APPEAL AGAINST MINING RIGHT MP 30/5/1/2/2/505 MR

DMR Ref: 8/7/1/10/1588

EEPOG and another's RESPONSE TO WILLIAM PATRICK BOWER PTY LTD'S REPLYING SUBMISSION

This responding statement is made in terms of Regulation 74(8) of the Mineral and Petroleum Resources Development Regulations GNR 527 of 23 April 2004 (Regulations), and responds to the replying submission made by William Patrick Bower Pty Ltd (WPB) sent to the EEPOG .

In terms of correspondence with Mr Nieman of the Department of Mineral Resources in 2014, the submission of this responding statement was delayed pending the receipt of reasons for the decision, which the decision-maker is required by law to provide within 21 days of receipt of the notice of appeal. All efforts to date to obtain the reasons for the decision have been unsuccessful. The Director-General was required to submit written reasons for the granting of the mining right by no later than Friday, 10 March 2013. (WE had lodged our appeal on 26 April 2013) In other words, **the written reasons for the appeal were due over one year and ten months ago.** This blatant failure to comply with the law has caused, and continues to cause, significant prejudice to the interested and affected parties in this matter.

In view of the time that has elapsed, and in view of our assumption that this failure to provide reasons for the decision is creating an unacceptable delay in the resolution of this matter, we have decided to submit this responding statement in so far as we are able to respond without having received reasons for the decision. We once again request that the reasons for the decision be provided to all appellants immediately, as is required by law. Should these not be received within 30 days (end of February 2015), we will have no choice but to:

- Come to the only possible conclusion that no reasons exist as is made provision for in the Promotion of Administrative justice Act (PAJA).[1] The appeal must then be decided upon the assumption within 30 days. (End of March 2015)

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[1] PAJA 5(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

- If no decision is received by the end of March 2015, we reserve the right to approach a Court for a judicial review on the basis that , inter alia, the internal remedy is not available effective and adequate. This will include a cost order. We wish to put before the Minister the following relevant Constitutional Court Judgement extract:

In **Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327** (CC):

'135] Internal remedies are designed to provide immediate and cost- effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost- effective internal remedies cannot be gainsaid.

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our Jaw. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny."

Drawing on international law, Mokgoro J writing for the court explained:

*"[43] In order to qualify as an available remedy, it is the approach of the African Commission that a complainant must have the ability to make use of the remedy in the circumstances of his or her case. Similarly, the Inter- American Commission on Human Rights has interpreted the duty to exhaust domestic remedies as existing only when these remedies formally exist and are **adequate to protect the legal interest infringed**. They must also be **effective** to produce the result for which they were intended.*

*[44] In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy be an effective one. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be **readily available** and it must **be possible to pursue without any obstruction**, whether systemic or arising from unwarranted administrative conduct. Factors such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interests of justice to intervene.*

*[45] Thus, as the international jurisprudence illustrates, judicial enforcement of the duty to exhaust internal remedies, in giving content to the 'exceptional circumstances' exemption, must consider the **availability, effectiveness and adequacy** of the existing internal remedies."*

What follows is a direct response, except for paragraphs 15-19 of the WPB reply which deal with the substantive grounds of appeal. WPB was not the decision maker and WPB's attempts to second guess the decision maker as to why our objections were not upheld must be dismissed. Only the decision maker can illuminate that. We reserve the right to address these substantive issues upon receipt of the reasons for the decision to grant a mining right to WPB.

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1. AD Para 5.2: No evidence is submitted of EEPOG's " opposition". The groups I represent are opposed to unsustainable development . When a project becomes sustainable then we will withdraw our opposition. The allegation must be ignored – it is pure speculation and without any evidence. This is clear from our Constitution in the Notice of Appeal.

2. AD Par 5.6: Once again pure speculation and without any proof. It must be ignored. Please note that Pretorius was not even on the email address list. Nowhere is any evidence submitted as to EEPOG being involved in any of the allegations.
3. AD Para 5.7 : Mr Krige is not a member of EEPOG. These allegations must be ignored.
4. Ad para 5.10: No evidence is submitted as to any of the EEPOG members being involved in any of the allegations. It must be ignored.
5. Ad para 5.11: No evidence is submitted in support of this sweeping statement. It must be ignored.
6. Ad Para5.12; We take note that there is no denial of the bias of the Regional Manager. In fact, it is admitted.
7. Ad Para 6: This sweeping statement is once again denied. No evidence is submitted in support of the statement.
8. Ad para 6.1: We refer to paragraphs 12 and 13 of the founding appeal. It is clear that they have standing. No evidence is submitted showing that they do not have an interest. Persons entitled to the protection of the audi alterem partem rule include affected parties such as "objectors to the granting of licences" . These Appellant were in any event objectors and as such is an affected party entitled to the protection of the audi-rule.[2] At no time during the process were they required or requested to show why they should be consulted. They were accepted as IAP's then and therefore have the right to appeal.
9. Ad para 6.2: the basis is laid and we request that such a decision be made upon the very high likelihood of success of the appeal.
10. Ad para 7- 10 and then 6.1 – 6.6 and then 7.1 – 7.13: The respondent once again makes the fatal flaw of looking only at the mining rights area, and not the area that will be impacted upon.
11. Ad para 7.14: It is a summary of the opinion of the respondent. No evidence is submitted in support thereof or why our submission should not be upheld.
12. Ad para8: (page 14):
    12.1. The allegation is against the Minister and the Regional Manager. No proof of notice is attached. This information lies with the DMR in Witbank. It is not within the knowledge of the Respondent. The submission should be ignored.
    12.2. The respondent clearly still does not understand the process. There is a separate consultation process between the Minister and the IAP's. This is to comply with

