Prospecting and mining rights*

Comparative analysis of the South African duty to consult and accommodate interested and affected parties before awarding prospecting and mining rights

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Introduction

Since the promulgation of the Mineral and Petroleum Resources Development Act[1] (the MPRDA) interested and parties affected by prospecting and mining activities are waging war against unfair administrative decisions taken by the Minister of Mineral Resources (the Minister) in favour of the applicants for prospecting and mining rights. Interested and affected parties have been asserting their constitutional right to be consulted and accommodated before granting prospecting and mining rights as prescribed by the Constitution and the MPRDA. On the other hand the decision maker and the applicants for prospecting and mining rights have been employing administrative law technicalities to overshadow the constitutional imperatives underpinning the duty to notify and accommodate interested and affected parties before granting mining and prospecting rights.

This article compares the South African constitutional jurisprudence on the duty to consult and accommodate interested and affected parties before awarding mining and prospecting rights with foreign judgements. In this regard reference will be made to the Canadian approach on this doctrine. It further investigates whether the South African approach on this doctrine is being developed in line with international best practises. Because of space limitation a discussion on the principles of administrative law on this doctrine is beyond the scope of this article.

The South African duty to consult and accommodate interested and affected parties before awarding mining and prospecting rights

In South Africa this doctrine is entrenched and articulated in sections 5(4) (c), 10(2), 16(4)(b), 22(4) (b) and 27(5)(b) of the MPRDA read with regulation 3 published under section 107 of the MPRDA. For petroleum resources, the doctrine is entrenched in sections 69(2), 74(4) (b), 79 (4)(b) and 83(4)(a) of the MPRDA read with regulation 3 published under section 107 of the MPRDA. Note that mining rights, prospecting rights and mining permits are issued by the Department of Mineral Resources (the DMR) whereas petroleum rights and permits are issued by the Petroleum Agency (SOC) Ltd of SA.[2] The constitutional imperatives underpinning this doctrine were resonated in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd*[3] *(Bengwenyama) In casu* the landowner took on review the decision of the Minister to grant a prospecting right in favour of the applicant without consulting and notifying the landowner as required by the MPRDA read with the Constitution. The landowner argued that the decision of the Minister to grant a prospecting right in favour of the prospector was discharged without consulting and notifying the landowner as required by section 10 (2) and 16(4) of the MPRDA.

Froneman J explained the purpose of consulting and notifying the landowner during the prospecting right acquisition as prescribed by section 10(2) and 16(4) of the MPRDA read with the Constitution and held that '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. 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 is 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.'[4]

These statements echoed Lacock et Olivier JJ in *Meepo Yase Chaba v Kotze & Four others*[5] *(Meepo)* where the court held that the consultation provisions of the MPRDA is intended to make a rational balance between, *inter alia,* the prospecting right holder and the property right of the land owner on the other hand, as well as the fundamental right to have the environment protected, and that the provisions of the MPRDA should be interpreted with due regard to constitutional values and norms.[6]The legislature has provided these due consultation frameworks between an owner of land and the prospecting right, mining right and permit holder in order to alleviate possible inroads being made on the

* The author states that he would like to initiate an 'Energy Law Forum.' He writes: '[T]oday energy is very political and the law has been often in the shadow. For the advocates' profession, evolution of energy law is a necessity that must be understood if one wants to litigate in the field of energy law that has been politicised.

The main aim of this proposed forum is to exchange viewpoints and share information about trends and new legal revolutions taking place in the field of energy law in South Africa and abroad. I personally believe that intellectual exchange among advocates is fundamental to understand this fast evolving area of law. In that regard I am prepared and willing to produce energy law related articles or case notes once or twice per year and this will depend on the availability of space. Members of the profession who willing to write under this discussion forum are also welcomed.'

ownership of the land.[7] The *Bengwanyama's* decision demonstrates that the Constitutional Court has developed its own jurisprudence and has entrenched the right to notify and consult interested and affected parties pre-granting of the prospecting right. Notably, the South African Constitutional Court is not the first jurisdiction in the world that has contributed to the advancement of the doctrine in the context of land and resources activity; Canada has advanced this doctrine by referring to the New Zealand consultation framework in line with international legal framework.[8] The Canadian jurisprudence on the duty to consult and accommodate interested and affected parties and its reference to the New Zealand consultation policy framework is discussed hereunder.

