CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 39/10
[2010] ZACC 26

In the matter between:

BENGWENYAMA MINERALS (PTY) LTD	First Applicant
BENGWENYAMA-YE-MASWAZI TRIBAL COUNCIL	Second Applicant
TRUSTEES FOR THE TIME BEING OF THE BENGWENYAMA-YE-MASWATI TRUST	Third to Thirteenth Applicants

and

GENORAH RESOURCES (PTY) LTD	First Respondent
MINISTER FOR MINERAL RESOURCES	Second Respondent
DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES	Third Respondent
REGIONAL MANAGER OF THE DEPARTMENT OF MINERAL RESOURCES, LIMPOPO REGION	Fourth Respondent
DEPUTY DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES	Fifth Respondent

together with

BENGWENYAMA-YE-MASWATI ROYAL COUNCIL	Intervening Party

Heard on : 7 September 2010

Decided on : 30 November 2010

JUDGMENT

FRONEMAN J:

Introduction

[1] This case turns on the lawfulness of the grant to a company of a prospecting right on the land of another. This deceptively simple statement of the ultimate legal issue at stake, though true, hides more than it reveals. First, it explains little of the invasive nature of a prospecting right on the ordinary use and enjoyment of the property by its owners. Second, it says nothing about the profoundly unequal impact our legal history of control of and access to the richness and diversity of this country's mineral resources has had on the allocation and distribution of wealth and economic power. Lastly, it does little to illuminate the effect of past racial discrimination on the ownership of land.

[2] The applicants seek to set aside the grant of a prospecting right on their land to the first respondent by the state. On one level it is simply a dispute between an owner of land and a person who has been awarded a prospecting right over that land. The owner of the land is, however, no ordinary owner. It is a community that was previously deprived of formal title to their land by racially discriminatory laws. Add to this the fact that the entity to which the prospecting right has been granted qualifies for treatment as a

historically disadvantaged person, and it becomes apparent that the issues are more complex than the first sentence of this judgment conveys.

[3] Equality, together with dignity and freedom, lie at the heart of the Constitution.[1] Equality includes the full and equal enjoyment of all rights and freedoms.[2] To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country.[3] The Mineral and Petroleum Resources Development Act[4] (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources.

[4] Against this background, I will first set out the facts and the issues arising for determination. I will then refer to the legal framework within which the issues should be assessed, before discussing and evaluating the issues within that framework. The

[1] Section 1(a) of the Constitution.

[2] Section 9(2) of the Constitution. See also *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 28 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 88.

[3] Sections 24, 25(4)-(7) and 27(1)(b) of the Constitution.

[4] 28 of 2002.

conclusion and the remedies flowing from this will finally be dealt with. The parties' contentions and submissions will be set out in my evaluation and discussion of the issues and will thus not be dealt with separately. In the end the issue to be decided narrows down to a question of administrative fairness.

Parties

[5] The first applicant is Bengwenyama Minerals (Pty) Ltd (Bengwenyama Minerals). The second applicant is the Bengwenyama-Ye-Maswazi Tribal Council and the third to thirteenth applicants are the Trustees of the Bengwenyama-Ye-Maswati Trust. The Council and the Trustees I shall refer to as the Community.

[6] The first respondent is Genorah Resources (Pty) Ltd (Genorah), previously known as Tropical Paradise 427 (Pty) Ltd. The second respondent is the Minister for Mineral Resources (Minister). The Department of Mineral Resources was previously known as the Department of Minerals and Energy (Department). The third respondent is the Director General of the Department (Director General), the fourth respondent is the Regional Manager of the Department, Limpopo Region (Regional Manager) and the fifth respondent is the Deputy Director General of the Department (Deputy Director General). These officials represent, at different levels, the Department. The Bengwenyama-Ye-Maswati Royal Council, an intervening party, was admitted as the sixth respondent in the North Gauteng High Court, Pretoria (High Court) but plays no material role in these proceedings.

Facts

[7] Genorah was awarded prospecting rights over five properties in September 2006, including two properties, Eerstegeluk and Nooitverwacht, on which members of the Community reside. The Community has enjoyed uninterrupted occupation of Nooitverwacht for more than a century. It was dispossessed of Eerstegeluk in 1945, but has successfully lodged a land claim for its formal restoration to the Community. Despite some earlier skirmishes, it is now accepted that the Community holds both properties (the farms) as owner for the purposes of the application of the Act.[5] The farms are situated in the Limpopo province.

[8] It became apparent, quite early on, that the Community had an interest in acquiring prospecting rights on the farms. On 2 December 2004 it lodged objections in writing to the Department against the granting of applications for prospecting on the farms (and another property) on the ground that the Community wanted to be accommodated meaningfully in the projects. When no acknowledgement of receipt of this letter was received, the Community addressed a further letter to the Department dated 19 January 2005 in which it noted that no acknowledgement of receipt had been forthcoming, but in

[5] Owner in the Act:

> "in relation to—
>
> (a) land—
>
> (i) means the person in whose name the land is registered; or
>
> (ii) if it is land owned by the State, means the State together with the occupant thereof."

which it thanked the Department for the advice it had received. No prospecting rights over the farms were granted in respect of these applications.

[9] Genorah's interest in obtaining prospecting rights over the Community's farms surfaced in early 2006. A representative of Genorah visited the traditional leader of the Community, Kgoshi Nkosi, on 3 February 2006 and informed him that Genorah wished to speak to him about certain prospecting applications. There is a dispute on the papers about what exactly transpired at this meeting, but it is common cause that the representative left a prescribed consultation form. The form simply provides blocks to be ticked "yes" or "no" to indicate whether there are any objections to the prospecting applications. If the answer is "yes", a further five lines are provided to detail the "full particulars" of the objection. The form was never signed by anyone on behalf of the Community.

[10] On 13 March 2006 the Kgoshi replied to Genorah in the following terms:

> "Subject: Your Notice and Consultation application for a prospecting right on Nooitverwagt 324 KT to Bengwenyama.
>
> Response: Your letter that notifies us or rather consults us about your interest in our land had been received. As your letter requires us to enable you to comply with relevant provisions of the Act, as well as completion/filling of the form attached, we would like to advise that Bengwenyama-ya-Maswati would do that, once we know each other. For now, we don't know each other well. The form that you request us to complete, seems

> to be more binding, as it does not fall within the definition of our standard letter that we give to Companies that applies for similar rights.
>
> Bengwenyama-ya-Maswati has an interest in the Property you applied for. We submitted an application for prospecting on three farms including Nooitverwacht 324 KT.
> The good luck wished to ourselves and other companies in an attempt of getting similar rights are also wished to your Company."

To this old-worldly and courteous response Genorah did not reply.

