IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **24294 /2016**

In the matter between:

NORMANDIEN FARMS (PTY) LIMITED	First Applicant
v	
THE SOUTH AFRICAN AGENCY FOR PROMOTION OF PETROLEUM AND EXPLOITATION S.O.C (STATE OWNED COMPANY) LIMITED	First Respondent
RHINO OIL AND GAS EXPLORATION SA (PTY) LTD	Second Respondent
THE MINISTER OF MINERAL RESOURCES	Third Respondent

Coram: ***Dlodlo J***

Date of Hearing: **22 March 2017**

Date of Judgment: **03 May 2017**

JUDGMENT

DLODLO, J

[1] This is an application seeking to set aside the acceptance by the first respondent of the application for an Exploration Right in terms of S 79 of the Mineral Resources Development Act 28 of 2002 ('the MPRDA') read with Regulation 28 (2) of the Regulations published in terms of S 107 of the MPRDA lodged by the second respondent. There are other ancillary reliefs sought by the applicant in this application. The application is opposed by the second respondent. The first respondent has given no notice to oppose the application but it has filed an affidavit described as an explanatory affidavit.

[2] The applicant is owner of various farms situated in Northern Kwazulu-Natal to which the Exploration Right application lodged by the second respondent in terms of S 79 of the MPRDA, relates. These farms are, *inter alia*: (i) The Albany No. 8944, situated in the Dannhauser registration division and in Dannhauser

Magisterial district; (ii) Subdivision 3 of the farm The Neck No. 10548 situated in the administrative district of Natal Province and in the Newcastle magisterial district; (iii) The remainder of the farm Mardedash No. 2, No. 9401, situated in the Dannhauser magisterial district; (iv) The farm Buffelshoek No. 15469, situated in the Newcastle registration division and in the Newcastle magisterial district; (v) Portion of the farm Konigsberg No. 16293, situated in the Newcastle registration division and in Newcastle magisterial district; (vi) The farm Woodburn No. 15470, situated in the Newcastle registration division and in the Newcastle magisterial district. The applicant conducts timber farming on the above properties and has (reportedly) also established a bottling plant, bottling water for commercial sale in this country.

[3] The first respondent is a state owned company and it is also known as The Petroleum Agency S.A. ('PASA'). PASA has been designated by the Minister of Mineral Resources – the third respondent herein, as the agency to perform the functions in Chapter 6 of the MPRDA on behalf of the Ministry. The second respondent is a company with limited liability registered and incorporated in accordance with the company laws of the Republic of South Africa and has its registered office and principal place of business in Cape Town, Western Cape. The third respondent (the Minister of Mineral Resources) was appointed in terms of S 3(2) of the MPRDA as the custodian of the Nation's mineral and petroleum

resources – I am told no relief is sought against the Minister and that he was merely joined by virtue of his interest in the application.

FACTUAL BACKGROUND

[5] The application for an Exploration Right was lodged by the second respondent in terms of S 71 of the MPRDA on 15 May 2016 and was accepted by PASA in terms of S 79 of the MPRDA on 15 May 2016. S 10 (1) of the MPRDA provides in peremptory terms that *'within 14 days after accepting an application lodged in terms of S 79, PASA must make known and publish this fact in the prescribed manner.'* The manner of publication is set out in Regulation 3, being the Regulation published in terms of S 107 of the MPRDA. The notices in terms of S 10 (1) of the MPRDA are dated 20 April 2015 but were only sent to certain magistrates courts on 5 May 2016.

[6] By virtue of the fact that the application for an Exploration Right has been accepted on 15 April 2016, it would appear to be now impossible to now comply with the peremptory terms of S 10. The notices of acceptance of the application were sent to the following magistrates' courts by fax; (i) the Dannhauser Magistrates Office (Majuba); (ii) the Zululand Magistrates Office (Inkanyezi); (iii) the Emseleni Magistrates Office (Uthungulu); (iv) the Hlabisa Magistrates Office (Umkhanyakude); (v) the Estcourt Magistrates Office (Uthukela); (vi) the Colenso Magistrates Office (Umzinyathi). Some of the farms belonging to the applicant are

situated within the Danuhauser Magisterial division (as mentioned above) and some in the Newcastle Magisterial Division. According to the founding papers, in respect of the Newcastle Magisterial division, no notice had been sent to it at all. This, the second respondent does not contest. On the contrary it is admitted.

