

# Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002

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## OPSOMMING

### **Gasheer gemeenskappe en mededingende aansoeke vir prospekterregte ingevolge die “Mineral and Petroleum Resources Development Act” 28 of 2002**

Die verskillende bepalings van die “Mineral and Petroleum Resources Development Act” 28 of 2002 (“die wet”) omtrent die toekenning van gewone prospekterregte of ’n preferente regte om te prospekeer word in hierdie bydrae bespreek. ’n Gewone prospekterreg word deur die Minister, by aansoek aan ’n applikant, toegeken indien aan die vereistes van artikel 17 van die Wet voldoen word. Artikel 104(1) van die Wet daarenteen maak voorsiening vir die aansoek deur en toekenning van ’n preferente prospekterreg aan ’n tradisionele gemeenskap (soos omskryf in die wet) om op gemeenskapgrond te prospekter. Hierdie bepalings het die grondslag gevorm van ’n ongeraporteerde beslissing van die Transvaalse Afdeling van die Hooggeregshof in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (39808/2007 (TPD) (18-11-2008) Die beslissing het gehandel het oor die bepaling van regsvoorkeur by mededingende prospekteeraanoeke wat na mekaar ten aansien van die Bengwenyama tradisionele gemeenskapsgrond ingedien is. ’n Poging is in die saak aangewend om *ex post facto* die een prospekteeraanoeke in te klee as ’n aansoek vir ’n preferente prospekterreg deur die tradisionele gemeenskap. Daar word geargumeenteer dat die hof se beslissing rakende die verskil en verhouding tussen die twee soorte prospekterregte en die toepassing van die “first come, first served principle” ingevolge artikel 9(1)(b) Wet juis was. Daar word voorts aangevoer dat die feite van die *Bengwenyama Minerals* beslissing die tekortkoming van die huidige artikel 104 van die Wet, om die belange van ’n tradisionele gemeenskap te beskerm, aantoon indien iemand anders aansoek doen vir ’n gewone prospekterreg. Daar word ook uitgewys dat die voorgestelde 2008 wysigings van die Wet ook nie ver genoeg strek om deelname in prospektering en benutting van mineraalbronne deur ’n tradisionele gemeenskap te verseker nie. Die slotsom word bereik dat die huidige wetgewing dringend gewysig behoort te word om die belange van tradisionele gemeenskappe te beskerm.

She is sitting there and smiling, especially at those who are 'more disadvantaged than others' (staring with rusted pans in their hands from shacks on the riverbanks). The Kliptonian transfer of mineral wealth to the people remains the biggest myth of them all.<sup>1</sup>

## 1 Introduction

The Mineral and Petroleum Resources Development Act 28 of 2002 (hereafter "MPRDA") has brought about a fundamental shift as regards the nature of rights to minerals (from common law to statutory law rights), the role of the state as (a) custodian of all minerals, (b) converter from old to new order mineral rights, and (c) being responsible for Black Economic Empowerment within the allocation of new order rights, and the granting of prospecting rights, preferential rights<sup>2</sup> to prospect, mining rights and mining permits. In this article, an overview is given of the relevant provisions of the MPRDA in section 2, with a specific focus on prospecting rights and preferential rights to prospect. These provisions formed the basis of the unreported decision of the Transvaal Provincial Division of the High Court of South Africa in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*<sup>3</sup> (hereafter "Bengwenyama decision"). The appeal in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening)*<sup>4</sup> to the Supreme Court of Appeal failed because the court agreed with the decision and reasoning of the court *a quo*. Since the preparation of this article, the appeal was recently upheld by the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.<sup>5</sup> Due to the fact that the decisions of (a) the court *a quo* as confirmed by (b) the Supreme Court of Appeal are miles apart from the decision of the Constitutional Court, we are of the opinion that a 'reporting' and discussion of the unreported decision of the court *a quo* is warranted. A separate discussion of the decision in the Constitutional Court will in due course be submitted for publication. Our present discussion will thus mainly focus on the decision of the court *a quo* with brief reference to the decision of the Supreme Court of Appeal.

Section 3 of the article gives an overview of the facts, with specific reference to (subsequent) applications by two companies, their arguments, the manner in which the so-called priority provision in the MPRDA was interpreted by the court, the distinction between preferential rights to prospect and prospecting rights, and the nature of the right awarded to one of the companies. This is followed by a critical discussion of the case (section 4), the relevant provisions of the MPRDA and proposed further amendments to the current statutory framework in

1 From the sketch of the "Bridge on the river kwaito" in 2002 *Obiter* 250 280.

2 The term 'preferent right' is used in the MPRDA. Unless we quote from the statute or decision, the term 'preferential right' will rather be used.

3 39808/2007 (TPD) (Unreported 18-11-2008).

4 2010 3 All SA 577 (SCA) 29.

5 2010 ZACC 26.

order to safeguard the interests of communities occupying communal (traditional) areas (section 5) and the first come, first served principle (section 6). This is followed by the conclusion (section 7).

## 2 The Relevant Provisions of the MPRDA

The MPRDA provides, amongst others, for the equitable access to the nation's mineral and petroleum resources, as well as the sustainable development thereof. Rights to minerals are statutory rights created in terms of the MPRDA and should be distinguished from mineral rights which existed prior to the introduction of the MPRDA (i.e. common law rights to minerals).<sup>6</sup> These statutory rights to minerals are categorised into reconnaissance permissions, prospecting rights, permissions to remove minerals, mining rights and mining permits.<sup>7</sup> Prospecting rights and mining rights are statutory limited real rights,<sup>8</sup> whilst the other rights seem to be contractual in nature.<sup>9</sup>

In a mineral law system where rights to minerals are allocated by the state to applicants, allocation of rights may either take place on a first come, first served basis or on the basis of merit. In accordance with the MPRDA, applications for rights to minerals are dealt with on a first come, first served basis.