[11] No consultation took place with the Community in respect of Eerstegeluk at all. Genorah approached another tribal authority in this regard and was informed that the members of the Community also occupied this property.

[12] Genorah had submitted its application for prospecting rights over five properties, including the farms, to the Department on 6 February 2006. It supplemented its application on 17 February 2006 by referring to consultation with the Community in the following terms:

> "Nooitverwacht 324 KT: Tropical Paradise introduced themselves to the Tribal Authority and Kgoshi Nkosi on the 3rd of February 2006 but have not received a response to date."

[13] On 20 February 2006 the Department informed Genorah that its application had been accepted for further processing and that it was required to: submit an environmental management plan; consult with the landowner or lawful occupier of the land, as well as

with other interested and affected parties; and to report the results of the consultation to the Regional Manager.[6] The environmental management plan was submitted by Genorah on 21 April 2006 but despite the letter addressed to it by the Kgoshi, dated 13 March 2006, Genorah made no further attempt to engage or consult with the Community. Under the requirements for the environmental management plan, consultation in that regard also had to take place with affected persons, but none took place with the Community.

[14] The Community pursued its own application for prospecting rights through Bengwenyama Minerals. On 10 May 2006, Bengwenyama Minerals addressed a letter to the Department titled "Application for Prospecting Permit." The letter recorded that Bengwenyama Minerals was the applicant, provided details of the type of minerals involved, of its relationship with the Community and of its shareholding, financing and technical support. It ended the letter by expressing hope for the receipt of "an informative reply." On 9 June 2006 the initial investment agreement between Bengwenyama Minerals, the Community and other interested parties was concluded. Bengwenyama Minerals then submitted an application for prospecting rights on the prescribed form.[7] The Department did not accept this application because of deficiencies relating to the production of a title deed and because a prospecting right had already been granted to another party in respect of a third property applied for.

[6] In terms of section 16(4) of the Act.

[7] In terms of section 16 of the Act.

[15] On 14 July 2006 Bengwenyama Minerals submitted another application for prospecting rights in respect of the farms and this application was accepted as proper by the Department on 24 July 2006. In its letter of acceptance of this application the Department informed Bengwenyama Minerals that the application complied with section 16(2) of the Act, that it had to consult with interested and affected parties and that it had to file an environmental management plan to comply with section 16(4) of the Act. The letter also stated that other entities, including Genorah, had applied for prospecting rights on the farms.

[16] In their papers the Community and Bengwenyama Minerals asserted that the Department was at all times aware of its interest in acquiring prospecting rights on the farms. The Department expressed concern that the initial investment agreement did not adequately safeguard the Community's interests in the vehicle used to acquire these rights, namely Bengwenyama Minerals. As a result, a final investment agreement was concluded in terms of which it was guaranteed that the Community's shareholding in Bengwenyama Minerals would be guaranteed at a certain minimum level. These facts, relating to the Department's knowledge of the Community's interest in pursuing its own application for prospecting rights and the Department's assistance in addressing problems relating thereto, were not contradicted by the Department at any stage.

[17] On 15 September 2006 the final investment agreement was concluded. On the next day, the Kgoshi of the Community wrote a letter to the Department stating his

concurrence and approval of Bengwenyama Minerals acting as a "black empowered enterprise" on behalf of the Community. Approximately two weeks later the Department informed Bengwenyama Minerals that it needed to furnish a guarantee of R20 000 to cover the costs of the potential environmental impact caused by the operations, by 20 November 2006. On 6 October 2006 the Kgoshi wrote a letter regarding the Community's application to prospect over the farms, in which he stated that Genorah (as well as other companies) had failed to meet or consult with the Community or him as the Kgoshi of the Community in regard to prospecting rights on the farms. He expressed surprise that during the process of the Community's application they were informed of other applications and recorded their objection to them. On 10 October 2006 the requisite financial guarantee for environmental rehabilitation was provided by Bengwenyama Minerals to the Department.

[18] What is surprising and perplexing is that during these continuing exchanges between the Community and Bengwenyama Minerals on the one hand and the Department on the other the Department made no mention of the fact that prospecting rights on the farms had already been awarded to Genorah. What is even more perplexing is that the prospecting rights were granted over the Community's land without any notice to the Community. The internal evaluation process of the merits of Genorah's application within the Department took place during August 2006. On 8 September 2006 the Department informed Genorah that the prospecting rights on five properties, including the farms, had been awarded to it. On 12 September 2006 notarial execution of

the award of the prospecting rights was effected. However, only on 6 December 2006 did the Department inform Bengwenyama Minerals that its application for prospecting rights on the farms had been refused because the prospecting rights had been granted to other entities that had applied earlier.

[19] The financial guarantee required of Genorah for environmental rehabilitation was only provided to the Department by Genorah on 15 September 2006. This was after Genorah had been informed, on 8 September 2006, that its application for prospecting rights had been approved and also after the notarial execution of this award was effected on 12 September 2006. In a similar, peculiar vein, Genorah's environmental management plan was approved two months after the approval of its application for prospecting rights, namely on 13 November 2006. The approval was done by an acting Regional Manager of the Department, a different person to the one who approved Genorah's prospecting application.

[20] Bengwenyama Minerals and the Community requested a record of Genorah's application with the Department in December 2006. This record was provided on 17 January 2007. The attorneys acting for Bengwenyama Minerals and the Community lodged an appeal against the grant of the prospecting rights to Genorah, on 13 February 2007. The grounds of objection in this original notice of appeal were based on the alleged non-compliance with sections 16(4) and 17(1)(a) of the Act. On 9 March 2007 additional grounds of appeal were added in a letter written to the Department by

Bengwenyama Minerals' attorneys. These were that: (a) the Community had a preferent community claim to prospecting rights in terms of section 104 of the Act;[8] (b) given its interest in the matter, the Community was entitled to a hearing before the Department prior to the allocation of the award to Genorah; (c) the allocation of the award was procedurally unfair and (d) the award may have violated the Community's fundamental right to property under section 25 of the Constitution. The Department responded to the purported appeal on 14 June 2007, almost four months after the initial appeal was lodged.

[21] Prior to receipt of the Department's response, the Community and Bengwenyama Minerals launched interdict proceedings on 22 March 2007 against Genorah, to prevent it from exercising its prospecting rights in respect of the farms pending the final determination of their challenge to the grant of the prospecting rights.

[22] In its response to the appeal, dated 14 June 2007, the Department stated that since the matter had become *sub judice*, the Minister was not in a position to decide the appeal and that the matter should be decided by means of a review.

