IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No: 3117/2006

In the matter between:

MOFSCHAAP DIAMONDS (PTY) LTD	**Applicant**
and	
THE MINISTER FOR MINERALS AND ENERGY	**1st Respondent**
THE REGIONAL MANAGER: MINERALS AND ENERGY FREE STATE REGION	**2nd Respondent**
THE DEPUTY DIRECTOR GENERAL: MINIRALS AND ENERGY	**3rd Respondent**

JUDGMENT: **KRUGER *et* VAN DER MERWE, JJ**

HEARD ON: **21 MAY 2007**

DELIVERED ON: **14 JUNE 2007**

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[1] In July 2006 applicant launched an application seeking a rule *nisi* calling upon the respondents to show cause why the 1st respondent should not be interdicted from granting a prospecting right, mining permit or mining right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002, ("the Act") to any third party in respect of the farms

Mofschaap and Adullam ("the property") pending the review of respondents' decision to refuse applicant's application for a prospecting right in respect of the property.

[2] On 27 July 2006 a court order was granted by agreement calling upon the respondents to provide full reasons for their refusal of the application under section 17 of the Act for a prospecting right by 27 August 2006, and to file same together with a record of the proceedings.

[3] On 5 October 2006 applicant filed a Supplementary Founding Affidavit.

[4] An Opposing Affidavit on behalf of all three respondents made by Jacinto Ferreira Dos Santos Rocha was filed on 6 November 2006. He is the Deputy Director: Mineral Regulation: Department of Minerals and Energy of the Republic of South Africa.

[5] Applicant's Replying Affidavit was filed on 1 December

2006.

[6] The following appears from the Founding Affidavit:

(a) On 18 November 2005 applicant applied for a prospecting right under section 17 of the Act in respect of the property.

(b) On 1 December 2005 the 2nd respondent wrote to applicant that its application for a prospecting right in terms of section 16 of the Act had been accepted and listed certain requirements in terms of section 16(4) of the Act.

(c) The applicant says it duly complied with all the provisions of the Act relevant to its application for a prospecting right.

(d) On 14 July 2006 applicant received a letter, apparently signed by the 2nd respondent on behalf of 3rd respondent refusing the application:

"**<u>REGISTERED MAIL</u>**

The Directors

Aquarella Investments 241 (Pty) Ltd
C/O Dr J H Coetzer
P O Box 60859
Pierre van Ryneveld
CENTURION
0045
Messrs

REFUSAL OF AN APPLICATION FOR A PROSPECTING RIGHT FOR DIAMONDS (GENERAL AND IN KIMBERLITE) AND ALL MINERALS ON THE FARMS MOFSCHAAP 1269 AND ADULLAM 1292, SITUATED IN THE MAGISTERIAL DISTRICT OF KROONSTAD.

Kindly be informed that after careful consideration of your application for a prospecting right, I, the Deputy Director-General: Mineral Regulation, have, by virtue of powers delegated to me in terms of section 103(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), and in terms of section 17(2) thereof, decided to refuse to grant a prospecting right in respect of the abovementioned property for the following reason, namely:-

Failure to meet the requirements of section 17(1)(a) and (b) of the abovementioned Act, read with Regulation 7.

Regards

(signed)

JF ROCHA

DEPUTY DIRECTOR-GENERAL:
MINERAL REGULATION

DATE: 2006/07/06"

(e) Applicant's attorney requested reasons for the decision in a letter dated 17 July 2006, and upon receiving no response, went to court. Hence the court order on 27 July 2006 and this application.

[7] Section 17(1)(a), (b) and (c) of the Act reads as follows:

"(1) Subject to subsection (4), the Minister must grant a prospecting right if-

(a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;

(b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;

(c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;

Paragraphs (a) and (b), upon which the refusal was based, refer to financial resources and estimated expenditure.

[8] **<u>INTERNAL REMEDIES – SECTIONS 96 AND 103</u>**

On behalf of the respondents it was argued that the application should be dismissed without consideration of the merits thereof for failure by the applicant to exhaust internal remedies available to it. Relying in this regard in the first place on the provisions of section 96 of the Act, it was specifically argued that the remedy of appeal to the first respondent is available to the applicant.

[9] According to its heading, section 96 of the Act deals with internal appeal process and access to courts. This section provides 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 3 of 2000), apply to any court proceedings contemplated in this section."