Section 9(1)(b) of the MPRDA provides for the process that has to be followed in the event that the Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit in respect of the same mineral and land. Applications received on different dates must be dealt with in order of receipt. The processing of applications in order of receipt (the so-called "first come, first served principle") in terms of section 9(1)(b) is, however, subject to the exception that if more than one application in respect of the same mineral and land is received on the same day, such applications must be regarded as having been received at the same time.<sup>10</sup> However, section 9(2) stipulates that when the Minister of Minerals and Energy (hereafter "the Minister") considers applications that were received on the same date by the Regional Manager, the Minister must give preference to applications from historically disadvantaged persons.<sup>11</sup> There is a *lacuna*

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6 See Badenhorst "Mineral Rights: 'Year Zero' cometh?" 2000 *Obiter* 119.

7 S 3(2).

8 S 5(1).

9 See, in general, Badenhorst "Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Circonium" 2005 *Obiter* 505.

10 s 9(1)(a).

11 s 9(2). The category of "historically disadvantaged persons" is defined in s 1 MPRDA and is (a) a person(s) or community disadvantaged by unfair discrimination before the present Constitution took effect; (b) an association of which the majority of its members are historically disadvantaged persons; or (c) a juristic person owned or controlled by historically disadvantaged

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in the provisions of section 9, as the section does not determine how applications received on the same day from (a) applicants who all fit in the “historically disadvantaged persons” category, or (b) applicants none of whom fit in the “historically disadvantaged persons” category, must be dealt with.<sup>12</sup> Although section 9 also deals with applications for mining permits or mining rights, the discussion that follows will focus mainly on prospecting rights granted in terms of the MPRDA.

## 2 1 Prospecting Rights

A prospecting right<sup>13</sup> is a right granted by the Minister if the requirements of section 17(1) are met upon application in terms of section 16 of the MPRDA. These requirements are as follows: (a) the applicant must have access to financial resources and must have the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; (b) the estimated expenditure must be compatible with the proposed prospecting operation and duration of the prospecting work programme; (c) the prospecting must not result in unacceptable pollution, ecological degradation or damage to the environment; (d) the applicant must have the ability to comply with the provisions of the Mine Health and Safety Act 29 of 1996; and (e) the applicant must not be in contravention of any relevant provision of the MPRDA. A prospecting right may be subject to stipulated terms and conditions and is valid for a specified period, which period may not exceed five years.<sup>14</sup> The Minister has delegated its power to grant or refuse an application for a prospecting right to the Deputy Director-General of Mineral Development.<sup>15</sup>

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persons. The deemed simultaneous receipt of applications by the Regional Manager is therefore tempered by s 9(2) which compels the Minister, when considering applications, to give preference to an application (included in the batch of “simultaneous applications”) from an historically disadvantaged person.

- 12 Dale *et al South African Mineral and Petroleum Law* par 112.4. Applications which simultaneously comply with the initial requirements in Western Australia are resolved by resorting to a ballot system (see a 105A(3) of the Mining Act 1978). These so-called ‘same time applications’ happen if applications are lodged by mail or by courier delivery and two or more applications for the same land are by the same post or courier delivery (Hunt *Mining Law in Western Australia* (2009) 264). In *Hot Holdings v Creasy* (unreported WASC FC 27 September 1996 (cited by Hunt 264)) the Western Australian Supreme Court decided that the words “at the same time” do not mean “at precisely the same millisecond”.
- 13 S 1 of the MPRDA defines “prospecting rights” as follows: “the right to prospect granted in terms of s 17 (1)”. (All further references in this article to a “prospecting right” would be to such a prospecting right as applied for in the normal course of events).
- 14 S 17(6).
- 15 S 103(1) of the MPRDA; Delegation of Powers by the Minister of Minerals and Energy to Officers in the Department of Minerals and Energy of 12 May 2004. As to the delegation of powers in the MPRDA, see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) (Revision service 6) chapter 2.2.5.

## 2 2 Preferential Rights to Prospect or Mine

Apart from a prospecting right, section 104(1) of the MPRDA also provides for the granting of a “preferent right to prospect or mine”. The term “preferent right” is not defined in the MPRDA and its content is unclear.<sup>16</sup> A community may apply for such a preferential prospecting right in respect of land which is registered or is to be registered in its name. A “community” is defined in section 1 of the MPRDA as “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”.

Section 104(2) provides that

[t]he Minister must grant such a 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.

A preferential prospecting right is valid for five years and can be renewed for another five years.<sup>17</sup> The terms and conditions of the preferential prospecting right are determined by the Minister.<sup>18</sup> A preferential prospecting right may, however, not be granted in respect of land if another right to minerals has been granted in respect of such land.<sup>19</sup> The power to grant a preferential right prospecting right to a community has been retained by the Minister.

## 3 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd<sup>20</sup>

The *Bengwenyama* decision *inter alia* dealt with competing applications for prospecting rights in terms of the MPRDA. An (unsuccessful) attempt was made by the applicants to *ex post facto* clothe their application as an application for a preferential prospecting right by the community. The applicants thereby purported to indicate that they acted in the interest of the community. The need to protect the interests of “communities” for

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16 Dale *et al* par 489.2. (This preferential right to prospect in terms of the s 104 of the MPRDA will hereafter be referred as a preferential prospecting right in contradistinction from an ordinary prospecting right in 2.1 above).