[23] On 22 August 2007 the Community and Bengwenyama Minerals launched review proceedings in the High Court, seeking to set aside the granting of prospecting rights to Genorah in respect of the farms. Prior to the determination of the review proceedings Genorah was interdicted from prospecting or in any way exercising its prospecting rights

[8] Section 104 of the Act below n 20.

in respect of the farms pending the final determination of the challenge to the validity of the prospecting rights. Hartzenberg J dismissed the main review application in a judgment handed down on 18 November 2008 on the grounds that no internal appeal was available and that the review was thus brought out of time; that no review grounds had been established; and that even if some of them had been established, he would nevertheless have exercised his discretion against granting relief. He granted leave to appeal to the Supreme Court of Appeal.

[24] The Supreme Court of Appeal dismissed the appeal. It considered that an internal appeal did exist, but that it had been abandoned. It accordingly found that the review application was brought out of time, albeit because of a different reason. The Supreme Court of Appeal did not deal with the review grounds at all, but agreed with the High Court that discretionary relief should be refused even if the review had merit.

[25] The Community and Bengwenyama Minerals approached this Court for leave to appeal and this Court set the matter down for hearing and issued directions for certain issues to be addressed at the hearing.[9] As the matter developed at the hearing, these issues were subsumed by the broader issues set out below.

[9] Directions dated 31 May 2010 directed the parties to include submissions on the following issues:

> "(a) When does the 180 day period in terms of section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 commence where: (i) an internal appeal has been refused; (ii) an internal appeal has been wrongfully terminated by the appeal body; (iii) an internal appeal has been abandoned by the appealing party?
>
> (b) What is the legal effect of the failure to file an environmental management plan before an application for prospecting rights is considered?

Issues

[26] The issues that crystallised in this Court are:

a. Whether leave to appeal should be granted;

b. Whether the Act provides for internal remedies in the present matter;

c. If internal remedies do exist under the Act, whether the review was brought in time;

d. In respect of the review grounds:

i. Whether there was proper consultation by Genorah with Bengwenyama Minerals and the Community in terms of the Act;

ii. Whether the decision-maker was obliged to afford Bengwenyama Minerals and the Community a hearing before awarding the prospecting rights to Genorah;

iii. Whether proper consideration was given to the environmental requirements of the Act prior to the granting of prospecting rights to Genorah;

iv. What relief should be granted if the review is successful.

(c) Should the application of the first applicant for the grant of prospecting rights have been considered as a community application under section 104 of the Mineral and Petroleum Resources Development Act, 28 of 2002?

(d) Is it legally permissible to treat the application of the first respondent for prospecting rights as severable in respect of each property over which prospecting rights have been granted?

(e) Is there a proper legal basis for refusing relief in the exercise of a judicial discretion where grounds for review have been established, and, if so, does such a basis exist here?"

[27] Before moving on to a discussion and evaluation of these issues it is necessary to have a look at the legal framework within which the issues must be decided.

Legal framework

[28] In the introductory paragraphs of this judgment reference was made to provisions in the Constitution that provide the general[10] as well as the more specific[11] foundations for legislative and other measures to ensure equitable access to the natural resources of the country. There is no denying that past mining legislation and the general history of racial discrimination in this country prevented black people[12] from acquiring access to mineral resources.[13] Dispossession of land aggravated the situation.[14] The Act seeks to redress these past wrongs.

[29] Amongst the objects of the Act[15] are:

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[10] Above n 2.

[11] Above n 3. See also Joubert *et al* (ed) *The Law of South Africa* (2ed) vol 18 (*LAWSA*) at para 16-7 and Van der Walt *Constitutional Property Law* (Juta, Cape Town 2005) 370.

[12] Used here in the generic sense of all people who were not classified as white persons.

[13] *LAWSA* above n 11 at para 16.

[14] See *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC) at paras 10-29.

[15] Section 2 of the Act states that the objects of this Act are to—

> "(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
>
> (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
>
> (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

a. The promotion of equitable access to the nation's mineral and petroleum resources for the country's people;

b. The substantial and meaningful expansion of opportunities for historically disadvantaged men and women to enter the mineral and petroleum industries and to benefit from the exploitation of these natural resources; and

c. To ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

[30] When interpreting a provision of the Act any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is inconsistent with the objects of the Act, and to the extent that the common law is inconsistent with the Act, the Act prevails.[16]

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

[16] Section 4 of the Act.

[31] In broad terms the Act seeks to attain its transformation and empowerment aims by making the state the custodian of the country's mineral and petroleum resources and by placing control of the exploitation of these resources under the control of the state, acting through the Minister.[17] Various provisions in the Act then seek to give specific effect to the object of expanding opportunities in the industry to historically disadvantaged persons.[18] Of particular relevance to this matter are the provisions giving preference in the consideration of applications for prospecting rights to historically disadvantaged persons[19] and to communities who wish to prospect on communal land.[20]

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[17] Section 3(1) of the Act states that "[m]ineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans."

[18] Section 100 of the Act deals with the transformation of the minerals industry. It states that:

> "(1) The Minister must, within five years from the date on which this Act took effect—
>
> . . . .
>
> (b) develop a code of good practice for the minerals industry in the Republic.
>
> (2) (a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad based socio-economic empowerment Charter that will set the framework-targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources."

[19] Section 9 of the Act deals with the order of processing applications. It states that:

> "(1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on—
>
> (a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);
>
> (b) different dates must be dealt with in order of receipt.
>
> (2) When the Minister considers applications received on the same date he or she must give preference to *applications from historically disadvantaged persons*." (Emphasis added.)

The Act defines historically disadvantaged persons as follows:

> "(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

[32] A person who wishes to apply for a prospecting right under the Act must lodge the application in the prescribed manner at the office of the Regional Manager in whose region the land is situated.[21] The Regional Manager must accept the application for consideration if the formal requirements for its lodging have been complied with and no other person holds the prospecting right already.[22] Within 14 days after acceptance the Regional Manager must make known that an application has been received and must call

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(b) any association, a majority of whose members are persons contemplated in paragraph (a);

(c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes."

[20] Section 104 of the Act provides for a preferent prospecting or mining right in respect of communities. It states that:

"(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must lodge such application to the Minister.

(2) The Minister must grant such preferent right if the community can prove that—

(a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;

(b) the community submits a development plan, indicating the manner in which such right is going to be exercised;

(c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and

(d) the community has access to technical and financial resources to exercise such right.

(3) The preferent right, granted in terms of this section is—

(a) valid for a period not exceeding five years and can be renewed for further periods not exceeding five years; and

(b) subject to prescribed terms and conditions.

(4) The preferent right referred to in subsection (1), shall not be granted in respect of areas, where a prospecting right, mining right, mining permit, retention permit, production right, exploration right, technical operation permit or reconnaissance permit has already been granted."

[21] Section 16(1) of the Act.

