

EYESIZWE COAL ZOEKOP BLYVOORUITZICHT

Importance:	<p>This case is illustrative of a number of the systemic problems observed in the review, including the process of public participation and consultation, the inputs of other state departments being ignored or misstated, and insufficient information and gaps in the environmental management plan (EMP). An interesting dimension which this case uniquely illustrates is the confusion that can arise from the manner in which portions of properties are designated. In this instance although application was only made for portions 1 through 8 of the farm Zoekop 426 JS, the right was also granted over portion 10, with the mining company explaining that portion 10 was included in portion 3. This fact was however not apparently ascertainable during the public participation and consultation process. This case reached the judicial review stage for the prospecting right, potentially enabling many of the systemic issues raised by the case studies to be fleshed out and resolved, but the Department of Mineral Resources and the mining company then withdrew their defence. It later transpired, however, that in the meantime they were compiling documentation required for an application for a mining right.</p>
Alleged Facts:	<p>This case relates to an application for firstly, a prospecting right, and subsequently a mining right, for coal on portions 1 – 8 of the farm Zoekop 426 JS, portion 2 and 4 of Blyvooruitzicht 383 JT, and the remaining extent of portion 1 of the farm Leewbank 427 JS in the district of Belfast, Mpumalanga. The prospecting applicant was Eyesizwe Coal (Pty) Ltd while the mining rights applicant is Exarro Coal Mpumalanga (Pty) Ltd, a subsidiary of Exarro Coal (Pty) Ltd owned by Exarro Resources Limited (Exarro Resources is South Africa's largest black-empowered company and was listed on the JSE on 27 November 2006 through the revised listing of Kumba Resources). The terrestrial and aquatic biodiversity for the area had been identified by the Mpumalanga Tourism and Parks Agency as 'highly significant' in terms of its biodiversity conservation plan. The appropriate land uses associated with this biodiversity conservation category exclude surface mining and restrict underground mining to compulsory and site specific conditions and controls when unavoidable.</p> <p>The case originates in a series of four meetings held during 2002/2003 between representatives of Eyesizwe and the applicants (see below). Representatives of Eyesizwe met with representatives of the Escarpment Environmental Protection Group (EEPOG) concerning the former's intention to mine coal on the affected farms, in an area which it termed the 'Belfast Block' (this area being considerably smaller than the area in respect of which the prospecting right was ultimately granted).</p> <ul style="list-style-type: none"> • Process 1: Prospecting right. Eyesizwe's application for a prospecting right was submitted some two years later during 2004. Despite both Eyesizwe and the office of the Regional Manager of the Department of Minerals being aware of EEPOG's interest in the matter, EEPOG received no notification of the prospecting application (EEPOG made a PAIA application for all documents constituting the application for the prospecting right on 30 January 2008 but had no reply). From the EMP submitted to the Department it appears that Eyesizwe consulted with certain landowners and lawful occupiers during February and March

2005, but apparently deliberately avoided consulting with (most) authorized representatives of EEPOG. Moreover, the 'consultation' process that did take place between the mining company and landowners/lawful occupiers appears to have consisted in the signing of a declaration indicating awareness of Eyesizwe's intention to prospect and agreeing to limit the consultation process to various aspects of the project. It was thus strongly framed in favour of Eyesizwe. Moreover, it is disturbing to note that the declaration Eyesizwe undertook not to erect camp sites closer than 50m from a stream, spring or dam. The EMP also stated that drilling operations would occur between 16 – 30 m from open water. This contravenes regulation 4 of the regulations promulgated in terms of s 26 of the National Water Act 36 of 1998 (NWA) under GN 704 which prohibits the carrying on of any prospecting or any other mining related process within a horizontal distance of 100m from a water resource, unless an exemption is obtained therefor. During August 2005 EEPOG learned that Eyesizwe had submitted an EMP to the Department. It therefore addressed a letter to the DME on 24 August 2005 which constituted an objection to the grant of the proposed prospecting right. The MPTA also submitted an objection, indicating that farming is a more sustainable option in this highly fertile area and that coal mining 'is not an option'.

Despite these objections a prospecting right was granted in favour of the applicant at the same time as the approval of the environmental management plan (EMP) on 30 October 2006 (DME Ref. No. *MP 30/5/1/1/3/2/1(189) EM*). There appear to have been discrepancies in the identification of the properties which were the subject of the application and the properties over which the prospecting right was eventually granted (although representatives of Eyesizwe argued that portion 10 in effect formed part of portion 3). Neither Eyesizwe, nor the Minister, DDG or Regional Manager notified EEPOG (or the applicants in their individual capacity as landowners/lawful occupiers of affected properties) of the granting of the prospecting right or of their rights to internal appeal and reasons.