17 S 104(3)(a).

18 S 104(3)(b).

19 S 104(4).

20 39808/2007 (TPD) (Unreported 18-11-2008).

purposes of the MPRDA (or so-called “host communities”) on mining land has recently been highlighted by Nthai.<sup>21</sup> The court found that the community had submitted an application for a prospecting right (which resulted in the ‘first come, first served principle’ applying to their application) and not an application for a preferential prospecting right. This case is indicative of the insufficient protection of communities provided for by the MPRDA, notwithstanding the broad-based black economic empowerment (BBEE) provisions of the MPRDA.<sup>22</sup> If a community is ill-advised to submit an application for a prospecting right (instead of an application for a preferential prospecting right), and that application competes with other applications submitted by non-community entities, the special provisions in section 104 of the MPRDA that favour communities do not apply. (The only other BBEE provision favouring “applications from historically disadvantaged persons” is contained in section 9(2), which was not relevant to the case.)

### 3 1 The Parties to the Dispute

The first applicant is Bengwenyama Minerals (Pty) Ltd (hereafter “Bengwenyama Minerals”), a limited liability company. The second applicant is the Bengwenyama-ye-Maswati Tribal Council (hereafter “the Tribal Council”) and the third to the fourteenth applicants are the trustees (for the time being) of the Bengwenyama-ye-Maswazi Trust (hereafter “the Trust”).

A prospecting right was granted to the first respondent, Genorah Resources (Pty) Ltd (hereafter “Genorah”), in respect of the five farms.<sup>23</sup> The second to the fifth respondents are respectively the Minister, the Director-General of the Department of Minerals and Energy (hereafter “the Department”), the Regional Manager, Limpopo Region and the Deputy Director-General of the Department. The Court granted leave to the Bengwenyama-ye-Maswazi Royal Council (hereafter “the Royal Council”) to intervene on behalf of the Bengwenyama-ye-Maswazi community.<sup>24</sup>

### 3 2 The Application for Prospecting Rights by Genorah Resources (Pty) Ltd

On 8 February 2006, Genorah applied to the Regional Manager for a prospecting right in respect of five adjoining farms (De Kom 252 KT, Eerstegeluk 327 KT, Garatouw 282 KT, Hoepakrantz 291 KT and Nootverwacht 324 KT in the magisterial district of Sekhukhuneland, Limpopo Province) (hereafter “five farms”).<sup>25</sup> The Regional Manager

21 “Host communities and mining projects in South Africa: Towards an equitable mineral regulation” 2009 *Obiter* 120.

22 See Badenhorst “Saving the pieces of the mineral law system: keeping the baby and the bathwater” 2003 *Obiter* 46; Badenhorst and Mostert *Mineral and Petroleum Law* chapter 23.4.

23 See par 3 2 of this article.

24 Par 2.

25 Par 6.3.

informed Genorah on 20 February 2006 that its application was accepted as it complied with section 16(2) of the MPRDA and that six copies of an environmental management plan had to be submitted by not later than 21 April 2006.<sup>26</sup> The Deputy Director-General signed an approval of the granting of the prospecting rights in favour of Genorah on 28 August 2006, and granted a power of attorney to the Regional Manager: Limpopo Region to sign the prospecting right in favour of Genorah in respect of the five farms.<sup>27</sup> The Regional Manager informed Genorah on 8 September 2006 that the Deputy Director-General had approved the granting of the prospecting right and that it had to be notarially executed within a period of sixty days.<sup>28</sup> The Regional Manager attended to the notarial execution of the granting of the prospecting right in respect of the five farms by the Minister to Genorah on 12 September 2006.<sup>29</sup> Genorah furnished financial guarantees in respect of the environmental rehabilitation of the mined areas on 15 September 2006.<sup>30</sup>

The Bengwenyama-ye-Maswazi community has been entitled to occupation of the farm Nooitverwacht for more than a century. The farm Eerstegeluk was still, in terms of Government Notice No. R 9 of the then Lebowa Government, defined to fall within the area of jurisdiction of Roka-Pasha Phokwane Local Government. According to the court, there was, however, a recommendation that these two farms had to be restored to the Bengwenyama-ye-Maswazi community.<sup>31</sup>

### **3 3 The Subsequent Application for Prospecting Rights by Bengwenyama Minerals**

On 14 July 2006, Bengwenyama Minerals submitted its application for a prospecting right. The application form indicated Bengwenyama Minerals as the applicant for the rights.<sup>32</sup> The Regional Manager informed Bengwenyama Minerals by registered mail on 27 July 2006 that its application for a prospecting right had been accepted in terms of section 16 of the MPRDA. It was also informed that its environmental management plan was to be submitted by not later than 26 September 2006, and that there were five earlier applications with regard to the same minerals and the same land (one of which was the application of Genorah). Bengwenyama Minerals was further informed that its application was to be “processed in accordance with the provisions of Section 9 of the Act”, which section deals with the order of processing applications.<sup>33</sup> During December 2006, Bengwenyama Minerals was advised that its application for a prospecting right had been refused.<sup>34</sup>

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26 Par 6.4.

27 Par 6.8.

28 Par 6.9.

29 Par 6.10.

30 Par 6.12.

31 Par 6.1. It seems as though this recommendation did not have a bearing on the outcome of the case.

32 Par 6.6.

33 Par 6.7.

34 Par 6.13.

The attorney for Bengwenyama Minerals then addressed a letter to the Minister (dated 13 February 2007). In the letter, it was stated that Bengwenyama Minerals applied for a prospecting right in terms of section 16(1) of the MPRDA on 10 May 2006. Dealing with the merits of the competing application (Genorah's application) and relying on section 47 of the MPRDA,<sup>35</sup> Bengwenyama Minerals' attorney urged the Minister to cancel or suspend Genorah's prospecting right.<sup>36</sup> In a letter dated 9 March 2007, Bengwenyama Minerals (a) urged the Minister to uphold its "appeal" (against the award of the prospecting right to Genorah), (b) referred specifically to section 104 of the MPRDA (which provides for applications by communities for a preferential prospecting or mining right), and (c) stated that additional grounds that were relevant to their claim, had come to light.<sup>37</sup>