[22] Section 16(2) of the Act.

upon interested parties to submit comments within 30 days of the notice.[23] If objections are received they must be forwarded for consideration to the Regional Mining Development and Environmental Committee for advice thereon to the Minister.[24]

[33] The Regional Manager must within 14 days after acceptance of the application also notify the applicant in writing to submit an environmental management plan to the Department[25] and to notify and consult with the landowner or lawful occupier and any other affected party. The result of the consultation must be submitted to the Department within 30 days from the date of the notice.[26] Upon receipt of the environmental management plan and consultation outcome the Regional Manager must forward the application to the Minister for consideration.[27]

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[23] Section 10(1) of the Act.

[24] Section 10(2) of the Act.

[25] Section 39(2) of the Act states that: "Any person who applies for a reconnaissance permission prospecting right or mining permit must submit an environmental management plan as prescribed."

[26] Section 16(4) of the Act states that:

> "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 or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice."

[27] Section 16(5) of the Act.

[34] Another one of the objects of the Act is to give effect to the environmental rights in the Constitution[28] by ensuring that mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.[29] Apart from the obligation to lodge an environmental management plan in terms of the Act, an applicant for a prospecting right must provide the Minister with the prescribed financial provision for the rehabilitation or management of negative environmental impacts.[30] The environmental management plan must be submitted to the Regional Manager within 60 days from the date of notification of acceptance of the application.[31] Amongst other requirements the plan must investigate, assess and evaluate the impact of the proposed prospecting operation on the environment and the socio-economic conditions of any person who might be directly affected by the prospecting operation.[32] It must contain a record of the public participation undertaken

[28] 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."

[29] See section 2(h) of the Act above n 15.

[30] Section 41(1) of the Act.

[31] Regulation 52(1) of the Mineral and Petroleum Resources Development Regulations, GN R527 GG 26275, 23 April 2004 (Regulations).

[32] Section 39(3)(b)(i) and (ii) of the Act.

and the results thereof.[33] The Minister must approve the plan within 120 days of its lodgement if it complies with the necessary requirements.[34]

[35] The Minister must grant a prospecting right if the provisions of section 17(1) are met. The subsection reads:

> "(1) Subject to subsection (4), the Minister must grant a prospecting right if—
>
> (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
>
> (b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;
>
> (c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;
>
> (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996); and
>
> (e) the applicant is not in contravention of any relevant provision of this Act."

[36] The granting of a prospecting right in terms of this subsection becomes effective on the date on which the environmental management programme is approved in terms of

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[33] Regulation 52(2)(g).

[34] Section 39(4) states that:

> "(a) Subject to paragraph (b), the Minister must, within 120 days from the lodgement of the environmental management programme or the environmental management plan, approve the same, if—
>
> (i) it complies with the requirements of subsection (3);
>
> (ii) the applicant has complied with section 41(1); and
>
> (iii) the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative impacts on the environment."

section 39.[35] The Minister may delegate the power to grant prospecting rights in terms of the Act, and did delegate it in this matter to the Deputy Director General.

[37] An internal appeal process under the Act provides that any person whose rights or legitimate expectations are materially or adversely affected or who is aggrieved by any administrative decision in terms of the Act may lodge an appeal in the prescribed manner.[36]

[38] A prospecting right is a limited real right in respect of the mineral and the land to which it relates.[37] Holders of prospecting rights may enter the land with their employees; they may bring any plant, machinery or equipment required for the purpose of prospecting on to the land; and they may build, construct or lay down any surface or underground infrastructure necessary for that purpose. They may prospect for the mineral on or under the land; may remove and dispose of it during the course of prospecting; may use water on the land subject only to the provisions of the National Water Act;[38] and may carry out any other activity incidental to prospecting which does not contravene the provisions of the Act.[39] These activities may not be done without

[35] Section 17(5) of the Act.

[36] Section 96 of the Act.

[37] Section 5(1) of the Act.

[38] 36 of 1998.

[39] Section 5(3) of the Act.

notifying and consulting with the landowner or lawful occupier of the land.[40] If the landowner or lawful occupier impedes holders of prospecting rights in the exercise of their rights, the holders must report this to the Regional Manager concerned.[41] Owners or lawful occupiers of land on which prospecting will be conducted must similarly notify the Regional Manager of any loss suffered or likely to be suffered as a result of the prospecting operation.[42] In both instances a process is then initiated which may, depending on the circumstances, result in payment of compensation to the landowner or lawful occupier or a prohibition on the commencement or continuation of prospecting activities.[43]

[39] A determination of the issues in this case will to a certain extent depend on, or at least be influenced by, an assessment of what the nature and extent of the opposing rights and interests of the involved parties are.

[40] Section 3 of the Act provides that the mineral and petroleum resources of this country are the "common heritage of all the people of South Africa" and that the allocation of rights to these resources is done by the Minister acting as the state custodian of the resources.[44] There may well be differences between the old order and the new as

[40] Section 5(4)(c) of the Act.

[41] Section 54(1) of the Act.

[42] Section 54(7) of the Act.

[43] Section 54(2)-(7) of the Act.

[44] Section 3(2) states that:

far as the nature of ownership of land holding mineral and petroleum resources is concerned, and the processes whereby prospecting rights are acquired, but many of the underlying practical consequences remain the same, or are similar, under the new order:

a. Nothing prevents owners of land from acquiring prospecting rights on their own land if they wish to do so;
b. Where third parties seek prospecting rights they must engage with the owner of land before acquiring the right;
c. Prospecting rights may only be exercised under state authority or permission;
d. The exercise of prospecting rights is highly invasive of the use by owners of their land, even if only restricted to surface use of the land.

[41] The implications of these similarities may have to be considered when the rights and interests of Bengwenyama Minerals, the Community, Genorah and the Department and its officials are considered and assessed in relation to the issues that arise for decision in this matter.

"As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may—

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right".

Should leave to appeal be granted?

[42] The matter clearly involves constitutional issues of some importance. The objects of the Act include the promotion of equitable access to mineral resources for historically disadvantaged people.[45] Both Genorah and the Community assert rights in relation to it. Another object of the Act is to give effect to the environmental right of everyone[46] by ensuring that the nation's mineral and petroleum resources are developed in an orderly and sustainable manner. Compliance with environmental requirements is in issue in the case. The right to administrative action must be determined against this background.[47] It involves a claim by a community to prospecting rights in respect of the land it owns and occupies. The constitutional issue raised is eminently arguable. It is thus in the interests of justice to hear the matter.[48] Leave to appeal should be granted.

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[45] See also section 25(4)-(6) of the Constitution.

[46] Section 24 of the Constitution.

[47] Section 33 of the Constitution. See also section 6 of the Act which states:

> "(1) Subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.
>
> (2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision."