[2] "'Affected individual' naturally includes the person or persons directly affected by the impending administrative action. It may, however, also include persons less directly affected, such as objectors to the granting of licences or permits" (footnote 57, p543) Lawrence Baxter, in the book Administrative Law on pages 542 to 551:

Administrative Justice as described in our appeal. No evidence to the contrary is supplied and their submission should be ignored.

12.3. The respondent admits that no Scoping report draft was made available. We refer to our submission which provides for the necessary legal basis thereof. (see para 33). The DMR's own guideline makes it patently clear:

A. PREAMBLE

…..The scoping report contemplated in Regulation 49 is founded on the principle of consultation with interested and affected parties, which consultation process and its result is an integral part of the fairness process. The decision to grant a mining right cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.

C: Legislative framework

…. In this instance no reference is made to the submission of the result of consultation. The reason is that in accordance with regulation 49 (2), read with regulations 49 (1) (c) and (f), the envisaged results are expected to be included in the scoping report to be submitted within 30 days of the date of the notice. The reference to 180 days, however, means that the consultation process is not expected to be discontinued after the 30 day deadline for the submission of the scoping report because a high level report is required, and further in depth consultation is required to more substantially inform the Environmental Impact Assessment and Environmental Management Programme in order to comply with section 39 (3) (b) (ii) and (iii) of the Act read with regulations 50 (c) (d) and (f). [3]

In summary at issue: Is it procedurally fair to not give access to IAP's to the scoping report, and not allow them to have their views and concerns recorded. We submit it is not. The appeal must succeed.

12.4. None of the notices complied with the requirements of the Minister's duty in terms of s10 of the MPRDA. They only deal with the requirements of the Applicant in the matter.

13. Ad Para 8.9: It is not within the knowledge off the respondent of why the DG approved the right. That will only become apparent once the Reasons are sent to the Appellants. The submission should be ignored.

14. Ad Para 9; once again the s10 and s22 process is confused.

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[3] GUIDELINE FOR CONSULTATION WITH COMMUNITIES AND INTERESTED AND AFFECTED PARTIES AS REQUIRED IN TERMS OF SECTIONS 10(1)(b),16(4)(b), 22(4)(b), 27(5)(b) and 39 OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT (ACT 28 of 2002)

15. Ad Para 9.2; To "deal" with an issue is not what is required. What is required in terms of s39 is to:

    15.1. establish baseline information concerning the affected environment

    15.2. to determine protection, remedial measures and environmental management objectives;

    15.3. investigate, assess and evaluate the impact of his or her proposed prospecting or mining operations on—

        15.3.1. the environment;

        15.3.2. the socio-economic conditions of any person who might be directly affected by the prospecting or mining operation; and

        15.3.3. any national estate referred to in section 3(2) of the National Heritage Resources Act, 1999 (Act No. 25 of 1999), with the exception of the national estate contemplated in section 3(2)(i)(vi) and (vii) of that Act;

    It is our submission that these were specific allegations and no evidence of compliance was submitted by the respondent.

16. Ad para 9.3: We disagree.

17. Ad Para 10; Once again the MPRDA is not well understood.

    17.1. Without an objection by day 30, there is no RMDEC procedure. In order to come to a decision to object information is needed. This was in the Scoping report

    17.2. We further refer to the importance of the scoping report as dealt with in para 33 onwards of our notice of appeal.

    17.3. Please also refer to the DMR guidelines quoted above as to the importance of the document.

    17.4. Par 10.12 when viewed in the admittance that the scoping report was not made available prior to its submission is simply breath taking. On the one hand it is admitted that it was submitted without consultation. Then there are submissions as to why this does not matter. lastly there is a denial that it was submitted without consultation.

    17.5. The fact that is was submitted without being made available is common cause. At issue is now whether or not this is a non-compliance with the requirements of the MPRDA. The DMR guidelines and regulation 49 clearly state that it is. Submission without consultation also cannot be construed as being a consultative process[4].

    17.6. The only conclusion can be that there was not consultation on the scoping report.

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[4] See para 25 onwards of the notice of appeal where this is dealt with in detail.