### **3 4 The Application for Review and Setting Aside of the Award of a Prospecting Right**

An application was made to the court by Bengwenyama Minerals for the review and setting aside of the decision by the Minister in terms of section 17 of the MPRDA to award a prospecting right in respect of the farms Nooitverwacht and Eerstegeluk to Genorah during September 2006. Simultaneously Bengwenyama Minerals applied to the court for a directive that this prospecting right be awarded to it, or, alternatively, that its application for the right be considered.<sup>38</sup>

### **3 5 The Parties' Arguments**

The Tribal Council and the trustees of the trust argued that they represented the Bengwenyama-ye-Maswazi community and, more specifically, that the community had decided to use Bengwenyama Minerals as a vehicle to exercise its mineral rights in terms of the MPRDA. They alleged that the Bengwenyama-ye-Maswazi community would benefit if Bengwenyama Minerals could obtain the prospecting rights. The applicants alleged that the position of Bengwenyama Minerals was different from that of Genorah. They maintained that Genorah had applied for the prospecting rights purely for its own gain. In addition, they argued that the community would be prejudiced if its own application were to be unsuccessful.<sup>39</sup>

The applicants further contended that Bengwenyama Minerals' application was brought in terms of section 104 of the MPRDA and that it was therefore entitled to preferential treatment in terms of the MPRDA. This contention was denied by all the respondents.<sup>40</sup>

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35 S 47 deals with the Minister's power to suspend or cancel rights, permits and permissions.

36 Par 6.15.

37 Par 6.16.

38 Par 1.

39 Par 4.

40 Par 5.2



The validity of the granting of the prospecting right to Genorah was also attacked on the basis of Genorah's application not complying with the environmental and notice requirements of the MPRDA.<sup>41</sup> It was also alleged that Genorah did not comply with the requirements as set out in the MPRDA regarding consultations with the Bengwenyama-ye-Maswazi community.<sup>42</sup>

Genorah alleged that the deponents to Bengwenyama Minerals' founding affidavit and one of their confirmatory affidavits are promoters and directors of Bengwenyama Minerals. As a result, these individuals stand to benefit from the granting of the prospecting right to Bengwenyama Minerals. Their membership of the Tribal Council and community was also challenged by Genorah.<sup>43</sup>

These arguments led Hartzenberg J at the outset to state as follows:

The issues become very intricate because of allegations and counter-allegations that it is not really the Bengwenyama community .... that stands to benefit directly from the grant of such rights but only three individuals who were involved in the orchestration of the competing applications for the relevant rights.<sup>44</sup>

It seems as if Hartzenberg J early on sensed that the community was not really involved. Therefore, a preferential community application was, in fact, not before the court.

### **3 6 The Court's Findings**

Amongst the issues that the court had to consider were the priority dispute between Bengwenyama Minerals and Genorah, and the attack on the validity of the Minister's decision to award a prospecting right to Genorah, and the award itself.<sup>45</sup>

#### ***3 6 1 The Priority Dispute Between Bengwenyama Minerals and Genorah***

Bengwenyama Minerals argued that their application was different to the section 16 application of Genorah, in that their section 16 application was in fact a community application which enjoyed the special protection provided by section 104 of the MPRDA.<sup>46</sup> Although not directly related to the decision and the *ratio decidendi* therefore, the court mentioned that the Bengwenyama-ye-Maswazi community satisfied the requirements of the section 1 MPRDA definition of a community and

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41 Par 5.4.

42 Par 5.3.

43 Par 4.

44 Par 4.

45 The issues between the parties related to amongst others: the authority of the officials who took the decision and awarded the right; the consultation requirements of the MPRDA; the environmental requirements of the MPRDA, and the provisions in the Promotion of Access to Information Act 3 of 2000 regarding the time period applicable to reviews (see par. 5).

46 Par 7.

consequently that “the community’s claim to the right to become owner of the properties and its interest in respect of the possible exploitation of the mineral rights” were undisputed.<sup>47</sup>

### **3 6 2 The Difference Between Preferential Rights and Prospecting Rights**

The court drew a clear distinction between a section 16 MPRDA application for a prospecting right and a section 104 MPRDA application for a preferential prospecting right, and stated that:

- (a) Any person can apply for a prospecting right,<sup>48</sup> whilst a preferential prospecting right is only granted to a community.<sup>49</sup>
- (b) The application for a prospecting right must be lodged at the office of (and directed to) the Regional Manager,<sup>50</sup> whilst an application by a community for a preferential prospecting right has to be lodged directly with the Minister.<sup>51</sup>
- (c) The requirements for the granting of the respective rights differ<sup>52</sup> For instance:
  - (i) it is not necessary for the grantee of a prospecting right to show that its operation will contribute towards the development and social upliftment of the community, although it must submit an environmental management plan and indicate compliance with the Mine Health and Safety Act 29 of 1996;<sup>53</sup>
  - (ii) it is not necessary for a grantee of a preferential prospecting right to address the impact on the environment or compliance with the Mine Health and Safety Act 29 of 1996, but it must show that its operation will contribute towards the development and social upliftment of the community.<sup>54</sup>
- (d) Although both rights can be granted for a maximum period of five years, a prospecting right is renewable once for three years,<sup>55</sup> whilst a preferential prospecting right can be renewed for further periods not exceeding five years;<sup>56</sup>
- (e) Unlike a prospecting right, the MPRDA does not provide for a delegation of ministerial powers to grant a preferential prospecting right.<sup>57</sup>

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47 Par 6.2.

48 Par 8.

49 Par 9.

50 Paras 8 and 10.

51 Paras 9 and 10.

52 The requirements are set out in part 1 above and in paras 8 and 9 of the decision.

53 Par 10.

54 Par 10.

55 Ss 17(6) and 18(4). S 17 deals with the granting and duration of prospecting rights and s 18 deals with the application for renewal of prospecting rights.