EEPOG launched review proceedings against the granting of the prospecting right in the Transvaal Provincial Division (now North Gauteng High Court) on 23 January 2008 (case number 8822/2008). The review proceedings were contested between five applicants (EEPOG, Highlands Organics (Pty) Ltd, Jacobus Philipus Pretorius, Marion Alma Joubert, Adriaan Joubert) and four respondents (the Minister of Minerals; the deputy D-G of the branch mineral regulation, the regional manager for the Mpumalanga region and Eyesizwe Coal (Pty) Ltd).

The documentation available for the case tracks the litigation process that subsequently unfolded. One of the more interesting available documents includes an affidavit submitted by a DME official that outlines the process by which prospecting rights are granted and the manner in which they justify departing from comments received

from other State departments.

Although the respondents indicated their intention to oppose the matter, none had delivered any answering affidavits by the time the heads of argument were lodged. In a surprising move, Eyesizwe withdrew its opposition and agreed to pay costs on the opposed scale to the date of withdrawal and on the unopposed scale thereafter, contingent upon the court granting the order to set aside the prospecting right and approval of the EMP. Sometime between 12 and 16 August 2009 it appears that the first three respondents withdrew their defence as well.

- **Process 2: Application for a mining right.** Documentation available, however, indicates that while this battle was playing out Exarro Coal Mpumalanga had already for some time simply been preparing for submission of a mining right in respect of the same properties. Already in August 2008 Clean Stream Scientific Services (Pty) Ltd had been appointed to conduct baseline water studies for the proposed 'Belfast Block' mine. Marsh Environmental Services was subsequently appointed to prepare the scoping and environmental impact report for the Environmental Management Programme (EMP). A background information document (BID), dated 21 July 2009, had already been prepared by Marsh Environmental Services for the scoping phase of the project. This report in turn indicates that a mining right application for the proposed Belfast coal mine had been submitted during June 2009 and accepted by the DME on 10 July 2009.

A public meeting relating to the proposed project was held on 4 August 2009 in order to publicly consult on the scoping report for the EMP. The final submission of the scoping report, however, was planned for 10 August 2009 – a mere week after this meeting. In effect, the scoping report was finalized even earlier – a mere two days after the public meeting. At the public meeting it was also claimed that a draft of the scoping report was not available.

EEPOG and the Wonderfontein Community Association submitted an objection to the proposed mining right to the Regional Manager on 10 August 2009. The MPTA also submitted an (undated) objection to the granting of the mining right, pointing out that it had not been invited to the meeting.

Similarly to the prospecting right application, the consultants employed by Exarro required parties with whom they were consulting to sign a document outlining the 'consent' of the person consulted to Exarro undertaking a variety of activities on the land. EEPOG engaged with the consultants over issues in the scoping report and the inadequacy of the public participation process during September and October 2009. A specialist report feedback meeting was subsequently held on 9 December 2009.

The EMPR was submitted on 9 January 2010, but the public meeting allowing the landowners to consult with the experts and lead consultants was only held on 3 March 2010. According to Marsh Environmental Services, the understanding was that DMR would not

	<p>proceed with the adjudication of the application until landowners had been allowed to express their views, concerns and objections.</p> <p>Highlands Organics (Pty) Ltd, being one of the I&APs for the project, commissioned an independent review of the EMPR. The overall finding of the review was that the EMPR did not fully comply with the objective of providing I&APs with all relevant information to enable them to come to a sound decision on the nature, extent and severity of anticipated impacts. While it identified impacts it failed to explain how such would be managed and mitigated in order to protect the environment and the people living in the area, as required by law. An independent review of the social impact assessment report was undertaken as well.</p> <ul style="list-style-type: none"> • Process 3: Application for NEMA authorizations. In the meantime a scoping report for purposes of obtaining required environmental authorizations under the National Environmental Management Act 107 of 1998 (NEMA) was submitted on 11 September 2009, though I&APs only learned of this in early 2010. The Mpumalanga Department of Agriculture and Land Administration accepted the scoping report on 1 February 2010.
<p>Forum:</p>	<p>Judicial review proceedings in the Transvaal Provincial Division, RMDEC objection.</p>
<p>Issues:</p>	<p>The processes outlined above raise the following issues:</p> <p>Regarding process 1:</p> <ul style="list-style-type: none"> • Insufficient public participation. For at least some of the landowners/lawful occupiers affected by the proposed prospecting operation, as well as EEPOG as an organization, consultation was non-existent. • Incorrect identification of properties in the prospecting right. While the applicants had not had sight of the prospecting application, the EMP indicated that prospecting was intended to take place over portions 1 through 8 of the farm Zoekop 426 JS. However, the prospecting right granted also allows for prospecting over portion 10. • Inputs from other state departments ignored or misstated. The prospecting right was granted notwithstanding the indication of the area concerned as ‘highly significant’ on the MPTA’s biodiversity conservation plan. The proximity of the operations to water resources authorized by the DME also contravened the distances specified in regulations under the NWA. • Inadequate information and gaps in the EMP. Apart from not indicating all affected landowners/lawful occupiers, the EMP failed to mention the presence of a seasonal wetland running over the area from 10km from north to south-east and a number of perennial pans. The EMP also contradicted itself in denying that any water would be extracted from a stream or pan at one point, and then (in fact on the same page) indicating that drilling water would be sourced from open pans in the area. • The proposed prospecting activities would lead to environmental