[7] In respect of the Dannhauser Magisterial division, a notice was apparently sent but, notwithstanding the fact that it records that a list of the farms involved would accompany such notice, and that it would be exhibited on the Notice Board, there is no confirmation from the Magistrates office to the effect that it was in fact displayed on the notice board and there is no reference to the farms.

[8] The documentation supplied by PASA makes it apparent that it had elected to resort to the publication of the acceptance of the application on the Notice Boards of the Magistrates Courts in the areas where the immovable properties are situated as required in terms of Regulation 3 (3) (b) of the MPRDA Regulations. There can be no denying that S 79 (1) (b) of the MPRDA provides that the application must be submitted in the prescribed manner.

[9] The applicant requested PASA to provide all documentation pertaining to the lodgement of the application in compliance with Regulations mentioned above. However, such documents were only supplied to the applicant pursuant to an application having been submitted by the applicant in terms of the Promotion of

Access to Information Act 2 of 2000. The applicant placed reliance on the documents so supplied to it in support of its contention that there has not been compliance with the Regulations.

[10] The second respondent has, in terms of Regulation 21 of the Regulations published in terms of the National Environmental Management Act 107 of 1998 ('NEMA") obtained a Scoping report which was submitted and accepted by PASA on 31 August 2016. As things now stand, the second respondent is in the process of complying with the provisions of Regulation 23 of NEMA Regulations by compiling and submitting an Environmental Impact Assessment Report and an Environmental Management Programme. The latter was actually due for submission on 5 January 2017 for approval by PASA by 7 January 2017. The latter state of affairs is confirmed in the letter by the second respondent dated 9 December 2016 serving as Annexure 'MLH18' in the founding papers. The applicant contends that it has not received any notice at all, nor did it have any knowledge of the fact that an application for an Environmental Right had been lodged with PASA. The applicant reportedly only became aware thereof on 7 December 2017.

[11] It is of importance to mention that the Minister has published Regulations in terms of S 107 (1) of the MPRDA. These Regulations prescribe the manner in which the acceptance must be made known and the manner in which interested persons

must be called upon to comment. It is mentioned in passing that S 79 (1) (b) of the MPRDA provides that the application must be lodged in the prescribed manner. Such prescribed manner is in turn defined in Regulation 28 read with Regulation 2 of the MPRDA Regulations. Needless to state that these Regulations are couched in peremptory terms and the word *'must'* is used throughout.

[12] From the documents in the possession of PASA which have been supplied to the applicant as aforementioned, the latter gathers that the Notices which PASA purportedly has issued and transmitted to the Magistrates Courts are defective in the following respects:-

(a) No notice was sent to the Newcastle Magistrates Office in respect of the properties owned by the applicant there; (b) The notice was sent to the Dannhauser Magistrates Office in respect of the immovable properties owned by the applicant situated in that Magisterial district. But this notice is defective in that there is no list annexed thereto of the immovable properties involved and no evidence exists that the Notice was displayed on the Notice Board of the Magistrates Office concerned; (c) Regarding all other notices (save for the Estcourt Magistrates Office, there is no evidence that attached thereto was a list of the immovable properties involved, and no evidence exists that the notices were displayed on the Notice Board of the relevant offices.

THE LEGAL FRAMEWORK

[13] The Minister was appointed in terms of S 3 (2) of the MPRDA as the custodian of the Nation's Mineral and Petroleum Resources. He may grant, issue, refuse, etc. an Exploration Right in terms of the MPRDA. The Minister has designated these obligations in terms of the MPRDA to PASA in terms of S 70 of the MPRDA. PASA mainly performs the functions referred to in Chapter 6 of the MPRDA (ss 69 to 90).

[14] The obligations set out in S 71 of the MPRDA entail the receipt of applications for Exploration Rights (s 71 (b)), to evaluate the Exploration applications and to make recommendations to the Minister (S 71 (c)) with regard to the acceptance of environmental reports and conditions of environmental authorisations (S 71 (i)). S 79 of the MPRDA provides that any person who wishes to apply to PASA for an Exploration Right must lodge an application at the office of the designated agency situated in Cape Town in the prescribed manner, with a prescribed non-refundable application fee.

