to the *mandamus* and a costs order in Part D of the Amended Notice of Motion.

PART A AND B OF THE AMENDED NOTICE OF MOTION: GLENCARD AND BUSHY PARK

31. These two properties can conveniently be discussed together, since the facts and the law applicable to the review application in respect of these two properties are similar. The First Applicant had applied on 15 December 2005 for prospecting rights in terms of s17 of the Act in respect of copper, lead, zinc and silver, in respect of Glencard and Bushy Park. As I have indicated earlier in this judgment, extensive prospecting work had been done in respect of these minerals on the said farms prior to this application being made. On 12 October 2006 the Second

Respondent informed the First Applicant that a number of its applications had been granted, but that Glencard was excluded. Certain enquiries followed and thereafter it became apparent that the Second Respondent had approved the application of the Fourth Respondent (hereinafter referred to as "*Samber*") already on 24 October 2006. Pursuant to this, on 14 December 2006, Samber and the Third Respondent concluded a notarial deed in respect of a prospecting right which was registered under No 95/2007. This right was granted in terms of a power of attorney dated 15 August 2006 and it was granted for silver, lead and zinc with regard to Glencard.

32. The applications of the First Applicant and Samber were made on the same date, namely 15 December 2005.

33. The facts set our hereinabove relating to Glencard apply equally with regard to the Bushy Park property. In respect of the latter, Samber was also the successful applicant, having concluded a notarial deed in relation to its prospecting right on 14 December 2006.

34. First Applicant has attacked the decision on various grounds. I now deal with these *seriatim*.

35. The first review ground advanced by the Applicants in respect of Glencard and Bushy Park, is that, in reliance

upon s16(4) of the Act, Samber had failed to notify the Second Applicant, as owner and occupier of Glencard, of Samber's application for a prospecting right and to consult with Second Applicant in that regard. In respect of Bushy Park, it is contended that Samber had similarly failed to notify and consult the Second Applicant as occupier and the Third, Fourth and Fifth Applicants as owners (in their capacities as trustees) of Bushy Park. This failure, so the Applicants contend, is in contravention of s6(2)(b) of PAJA.

36. Section 16(4) of the Act provides as follows:

> "(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-
>
> (a) to submit an environmental management plan; and
>
> (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 the notice."

In terms of s16(5) of the Act, the Regional Manager (i.e. the Second Respondent in the present matter) must, upon receipt of the information referred to in subsection 4(a) and (b), forward the application to the Minister for consideration.

37. Samber was advised by the Department that there are existing applications with regard to Glencard on 15 December 2005. I have no doubt that this could only have referred to the First Applicant's application in respect of Glencard. The First Applicant was undoubtedly therefore an affected party within the meaning of s16(4) of the Act, quoted above. Notice and consultation in terms of the said provisions by Samber with the First Applicant in respect of the Glencard application was therefore imperative. The position is the same in respect of the Bushy Park property with regard to notice and consultation with the Applicants by Samber.

38. The Respondents rely on an averment by the Second Respondent that there had been consultations with interested and affected parties. No proof thereof was submitted in the papers before us. In the submission prepared by the Second Respondent to the Third Respondent for approval in respect of both Bushy Park and Glencard, the Second Respondent reported to the Third Respondent that "*Notification and consultation with interested*

and affected parties have taken place. No objection has been raised in respect of the application". This is a bald statement, not supported, as I have stated, by any evidence on the papers before us. The main answering affidavit on behalf of the Respondents, deposed to by a person acting in the position of the Third Respondent, merely made reference to the fact that in the aforementioned submission prepared by the Second Respondent, the latter had reported that notification and consultation with interested and affected parties had indeed taken place. In the supporting affidavit on behalf of the Respondents, the Second Respondent merely confirmed in general terms, the averments contained in the main answering affidavit which relate to him. This is clearly inadequate as regards proof of compliance with the provisions of s16(4) read with s16(5) of the Act.