[10] The question then is whether the remedy of appeal to the first respondent in terms of section 96 of the Act is available to the applicant in the circumstances of this case. For the reasons that follow, we think that it is not.

[11] In his well-known work on administrative law, **Administratiefreg**, p. 52 – 57, Prof. Marinus Wiechers distinguishes in the field of delegation of public power *inter alia* between what he terms deconcentration and decentralisation. Delegation of power in the form of decentralisation takes place when powers are transferred to an independent organ or body which carries out these powers and functions entirely in its own name. As a rule the *delegans* (that is the delegating authority) has no

authority to act on behalf of the delegate and has no control over the independent body other than appointment of the members thereof and/or some form of appeal against the decisions of that body. Deconcentration on the other hand, is applicable where the functions are performed by the delegate in the name or on behalf of the *delegans*, in other words the *delegans* acts by means of the delegate. An essential feature of the deconcentration of administrative power is that the *delegans* may withdraw the delegation at any time and perform the function himself or herself. Also, the *delegans* may exercise various forms of control over the delegate. These principles were expressly adopted in **NAIDOO AND OTHERS v JOHANNESBURG CITY COUNCIL AND OTHERS** 1979 (4) SA 893 (W) at 896 E – 898 E and **SA FREIGHT CONSOLIDATORS (PTY) LTD v CHAIRMAN, NATIONAL TRANSPORT COMMISSION, AND ANOTHER** 1987 (4) SA 155 (W) at 164 F – 169 D. We respectfully believe that these decisions are correct. See also Baxter, **Administrative Law**, p. 436 footnote 317 and p. 441, 442 as well as **LAWSA**, 2nd Edition, Volume 1, para 101, p. 81 – 82. This principle is also illustrated in the judgment of **BARTLETT v MUNISIPALITEIT VAN KIMBERLEY** 1966 (2) SA 95 (GW) at 100 E – 102 F, where it was decided that where the exercise by a town clerk of a power delegated to him by the municipal council is attacked, the proper body to sue is the municipal council or municipality as the town clerk acted on its behalf under the delegated authority. The judgment in the case of **ADMINISTRATOR, CAPE v ASSOCIATED BUILDINGS LTD** 1957 (2) SA 317 (A) at 323 H, referred to on behalf of the respondents, does not support the respondents' argument, as it in fact provides an example of administrative deconcentration.

[12] In this case section 103(4) and (5) of the Act specifically provides as follows:

> "(4) The Minister, Director-General, Regional Manager or officer may at any time-
>
> (a) withdraw a delegation or assignment made in

terms of subsection (1), (2) or (3), as the case may be; and

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be.

(5) The Minister, Director-General, Regional Manager or officer is not divested of any power or exempted from any duty delegated or assigned by him or her."

Furthermore, in the written delegation document, *inter alia* the following conditions of the delegation in question are stated:

"(a) Any power must be exercised judiciously with the necessary discretion and with due regard to the applicable Regulations, as well as other instructions and control measures determined in terms of the Act.

.....

(f) Should any doubt exist for any reason as to which decision should be taken regarding any matter, such matter should be referred to me for finality.

(g) The aforesaid powers may nonetheless be exercised by myself notwithstanding the fact that it has been delegated.

(h) I should be consulted should there be any reason to move away from or revise established policy guidelines."

[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.

[14] There is a further indication that this conclusion must be correct. In terms of the Act "Director-General" means the Director-General of the Department. "Department" means the Department of Minerals and Energy. The Act also contains a definition of a designated agency referred to in section 96(1)(b) thereof, which is not relevant here.

Importantly however, an officer as referred to in section 96(1)(a) of the Act, is defined as any officer of the Department appointed under the Public Service Act, 1994. It follows that the third respondent is an officer as defined. It also follows that if the decision in question must in law be regarded as the decision of the third respondent, then, in terms of section 96 of the Act, an appeal would lie not to the first respondent, but to the Director-General. It could not have been intended that the exercise of a power granted to the first respondent (the Minister) could be appealed against to a lower ranking official, to wit the Director-General. This anomaly does not arise if the decision in question is regarded as the decision of the first respondent, as we do.

[15] Secondly it was argued, albeit with little enthusiasm, that section 103(4)(b) of the Act also provides an internal remedy to the applicant. We cannot agree. An internal remedy in this context is one that an aggrieved person may exercise as of right. To seek an indulgence, which at

best is what the request to act in terms of section 103(4)(b) would amount to, is not a remedy.