[15] In terms of S 79 (2) of the MPRDA, PASA is obliged, within 14 days of the receipt of the application for an Exploration Right, to accept the application for an Exploration Right if there has been compliance with the provisions of S 79 (2) of the MPRDA read with the Regulations. Section 79 (1) of the MPRDA provides that the application for an Exploration must be lodged in the prescribed manner,

which is prescribed by Regulation 28 of the Regulations published in terms of the MPRDA read with Regulation 2. Section 79 (4) of the MPRDA provides that in the event of PASA having accepted the application, it is obliged within 14 days from the date of acceptance to notify the applicant (second respondent) in writing, and consult with any affected party and to submit an environmental management program. The provisions of S 10 of the MPRDA are implicated in this matter. I set out such provisions *infra*:

'10. Consultation with Interested and Affected parties.

1. *Within 14 (Fourteen) days after acceptance of the application lodged in terms of Section 16, 22 or 27, the Regional Manager must in the prescribed manner-*
   (a) *make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and (b) call upon interested and affected persons to submit their comments regarding their application within 30 (Thirty) days from the date of the notice.*
2. *If a person objects to the granting of a prospecting right, mining right or mining permit, the regional manager must refer the objections to the regional mining development and environmental committee to consider the objections and to advise the Minister thereon.'*

[16] Chapter 6 of the MPRDA, including S 69, contains the provisions pertaining to Petroleum and Production. Section 69 (2) (a) of the MPRDA provides that for the purpose of Chapter 6, inter alia, SS 9 and 10, 37, Chapter 7 and Schedule ii apply with the necessary changes. In terms thereof, S 69 (2) (a), S 10 of the MPRDA (relevant herein) applies to the application for an Exploration Right referred to in Chapter 6 of the MPRDA. Consequently, S 10 is applicable when an application is made for an Exploration Right.

[17] I set out *infra* the provision of Regulation 3 of the Regulations:

'(3) CONSULTATIONS WITH INTERESTED AND AFFECTED PERSONS

(1) *The Regional Manager or designated Agency as the case may be must make known by way of Notice that an Application contemplated in Regulation 2 has been accepted in respect of the land or offshore area as the case may be.*

(2) *The notice referred to in sub-regulation (1) must be placed on a notice board at the office of the Regional Manager or designated agency, as the case may be that is accessible to the public.*

(3) *In addition to the notice referred to in sub-regulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods-*

(a) *publication in the applicable Provincial Gazette;*

(b) *notice in the Magistrate's Court in the magisterial district applicable to the land in question; or*

(c) *advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated."*

(4) *A publication, notice or advertisement referred in sub-regulation (3) must include-*

(a) *An invitation to members of the public to submit comments in writing on or before a date specified in the publication, notice or advertisement, which date may not be earlier than 30 days from the date of such publication, notice or advertisement;*

(b) *A name and an official title of the person to whom any comments must be sent or delivered; and*

(c) *The –*

(i) *work postal and street address and, if available an electronic mail address;*

(ii) *work telephone numbers; and*

(iii) *facsimilee number if any of the persons contemplated in paragraph (b) .'*

[17] Section F of the guidelines pertaining to the application to be submitted in terms of S 10 (1) (a) of the MPRDA reads as follows:

'F. SECTION 10 (1) (A): NOTIFICATION BY THE REGIONAL MANAGER

To comply with this provision, the Regional Manager or designated agency, as the case may be,

(1). Must as prescribed in Regulation 3, make known by way of a notice, that an application contemplated in Regulation 2 has been accepted in respect of the land or offshore area, which notice must be placed on a notice board at the office of the Regional Manager or designated agency as the case may be, and in addition also make the application known by at least one of the following methods-

a. Publication in the applicable Provincial Gazette;
b. Notice in the magistrates court in the managerial district applicable to the land in question; or
c. Advertisement in a local or national newspaper circulating in the area where the land or offshore area to which the application relates, is situated.
Since the intention of the Act is to make the application known in order to afford communities and interested and affected parties an opportunity to raise comments and concerns before the application can be processed further, the prescribed notifications do not preclude the Regional Manager from placing notices at other venues such as the relevant local Municipality, the Department of Traditional Affairs, or on the Departments official website, or from causing the application to be brought to the attention of other directly affected parties I identified in the consultation process.'

Regulation 86 of the Regulations published in terms of the MPRDA provides inter alia the following:

'86 ENVIRONMENTAL IMPACT ASSESSMENT

(1) The Exploration and production activities related to petroleum are subject to the requirements of the National Environmental Management Act and any relevant specific Environmental Management Act.'