[48] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 14 and *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 15.

Delegation and internal remedies

[43] The High Court held that no internal appeal lay against the award of the prospecting right to Genorah by the Deputy Director General in terms of the authority delegated to him by the Minister. The Supreme Court of Appeal came to the opposite conclusion, but found that Bengwenyama Minerals and the Community had abandoned the internal appeal. The result was, however, the same on either approach: Bengwenyama Minerals and the Community should have instituted review proceedings within 180-days of learning in December 2006 that prospecting rights had been granted to Genorah.

[44] In this Court counsel for Genorah submitted that the Act made no provision for an internal appeal in the particular circumstances of this case. He submitted that the power to grant prospecting rights in terms of the Act is that of the Minister. The Minister could and did delegate that power to the Deputy Director General. Although the Deputy Director General made the actual decision, the decision nevertheless remained that of the Minister. Section 96 of the Act makes no provision for an appeal to the Minister against her own decision. Counsel relied upon the decisions of *Global Pact Trading 207 (Pty) Ltd v The Minister of Minerals and Energy*[49] and *Mofschaap Diamonds (Pty) Ltd v The Minister for Minerals and Energy and Others*[50] in support of this submission.

[49] Orange Free State Provincial Division, Case No 3118/06, unreported, 14 June 2007.

[50] Orange Free State Provincial Division, Case No 3117/06, unreported, 14 June 2007.

[45] In my view the argument cannot be sustained. In modern government it is a practical necessity that functions assigned by the Constitution and legislation often need to be performed by administrative officials.[51] These functions may be performed under assignment or delegation.[52] What usually distinguishes delegation in its many forms from assignment is that the delegator retains final control over the decision taken by the delegatee in her name. As Kriegler J put it in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* delegation "postulates revocable transmission of subsidiary authority."[53] What kind of control is retained by the delegator depends on the purpose of the delegation and the specific terms regulating the delegation in the applicable legislation. Here I can find no indication in the delegation provisions of the Act or in their contextual purpose that would preclude an internal appeal in the particular circumstances of this case.

[46] Section 103 of the Act deals with delegation and assignment. It reads:

> "(1) The Minister may, subject to such conditions as he or she may impose, in writing delegate any power conferred on him or her by or under this Act, except a power to make regulations or deal with any appeal in terms of section 96, and may

[51] *Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* [2000] ZACC 18; 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 24. See also *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 32 and *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 51.

[52] Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) at 233; De Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban 2003) at 146.

[53] Above n 51 at para 173.

assign any duty so imposed upon him or her to the Director-General, the Regional Manager or any officer.

(2) The Minister may, in delegating any power or assigning any duty under subsection (1), authorise the further delegation of such power and the further assignment of such duty by a delegatee or assignee.

(3) The Director-General, the Regional Manager or any other officer to whom a power has been delegated or to whom a duty has been assigned by or under this Act, may in writing delegate any such power or assign any such duty to any other officer.

(4) The Minister, Director-General, Regional Manager or officer may at any time—

(a) withdraw a delegation or assignment made in terms of subsection (1), (2) or (3), as the case may be; and

(b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be.

(5) The Minister, Director-General, Regional Manager or officer is not divested of any power or exempted from any duty delegated or assigned by him or her."

[47] Section 96 of the Act deals with internal appeals:

"(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to—

(a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or

(b) the Minister, if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section."

[48] The terms of section 103(4)(b) allow the Minister to "withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned"[54] by him or her. It does not prescribe the manner in which this must be done and certainly does not exclude that it may be done by way of internal appeal.

[49] In *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*[55] this Court emphasised the importance of internal remedies:

> "Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
>
> First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular

[54] Section 103(4)(a) and (b) need not be read conjunctively.

[55] [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC).

> case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action."[56] (Footnotes omitted.)

[50] Allowing an internal appeal under section 96 of the Act in the circumstances of this case will enhance the autonomy of the administrative process and provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation. An internal appeal process will also allow the Minister to develop guidelines for the proper application of the Act in future decisions.

[51] The reasoning in the *Global Pact Trading* and *Mofschaap Diamonds*[57] cases in the Free State High Court relied on the analytical distinction between two forms of delegation made by Professor Wiechers in his work, *Administrative Law*,[58] namely that between deconcentration and decentralisation.[59] In particular, reliance was placed on the statement that in cases of deconcentration the delegatee acts in the name of the delegator and that in those cases the former's decision is regarded in law as that of the latter.[60] That is of course correct as far as it goes, but it does not answer the question when and in what manner the Minister as delegator may make the final decision in her own name.[61] If

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[56] Id at paras 35-6.

[57] *Global Pact Trading* above n 49 and *Mofschaap Diamonds* above n 50.

[58] Wiechers *Administrative Law* (Butterworths, Durban 1985).

[59] See especially *Global Pact Trading* above n 49 at paras 6-9 and *Mofschaap Diamonds* above n 50 at paras 11-4.

[60] *Global Pact Trading* id at para 8 and *Mosfschaap Diamonds* id at para 13.

[61] Professor Wiechers acknowledges this himself. See Wiechers above n 58 at 52 where he states:

> "In his capacity as administrative superior, the *delegans may exercise various forms of control over the delegate. He may require that the delegate report to him and, if the delegate does not carry out his task as he should, the delegans may relieve him of the task. If the matter has not*

it is the essence of delegation that final control remains with the delegator there appears to be no reason in principle why final control cannot be exercised by way of internal appeal. In such a case the conceptual difficulty of an appeal against the Minister's own decision also disappears.[62]

[52] There is, however, a further substantive reason why reliance on analytical and conceptual distinctions made in relation to pre-constitutional administrative law should be approached with caution.[63] The starting point for an analysis of delegation as a legal concept today must be the demands of the Constitution. The problems relating to delegation of powers are not uniform. In some instances the question will arise whether delegation of power by a legislature is valid having regard to the constitutional separation of powers.[64] In other cases it might involve questions of whether the correct organ of state has been cited. The present matter does not involve a consideration of any of those issues. The Act makes it clear to whom powers may be delegated and those provisions

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> *been finally dealt with, the delegans may always still intervene and finalize it himself*. In such a case the *delegans* is by no means *functus officio* and he may always intervene in his capacity as administrative superior and carry the matter through to a satisfactory conclusion. However, it is clear that if the delegate has already finalized the matter, the *delegans* will have to be content with that, since, in accordance with the principles governing administrative deconcentration, the delegate will have acted on behalf of the *delegans* in full. In such a case the *delegans* may decide to revoke the delegation or to act against the delegate in some other way, but he cannot undo the effect of the completed delegated function." (Emphasis added.)

[62] The Deputy Director General's decision is then appealed in the hierarchy provided for in section 96(1) of the Act.