39. To conclude, I find that there has not been any compliance with the provisions contained in s16(4) and s16(5) of the Act and that therefore there had not been compliance with s6(2)(b) of PAJA which reads as follows:

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

See in this regard:

De Beers Consolidated Mines Ltd v Mondira Pula Diamonds CC and others, unreported judgment, Northern Cape

Division (Lacock J *et* Olivier J), case no 496/04, delivered on 13 May 2005, at page 23 (par 43).

40. In her written heads of argument on behalf of the Respondents, Ms Nkosi-Thomas had advanced the submission that strict compliance with the provisions contained in s16(4) and s16(5) is not required. She submitted that substantial compliance therewith would suffice in the circumstances. For this submission she relied, *inter alia*, on the following:

Cora Hoexter, **Administrative Law in South Africa**, at 261 par D.

Stadsraad van Vanderbijlpark v Administrateur, Transvaal and others 1982(3) SA 166 (T) at 191-193;
Maharaj v Rampersad 1964(4) SA 638 (A) at 646 C-E;
Weenen Transitional Local Council v Van Dyk 2002(4) SA 653 (SCA);
African Christian Democratic Party v Electoral Commission and others 2006(3) SA 305 (CC) at par 25.

41. The aforementioned authorities are either distinguishable on the facts and/or the law or do not support the contention advanced by Ms Nkosi-Thomas at all. During argument, wisely so, Ms Nkosi-Thomas abandoned these submissions. The cases of **Stadsraad van Vanderbijlpark v Administrateur, Transvaal and others** and **Maharaj v Rampersad**, dealt with the distinction between peremptory and discretionary statutory provisions. In the said cases

the respective courts found that, based on the facts in those matters, the statutory provisions not complied with were merely directory in nature and that substantial compliance therewith was consequently sufficient. In the present instance, in my view, the provisions of s16(4) and s16(5) are peremptory and the use of the word "*must*" is significant. Notification and consultation with affected parties and the owner and occupiers of land is in my view peremptory and strict compliance therewith is required, for reasons which speak for themselves. Interested and affected parties, land owners and occupiers of land, in respect of which a right has been issued to prospect for minerals, quite clearly need to be made aware of an application and consultations need to follow so as to protect the rights of such interested/affected parties/landowners/occupiers. During argument, Ms Nkosi-Thomas, correctly so, conceded that this **must** be the case.

42. The **Weenen Transitional Local Council v Van Dyk** and **African Christian Democratic Party v Electoral Commission and others** cases, referred to during argument, are not in point at all and merely contain *obiter dictae* with respect to the differentiation between mandatory and directory provisions and strict or substantial compliance. The last mentioned case also deals with the purposive approach with regard to compliance with statutory provisions.

43. There is a further, compelling reason why strict compliance with the said provisions is required. Section 105 of the Act provides as follows:

"105 Landowner or lawful occupier of land cannot be traced

(1) If the applicant for a right, permit or permission, who must notify and consult with the landowner of [sic] lawful occupier of the land to which the application relates in terms of the relevant provisions of this Act, notify the Regional Manager that, the landowner or lawful occupier of the land concerned-

a) cannot be readily traced; or

(b) is deceased and no successor entitled can be readily traced.

(2) Notwithstanding any other law, the Regional Manager, on application in writing from such applicant and on payment of the prescribed application fee, may-

(a) grant consent to such a person to install a notice on a visible place on the land and enter the land to which the application relates to; and

(b) subject such a person to such other terms and conditions as the Regional Manager may determine.

This section can hardly be described as an epitome of exemplary draftsmanship, but some sense can be made of it through careful and imaginative reading (cf Joubert, LAWSA, 2nd Edition, Vol 18 at par 118, footnote 10 ([p171]). None of the steps envisaged in s105 had been taken by Samber if their case is that the landowner/s or lawful occupier/s could not be traced. Some argument was directed along these lines by Ms Nkosi-Thomas on this aspect, namely that none of the Applicants resided on either Glencard or Bushy Park. During the course of her argument, however, when the provisions of s105 were drawn to her attention, she promptly threw in the towel.

In the premises, this is a further reason why the argument of substantial compliance cannot be upheld.