In terms of S 80 (1) (c) of the MPRDA, an Exploration right will only be granted if the Minister has issued an Environmental Authorisation.

[19] Another important provision relevant to this matter is Regulation 22 of NEMA which provides the following:

'22. A competent authority must within 43 days of receipt of a scoping report-

(a) Accept the scoping report with or without conditions and advise the Applicant to proceed or continue with the task contemplated in the plan of study for environmental impact assessment; or
(b) Refuse the environmental authorisation if-
(i) The proposed activities are in conflict with a prohibition contained in legislation; or
(ii) If the scoping report does not substantially comply with appendix 2 to these Regulations and the Applicant is unwilling or unable to ensure compliance with these requirements within the prescribed period.'

Section 10 (2) read with S 69 (2) (b) of the MPRDA provides that if a person objects to the granting of an exploration right the Regional Manager must refer the objection to the Regional Mining Development Committee to consider the objections and to advise the Minister thereon.

DISCUSSION-APPLICATION OF LEGAL PRINCIPLES

[20] Relying on **Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga and Others** 2003 (1) SA 373 (SCA), Mr De Waal prefixed his submissions by stating the following:

'The two challenges fall to be rejected on the following basis:

5.1 *the actions complained about are either "administrative actions" within the meaning of S 1 of PAJA in which event the applicant is obliged, by virtue of S 7 (2) of PAJA, to exhaust the internal appeal conferred by S 96 of the MPRDA; or*

5.2 the actions complained about are merely preliminary steps taken en route to administrative act, ie the granting or refusal of the exploration right, in which event they are not reviewable until the final decision is taken.'

The alternative argument presented on behalf of the second respondent is that its application complied with the prescribed requirements in all respects save for one, namely that the MPRDA Regulation 28 (2) (f) calls for the provision of *'a certified copy or copies of the title deed or deeds, where applicable, in respect of the area to which the application relates.'* In Mr De Waal's contention, this provision was intended to cater for pre-existing *'old order'* mineral rights, which would be reflected in the title deeds of landowners. Expanding on his contention Mr De Waal explained that holders of such rights were afforded a period of one year after implementation of the new legislative regime (in terms of the MPRDA

and regulations) to *'use it or lose it'* i.e. to exercise their exclusive rights to apply for new order rights, failing which they would forfeit the opportunity to do so.

[21] The argument presented on behalf of the second respondent is that (concerning the second challenge) it is not necessary to determine whether the first notification process was compliant because PASA elected (in addition to that process) to implement the notification method provided for in MPRDA regulation 3 (3) (a) – publication of the notice in the Provincial Gazette. In Mr De Waal's submission, this completely cures any defect which may have existed in respect of the first process. As to the 14 day period which sets time limit within which the acceptance must be made known, Mr De Waal opines that non-compliance therewith does not result in invalidity of the acceptance. As far as the third challenge is concerned it is contended on behalf of the second respondent that EIA Regulation 16 (2) (a) merely requires that the application for an exploration right must be accepted before the application for environmental authorisation may be submitted.

[22] Maybe the most convenient manner of dealing with this matter is first and foremost to make a determination whether the obligations of PASA amount to administrative decisions or not. Indeed, it is apparent from S 96 of the MPRDA, particularly S 96 (3), that there are internal remedies that must be exhausted.

There is for instance an appeal to the Minister in the event of an administrative decision having been taken by, *inter alia*, PASA. See **Bengwenyama Minerals (Pty) Ltd and Others v Genovah Resources (Pty) Ltd and Others** 2011 (4) SA 113 (CC) at para. 55. In **Dengetenge v Southern Sphere** 2014 (5) SA 138 (CC) at para. 68, the Constitutional Court observed:

> *'[68] Section 7 (2) (a) does not preclude any person from applying to court for the review of an administrative act unless the person has exhausted his or her internal remedies. It precludes a court from reviewing any administrative action in terms of PAJA unless any internal remedy provided for in any other law has first been exhausted.'*