The Canadian jurisprudence on the duty to consult and accommodate the interested and affected parties and its reference to the New Zealand consultation policy framework

The British Columbia Court of Appeal has provided well-articulated jurisprudence on the duty to notify and accommodate doctrine that is wider than the consultation under the general principle of administrative law.[9] The significance of this doctrine in the context of land and resources activity was firstly highlighted in *R v Sparrow*[10] *(Sparrow)* where the court emphasised that it is important for government to justify any legislation which has some negative effect on any aboriginal right protected under the Canadian constitution and that the government must consult and accommodate native people in developing regulations that both conserved the fish population and met native needs.[11]

Since the *Sparrow* decision, the British Colombia Court of Appeal continued to send flawless consistent judicial messages on the constitutional imperatives of the duty to consult and accommodate the interested and affected parties in the context of land and resources activity. The constitutional imperative of this doctrine was further echoed in *Delgamuukw v British Columbia*[12] where Lamer CJ held that in addressing aboriginal concerns there is always a duty to consult and accommodate aboriginal people before infringing aboriginal title and the duty is significantly deeper than mere consultation.[13]

In *Halfway River First Nation v BC (Ministry of Forests)*[14] the First Nation challenged the decision of the Minister of Forests to grant a cutting permit in respect of land adjacent to a reserve established by the treaty.The First Nation contended that the permit would infringe its treaty right to hunt moose. The court quashed the cutting permit issued by the Minister of Forests and held that the duty to consult imposes on the Crown the obligation to reasonably ensure that the aboriginal peoples are provided with all necessary information in a timely way and to ensure that their representations are seriously considered and where possible integrated into the proposed course of action.[15]

The duty to consult and accommodate interested and affected parties was further articulated in *Taku River Tlingit First Nation v Tulsequah Chief Mine Project.*[16] The First Nation challenged the granting of a project approval certificate issued by the Minister in favour of a mining company. A mining company intended to reopen a mine and to build an access road which would cross a portion of the territory claimed by the First Nation. The court quashed the granting of a project approval certificate to the mining company and held that the Crown owed the First Nation a constitutional or fiduciary duty of consultation despite the fact that the aboriginal rights or title had not yet been established in court proceedings. Interestingly in *Gitksan and other First Nations vs. British Columbia (Minister of Forests)*[17] per Tysoe J, the court characterised the duty to consult and accommodate the interested and affected parties in the context of land and resources activity as a 'constitutional pre-requisite to the decision' which must be satisfied in order for the decision to be considered valid.

In *Haida Nation vs. British Columbia (Minister of Forests)*[18] *(Haida Nation)* the court further enhanced the duty to consult and accommodate doctrine by referring to New Zealand consultation policy framework. The *Haida Nation* challenged the fairness of am administrative decision of the Minister of Forests to transfer and replace a timber harvesting license from the Province of British Columbia to a large forestry firm, Weyerhaeuser Co, over their objection. The *Haida Nation* argued that the aboriginal title of the *Haida Nation* offered them something close to a veto over resource development on their traditional land and the license could not be granted over their objections.

McLachlin CJC examined the duty to notify and accommodate doctrine during the transfer of a timber licence by providing a description of the concept 'consultation' in the context of land and resources activity. What is so significant about this decision is that McLachlin CJC cited the New Zealand Ministry of Justice's *Guide for consultation with Maori* to illustrate what consultation entails in the context of land and resources activity. The Guides make it clearly that 'the consultation is not just a process of exchanging information but it entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. It is a process which should ensure both parties are better informed, genuine and it is a process that involves gathering information to test policy proposals, putting forward proposals that are not yet finalized, seeking Mäori opinion on those proposals, informing Mäori of all relevant information upon which those proposals are based, not promoting but listening with an open mind to what Mäori have to say, being prepared to alter the original proposal, providing feedback both during the consultation process and after the decision process.'