44. Lastly, I must deal with the submission on behalf of the Respondents, made by Ms Nkosi-Thomas, that if we were to find there had not been compliance, an inquiry must follow whether the Applicants had suffered any prejudice flowing from the said non-compliance. In this regard she relied on **Manong and Associates v Director General, Departmentof Public Works [2004] 1 All SA 673 (C)** at 685 a-b. This case is also distinguishable on the facts and the law. It concerned a review application in which the applicant had challenged the appointment of the third respondent as a consultant engineer to the first respondent. Davis J dismissed the application, *inter alia* by reason of the fact that the applicant was unable to show how he had been prejudiced by the appointment of the third respondent or which of his rights had been adversely affected by such appointment. In my view prejudice does not feature at all in a consideration on review of a decision concerning the allocation of rights under the Act, where s16(4) and s16(5), which I have already found to be

peremptory in nature, have not been complied with. Consequently this contention can also not be upheld.

45. In the premises therefore the review ought to succeed on this first ground alone. This disposes of the matter, but I deem it necessary for the sake of completeness to consider one further ground of review advanced by the Applicants. That is the fifth ground for review advanced in the Applicants' papers namely non-compliance with s9(1)(a) of the Act.

46. Section 9(1)(a) reads as follows:

> "9 Order of processing of applications
>
> (1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on-
>
> (a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2)."

Section 9(2) provides that:

> "When the Minister considers applications received on the same date he or she must give preference to applications from historically disadvantaged persons. "

47. It is common cause that the applications of Samber and the Applicants were both submitted to the Department on

15 December 2005. The applications which related to the same minerals, namely, lead, zinc and silver, had to be dealt with simultaneously, evaluated together and the best one had to be selected bearing in mind the provisions of s9(2) above. The Respondents have conceded that this was not done. During argument and in the papers, an *ex post facto* evaluation was sought to be undertaken by the Respondents and a bald averment was made that in any event, Samber's application was better than that of the Applicants and would have been the preferred one. Such an approach is untenable in law. There was a duty on the Second Respondent to advise the Applicants of Samber's application so that the Applicants could lodge an objection should they wish to do so (s10(2) of the Act). Consequently the non-compliance with s9(1)(a) is also fatal to the Respondents' case.

48. It is not necessary to deal with the further grounds of review advanced by the Applicants. It would suffice to state at this juncture that the delegation argument proffered by the Applicants in respect of the delegation by the First Respondent to the Third Respondent (which was challenged) and that of the Third Respondent to the Second Respondent (based on the decision of **Sechaba v Kotze,** *supra*) has considerable merit in my *prima facie* view of the matter.

49. The review application in respect of Parts A and B of the Amended Notice of Motion must consequently succeed and the *mandamus* part thereof should also in my view be granted. In the case of Part A, Glencard, the Applicants merely seek an order that their application should be processed within 30 days of an order herein. In respect of Bushy Park, however, the Applicants seek an order in paragraph 2.4 of their Amended Notice of Motion that the Respondents be ordered to grant their application. Ms Nkosi-Thomas has not opposed this form of relief, should we hold for the Applicants in respect of their contentions. I am of the view that the Applicants are entitled to this order, given the fact that they have applied already on 15 December 2005 for prospecting rights in respect of copper, lead, zinc and silver in respect of Bushy Park and given the fact that that application had been refused.

CONCLUSION

50. In summary:

50.1 The Respondents' contention that Rockwood (Pty) Ltd should have been joined as a party to these proceedings is rejected.

50.2 The various points *in limine* raised by the Respondents are dismissed.

50.3 The Applicants are entitled to the relief sought in the Amended Notice of Motion, save and except the relief in Part D which relates to the review of the decision in respect of the Rockwood property.

51 It is necessary that I comment on a disturbing aspect of this case.

A lamentable trend has developed in cases of this nature, i.e. concerning the issuing of rights under the Act, that very lengthy delays are experienced by applicants to have their applications finalised by the Department. The present case is no exception. These lengthy delays cannot be in the interests of the economy, where much needed investment is delayed and sometimes even lost. In the present matter a US company has already invested millions of Rands and stands ready to invest more, provided it can have finality on its applications. The extraordinary delays, alluded to in this judgment, are adverse to such foreign investment.