[63] In stating this I certainly do not wish to be seen as dismissive of the important contribution made by Professor Wiechers in his work on administrative law under the previous constitutional dispensation. It was at a time when it was necessary, in the words of Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 45, "to claim space and push boundaries to find means of controlling public power" and his work made an important contribution in this process.

[64] Hoexter above n 52 at 233.

are not attacked as constitutionally suspect. The correct parties are before court. The issue here involves the constitutional provisions relating to public administration. It is in the context of the fundamental constitutional value requiring a democratic system of government to ensure accountability, responsiveness and openness,[65] and the basic values and principles governing public administration[66] that the issue of delegation and internal appeals and remedies should be assessed.[67] Those values and principles are enhanced by

[65] Section 1(d) of the Constitution.

[66] Section 195 of the Constitution provides:

> "(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
>
> (2) The above principles apply to—
>
> (a) administration in every sphere of government;
>
> (b) organs of state; and
>
> (c) public enterprises."

[67] Compare Elliott et al (eds) *Administrative Law: Text and Materials* 3ed (Oxford University Press, Oxford 2005) 162-6.

an internal appeal process. It is in that context that I accordingly find that an internal appeal in terms of section 96 existed in this case.

[53] The applicants also approached the Minister in terms of section 47 of the Act on the basis of the same facts and contentions raised in the section 96 internal appeal. Counsel for Bengwenyama Minerals and the Community submitted that section 47 of the Act provided a further internal remedy for his clients. I do not agree. That section deals with the power of the Minister to cancel or suspend a prospecting right granted to the holder of that right in relation to conduct that occurs after the prospecting right had already been granted.

[54] It was argued that section 47(1)(d), which provides for sanction where inaccurate, incorrect or misleading information in connection with matters required to be submitted under the Act had been given, also caters for information contained in the application for the prospecting right. In my view this would be a strained interpretation, out of kilter with the rest of the provisions of the section. This is so because the information the sub-section refers to sits more comfortably with the information the holder of the right needs to provide under section 21 of the Act than with the information provided in the application for the right. Section 96 read with section 103 cater adequately for possible defects in the application process for prospecting rights.

[55] I accordingly conclude that an internal appeal in terms of section 96 of the Act was available to the applicants in respect of the decision to grant prospecting rights to Genorah over the farms.

Delay

[56] Bengwenyama Minerals and the Community only became aware of the decision to award prospecting rights over the farms on 6 December 2006. They asked for a record of the application from the Department in December 2006 and the record was provided on 17 January 2007. On 13 February 2007 they lodged an internal appeal in terms of section 96 of the Act. They added additional grounds of appeal on 9 March 2007. While waiting for a response they launched proceedings to interdict Genorah from proceeding with prospecting operations on the farms on 22 March 2007. The response from the Department only came four months later in a letter that informed them that the Minister was not in a position to decide the appeal and that the matter should be decided by way of review proceedings. They launched the review proceedings on 22 August 2007.

[57] Ignoring for the moment the legal arguments around the issue, it can hardly be said that these time lines on their own indicate any deliberate delay in taking steps to correct what Bengwenyama Minerals and the Community considered to be an unlawful award of prospecting rights on the farms to Genorah. The only truly culpable delay was that of the Department who took more than four months to respond to the internal appeal.

[58] A number of different submissions were made in support of the delay findings in the High Court and Supreme Court of Appeal. It was submitted that: (a) the internal appeal was late and that no condonation had been granted for it being lodged late; (b) the refusal to consider the appeal should have been taken on review and not the decision to award the prospecting rights; and (c) the conduct of Bengwenyama Minerals and the Community after receipt of the letter from the Department on 14 June 2007 indicated that they had abandoned their right of appeal.[68] I do not consider it necessary to deal with each of these arguments in any detail. Suffice it to say that in my view the contents of the letter refute each of these arguments. It reads as follows:

> "You are hereby advised that since this matter is now *sub judice,* the Minister will not be in a position to decide on your appeal in this matter. The fact that a right has already been granted to Genorah also poses a legal challenge in deciding on the appeal, and it is therefore the view of this Department that this matter should be decided by means of a review."

There is no indication that the application was not considered for want of an application for condonation, nor is there any indication that anything other than a review of the original decision would bring the Department to change that decision to award prospecting rights to Genorah. In effect the Department advised Bengwenyama Minerals and the Community to seek a review and not to prosecute their appeal.

[68]This too was the finding of the Supreme Court of Appeal.

[59] Section 7(1)(a) of the Promotion of Administrative Justice Act[69] (PAJA) provides that judicial review proceedings must be instituted without unreasonable delay and not later than 180-days after the date on which internal remedies "have been *concluded*"[70] (emphasis added). In my view the clear import of the Department's letter of 14 June 2007 was that the internal appeal had been "concluded" in the sense required by the section. Consequently the 180-day period began to run from the date of the Department's letter of 14 June 2007. The review was thus brought in time. The conduct of Bengwenyama Minerals and the Community in pursuing review proceedings two months later is in my respectful view more consistent with an acceptance that the internal appeal process had been concluded, rather than with the abandonment of the process itself. I may add that in these circumstances of apparent confusion about the availability of an

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[69] Act 3 of 2000.

[70] Section 7(1) and (2) of PAJA state:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
>
> (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

internal appeal I would have considered that there was no unreasonable delay in bringing the proceedings even if no internal appeal existed in terms of section 96 of the Act.[71]

[60] In the result I find that there was no delay in bringing the review application.

Fair administrative action

[61] In terms of the Act any administrative process conducted or decision taken in terms of the Act must be taken in accordance with the principles of lawfulness, reasonableness and procedural fairness.[72] The prescripts of the Act in this regard are subject to the provisions of PAJA. In *Zondi v MEC for Traditional and Local Government Affairs and Others*[73] Ngcobo J stated:

> "PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA."[74] (Footnotes omitted.)

With that in mind I turn to the consultation and hearing requirements of the Act.

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[71] Compare *Koyabe*, above n 55 at para 48 and *Joint Municipal Pension Fund and Another v Grobler and Others* 2007 (5) SA 629 (SCA) at paras 29-30.

[72] Section 6 of the Act and see n 47 above.

[73] [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[74] Id at para 101.

Consultation

[62] The Act requires consultation in regard to prospecting rights at different levels. Within fourteen days of accepting a prospecting right application the Regional Manager must make known that an application has been received and must call upon interested and affected persons to submit their comments within 30 days from the date of the notice.[75] If a person objects to the granting of the right the objection must be referred to the Regional Mining Development and Environmental Committee to consider the objections and advise the Minister on them.[76] Also within fourteen days of acceptance of the application, the Regional Manager must notify the applicant in writing that the landowner or lawful occupier must be notified and consulted.[77] The result of the consultation must be submitted within 30 days from the date of the notice.[78] Before the holder of a prospecting right actually starts prospecting the landowner or lawful occupier must again be notified and consulted.[79]

[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

[75] Section 10(1) of the Act.

