Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case No: 2090/2010
Heard: 25 / 11 / 2011
Delivered: 19 / 12 / 2011

In the matter between:

LOUISVALE IRRIGATION BOARD **1st Applicant**

KOLSKOOT BELEGGINGS 116 CC **2nd Applicant**

v

THE MINISTER OF MINERALS & ENERGY **1st Respondent**

THE DIRECTOR GENERAL: DEPARTMENT OF MINERALS AND ENERGY **2nd Respondent**

THE REGIONAL MANAGER, MINERALS REGULATION, NORTHERN CAPE REGION **3rd Respondent**

SIZWE PLANT HIRE CC **4th Respondent**

JACOBUS WOUTER VAN ZYL **5th Respondent**

YOLANDA OBERHOLSTER **6th Respondent**

Coram: Kgomo JP et Pakati AJ

JUDGMENT

KGOMO JP

1] The first applicant, Louisvale Irrigation Board (LIB), and the second applicant Kolskoot Belegging 116 CC (Kolskoot CC) seek the following relief from the respondents:

1.1 That the first respondent's (the Minister of Minerals and Energy (the Minister)) and/or the third respondent's (the Regional Manager, Mineral Regulation: Northern Cape Region (the Regional Manager's), decision to grant the mining permits listed below to mine sand on a portion of the Farm Jannel se Pan Nr 39, Administrative District of Kenhardt, measuring 1.5 hectares each:

a) Mining Permit nr. 045/2009 (reference number (NCS) 30/5/1/3/2/738MP) to Sizwe Plant Hire CC (4th Respondent); and

b) Mining Permit nr. 044/2009 (reference number (NC's) 30/5/1/3/2/737MP) to Jacobus Wouter van Zyl (5th Respondent); and

c) Mining Permit nr. MP 043/2009 (reference number (NCS) 30/5/1/3/2/736MP) to Yolanda Oberholster (6th Respondent):

be reviewed and set aside and that the aforesaid mining permits granted to the 4th (Sizwe Plant Hire CC), the 5th (Jacobus Wouter Van Zyl), and the 6th (Yolanda Oberholster) respondents be and are hereby set aside; and.

1.2 An order that the identified three mining permits are cancelled; and

1.3 That the respondents pay the costs of this application jointly and severally the one paying the other to be absolved *pro tanto*.

2] It is common cause that Louisvale Irrigation Board or LIB, a body duly constituted and registered in terms of the National Water Act Nr 36 of 1998, is the legal or registered owner of the property forming the subject–matter of this application. Also

common cause is that Kolskoot CC is the lawful occupant of the property, over which this dispute goes by virtue of a mining lease agreement entered into with LIB before the permits were granted by the department to 4th, 5th and 6th respondents.

3] The issue that falls for determination is whether it was a statutory requirement that Kolskoot Beleggings 116 CC, the second applicant, as mining rights permit holder or lessee and therefore the lawful occupier of the property in question, should have been consulted and/or was indeed consulted before the Regional Manager, the 3rd respondent, issued permits to 4th, 5th and 6th respondents in terms of the provisions of S27(1) – (6) or S16(1) – (5)of the **Mineral and Petroleum Resources Developments Act, Nr 28 of 2002** (the Minerals and Petroleum Act, 2002).

4] S27(1)-(6) of the same Act provides that:

*"**27 Application for, issuing and duration of mining permit***

(1) A mining permit may only be issued if-

(a) the mineral in question can be mined optimally within a period of two years; and

(b) the mining area in question does not exceed 1,5 hectares in extent.

(2) Any person who wishes to apply to the Minister for a mining permit must lodge the application-

(a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.

(3) The Regional Manager must accept an application for a mining permit if-

(a) the requirements contemplated in subsection (2) are

met;

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(4) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.

(5) 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 and lawful occupier and any other affected parties and submit the result of the said consultation within 30 days from the date of the notice.

(6) The Minister must issue a mining permit if-

(a) the requirements contemplated in subsection (1) are satisfied; and

(b) the applicant has submitted the environmental management plan."