[16] In the light of this conclusion it is not necessary to deal with the prayer by the applicant for exemption in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). It is worthy of note in passing however, that it would appear that in terms of the Act an absolute duty to exhaust the remedies in terms of section 96 thereof is intended. That is the import of section 96(3) and in section 96(4) section 7(2) of PAJA is not made applicable to the proceedings contemplated in terms of section 96.

GROUNDS FOR REVIEW

[17] In its heads of argument applicant relies on section 6 of the Minerals and Petroleum Resources Development Act 28 of 2002, which reads as follows:

> "**6.** (1) 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.

(2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision."

[18] Applicant says that respondents are in violation of several provisions of the Promotion of Administrative Justice Act 3 of 2000. The applicant followed an approach which was justifiably described as a shotgun approach. Several of the grounds relied on were baseless, and deserve no further consideration. These include: Bias, ulterior purpose or motive, taking into account irrelevant considerations or failing to consider relevant considerations; taking into account unauthorised or unwarranted dictates of another person or body; bad faith; decision taken arbitrarily or capriciously. The main impetus of applicant's attack is in relation to (1) delegated powers, (2) error of law and (3) procedural fairness.

1. <u>Section 6(2)(a):</u> *(i) The administrator who took the decision was not authorised to do so by the empowering provision and (ii) acted under improper delegation.*

Mr. Van Heerden, for applicant, contends that because the delegation by the minister in respect of section 17(1) to (4) is to the "Deputy Director-General: Mineral Development", and the 3rd respondent, who took the decision, is the "Deputy Director-General: Mineral Regulation", the 3rd respondent did not have the power to take the decision herein. The point is not taken in the applicant's papers (also not in reply) that the 3rd respondent was not empowered. In the Answering Affidavit 3rd respondent says: "I attach the delegation to myself, marked annexure "R3"". In response to this pertinent allegation, the applicant's deponent says in the Replying Affidavit: "Save to state that there is no indication that Mr Oberholzer signed on behalf of the Third Respondent. The content is noted."

There was a proper delegation. There is no substance in applicant's contention.

2. <u>Section 6(2)(d):</u> *The action was materially influenced by an error of law.*

Mnr. Van Heerden contends that the 2nd and 3rd respondents misconstrued the meaning of the Act and regulations regarding geological description, the reference to mining, geological maps and other aspects.

The regulations promulgated under Act 28 of 2002 (GN R526, Government Gazette 26275 of 23 April 2004) contain detailed provision regarding applications for prospecting rights.

There are a number of aspects upon which the application does not comply. Mr. Claasen referred in particular to regulation 5(1)(g), (j) and (k). The main objection relates to non-compliance with regulation 7(1)(j) and (k). The most glaring non-compliance is in respect of regulation 7(1)(k) which expressly states that the expenditure must be broken down. That has not been done. It is not the respondent who has made an error of law, it is the applicant. The respondent applied the Act and Regulations correctly.

3. <u>Section 6(2)(c):</u> *The Administrative decision was procedurally unfair*.

The main thrust of Mr. Van Heerden's argument was that of procedural unfairness.

In support of this submission applicant says:

(1) In terms of section 9 of the Act applications are processed in the order of receipt, and a competing application should not be processed before an application has been disposed of.

(2) Because the legislation is new the applicant should be treated more leniently, and more guidance given by respondent.

(3) It was procedurally unfair not to point out errors in the application and to allow it an opportunity to rectify those errors, so as not to lose priority.

We deal with these points seriatim:

The processing of competing applications

Applicant states that section 9 of the Act provides for the order of processing of applications, and says that applications must be dealt with in order of receipt. The respondents have acted contrary to section 9 by processing another application together with applicant's application. Mr. Van Heerden says the process of consultation with interested and affected parties contemplated in regulation 3, and publication in the Government Gazette referred to in regulation 3(3), should not be done simultaneously in respect of two applications. He contents that is procedurally unfair.

In answer to the allegation that it is "ultra vires" to process an application simultaneously with the one lodged by the applicant, 3rd respondent says "It stands to reason that no competing application can ever be decided upon unless finality has been reached on the first application." (page 251 paragraph 4.15, see also paragraph 4.14).