It is, however, instructive to mention that the obligations of PASA in terms of S 79 (1) of the MPRDA (namely that the application must comply with Regulation 3 of the MPRDA) are prescriptive in form and they do not constitute administrative decisions. Similarly, the provisions of SS 10 (1) (a) and 10 (1) (b), read with Regulation 3, also do not involve any administrative decision at all and they remain prescriptive. Importantly, the MPRDA read with the Regulations promulgated thereunder, make provision for various phases and these can be categorised into seven phases altogether. I have no intention to specifically refer and deal with individual phases. They have been referred to and pointed out above. The prescribed manner referred to in S 79 (1) (b) of the MPRDA is a reference to Regulation 28 of the MPRDA read with Form M in Annexure 1 to the Regulations. All that is required from PASA is to ascertain whether the requirements have been met. This involves a mere scrutiny of the documents

submitted. It does not involve any decision-making. The submission of the Scoping Report by the second respondent to PASA also does not involve any decision-making. PASA exercises a discretion whether to accept or refuse the Scoping Report. Although the latter involves the making of a decision, it is not the kind of decision that would adversely affect the rights of any interested party at that stage (as is required in S 1 of PAJA). It is and remains a mere phase in the process required for environmental authorisation.

[23] Mr Roberts referred to **Gamevest (Pty) Ltd** *supra*, a decision which related to the lodgement of an application for a Restitution of Land Right. In the latter case the Supreme Court of Appeal stated the following at para 11 of the judgment:

> *'[11] It is patently clear that the fundamental right created by s 33 (1) and (2) of the Constitution is that of lawful and procedurally fair administrative action. I emphasise the words 'administrative action', because they emphasise the very first question to be asked and answered in any review proceeding: what is the administrative act which is sought to be reviewed and set aside? Absent such an act, the application for review is stillborn.'*

Indeed there is no neat definition in our law of what an administrative act is for the purpose of justiciability. In **Hira and Another v Booysen and Another** 1992 (4) SA 69 (SCA) at 93A-B, the Supreme Court of Appeal talking about what is required for common-law review stated that the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the

court for relief. The court went on to explain that where the duty/power is essentially a decision-making one and the person or body concerned has taken a decision, a review is available. One bears in mind that the Supreme Court of Appeal in **Nedbank v Mendelow NNO** 2013 (6) SA 130 (SCA) at 138 made the following observation pertaining to the distinction between an administrative act or a mere clerical or administrative act:

"[24] *As I said in Kuzwayo v Representative of the executor in the estate of the late Masinela, not every act of an official amounts to administrative action that is reviewable under PAJA or otherwise. I found there that the act of signing a declaration by a director-general of the department of housing to the effect that a site permit be converted into the right of ownership, and the signing of the deed of transfer giving effect to that declaration, were simply clerical acts.*

[25] *Administrative action entails a decision, or a failure to make a decision by a functionary and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function, but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of PAJA or even under the common law."*

See also in this regard **President of the Republic of South Africa v South African Football Union** 2000 (1) SA 1 (CC) at para. 141. In **Manok Family Trust v Blue Horison Investments** 2014 (5) SA 50 (SCA) at 508, the Supreme Court of Appeal observed as follows:

'Counsel correctly accepted in his heads of argument, and before us, that the regional commissioner's decision-to the effect that the criteria set out in ss (1) of s 11 had not been met, i.e. that there had been no dispossession of the claimed land, which decision was conveyed to Kgoshi Manok in the letter of June 2000 – constituted administrative action (see Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga, and Others 2003 (1) SA 373 (SCA) (2002 (12) BCLR 1260) para 7), capable of being reviewed. In Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) ([2004] 3 ALL SA 1; [2004] ZASCA 48), a case which concerned the question whether, or in what

circumstances, an unlawful administrative act might simply be ignored, this court said the following:

> *'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside'.*

[24] It is plainly apparent that the obligations on PASA in respect of the receipt of the application, the acceptance of the application, are couched in peremptory terms in that the word 'must' is used at all times. See S 79 (2) of the MPRDA. Similarly Regulation 28 (2) quoted *supra* is also couched in peremptory terms and the word *'must'* feature prominently. S 10 is couched in peremptory terms providing what PASA is obliged to do after accepting the application. The same applies to Regulation 3. Mr Roberts submitted that the actions of PASA (by virtue of the fact that it has not complied with peremptory requirements) has the effect that the actions taken by it are unlawful and should be set aside on the basis of an illegality. He contended that it follows, that the processes (in particular the process of the Scoping Report in terms of NEMA), also constitute an illegality and should be set aside. It would follow that if PASA has not passed muster in having failed to comply with the peremptory obligations set out hereinabove, all further processes constitute illegalities. This court was referred to **Weenen Transitional**

Local Council v Van Dyk 2002 (4) SA 653 (SCA) where the following reasoned observation is made:

'[13] It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434A-B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori, not a priori significance. The approach described above, identified as '...a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex Parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138D-E, seems to be the correct one and does away with debates of secondary importance only.