5] The provisions of S16(1)-(5) of this Act are almost identical to S27 (above) and need not be recited because S27 is more pertinent to this application. Whereas S27 deals with applications for mining permits S16 on the other hand has to do with applications for prospecting rights. S27(5)(b) stipulates that an applicant has *"to notify in writing and consult with the owners* ***and*** *lawful occupier and any other affected parties."* S16(4)(b) requires that notification and consultation be *"with the land owner* ***or*** *lawful occupier and any other affected party."* The difference in the use of *"or"* and *"and"* in these sections is of no moment. (The emphasis is mine).

6] The Minister, the Director General (the DG) and the Regional Director (first, second and third respondents, respectively)

contend that the letters Annexures "JAH6", "JAH7" and "JAH8", addressed to LIB (first applicant) by the fourth, fifth and sixth respondents, should be construed not only as the requisite notice and consultation but as adequate consultation too. It is common cause that Koolskoot CC, the lawful occupier, was not known (as in written to, notified, or consulted with) at all. The collective response or attitude by the department is essentially that LIB did not disclose the existence or occupancy by Kolskoot CC of the property and that it could not possibly divine the existence of and interest that Kolskoot CC had or whether it had any relationship with LIB.

7] In order to determine whether the contents of Annexures "JAH6", "JAH7" and "JAH8" measure up to the requirements of the relevant provisions of S27 of the Mineral and Petroluem Act, 2002, quoted above, it is necessary to quote the contents of one of the letters. Sizwe Plant Hire CC (fourth respondent) writes on 20 January 2008 to the chairman (Mr J A Hurselman) of Louisvale Irrigation Board, as follows:

*"**Re: Comments on proposed mining operation on the Farm Jannel se Pan No.39***

Application has been made by SIZWE PLANTHIRE CC to the Department Minerals and Energy for a mining permit on a 1.5Ha portion on the above property in terms of section 27(2) of the Minerals and Petroleum Resources Development Act 28, 2002. The target mineral of the proposed operations is River Sand and will be conducted over a period of 2 years.

In accordance with section 16(4) of the Minerals and Petroleum Resources Development Act 28, 2002 you are required as the landowner to submit any written comments you may have on the application to the following address:

Department Mineral and Energy

P/Bag X14

Springbok 8240

As applications are working according to a time schedule you only have time until 20 February 2008 to summit your comments. Should you not submit any comments at this stage, you will have a further opportunity to comment on the Environmental Management Plan when it is distributed for comment in about 60 days time.

Please do not hesitate to contact me should you require any additional information.

Best regards."

Annexures "JAH7" by Mr Van Zyl (5th respondent) and "JAH8" by Ms Oberholster (6th respondent) were composed by the same author and the contents are similar.

8] The Legislature has in S27(5)(b) of the Minerals Act employed the conjunctive "and" to signify that not only "the land owner" but also the "lawful occupier" and in addition "any other affected parties" must be "notified in writing and consulted with." The implication therefore is that written notification which is not followed by proper consultation falls short of meeting the requirements envisaged in section 27(5) (b) and/or S16(4)(b), as the case may be.

9] In **Maqoma v Sebe NO & Another** 1987(1) SA 483 (CK) at 490C-E the Court made this pronouncement:

"'(C)onsultation' in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party (also indicative of the prefix 'con-') in a situation of conferring with each other where minds are applied to weigh and consider together the pro's and cons of a matter by discussion or debate.

The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied

with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."

10]An examination of "JAH6", "JAH7" and "JAH8" reveal the following inadequacies even if the contents of these letters are to be construed as notification, let alone consultation:

10.1 The notifications do not contain any particulars of where on the targeted property the applicants intend to mine for the sand;

10.2 The applicants do not supply any particulars of the steps intended to be taken to ensure that the mining activities would not jeopardize or interfere with the owner's (LIB's) or Kolskoot CC's mining activities. It must be borne in mind that nothing prohibits an owner of land from mining on his own land;

10.3 The notification does not specify over which route the applicants intend to access the proposed mining site. An access road is akin to a via or a servitude and can be very invasive of other occupants' rights.

10.4 The notification does not contain any invitation by the 4th, 5th and 6th respondents to LIB to enter into negotiations. The letters only state that if LIB has any query it must not hesitate to contact the authors; and

10.5 The permit applicants could, in addition to the invitation in 10.4, also have enquired from LIB whether there was any "lawful occupier and any other affected parties", as provided for in S27(5)(b) of the Minerals and Petroleum Act, 2002, on its(the owner's) land. To insinuate, as the department (1st, 2nd and 3rd respondents) has done, that LIB suppressed the existence of Koolskoot CC as a mining

permit holder (s27(3)(b) of same Act) is unjustified. It was incumbent upon the mining permit applicants to comply with the statutory prescripts and for the department to see to it that they have done so before the permits were approved or issued.