It is not entirely clear what is meant by "dealt with" in section 9(1)(b). Certain preliminary steps can possibly be taken simultaneously – e.g. consultation with interested or affected parties and publication. The 3rd respondent makes it clear that there has to be finality on the first application before a decision on a further application is taken. Section 9 does not say that nothing can be done in respect of later applications. The crucial point is that applicant does not say how any alleged steps taken in relation to any later application prejudiced it. This contention by applicant must fail.

The short answer to this submission in respect of priority is that an applicant, whose papers are in order, must succeed. Section 17(1) of the Act, which came into operation on 1 May 2004, states that the minister must (not may) grant a prospecting right if the provisions of section 17 have been complied with. The regulations spell out the requirements in detail.

New legislation: No guidelines

Regarding new legislation applicant contends that this is new legislation in respect whereof no guidelines exists. This contention is without merit. The regulations contain detailed provisions which should be followed. This is a tenuous type of argument, and inevitably the question arises, "When is the legislation no longer new?" This Act has been in operation for more than three years (since 1 May 2004); two years at the time of lodging the application. This is no basis to infer procedural unfairness from.

Opportunity to rectify errors: retaining priority

The applicant contends that if errors are not pointed out to an applicant so as to afford the applicant an opportunity to rectify them, the applicant loses priority. The consequences of refusal of this type of licence are more severe and irreversible than in the case of e.g. a liquor licence, where the applicant can simply lodge a new application. In this case, the applicant loses priority. With regard to being afforded an opportunity to rectify defects in the application the third respondent says the following:

"4.5 **AD 9.6:**

It is standard practice in the offices of the Second Respondent not to divulge any information regarding the progress and where the application is at that present moment or who is at the present moment evaluating the application. The correct and standard answer to all Applicants, regarding their enquiries after the application has been accepted, is that the application is in the process. There is nothing untoward such answers. Once the application passed muster at the information desk regarding completeness, only then does the evaluation regarding the merits of the applications starts. The Act and Regulations are clear and it would be an impossible task for each and every desk and expert or for the First, Second or Third Respondent to report and advise any Applicant through the whole process in such a way that each and every application is successful. The whole application procedure will come to a standstill. Thousands of applications are received right over the country. Approximately seven hundred applications were submitted to the Free State office alone since 1 May 2004.

…

4.7 **<u>AD 9.8:</u>**

I respectfully refer to the Court to what was said to paragraph 9.6 above. It would lead to absolute administrative chaos if each and every application in any Department of the State's administration, such as applications for fire-arms, business licenses, transport permits, liquor licenses, etc, etc, are to be processed by the administrating body as suggested by Applicant. It is, as aforesaid, a practical impossibility to revert back to an Applicant right through the evaluating process to enable an Applicant in any application to rectify any errors in its application. In most of the matters Applicants are usually assisted by experts in the different fields. Again, the logical conclusion to Applicant's viewpoint is that each and every Applicant should at the end be successful.

…

4.10 **AD 9.11**

… Assistance is given to Applicants regarding the formal requirements of the application, but it is impossible for each and every desk and each and every expert to revert back to an Applicant in informing an Applicant of the deficiencies of its application and to allow an Applicant to rectify such deficiencies until each and every desk and each and every expert could submit a positive recommendation."

In **BEL PORTO SCHOOL GOVERNING BODY AND OTHERS v PREMIER, WESTERN CAPE AND ANOTHER** 2002 (3) SA 265 (CC) paragraphs 103 and 104 it appears that the appellants in that case argued that they were not involved in negotiations, and that their representations were not given sufficient attention. The

Constitutional Court held that the requirements of procedural fairness depend on the circumstances of each case. It that case, the Constitutional Court held, it could not be expected that negotiations with each of the 1750 educational institutions be held.

In the circumstances this case procedural fairness did not require the respondents to give the applicant an opportunity to rectify errors or inform it of any shortcomings in the application.

[19] No procedural unfairness has been shown.

[20] The application is dismissed with costs, including the costs of 27 July 2006.

A. KRUGER, J **C. H. G. VAN DER MERWE, J**

On behalf of the applicant: Adv. C. N. van Heerden
And Adv. N. Smit
Instructed by:
State Attorney
BLOEMFONTEIN

On behalf of the respondents: Adv. J. Y. Claasen
Instructed by:
Hill, McHardy & Herbst
BLOEMFONTEIN

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