Of further concern in this matter is that the Respondents had failed to discover the records of the various decisions, as they were called upon to do in terms of Rule 53(1). It took a contempt of court application to have same discovered.

I would hope that this Court has seen the last of this disturbing trend in the present matter.

52 The following order is issued:

a. **The decision of the Deputy Director-General, Mineral Regulation, to grant a prospecting right for copper, lead and zinc, dated 14 December 2006, Protocol No 1483/2006 with Registration Number 95/2007, to Samber Trading 103 (Pty)**

Ltd with regard to the farm Glencard 525, district Hay, Northern Cape Province (*"Glencard"*), is hereby set aside and the said prospecting right is hereby declared invalid.

b. **The First, Second and Third Respondents are ordered to process and to finalise the application of the First Applicant dated 15 December 2005 for a prospecting right, in terms of s17 of the Mineral and Petroleum Resources Development Act, 28 of 2002 (*"the Act"*) for copper, lead, zinc and silver with regard to Glencard, within 30 days of the issuing of this order.**

c. **The First, Second and Third Respondents are ordered to pay the costs of the First and Second Applicants with regard to pars 1.1, 1.2 and 1.3 of the application, jointly and severally, including the costs of two counsel.**

d. **The decision of the Deputy Director-General, Mineral Regulation, dated 14 December 2006, Protocol 1483/2006 with Registration Number 95/2007, to grant a prospecting right for copper, lead and zinc to Samber Trading 103 (Pty) Ltd, with regard to the remainder and portion 1 of the farm Bushy Park No 556, District Hay, Northern Cape Province (*"Bushy Park"*) is hereby set aside and the said prospecting right is hereby declared invalid.**

e. **The decision of the First, Second and Third Respondents to refuse the application of the First Applicant for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to Bushy Park, is hereby set aside.**

f. **The First, Second and Third Respondents are ordered to grant the application of the First Applicant dated 15 December 2005, for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to Bushy Park, within 30 days of the issuing of this order.**

g. **The First, Second and Third Respondents are ordered to pay the costs of the First, Second, Third, Fourth and Fifth Applicants with regard to pars 2.1, 2.2., 2.3 and 2.4 of the application, jointly and severally, including the costs of two counsel.**

h. **The First, Second and Third Respondents are ordered to complete the finalisation of the application of the Applicant dated 15 December 2005 which has already been granted, for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to the remainder as well as portions 1 and 2 of Farm No 44, District Hay, Northern Cape Province, within 30 days of issuing of this order.**

i. **The First, Second and Third Respondents are ordered**

to pay the costs of the First Applicant with regard to pars 3.1 and 3.2 of the application, jointly and severally, including the costs of two counsel.

j. **The First, Second and Third Respondents are ordered to process and finalise the application of the First Applicant dated 15 December 2005 for a prospecting right in terms of s17 of the Act for copper, lead, zinc and silver with regard to portion 1 of the farm Rockwood No 555 and portion 2 Annex, Vreemdelingsrust No 563, District Hay, Northern Cape Province, within 30 days of the issuing of this order.**

k. **The First, Second and Third Respondents are ordered to pay the costs of the First Applicant with regard to pars 4.1 and 4.3 of the application jointly and severally, including the costs of two counsel.**

SA MAJIEDT
JUDGE

I CONCUR.

CJ OLIVIER

JUDGE

ADVOCATE FOR THE APPLICANTS : ADV CN VAN HEERDEN & ADV N SMIT
ADVOCATE FOR 1st, 2nd and 3rd RESPONDENTS : L NKOSI-THOMAS

ATTORNEY FOR THE APPLICANTS : VAN DE WALL ATTORNEYS
ATTORNEY FOR THE RESPONDENTS : STATE ATTORNEY

DATE OF HEARING : 13 DECEMBER 2007
DATE OF JUDGEMENT : 8 FEBRUARY 2008