11]I tend to agree with Adv Van Niekerk SC, for the applicants, that the six respondents, whether jointly or severally, had three opportunities to get the issue of the notification of Koolskoot CC and the consultation with both LIB and Koolskoot CC right.

11.1 The first occasion was when the mining lease agreement was produced before the Regional Mining Development & Environment Committee (Remdec) on 12 March 2008 pursuant to the applicants' objection to the issuing of the mining permits. See S10(2) which reads:

"10(2) If a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environment Committee to consider the objections and to advise the Minister thereon."

11.2 The second opportunity presented itself at the stage that S96 of the Minerals Petroleum Act, 2002, kicked in with the appeal process to the Minister of Minerals and Energy (1st respondent); and finally

11.3 When this review proceedings were launched. At least two glaring shortcomings were evident. The two groupings of respondents (the department and the mining permit applicants) should have stopped the application in its tracks in light of (a) the failure to consult Kolskoot CC and (b) the acceptance of the 4th, 5th and 6th respondents

applications by the department in the face of an existing permit holder (Kolskoot CC).

12]In the landmark case of **Bengwenyama Minerals v Genorah Resources** 2011(4) SA 113(CC) at 126A-137B (paras 32-33) **Froneman J**, writing for the anonymous Court, sets out the procedure and object of the Act and thereafter remarks as follows at para 34:

"[34] Another one of the objects of the Act is to give effect to the environmental rights in the Constitution (Section 24 of the Constitution states that:

'(1) Everyone has the right —

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.') by ensuring that mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development."

13]The following pronouncement by the learned Judge is particularly apposite to this matter at 139A-136H (paras 63-68):

"[63] These different notice and consultation requirements are indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights. It is not difficult to see why: the granting

and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it 'in all the fullness that the common-law allows', or as use only of its surface, if what lies below does not belong to the landowner, but somehow resides in the custody of the State.

[64] The purpose of the notification and subsequent consultation must thus be related to the impact that the granting of a prospecting right will have on the landowner or lawful occupier---.

[65] One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. Under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land. Of course the Act does not impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract.

[66] Another, more general, purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done, so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result are an integral part of the fairness process because the decision 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.

[67] The consultation process required by s 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the regional manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the regional manager within 30 days of receiving notification to consult.

[68] Genorah did not comply with these requirements for consultation in terms of the Act. Essentially its purported compliance with the consultation requirements of the Act consisted of notifying the Kgoshi of the community of its application before lodging it with the regional manager, and leaving a prescribed form for him to indicate, by ticking a box on the form, whether he on behalf of the community supported its application or not. The form was never signed by the Kgoshi. Genorah did nothing further, despite being notified of

the requirements under s 16(4) of the Act by the department, and despite receiving a letter from the Kgoshi on 13 March 2006 inviting Genorah to get to know each other better. There was never any consultation in relation to Eerstegeluk. The review must thus succeed on this ground." (Footnotes omitted).

14]Councel for the department, except to urge that in respect of LIB there was adequate notice and consultation and in respect of Koolskoot CC that LIB failed to disclose its existence as a legal occupier, confined himself to the following technicalities, which should not encumber this judgment as they lack merit:

14.1 That the relief sought offends against the doctrine of the separation of powers. This case has nothing to do with this doctrine, even stretching the doctrine liberally;

14.2 That separate applications should have been brought by the two applicants. Counsel contended that each of the applicants deposed to a founding affidavit which he says is impermissible. This talks to form and neither to substance nor sound procedure. See **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th Edition, Vol 1** (Edited by Cilliers et al) at 208 under **"Joinder of Parties"** the authors comment: *"Parties are often joined for reasons of convenience and equity, and to avoid oppression or a multiplicity of action. (See BHT Water Treatment (Pty) Ltd v Leslie 1993(1) SA 47 (W) at 50G-H) Apart from considerations of convenience, however, there are circumstances in which it is essential to join a party because of the interest that party has in the matter. When such an interest becomes apparent the court has no discretion and will not allow the matter to proceed without joinder, or the*

giving of judicial notice of the proceedings to that party. (Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A). The reason for this is that it is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. (Ex Parte Body Corporate of Caroline Court 2001(4) SA 1230 (SCA) para 9, citing Amalgamated). "