17.7. In view of the above there was non compliance with the MPRDA and in terms of s 23(3) the Minister had no choice but to refuse the right. [5]

18. Ad Para38: It is now common cause that the SLP was not made available.

18.1. The IAP's had a right to substantially the same information that the decision maker had access to in making the decision. The respondent claim that the information is "subsumed" in the EIA. The SLP is however not attached and no evidence is submitted as to where this information is " subsumed".

18.2. The assumption that it is not of any consequence is rejected. Lots of positive impacts of a socio-economic nature is claimed. Many of these should have been dealt with the SLP. Although the farm owners would not be beneficiaries, the environment within which they operate will be affected by the contents as would some of the recipients of the SLP. The SLP is supposed to be in support of the IDP's. Are the IDP's also of no consequence" The "no consequence " argument isdenied.

18.3. We have experience with SLP's. The requirements of the SLP is not " subsumed" in the EIA. That is non-compliance with the requirement of consultation. The same applies if there were also non compliances within the SLP document. The Minister had no choice but to refuse the right.

19. Ad Para 12.1 – 12.3;

19.1. It is submitted that the respondent does not understand the process and the linkage between the s 10 objection, the scoping report, being the only document on which such an objection could have been based as well as the importance of the scoping report further on.

19.2. The only issue is really whether or not the s 10 process was in compliance of PAJA or not. If it is not, then the appeal must succeed. The respondent does not attach any documents to show that there was compliance.

19.3. There either was or was not consultation prior to the submission of the EMPR. It is now common cause that there was not. That is a non-compliance with s 22(4)(b) and 39 (1) which both require consultation prior to the submission of the EMPR.

19.4. The decision maker had no choice but to refuse the application in terms of s23(1)(g) and 23(3).

20. Ad para 12.4 – 12.6: No evidence is submitted to refute our detailed objection to refute the allegations.. The contention of the respondent is thus denied.

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[5] MPRDA s 23. (1) Subject to subsection (4), the Minister must grant a mining right if—
(g) the applicant is not in contravention of any provision of this Act;
23(3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).

21. Ad Para 12.7 – 12.8: This is an admission of a fatally flawed consultative process. The requirement to consult stems from:

    21.1. S 6 of the MPRDA.[6] This relates directly to PAJA and the requirements of PAJA.

    21.2. Then there are the specific requirements to consult within 180 days on the EMPR in s 22(4)(b) and s39(1). Consultation was dealt with in detail in the notice of appeal.

    21.3. The audi alterem partem rule means that in order for the process to comply with PAJA and the mentioned sections of the MPRDA, there must be consultation as prescribed, but also where not prescribed the consultation must still comply with PAJA.

    21.4. The consultation continues into the adjudicative process as has been the opinion of court after court. The consultation process does not stop at the submission of the EMPR as is stated by the respondents in para 12.7.2.

    21.5. In this matter it is common cause that there was no consultation on the final draft EMPR submitted, the respondent states that we had no right to make our views known thereafter. This is a fatally flawed process.

    21.6. The above means that we had to have had access to substantially the same information as the decision maker. It is clear that the respondent is admitting once again that this was not the case.

    21.7. The appeal must succeed.

22. Ad para 12.9: This is speculation and an opinion of the respondent and devoid of any truth. The allegation is denied.

23. Ad Para 12.10: the allegation of a veto is denied. If the scoping report was made available. If our views and concerns could have been raised and if these were then investigated, assessed and meaningfully addressed, then there would not have been the allegation. Fact is , the process was fatally flawed and the result is the consultation failure.

24. Ad para 12.11; it is not the duty of the IAP's to request document. They have a reasonable assumption that access would be granted to documents submitted in support of the application. When these were received, it was not attached. As stated above, the respondents are of the opinion that at that time of lodging of the EMPR the IAP's had no more rights to the process. That is the reason why the SLP was not supplied and is a fatal flaw.

25. Ad Para 13:

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[6] Principles of administrative justice

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.

25.1. We stand by our allegations and await the Minutes from the regional manager in support of the granting of the mining right.

25.2. As far as the denial of our right to present our concerns to the members of the RMDEC meeting after the site visit, we refer again to the principles of administrative reasonableness and fairness as well as the audi alterem partem principles. Cleary we should have had the opportunity to present our concerns to the members as they made a decision based upon the report by the regional manager without us having had an opportunity to provide our objections.

26. Ad Par 14; We deny the allegations. PAJA is very clear as to our rights. No evidence is submitted to show otherwise.

27. Ad par 15 -19 :

27.1. We await the reason of the decision maker as to why the objections were not upheld. Once we have the reasons we reserve the right to once again deal with the matters under consideration.

27.2. The respondent is not the decision maker, and cannot speak on behalf of the decision maker. Objections were lodged, and these were rejected.

27.3. As shown above, s 6(2) of the MPRDA require these reasons to be in written format. In terms of the MPRDA regulations we should have received the reasons over a year ago.

27.4. We hereby once again request the reasons within 30 days. If these are not received we will have no choice but to approach a court for appropriate relief, including a cost order.

Signed at Belfast on the 28th of January 2015.