56 S 104(3)(a). In par 9 the court states that the maximum period of renewal is five years (“can be renewed for a further maximum period of five years”). The court did not explicitly pronounce whether s 104(3) provides for successive renewal periods of a maximum of five years each, or only for a renewal or renewals that, in total, do not exceed five years.

57 Par 10.

This clear distinction between the two forms of application assisted the court in its eventual finding that Bengwenyama's application was not an application for a preferential prospecting right. The distinction drawn forms the crux of the decision by the court *a quo*.

The rationale behind the recognition by the legislature of a preferential prospecting right is stated as follows by the court:

It seems as if the Legislature wanted to give some sort of preference to communities who live on land underlain by minerals, in the sense that if they can arrange for the exploration of the minerals in a way where they can benefit from it, they must be given the right to do so. Where they can persuade the Minister that they will be able to do so, in the not so distant future, section 104 empowers the Minister to protect their right to apply for a prospecting right for a period of time so that they can get their ducks in a row.<sup>58</sup>

The court explained that in the case of a community, section 104 of the MPRDA creates the opportunity to obtain a preferential prospecting right. If a preferential prospecting right is granted, the applications of other would-be applicants may not be considered before (a) the community has had an opportunity to arrange for the necessary financial assistance to prospect and mine for the minerals or (b) until it becomes clear that the community will not or cannot succeed with an application for the granting of a prospecting right.<sup>59</sup> According to the court, the granting of ministerial preference to the community does, however, not exempt the community from eventually submitting an application for a prospecting right and complying with the requirements of section 17(1) of the MPRDA before the community will actually be allowed to prospect.<sup>60</sup> Hartzenberg J held that:

I do not believe that the Legislature had in mind that communities, exploring the minerals on the land on which they live, were to be exempt from the duty to protect the environment or to mine without complying with the requirements of the Mine Health and Safety Act.<sup>61</sup>

The court found that Bengwenyama Minerals' application was "definitely not an application for a preferential right" to prospect; "[i]t was an out-and-out application for a prospecting right".<sup>62</sup> As indicated before, this flows from the court's clear distinction between the two forms of applications. The court reasoned that it was understood by the Department as application for a prospecting right. When Bengwenyama Minerals was asked to submit an environmental management programme (as required by section 16 MPRDA), it did so.<sup>63</sup> The reliance on section 104 was only an "afterthought" to have come to the attention of Bengwenyama Minerals after it had learned that Genorah's section 16

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58 Par 10.

59 Par 29.

60 Par 10.

61 Par 10.

62 Par 11.

63 Par 11.

MPRDA application for a prospecting right had been granted.<sup>64</sup> The court accordingly found that Genorah's application preceded Bengwenyama Minerals' application, and that, in terms of section 9 of the MPRDA, Genorah's application had to be dealt with before the application by Bengwenyama Minerals (according to the first come, first served principle).<sup>65</sup>

In light of the court's finding that the application of Bengwenyama Minerals was not a community application for a preferential prospecting right, the question of intervention by the Royal Council on behalf of the community (to show that neither application was for the benefit of the community) became academic.<sup>66</sup> Hartzenberg J explained that

[i]t makes no difference whether the Kgosi supports the applicant or the first respondent or whether the fact that the Kgosi supports the one side or the other is conclusive of the question of where the support of the community lies. Likewise it is not relevant whether the Tribal Council has become defunct or whether the application to intervene could be brought in the name of the Royal Council without the active support of the Kgosi. It is also not necessary to decide whether the community will be better off if the first applicant mines the minerals and Maphanga and Mhlungu and the trust have an interest in the first applicant or whether the Genorah mines the minerals and Mhpahlele has an interest in Genorah.<sup>67</sup>

### ***3 6 3 The Validity of the Prospecting Right Granted to Genorah***

As part of its attack on the validity of (a) the decision by the Minister to award the prospecting right to Genorah, and (b) the award itself, it was alleged by Bengwenyama Minerals that there was no strict compliance by Genorah with the following sections of the MPRDA:

(a) Section 39 of the MPRDA, in that the environmental management plan was only approved by the Department a number of months after the approval of the application for a prospecting right and Genorah did not pay the necessary moneys on the time prescribed by the MPRDA.<sup>68</sup>

(b) Section 10 of the MPRDA, in that there was no proper notice to, and calling upon, interested and affected parties to submit comments within 30 days.<sup>69</sup>

(c) Section 16(4)(b) of the MPRDA, in that there was no proper notification to, and consultation with, the community (as lawful occupier).<sup>70</sup>

At issue was whether strict compliance with the above provisions of the MPRDA is required. According to the court, the question is whether the legislature intended the provisions to be strictly complied with or not. It was suggested that regard must be had to the scope and object of the

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64 Par 11.

65 Par 11.

66 Pars 12-13.

67 Par 13. See also par 49.1.

68 Pars 27 and 35.

69 Pars 27 and 37.

70 Pars 27 and 37.

MPRDA as a whole. A further enquiry was whether what was done, constituted compliance with the MPRDA.<sup>71</sup>

The court listed the objectives of the MPRDA and stated that the emphasis seemed to be on a system that awards mineral rights to entities that could and would be able to exploit the minerals for the benefit of the nation.<sup>72</sup> The court drew a distinction between actions by the Department that strictly need to be complied with (such as the sequence of applications), and other actions by the Department which are less mandatory (such as adherence to environmental requirements or consultations with interested parties).<sup>73</sup>