[76] Section 10(2) of the Act.

[77] Section 16(4)(b) of the Act

[78] Id.

[79] Section 5(4)(c) of the Act.

granting prospecting rights.[80] 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",[81] 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. The Community is the landowner of the farms at stake in this application and therefore I will restrict further discussion to the position of landowners.

[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

[80] Compare *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at para 13.1.

[81] Schutz JA's words in *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (AD) at 509B.

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.[82] 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.[83] 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 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

[82] Consultation in good faith with a view to reach a result is a familiar concept in our law. See *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at paras 46 and 51; *Matatiele Municipality and Others v President of the RSA and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 66; *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (Van der Westhuizen J, dissenting) at para 244 and *S v Smit* 2008 (1) SA 135 (T) at 153I-J. With regard to consultation in labour law, see *NUM & Others v Crown Mines Ltd* [2001] 7 BLLR 716 (LAC) at para 38.

[83] In terms of section 54 of the Act.

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 section 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 section 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.

The right to a hearing

[69] Administrative action which "materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."[84] Any administrative decision taken in terms of the Act must be taken in accordance with the principles of procedural fairness.[85] Procedural fairness generally requires adequate notice of the nature and purpose of any proposed administrative action and a reasonable opportunity for the affected person to make representations in respect of the proposed action.[86]

[70] Section 10 of the Act provides for notice to interested and affected parties to enable them to comment and raise objections to an application for prospecting rights. The Minister must consider these objections and make a decision on them on the advice

[84] Section 3(1) of PAJA.

[85] Section 6 of the Act.

[86] Section 3(2) of PAJA states that:

> "(a) A fair administrative procedure depends on the circumstances of each case.
>
> (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5."

of departmental institutions. There was much debate in argument about whether the method of giving notice to the public in terms of regulation 3[87] under the Act was complied with. I prefer to deal with this issue under the broader principle of procedural fairness.

[71] Earlier in this judgment reference was made to the fact that the Act contains no provision that prevents landowners from acquiring prospecting rights on their own land and that the exercise of prospecting rights is highly invasive of the use by owners of their land even if only in relation to surface use.[88] Landowners are entitled to adequate notice of the nature and purpose of any contemplated administrative action under the Act that will in this manner materially and adversely affect the surface use of their land and the Community was entitled to a reasonable opportunity to make representations in relation to the Genorah application.

[72] Section 25 of the Constitution also recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources, not only land,[89] and requires the state to foster conditions which enable citizens to gain access to land on an equitable basis.[90] A community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act

[87] Regulation 3 above n 31.

[88] See [38]-[41] above.

[89] Section 25(4) of the Constitution.

[90] Section 25(5) of the Constitution.

of Parliament, either to tenure which is legally secure or to comparable redress.[91] The Act gives recognition to these constitutional imperatives. It recognises communities with rights or interests in community land in terms of agreement, custom or law.[92] Section 104 of the Act makes provision for a community to obtain a preferent right to prospect on community land for an initial period not exceeding five years that can be renewed for further periods not exceeding five years.

[73] It seems to me that these provisions of the Act create a special category of right for these communities, in addition to their rights as owners of the land, namely to apply for a preferent right to prospect on their land. It is only where a prospecting right has already been granted on communal land that the preferent right may not be granted.[93] It therefore appears to me that any application for a prospecting right under section 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under section 104 of the Act, materially and adversely affects that right of a community. Before a prospecting right in terms of section 16 may be granted under those circumstances, the community concerned should be informed by the Department of the application and its consequences and it should be given an opportunity to make representations in regard thereto. In an appropriate case that would include an

[91] Section 25(6) and (7) of the Constitution.

[92] A community as defined in section 1 of the Act:

> "means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law."

[93] Sections 16(1)(b) and 104(4) of the Act.

opportunity to bring a community application under section 104 prior to a decision being made on the section 16 application.

[74] This is such a case. The Department was at all times aware that the Community wished to acquire prospecting rights on its own farms. It gave advice to the Community over a long period of time in this regard, to the extent of requiring better protection for the Community in the investment agreement. It continued dealing with the Community and Bengwenyama Minerals in relation to their application brought on prescribed section 16 forms without informing them of the fact that approval of that application would end their hopes of a preferent prospecting right. There is no explanation from the Department for this strange behaviour. The Department had an obligation, founded upon section 3 of PAJA, to directly inform the Community and Bengwenyama Minerals of Genorah's application and its potentially adverse consequences for their own preferent rights under section 104 of the Act. This obligation entailed, in the circumstances of this case, that the Community and Bengwenyama Minerals should have been given an opportunity to make an application in terms of section 104 of the Act for a preferent prospecting right, before Genorah's section 16 application was decided. None of this was done. The review must succeed on this ground as well.

The environmental issue

[75] It is one of the objects of the Act to give effect to the environmental rights protected in section 24 of the Constitution by ensuring that the nation's mineral and

petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. In terms of section 17(1)(c) of the Act the Minister must grant a prospecting right if, amongst other requirements, the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment. An applicant for a prospecting right must submit a prescribed environmental management plan in terms of section 39(2) of the Act. Section 41(1) of the Act requires that the prescribed financial provision for the rehabilitation or management of negative environmental impacts must be provided to the Minister by an applicant for prospecting rights.

[76] There is no evidence on affidavit by the Deputy Director General who granted the prospecting rights to Genorah that he or she considered and was satisfied that the environmental requirement in section 17(1)(c) read with section 39(2) was fulfilled. It would in any event have been difficult to do so because Genorah's environmental plan was only approved by a different (acting) Regional Manager on 13 November 2006, some two months after the prospecting rights were granted. The financial guarantee was also only provided after the granting of the prospecting rights, namely on 15 September 2006.

[77] On Genorah's behalf counsel argued that environmental satisfaction was not a prerequisite or jurisdictional fact for the granting of a prospecting right because section 17(5) provides that the granting of a prospecting right in terms of section 17(1) only

"becomes effective on the date on which the environmental management programme is approved in terms of section 39." The argument is misconceived, firstly because an applicant who applies for the granting of a prospecting right needs to submit an environmental management *plan* (not a programme), and secondly because the section explicitly states that the granting of the prospecting right only becomes "effective" on approval of the programme. It obviously relates to the implementation of the prospecting operation, not its approval. Approval of the prospecting operation is dependent on an assessment that the operation will not result in unacceptable pollution, ecological degradation or damage to the environment.