In this regard the court held the duty to consult and accommodate the *Haida Nation* during a decision making process to transfer the timber license is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The court made it crystal clear that the duty to consult and accommodate Aboriginal people before transferring timber license resides with the Crown and therefore it cannot be delegated to a third party. The Minister of Forestry is required to balance competing interests but he is first required to fulfil his duty of consultation and accommodation. The court further held that the principal purpose of consultation is to enable the Minister to gain a proper understanding of the aboriginal interests and to seek ways to accommodate those interests.

Furthermore in *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*[19] *(Platinex)* the court held that the objective of the consultation process is to foster negotiated settlements and avoid litigation and it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.[20] What is noteworthy about this judgment is the fact that the court took into consideration that the affected community was

impoverished and cannot afford to hire the expertise that is needed to participate fully in the consultation process. The court held that the issue of appropriate funding is essential to a fair and balanced consultation process to ensure a "level playing field".[21]

Reflecting on *Bengwanyama*

In *Bengwenyama* the constitutional imperative of the duty to consult and accommodate the landowner prior to granting of the prospecting right was at the heart of the matter.[22] In analysing the constitutional imperative Froneman J articulated the purpose of consulting and notifying the interested and affected parties prior to granting the prospecting right.[23] Notably Froneman J did not provide the definition of the concept 'consultation' in the context of land and resources activity and the South African consultation policy framework for acquisition of mining right, prospecting right, petroleum right and mining permit did not provide a definition of the concept 'consultation.'[24] Whereas in *Haida Nation,* McLachlin CJC gave a definition of the concept 'consultation' in the context of land resources activity by referring to the New Zealand consultation policy framework.[25]

Furthermore in *Haida Nation,* McLachlin CJC clarifies as to who owes the duty to consult and accommodate Aboriginal people wherein it is the Crown or the license holder during the transfer of timber licence. McLachlin CJC held that the Crown remains responsible for the consequences of its actions and interactions with third parties which affect Aboriginal interest.[26] In *Bengwanyama* the litigants did not advance any argument as to who owes the duty to consult and accommodate the interested and affected parties prior to granting the prospecting right.

However it is noteworthy that Froneman J indicated that the DMR had an obligation, founded upon section 3 of Promotion of Administrative Justice Act[27] to directly inform the interested and affected parties of an application filed by the applicant of the prospecting right and its potentially adverse consequences for their own preferent rights under section 104 of the MPRDA .[28] Against the verdict of the Constitutional Court on this doctrine, the DMR has amended its consultation policy framework to mitigate and clarify the consultation process during the mining right, prospecting right and permit acquisition and before the commencement of mining resources activities. It is unknown at this stage whether an amended consultation policy framework would withstand the constitutionality scrutiny.

Another important lesson learnt from the Canadian jurisprudence on this doctrine as articulated in *Sparrow* and *Platinex* respectively is that the funding aspect of the duty to consult and accommodate interested and affected parties prior to granting mining and prospecting rights can attract some constitutional scrutiny if it is not attended to by the applicant for mining and prospecting rights.

In the mining sector the applicants for mining right and prospecting rights would normal retain technical experts when compiling their mining work programme, environmental management plan, social and labour plan. Even when they consult with the interested and affected parties they would retain the service of the communication consultant.

Although in *Bengwenyama* the funding process was not an issue, it is submitted that the analogy applied in *Platinex* and *Sparrow*'s decision points out that the funding aspect of the duty to notify and accommodate the interested and affected parties is one of the constitutional imperatives that should be looked at by the DMR before granting a mining right and prospecting right, and the applicant for the mining right and prospecting right must ensure that the interested and affected parties retain expert advice during the consultation stage prior to the granting of the mining right and prospecting right and must fund the consultation process.

Furthermore the constitutional influence of this doctrine as narrated in *Haida Nation* and *Bengwenyama* respectively may be extended to other provisions of the MPRDA like section 11 transactions. In terms of section 11 of the MPRDA, the mining right holder is obliged to acquire a written consent from the Minister before cession, transfer, letting, subletting, or alienation of the mining right. The Minister must consent to the transfer if the transferee, lessee and sub-lessee or cessionary will comply with the obligation and the terms of right in question and comply with section 17 and 23 of the MPRDA.