Even though the court regarded it as essential that the Department took proper steps to protect the environment<sup>74</sup> as far as possible by requiring an environmental impact assessment and the submission of an environmental management plan,<sup>75</sup> it held that the scheme of the MPRDA did not indicate that an environmental management plan, once approved, was cast in stone.<sup>76</sup> The measures related to protection of the environment are not static, because amendments to an environmental management plan are possible before and even after its approval.<sup>77</sup> Insofar as the granting of a prospecting right only becomes effective on the date on which the environmental management plan is approved, the legislature contemplated approval of the environmental management plan after approval of the application.<sup>78</sup> According to the court, non-compliance with the provision that the environmental management plan must be approved within 120 days will not automatically invalidate the approval of such plan outside said period. Genorah did submit its environmental management plan timeously and it was, in fact, the Department that approved the plan outside the 120 day period. The late approval by the Department was found not to have invalidated the granting of the prospecting right to Genorah. In addition, the late payment of fees did not vitiate the decision to grant and the granting of the prospecting right.<sup>79</sup>

In the view of the court, notice to interested parties and consultation may not be possible in certain circumstances. Section 105 of the MPRDA contemplates the situation where the landowner or lawful occupier cannot be traced. In such a case, it is unlikely that meaningful consultation can take place. In addition thereto, there may be circumstances where the registered owner is not really the interested

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71 Par 28.

72 Par 28.

73 Par 30.

74 The court's reference to ecology is unfortunate. It would be impossible to "protect the ecology" in the strict sense of the word.

75 Par 35.

76 Par 36.

77 Par 36.

78 Par 36.

79 Par 36.

party (i.e. when the property had been sold but not yet transferred, or when a community is not yet the registered owner but has a *spes* to become the landowner as a result of a land claim).<sup>80</sup>

According to the court, the provisions of section 16(4) MPRDA are such that, if it is clear that there was communication between the applicant for a prospecting right and the landowner, and the landowner was aware of the applicant's intention to apply for a prospecting right, it is sufficient to constitute compliance with the provisions thereof. The court found that the landowner or occupier does not necessarily have to support the applicant's application.<sup>81</sup>

The court stated that, in respect of the farms Nooitverwacht (which is the property of the community) and Eerstegeluk (which lies within the area of jurisdiction of the Rhoka-Phasha Phokwane Local Government), there was compliance with the section 16(4) community consultation requirement in that the visit by Genorah to kgosi Nkosi and the Ga Phasha Tribal Authority, the community was made aware of Genorah's intention to apply for a prospecting right.<sup>82</sup>

According to the court, section 10 of the MPRDA does not prescribe a hearing simply because the community objected to the application. The court reasoned that section 10(2) provides for a referral to the Regional Mining Development and Environmental Committee in the case of an objection.<sup>83</sup> The object of section 10, according to the court, is to give interested parties notice about pending applications.<sup>84</sup> After examining the conflicting facts,<sup>85</sup> the court accepted that the section 10(1) MPRDA (read with regulation 3(3)(b)) notice was received and displayed by the magistrate<sup>86</sup> and that Bengwenyama Minerals was aware of the application.<sup>87</sup> To what extent the community was aware of the different applications is not clear from the judgment. It must, however, be borne in mind that Bengwenyama Minerals purported to have acted on behalf of the community by arguing that its application was a preferential community application.<sup>88</sup>

The court concluded that Genorah, in the ordinary course of events, openly brought its application for a prospecting right, as it was entitled to do. There were a number of other section 16 MPRDA applications, received by the Regional Manager after the one by Genorah. The application for a prospecting right by Bengwenyama Minerals was well down the line. The court held that it did not detect any improper conduct

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80 Par 37.

81 Par 37.

82 Par 38.

83 Par 39.

84 Par 47.

85 Pars 41-46.

86 Par 46.

87 Par 47.

88 Par 49.1.

by either the Department or by Genorah and was satisfied that the granting of the rights by the Minister to Genorah was regular and that it would be wrong to set it aside.<sup>89</sup> The application was accordingly dismissed by the court.<sup>90</sup>

The Court correctly found that a different outcome to the decision would in any event not have made a difference to the members of the Bengwenyama-ye-Maswati community as such. In the words of Hartzenberg J:

I am far from convinced that the position of individual members will be much different whether the exploitation of the minerals is done by Genorah as supported by Mr. Mphalele or by the first applicant as supported by Mr. Maphanga and Mr. Mhlungu. Individual members are prejudiced by this litigation, in that the actual mining and development are delayed.<sup>91</sup>

## 4 Commentary

The correctness of the decision by Hartzenberg J cannot be faulted. On appeal to the Supreme Court of Appeal in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening)*<sup>92</sup> it was confirmed that the court *a quo* correctly found that Bengwenyama Minerals' application did not constitute a community application for a preferential prospecting right.<sup>93</sup> The facts in this case illustrate the problems in applying section 104 of the MPRDA to a community who wishes to exploit its minerals. This may be due to one or more of the following general reasons, namely:

- (a) The fact that a community may not be sufficiently informed and/or prepared to even bring a community application for a preferential prospecting right to the Minister;
- (b) The non-existence or dysfunctionality of structures to represent the community (both as regards the lodging of an application and the entity to be consulted);
- (c) Time constraints with regard to the creation of effective community structures;
- (d) The representation of the community by individuals or groups who are not appropriately mandated or who are not part of the community;
- (e) The provision of inappropriate legal and other advice to the community;
- (f) The lack of funds on the part of the community;<sup>94</sup> and

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89 Par 48.

90 Par 50.

91 Par 49.

92 [2010] 3 All SA 577 (SCA) 29.

93 Paras 15, 16, 18 and 34.

94 Par 13.

- (g) The likelihood of the formal section 9(1) MPRDA submission of an application for a prospecting right by an individual applicant or applicants, whilst the community is still in the process of formulating its:
- (i) section 104 community application for a preferential prospecting right to prospect or mine, or
  - (ii) section 9(1)(b) community application for a prospecting right.

The compliance by Genorah with the section 16(4)(b) notification and consultation with the land owner or lawful occupier was deemed by the court to have been sufficient. The MPRDA does not contain a minimum standard for sufficient consultation. The question arises whether the method and minimum content of such consultation, and the range of community governance entities to be consulted, should not be determined by means of subordinate legislation by the Minister. This would facilitate the realisation of the objects of the MPRDA, and specifically section 2(d), to:

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.