[78] This ground of review must succeed on the basis that there is nothing on record to show that the requirement set out in section 17(1)(c) of the Act was fulfilled.

Public accountability and fairness

[79] I think it is necessary and apposite to make some general remarks on the treatment of Bengwenyama Minerals and the Community by the Department. They were not properly assisted in what was obviously an effort to acquire prospecting rights on their own property. Genorah was allowed to lodge financial guarantees late; they were not. They were not told of the grant of the prospecting rights to Genorah, which effectively put paid to their own application. Their internal appeal was responded to only after four months had elapsed.

[80] The Community was entitled to adequate notice of the nature and purpose of the administrative action that was proposed in relation to the Genorah application.[94] It was entitled to a reasonable opportunity to make representations in relation to the Genorah application.[95] Once the administrative decision was taken the Community was entitled to a clear statement of the administrative action.[96] It was entitled to adequate notice of any right to a review or internal appeal.[97] It was entitled to adequate notice of the right to request reasons in terms of section 5 of PAJA.[98] It was entitled to reasons.[99] None of this was done or complied with by the Department and, finally, the Community's appeal was ignored for four months before it was told to bring a review application in court. This is not the way government officials should treat the citizens they are required to serve.

A discretionary remedy?

[81] Both the High Court and the majority judgment in the Supreme Court of Appeal stated that even if Bengwenyama Minerals and the Community were to succeed on the merits they would have refused relief in the exercise of their discretion to do so. Genorah supported this approach with reliance on a number of recent cases decided in the Supreme Court of Appeal, namely *Oudekraal Estates (Pty) Ltd v City of Cape Town and*

[94] Section 3(2)(b)(i) of PAJA.

[95] Section 3(2)(b)(ii) of PAJA.

[96] Section 3(2)(b)(iii) of PAJA.

[97] Section 3(2)(b)(iv) of PAJA.

[98] Section 3(2)(b)(v) of PAJA.

[99] Section 5 of PAJA.

Others,[100] *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*[101] and *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others.*[102] The Community, on the other hand, submitted that this approach was based on incorrect legal principles. The starting point, the Community urged, was section 172(1) of the Constitution[103] which declares that a court must declare any law or conduct that is inconsistent with the Constitution invalid. A court has no discretion to refuse to do that, it was submitted. A court does, however, have a discretion under section 172(1)(b) of the Constitution to suspend a declaration of invalidity where it is just and equitable to do so. In an administrative law context the decision not to set aside an invalid administrative act amounts to a decision to suspend the declaration of invalidity, so the argument went.

[100] 2004 (6) SA 222 (SCA).

[101] 2008 (2) SA 638 (SCA).

[102] 2008 (2) SA 481 (SCA).

[103] Section 172 states that:

> "(1) When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[82] In terms of the provisions of section 8 of PAJA[104] a court may grant any order that is just and equitable. PAJA seeks to give expression to the right to just administrative action in terms of section 33 of the Constitution and its provisions must, of course, also be read in accordance with the Constitution where it is reasonably possible to do so.[105] There is much merit in counsel's reminder that invalid administrative conduct must be declared unlawful, but it seems to me that it would be unnecessarily inflexible and difficult to explain further discretionary relief as a form of suspension of the invalidity of administrative action, in all cases. If the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity. In my view it is not necessary to place the just and equitable relief that may be granted under PAJA into this kind of conceptual straitjacket in order for that relief to be constitutionally acceptable.

[83] In *Steenkamp NO v Provincial Tender Board, Eastern Cape*[106] Moseneke DCJ stated:

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[104] Section 8(1) of PAJA reads as follows:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable . . . ."

Section 8(2) of PAJA reads as follows:

> "The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable . . . ."

[105] See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-6.

[106] [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

> "It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. . . . The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.
>
> Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s 8 of the PAJA. It is indeed so that s 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable'."[107]
> (Footnotes omitted.)

This 'generous jurisdiction' in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner and orders prohibiting him or her from acting in a particular manner.

[84] It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not

[107] Id at paras 29-30.

precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.[108]

[85] The apparent anomaly that an unlawful act can produce legally effective consequences[109] is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral;[110] the interests involved[111] and the extent or

[108] *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para 9.

[109] Compare *Oudekraal* above n 100 at paras 27-38.

[110] Id at para 36.

[111] *Millennium Waste* above n 102 at paras 23-32.

materiality of the breach of the constitutional right to just administrative action in each particular case.

[86] The High Court, after finding that the review was brought out of time and that there were no reviewable irregularities, nevertheless went ahead and stated that this was a case where a court in its discretion ought to decline to set aside the invalid administrative act. The majority judgment in the Supreme Court of Appeal adopted this reasoning. The reasons offered were fourfold, namely that: (a) it would make little difference to the members of the Community whether Genorah or Bengwenyama Minerals exploited the prospecting rights; (b) reliance on section 104 of the Act was misplaced; (c) if the grant in respect of the two Community farms was set aside, it would probably affect the viability of the remainder of the project; and (d) the public interest required finality.

[87] The first and third considerations are not justified by any evidence on record. This judgment makes it clear that a community application in terms of section 104 of the Act is relevant to a determination of the issues in the case. That disposes of the second consideration. The last consideration, that of finality, must yield to the principle of legality and the fact that Genorah was aware from a very early stage of the Community's interest in the granting of a prospecting right. When it went ahead in the execution of the prospecting right, despite this knowledge, it was interdicted from doing so. Any further prejudice it suffered, it suffered knowingly.

Costs

[88] Bengwenyama Minerals and the Community have been successful in vindicating their rights in this Court and the state respondents should pay their costs in this Court and in the High Court and the Supreme Court of Appeal.[112] There is no reason why the state and Genorah, who made common cause in relation to almost all the issues in the case, should not share the costs burden jointly and severally. This will be reflected in the order we make.

Order

[89] The following order is made:

(a) Leave to appeal is granted.

(b) The appeal is upheld.

(c) The orders made in the North Gauteng High Court, Pretoria and the Supreme Court of Appeal are set aside.

(d) The decision to grant a prospecting right to the first respondent in respect of the farms Nooitverwacht 324 KT and Eerstegeluk 327 KT in the Limpopo Province is set aside.

(e) The first to fifth respondents are ordered to pay the applicants' costs in the High Court, the Supreme Court of Appeal and in this Court, jointly and severally, including the costs of two counsel.

[112] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 28.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Froneman J.

For the Applicants:	Advocate G Marcus SC and Advocate I Goodman instructed by Eversheds.
For the First Respondent:	Advocate BE Leech instructed by Werksmans Inc.
For the Second to Fifth Respondents:	Advocate MP van der Merwe instructed by the State Attorney, Pretoria.