[14] It seems to be clear that the object of s 105 (1A) was to inform all the ratepayers in the particular borough of the council's estimates of its income and expenditure for the next financial year, and of the amount of the assessed rates. The estimates are to be made available for inspection at the municipal office for a period of at least seven days after the publication of the notice. There can be no doubt, as the Court a quo rightly, concluded, that where, upon inspection of the estimates, ratepayers should discover that the matters required by s 105 (2) – (6) to be taken into account in arriving at the estimates have not properly been accounted for or that provision was made in the estimates for expenditure which is not authorised by the ordinance, they would be entitled to approach a court for relief by way of interdict or mandamus. I am also of the view that in appropriate cases the council's decision as regards estimates and assessments can be taken on review. The object of the notice required by s 105 (1A) is clearly not to place the ratepayer in mora or to demand payment, but to afford an opportunity to object to the estimates and assessment.'

Similarly in **Democratic Alliance v Ethekwini Municipality** 2012 (2) SA 151 (SCA) the Supreme Court of Appeal talking to this aspect of our law said the following:

'[21] This conclusion does not mean, however, that these decisions are immune from judicial review. The fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative-is only legitimate when lawful (see e g Fedsure para 56). This tenet of constitutional law which admits of no exception, has become known as the principle of legality (see e g Cora Hoexter Administrative Law in South Africa 117). Moreover, the principle of legality not only requires that the decision must satisfy all legal requirements, it also means that the decision should not be arbitrary or irrational (see e g Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) in para 85; Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (2005 (6) BCLR 529) at paras 74-75).

[22] Departing from these well-established principles, the appellant contended that the impugned decisions were illegal in that they fell foul of statutory requirements and that they also failed to meet the rationality test. As to the former, it is not the appellant's case that the decisions were not taken in accordance with procedural requirements that are prerequisites to their validity, ie that they suffered from what has become known as a 'manner and form' deficiency (see e g King and Others v Attorneys' Fidelity Fund Board of Control and Another 2006 (1) SA 474 (SCA) (2006 (4) BCLR 462; [2006] 1 ALL SA 458) paras 17-18). The objection is that the decisions were not preceded by a process of public participation required by statute.'

[25] As far as the interdictory relief sought is concerned I am of the view that a clear right for an interdict has been established by virtue of the undisputed failure to comply with the peremptory provisions of S 10 of the MPRDA. S 5 of the MPRDA provides for serious inroads upon the rights of a surface owner, if an exploration right is granted. In the **Bengwenyama Mineral** case *supra* at page 139, the following pertaining to harm was said:

'These different notice and consultation requirements are indicative of a serious concern for the rights and interest 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 right 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. 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.'

Although reference is made to a prospecting right, we all know the object of the MPRDA. As set out, the object of this legislation and the notice referred to, is equally applicable to the application for an exploration right. It of course apparent that the Scoping Report has been accepted by PASA in terms of Regulation 22 of NEMA without notice to the applicant. This much is fully explained in the founding affidavit. It has not been disputed. On the contrary there is an admission in this regard.

[26] It is common cause that the second respondent has been directed by PASA to submit an Environmental Impact Report and Environmental Management Programme within 106 days in terms of Regulation 23 of NEMA. Upon receipt of the Environmental Impact Report and Environmental Management Programme, PASA would consider whether to accept the report and make recommendations to the Minister. See Regulation 24 of NEMA and S71 (c) of the MPRDA. In terms of S 80 of the MPRDA the Minister has the right to grant an exploration right. The applicant correctly fears that seeing that the Scoping Report had been accepted, that alone has somewhat exacerbated the situation in that the second respondent

is obliged to submit the Reports sooner. Indeed the processes set out in NEMA are time-related. The longer it takes, the more difficult it obviously would be to stop the process and various affected landowners may claim prejudice. It is important to point out that in the event of the Environmental Impact Report and the Environmental Management Programme having been submitted to PASA, the applicant would be precluded from either objecting thereto or to provide its input pertaining to environmental issues. I agree that the applicant has been prejudiced in that it never had the opportunity to object to the acceptance of the application and for that matter to be referred to the Regional Development and Environmental Committee (in terms of S 10 (2) of the MPRDA). It was for instance precluded from employing its own experts to provide an input which could have been submitted to PASA and ultimately to the Minister. The founding papers reveal that the applicant incurred a capital investment of in the region of R40 million to set up a water bottling plant on the farm Albany. It is feared that if the exploration right is granted, it could well affect such operation and the water extracted from the earth. See, *inter alia*, **Allpay Consolidated Investment Holdings (Pty) Limited & Others v Chief Executive Officer South African Social Security Agency** 2014 (10) SA 604 (CC) at page 614 – 616; **Grey's Marine Houtbay (Pty) Limited & Others v Minister of Public Works** 2005 (6) SA 313 (SCA).