14.3 Counsel for the department stated in the Heads of Argument: *"(T)hat it is fundamental rule of practice than an application for review must indicate which of the review grounds in s6 of PAJA it relies upon and must establish a factual basis for those review grounds. [It is] submitted that in the present case the applicants have failed to do so in the founding papers."*

Counsel for the department therefore argued that for these reasons this application is fatally flawed and must be dismissed.

[15] In my view it counsel's submission which is flawed In **Bato Star Fishing (Pty) v Minister of Environmental Affairs & Others** 2004(4) SA 490 (CC) at 507C-E (para 27) the Constitutional Court (per **O'Regan J**) held:

"[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative.[16] *I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of*

action, and the legal basis of their cause of action."

See also **National Horseracing Authority of Southern Africa v Naidoo & Another** 2010(3) SA 182 (NPD) at 188G – 189C.

In the result I am satisfied that the applicants have made out a proper case for the relief sought which is set out in the order below.

THE COSTS ISSUE

16]The applicants have urged for costs on an attorney and client scale. Their counsel contend that the department's defence is frivolous, that they knew it, hence their only reliance on unmeritorious technicalities set out in para 14 (above). I enquired from counsel for the department, Adv Khokho, why in light of the clear decision, guidelines and finding in **Bengwenyama Minerals (Pty) Ltd & Others** (above), which the department was aware of because it was party to the proceedings, the department still persisted in prosecuting its defence, or the lack thereof. Counsel avoided the question. Perhaps that says it all.

17]In **Nel v Waterberg Landbouwers Ko-Operatiewe** 1946 AD 597 at 607 the Court said the following on the award of punitive costs:

"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of

pocket in respect of the expense caused to him by the litigation."

I am satisfied that the applicants have made out a valid case for the punitive costs award sought.

18]As far as the 4th, 5th and 6th respondents are concerned:

18.1 They opposed the application but did not file any opposing papers;

18.2 There was no appearance on their behalf;

18.3 They did not withdraw their opposition to the application and are therefore liable for the costs as losing parties; but on an ordinary scale.

19]**I therefore make the following order:**

1. That the first respondent's (the Minister of Minerals and Energy) and/or the third respondent's (the Regional Manager, Mineral Regulation: Northern Cape Region's), decision to grant the mining permits listed below to mine sand on a portion of the Farm Jannel se Pan Nr 39, Administrative District of Kenhardt, measuring 1.5 hectares each:

   1.1 Mining Permit nr. 045/2009 (reference number (NCS) 30/5/1/3/2/738MP) to Sizwe Plant Hire CC (4th Respondent); and

   1.2 Mining Permit nr. 044/2009 (reference number (NCS) 30/5/1/3/2/737MP) to Jacobus Wouter van Zyl (5th Respondent); and

   1.3 Mining Permit nr. MP 043/2009 (reference number (NCS) 30/5/1/3/2/736MP) to Yolanda Oberholster (6th Respondent);

is hereby reviewed and set aside and that the aforesaid mining permits granted to the 4th (Sizwe Plant Hire CC), the 5th (Jacobus Wouter Van Zyl), and the 6th (Yolanda Oberholster) respondents are hereby set aside.

2. It is ordered that the identified three mining permits are cancelled.
3. The first second and third respondents are ordered to pay the costs of this application on an attorney and client scale.
4. The fourth, fifth and sixth respondents are ordered to pay the costs of this application on a party and party scale.
5. The order in respect of the costs in paras 3 and 4 hereof are to be paid jointly and severally the one paying the others to be absolved *pro tanto*.

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F DIALE KGOMO
JUDGE-PRESIDENT
Northern Cape High Court, Kimberley

I agree.

_____

B M PAKATI
ACTING-JUDGE
Northern Cape High Court, Kimberley

On behalf of the Appellans:	**Adv J G Van Nieker SC**
Instructed by:	Elliot Maris Wilmans & Hay
On behalf of the Respondents:	**Adv N D Khokho**
Instructed by:	State Attorney