The route of acquiring a section 104 community preferential prospecting right will be of no avail to a community if another party has submitted and been awarded a prospecting right. The intention of the legislature with regard to the granting of preferential prospecting rights is presumably to give the community preference if it applies before, or at the same time as, another party for the same right to prospect on the same land (provided it fulfils the requirements of the MPRDA).<sup>95</sup> This is unfortunately not stated explicitly in the MPRDA, and should by means of amendment legislation, be clearly indicated.

If the preferential prospecting right has been granted by the Minister, the 'first come, first served principle' contained in section 9(1) may not be applicable if such community subsequently applies for a (follow-up) prospecting right in terms of section 16.<sup>96</sup> In paragraph 10 of the judgement in the *Bengwenyama* case, the court made it clear that section 104 aims to protect a community's right to apply for a prospecting right for a specified period of time. This gives the community the opportunity to "get their ducks in a row". For a community's subsequent application for a prospecting right, the requirements of section 17(1) of the MPRDA must still be met. In particular, the applicant community has to satisfy the Minister that, amongst others, the prospecting will protect the environment and will comply with the provisions of the Mine Health and Safety Act 29 of 1996. Section 17(1) of the MPRDA does not provide for a less onerous standard of prescribed compliance with environmental and health and safety measures in terms of the MPRDA in the case of a

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<sup>95</sup> Dale *et al* par 489.

<sup>96</sup> Dale *et al* par 489.



community being the applicant or when politically convenient.<sup>97</sup> (Although section 106(1) MPRDA empowers the Minister to exempt any organ of state from the provisions of, among others, section 16, compliance with section 17 cannot be exempted; in addition, an environmental management programme must in all cases be submitted by such an exempted organ of state).<sup>98</sup>

## 5 Proposed Amendments to the MPRDA

### 5.1 The Mineral and Petroleum Resources Development Amendment Act 49 of 2008

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (hereafter “the Amendment Act”) contains a number of important amendments as regards issues pertaining to communities and applications for preferential prospecting rights. The commencement date of the Amendment Act has not yet been promulgated.

A “community” is defined in section 1. According to the Amendment Act, a community is defined as:

a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part

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97 See in general Badenhorst and Du Toit “The Mineral Development Draft Bill, 2000 and the Environment” 2002 *Stell LR* 22 48-49. A more recent example of the Department treating a mining company in the words of George Orwell as “more equal than others” can be mentioned in passing. The Minister has in terms of s 106(1) MPRDA exempted the state owned African Exploration Mining Finance Corporation from the provisions of applying for a: (a) prospecting right, (b) right to remove minerals, (c) mining right or (d) mining permit (ss 16, 20, 22 and 27 respectively). (GN 1081 *Government Gazette* 31485 of 2008-10-10). This has led to an outcry by the organised mining industry as being a negation of the principle of equality before the law (Creamer “South Africa’s State mining company gazetting ‘concerning’-Chamber” (<http://www.miningweekly.com/article/south-africas-state-mining-company-gazetting-concerning-chamber-2008-10-16>) (accessed on 2009-11-18)) and withdrawal of the exemption by the department (GN 1081 in GG 34115 of 2011-03-14). The exemption also seems *ultra vires* the powers of the Minister in terms of s 106(1) MPRDA insofar as exemptions of state organs from compliance with application requirements are intended for such organs being involved in building of roads or construction of dams (and purposes related to such activities) but not the mining industry.

98 S 106(2). See the 2008 Amendment Act which, after commencement, will substitute the current s 106(2) MPRDA with the following: “Despite subsection (1), the organ of state so exempted must submit relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998, to obtain an environmental authorisation.”

of the community directly affect (*sic*) by mining on land occupied by such members or part of the community.<sup>99</sup>

The 2008 definition differs from the previous (2002) definition in that the 2002 notion of a “coherent, social group of persons” is replaced in the Amendment Act with the notion of a “group of historically disadvantaged persons”. The last-mentioned concept is therefore linked to the definition of a “historically disadvantaged person” in section 1 of the MPRDA (which has, except for (c) juristic person, not been amended). In order for a group of persons to qualify as a community, the requirements of the section 1 definition of a “historically disadvantaged person” will have to be met. These requirements are:

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

Paragraph (c) of the new definition of “juristic person”, for purposes of “historically disadvantaged person”, states as follows:

'historically disadvantaged persons' - para. (c)

a juristic person, other than an association, which-

- (i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or
- (ii) is a subsidiary, as defined in section 1 (e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i).

In short, only a “group of historically disadvantaged persons” will be able to constitute a “community” for purposes of the (amended) MPRDA. This could mean that juristic persons (like Bengwenyama Minerals) could also qualify as a community if its shareholders and the juristic person are seen as a group. This may result in the exclusion of the true community, or the exclusion of the majority of the members of a community. A further amendment to the legislation should clarify this by determining that a certain minimum percentage of the adult members of a community either support the application, or are members of the juristic person that submits the application.

The proviso to the new definition of a “community” which forms part

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<sup>99</sup> The term “community” is amended and defined in s 1 of the Amendment Act.

of the new (2008) definition,<sup>100</sup> narrows the definition of “community” - for purposes of section 1 (“community”) and section 16(4)(b) for purposes of section 1 (“community”) negotiations or consultations and section 16(4)(b) consultations - to consist only of community members who are occupying land and are directly affected by mining. As a result, the bypassing of such community members during negotiations or consultations, as was the case in the *Bengwenyama* decision, would be more difficult in future. However, it is suggested that the subordinate legislation envisaged in the 2008 version of section 16(4)(b) should provide a clear framework on how this group of community members is defined. In addition, the rights of other community members not directly affected by the proposed mining operation (as well as of those who do not occupy any part of the land concerned, e.g. where a restitution beneficiary community has resolved not to occupy the restored land and has transferred the exclusive occupation and use to a strategic partner in terms of a business arrangement), need to be addressed by means of an appropriate policy and benefit-sharing arrangement.