[27] As far as the interdictory portion of the applicant's case is concerned, this court bears in mind that in determining whether an application for an interim interdict has crossed the threshold of proving a clear right or a right (*prima facie* established though open to some doubt) the proper approach is and remains to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts obtain final relief at the trial. The requirement of a right prima facie established involves two stages. Once such right has been assessed, the part of requirement referring to the doubt involves a further enquiry in terms whereof the court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case. If there is a mere contradiction or unconvincing explanation, then the right will be protected; where there is serious doubt, the applicant cannot succeed. See **Spur Steak Ranches Ltd v Saddles Steak Ranch, Claremont** 1996 (3) SA 706 (C). It is trite that the different requirements should not be considered separately or in isolation but they must be considered in conjunction with one another in order to determine whether this court should exercise its discretion in favour of the grant of the interim relief sought. I need to mention that there is no comprehensive rule that can be laid down for the exercise of judicial discretion in granting or refusing an interdict. The court must decide on the circumstances of each individual case. It is not necessary to itemise the requisites for the interim relief. These have

become common knowledge in legal circles. I merely point that these considerations are of course not individually decisive, but that they remain interrelated. For an example, the stronger the applicant's prospects of success, the less his need to rely on prejudice to himself. Conversely, the more the element of '*some doubt*', the greater the need for the other factors to favour him. As pointed out above, the court considers the affidavits as a whole, and the interrelation of the aforegoing considerations, according to the facts and probabilities. See **Olympic Passenger Service (Pty) Ltd v Ramlagan** 1957 (2) SA 382 (D) at 383 D-G.

[28] The relief sought in paragraphs 1, 2, 3 and 4 of the Notice of Motion only involves PASA although it might affect the second respondent. PASA (which does not oppose this application) has, however, filed an affidavit deposed to by its acting Chief Executive Officer. This affidavit is styled as *'Explanatory Affidavit'*. It must be pointed out that pursuant to the institution of the current application (wherein failure to comply with certain peremptory requirements is relied on) PASA caused a Notice to be published in the KwaZulu-Natal Provincial Gazette on 21 December 2016. This is seen by the applicant as an attempt to comply with the provisions of Regulation 3 (3) (a) of the Regulations published in terms of the MPRDA. This publication which is clearly an after-thought on the part of PASA itself constitutes an illegality regard being had on the provisions of S 10 (1) of the MPRDA. The latter section states in peremptory terms that the publication must

take place within 14 days after the acceptance of the application for an Exploration Right. Now we know that the application for an Exploration Right was accepted on 15 April 2016. How can publication envisaged in S 10 (1) of the MPRDA take place more than 8 months after the acceptance of the application? A mention must be made that the provision of SS 10 (1) (a) and 10 (1) (b) of the MPRDA read with Regulation 3 of the Regulations promulgated thereunder has as its object, an information process whereby all landowners are notified of the acceptance of the Exploration application. The fact that prescribed method has not been adhered to is failure to comply with peremptory provisions of the law. PASA has therefore committed an illegal act. The applicant has had to deal with PASA's Explanatory affidavit. Effectively PASA despite the fact that it filed no notice to oppose the relief sought herein, it has opposed the application by filing the Explanatory affidavit.

[29] In **African Christian Democratic Party v Electoral Commission** *supra* (CC) at 317 para 25, the Constitutional Court guidingly observed as follows:

'[25] The question thus formulated is whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in Weenen Transitional Local Council v Van Dyk:

> *'It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 434A-B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether "shall" should be read as "may"; whether strict*

as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have a posteriori not a priori significance. The approach described above, identified as "...a trend in interpretation away from the strict legalistic to the substantive" by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138D-E, seems to be the correct one and does away with debates of secondary importance only.'