As per the decision of *Haida Nation,* it is clear that it is probable that interested and affected parties can challenge the administrative fairness of the decision taken under section 11 transactions and assert their right to be consulted and accommodated when section 11 transactions are considered by the Minister. In that regard our courts will be required to determine to what extent this duty to consult and accommodate the interested and affected parties applies to section 11 transactions.

Although the DMR has indicated that it intends to amend section 11, it is submitted that mining and prospecting law

practitioners should consider the above highlighted constitutional imperatives that underpinned the duty to notify and accommodate the interested and affected parties and the standard of review applied by the Canadian courts when interpreting the duty to consult and accommodate interested and affected parties before granting a mining right or a written consent for cession, letting, subletting and alienation of the mining and prospecting right in terms of section 11.

Conclusion

In the final analysis the *Bengwanyama* decision is a landmark decision in the sense that the Constitutional Court has laid a foundation upon which the duty to consult and accommodate is to be built upon.

The legal ramification of the decision has extended to the petroleum sector regulated by the MPRDA. More importantly the court interpreted this duty from the South African historical experience and beyond administrative law technicalities and its interpretation falls squarely within an established international jurisprudence articulated in Canada.

With this, it is anticipated that mining and prospecting law practitioners will apply caution and consider the above highlighted possible constitutional imperatives underpinning the duty to consult and accommodate interested and affected parties when applying for a mining right, prospecting right, petroleum right and permit in terms of Chapter 4 and 6 of the MPRDA. The *Bengwenyama* decision and the Canadian approach on this doctrine has communicated a warning message to mineral and petroleum resource development companies that they cannot simply ignore notification and consultation with interested and affected parties when they apply for mining right, prospecting right, petroleum right and permits. In particular the Canadian jurisprudence indicates that it is possible that the South African doctrine might evolve in the future. A

Endnotes

1 Act 28 of 2002.
2 See section 70 of the MPRDA and section 8 (2) of the Companies Act 71 of 2008 dealing with categories of companies and abbreviation of state-owned enterprises.
3 2011 (4) SA 113 (CC).
4 Ibid at para 65.
5 2008 (1) SA 104 (NC).
6 Ibid at para 13 and see *Director Mineral Development Gauteng v Save the Vaal Environment* 1999(2) SA 709 (SCA) at 718. In this case the Department of Mineral and Energy before issuing a licence to the applicant did not give the citizens' group an opportunity to raise their concerns about, inter alia, the possible destruction of a wetland; pollution; loss of water quality; decrease of property values; and the threat to flora and fauna posed by the proposed development. The main question presented before the court was whether interested and/or affected parties had a right to be heard by the licensing body (i.e. an administrative law question relating to the South African administrative law principle of *audi alteram partem),* as well as whether they had the right to raise environmental objections to the grant of the license. Furthermore see Jones, Mariette X 'The enforceability of environmental rights as human rights: a tale of two countries' in Society of Legal Scholars Centenary Conference, July 2009, Keele University.
7 See *Joubert and others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA*)* at para 12.The court held that once a permit holder complies with statutory requirements it has right to enter land and exercise its rights under permit.
8 See Article 26 of the United Nations Draft Declaration on the Rights of Indigenous Peoples.
9 Anthony Wicks 'Beyond *audi alterem partem:* The duty to consult Aboriginal peoples in Canada and New Zealand' 2009 (13) 1 *Journal of South Pacific Law* .
10 [1990] S.C.R. 1075.
11 Ibid at para 21.
12 [1997] 3 S.C.R. 1010].
13 Ibid at para 168.
14 (1999) 178 D.L.R. (4th) 666 (BCCA).
15 Ibid at para 160.
16 [2002] 4 W.W.R. 19.
17 2002 BCSC 1701.
18 2002 BCCA 462.
19 (1 May2007) 06-0271/06-0271.
20 Ibid at para 89 and see supra note 18 at 76.
21 Ibid at para 27–28.
22 Supra note 3 at para 26 and 42.
23 Ibid paras 65 and 66.
24 See Regulation 3 of the MPRDA.
25 Supra note 18 at para 47.
26 Ibid at paras 52-56.
27 Act 3 of 2000.
28 Supra note 3 at para 74.