	<p>degradation and would not promote sustainable and justifiable socio-economic development. The EMP submitted by EMP did not establish baseline information concerning the environment, nor did it investigate, assess and evaluate the impact of the proposed prospecting operation on the environment or the socio-economic conditions of, in particular, the applicants.</p> <p>Regarding process 2:</p> <ul style="list-style-type: none"> • Transfer of prospecting right. While the prospecting right had been granted to Eyesizwe, in documentation relating to the subsequent mining rights application, Exarro Coal Mpumalanga consistently claimed that the prospecting right had been granted to Exarro Mpumalanga (Pty) Ltd. This raises the issue whether the proper procedures for transfer of the prospecting right were observed. • Insufficient public participation. In terms of the timescales adopted for the preparation of the environmental reports, less than a week was allocated for the inclusion of I&AP comments regarding the scoping phase of the project. In effect the report was finalized a mere two days after the public meeting. The strategy adopted by the consultants – in requiring persons consulted to sign a ‘consent form’ appears to have been intimidatory. • Incomplete and insufficient information in the EMPR and social impact assessment report. The deficiencies in this regard are outlined in the independent review of these documents respectively. <p>Regarding process 3:</p> <ul style="list-style-type: none"> • Insufficient public participation. It appears that the same meeting used to discuss the scoping report for the EMPR was considered a public participation meeting for purposes of compiling the scoping report for the NEMA authorization, though I&APs did not regard it was such.
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Paper Trail:

Document	Author /Originator	Date
Process 1: Prospecting right application		
Objection to granting of prospecting right	MPTA	23 August 2005
Objection to granting of prospecting right	EEPOG	24 August 2005
Notice indicating change of company registered address to Exarro Corporate Centre	CIPRO	13 December 2006
Founding affidavit for judicial review of case in the TPD	EEPOG	23 January 2008
PAIA request for access to all documentation relating to granting of prospecting right	Cameron Cross	30 January 2008
Answering affidavit in action to compel	Molatelo Maruthla (DME official)	21 July 2008
Letter indicating Eyesizwe’s withdrawal of defence	Eben Griffiths & Vennote	22 July 2009
Applicants’ Heads of Argument	EEPOG	10 August 2009
Fax to state attorney outlining position on costs following withdrawal of first three respondents from the matter	Cameron Cross	16 August 2009

Process 2: Mining right application		
Letter noting intimidation by Clean Stream consultants re gathering of samples for Belfast Block Mine	EEPOG	26 August 2008
Exarro reply to letter of complaint	Exarro	22 September 2008
Mining work programme for the proposed Belfast Coal Mine	Exarro Coal Mpumalanga (Pty) Ltd	Undated
Registration form for scoping phase of EMP	Marsh Environmental Services	Undated
Letter of acceptance of mining right application	DME	Undated, faxed 12 July 2009
Background Information Document for the scoping phase of the proposed EMPR and integrated water use licence	Marsh Environmental Services	21 July 2009
Presentation on proposed project given at public meeting on 4 August 2009	Marsh Environmental Services	4 August 2009
Scoping report for Belfast Project (EMP)	Marsh Environmental Services on behalf of Exarro Resources Limited	6 August 2009
'Consent' form given to landowners	Unknown	Undated
Minutes of specialist report feedback meeting	Exarro Resources Limited	9 December 2009
Objection submitted by MPTA	MPTA	Undated
EMPR	March Environmental Services on behalf of Exarro Resources Limited	9 January 2010
Minutes of public meeting for specialist report feedback	Exarro Resources Limited	3 March 2010
Independent review of EMPR commissioned by Highlands Organics	JMA Consulting	13 March 2010
independent review of social impact assessment report	Tony Barbour	May 2010
Process 3: Application for NEMA authorization		
Scoping report for Belfast Project (NEMA)	Marsh Environmental Services on behalf of Exarro Resources Limited	11 September 2009
Acceptance of scoping report	MDLALA	1 February 2010
Letter indicating lack of knowledge of submission of scoping report	EEPOG	10 February 2010