Similarly, the Supreme Court of Appeal in **City of Tshwane Metropolitan Municipality v RPM Bricks** 2008 (3) SA 1 (SCA) at para 24 made the following important observation:

'[24] With respect to Boruchowitz J, what he postulates is, in my view, the antithesis of that demanded by the Constitution. Section 173 of the Constitution enjoins courts to develop the common law by taking into account the interests of justice. The approach advocated by the learned judge, if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interests of justice. Nor, can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality.'

What the authorities referred to above warn the courts about is that they must under no circumstances permit illegality to trump legality. I cannot therefore turn a blind eye to all these illegalities pointed out in this case.

[30] One must always treat matters falling under the MPRDA with sensitivity deserved. It is not secret that the MPRDA can be described as having corroded the right of ownership of land. Before its promulgation the holder of a title deed in in respect of a piece of land also owned what is underneath that particular land. But after the coming into being of the MPRDA the owner of the land only owns the surface of that land. If there are minerals underneath that piece of land, those minerals are owned by the Government on behalf of the South African Nation. In

fact, the Guideline for consultation with communities and interested Parties issued in terms of SS10 (1) (b), 16 (4) (b), 22 (4) (b), 27 (5) (b) and 39 of the MPRDA must never be lost sight of in applications such as one lodged by the second respondent. The preamble of the Standard Directive states categorically that since the introduction of the MPRDA the State acknowledges the importance of the involvement of communities where mining is taking place at the earliest stages of the application for prospecting and mining rights and permits. This entails the communities being informed and consulted on any mining activities applied for by mining companies (such as the second respondent) in their area. This preamble points out that the consultation process (and the result thereof) is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to what happened during the consultation process in order to determine whether that consultation was sufficient to render the grant of the application procedurally fair. The rationale for consultation is described in sE of the Guidelines as follows:

'The purpose of consultation with the landowner, affected parties and communities is to provide them with the necessary information about the proposed prospecting or mining project so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as the interference with their rights to use the affected properties is concerned. Consultation under the Act's provisions requires engaging in good faith to attempt to reach such accommodation.'

The parties also argued the question of costs. I listened attentively to these submissions. Having evaluated them, one must always bear in mind that the court exercises a discretion in the award of costs. Such discretion must always be exercised judiciously and reasonable.

ORDER

In the circumstances I make the following order:

(a) The acceptance by PASA (the First Respondent) of the application for an Exploration Right in terms of S79 of the Mineral and Petroleum Resources Development ACT 28 OF 2002 (The MPRDA) read with Regulation 28 (2) of the Regulations published in terms of S 107 of the MPRDA lodged by the second respondent is hereby set aside.

(b) The notices purported to have been given by the First Respondent in terms of S 10 (1) (a) and 10 (1) (b) of the MPRDA read with Regulation 3 of the Regulations published in terms of S 107 of the MPRDA are hereby set aside.

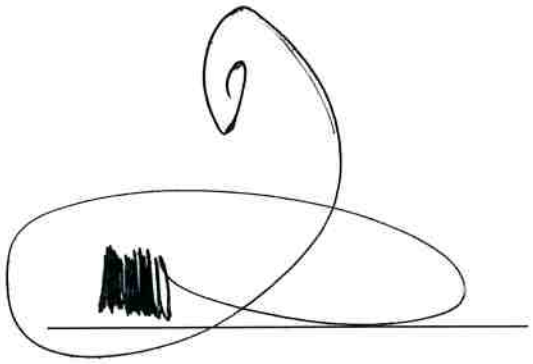
(c) The publication in the Kwazulu-Natal Provincial Gazette Number 1773 dated 21 December 2017 in terms of S 10 (1) of the MPRDA read with Regulation 3 (3) (a) of the Regulations promulgated thereunder, is hereby set aside.

(d) The acceptance by the First Respondent of the Scoping Report submitted by the second respondent in terms of Regulation 22 of the Regulations published in terms of the National Environmental Management Act 107 of 1998 (NEMA), is hereby set aside.

(e) The Second Respondent is hereby interdicted and restrained from submitting the Environmental Impact Assessment Report (EIR) and the Environmental

Management Program (EMPr) compiled in terms of Regulation 23 of the NEMA Regulations to the first respondent for consideration.

(f) The costs of this application shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.



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Judge of the High Court

APPEARANCES:

For the Applicant:	Adv. MG Roberts (SC)
	Adv. E Roberts
For the Second Respondent:	Adv. HJ De Waal
	Adv. NC De Jager