## 5 2 Other Legislation Relevant to the Issue at Hand

A detailed discussion of the role of existing governance structures and the establishment of other governance structures that represent, and act on behalf of, communities such as the Bengwenyama-ye-Maswati community falls beyond the scope of this article. Some of these structures are provided for in the Communal Properties Associations Act 28 of 1996 (hereafter “CPAA”) and the Traditional Leadership and Governance Framework Act 41 of 2003 (hereafter “TLGFA”).

According to its Long Title, the objective of the CPAA is:

To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.

Section 8(6) determines that upon the registration of a Communal Property Association (hereafter CPA), the CPA is established as a juristic person, which may acquire rights and incur obligations in its own name in accordance with its registered constitution. In addition, it may acquire and alienate immovable property as well as the real rights attached to it.<sup>101</sup>

The TLGFA (commencement date 24 September 2004) provides for the establishment of a traditional council by every traditional community recognised by the Premier concerned. “At least a third of a traditional council must be women.”<sup>102</sup> A traditional council must consist of (a)

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100 “... where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect (*sic*) by mining on land occupied by such members or part of the community”.

101 S 8(6)(C).

102 S 3(2)(B).

traditional leaders and other community members selected by the senior traditional leader in accordance with that community's customs, and (b) other democratically elected members (for a term of five years), who constitute 40% of the members.<sup>103</sup> A traditional council has a number of prescribed functions,<sup>104</sup> amongst others, to perform "the functions conferred by customary law, customs and statutory law consistent with the Constitution."<sup>105</sup> Section 20 determines that national government or a provincial government may, through legislative or other measures, provide a framework determining the role for traditional councils in respect of, amongst others, land administration, economic development and the management of natural resources. In addition, the TLGFA also allocates certain community governance functions to the officially recognised kings, queens, senior traditional leaders, headmen and headwomen of every traditional community.<sup>106</sup>

On account of "traditional leadership" being a concurrent functional domain as determined in Schedule 4 (Part A) of the Constitution, the Limpopo Provincial Legislature enacted the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (date of commencement 1 April 2006). This 2005 Limpopo provincial Act provides that organs of state that have allocated functions in terms of section 20 of the TLGFA, must inform the Premier of such allocation, and that the traditional council in question is accountable in general to the Premier, and specifically to the organ of state concerned in respect of functions allocated by such organ of state.<sup>107</sup> Functions related to the development of traditional communities and the community areas are allocated to officially recognised kings, queens, senior traditional leaders, headmen and headwomen.<sup>108</sup>

### 5 3 Recommendations

The above brief overview of community governance structures established or recognised by law (namely (a) traditional councils; (b) officially recognised kings, queens, senior traditional leaders, headmen and headwomen; and (c) communal property associations (CPAs)), indicates that there is sufficient precedent in South African law to propose that legislation (primary or subordinate) should provide for the incorporation of one or more of these structures in the list of entities to be consulted for purposes of giving effect to the objective and the substantive provisions of the MPRDA.

Alternatively, a right to negotiate could be created by the legislature in a favour of a community in similar vein as the recognition of the right of native title holders in Australia to negotiate with mining companies when

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103 S 3(2)(C).

104 S 4(1).

105 S 4(1)(L).

106 S 11 read with ss 19 and 20.

107 S 18(3).

108 S 18(1).

a right to mine is created or extended by the state government.<sup>109</sup> In Australia, the negotiating parties<sup>110</sup> are obliged to negotiate in good faith<sup>111</sup> and may resort to arbitration after a period of six months.<sup>112</sup>

The 2008 Amendment Act amended section 104(1) by providing that a

community who wishes to obtain the preferential 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 in terms of section 16 or 22 lodge such application to the Minister.<sup>113</sup>

An application for a preferential prospecting right (or a preferential right to mine) will have to take place in accordance with the section 16 (and section 22)- application procedures and requirements for a prospecting right (or mining right). It is proposed that section 104(2) needs to be further amended by requiring, in addition to compliance with the section 104 requirements of a preferential prospecting right, compliance with the requirements for the granting and duration of a prospecting right<sup>114</sup> or a mining right.<sup>115</sup> This proposed amendment should also provide for the imposition of necessary conditions by the Minister in order to promote the rights and interests of the community if a third party lodges an application for a prospecting right or an application for a mining right relates to land that is occupied by a community. These should include conditions relating to the manner and content of community participation.<sup>116</sup> This proposed amendment would make it possible for the Minister to ensure that the rights and interests of the community are appropriately taken into account prior to and during prospecting or mining.

It is not entirely clear how the 2008 amendments will impact on section 9 of the MPRDA insofar as sections 9(1)(b) and 9(2) will only be amended by the substitution of the words “dates” and “date” for “days” and “day” respectively. It would seem that an application for a preferential prospecting right would not triumph over an application to prospect, which had been submitted at an earlier date in accordance with section 9.

It is proposed that a further amendment to section 9 should be enacted to make provision for the Minister to give priority status to a community application for a preferential prospecting right over an

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109 S 26(1A) of the Native Title Act 1993 (Cth); Butt *Land Law* (2010) 1020; Gray et al *Property Law in New South Wales* (2007) 178.

110 The government is also included as a negotiating party.

111 S 31(2). Butt 1025.

112 S 35(1). Butt 1025.

113 S 74 of the Amendment Act; S 16 and 22 respectively deal with applications for prospecting rights mining rights.

114 See s 17.

115 S 74 of the Amendment Act. See s 23.

116 Ss 13(f) and 19(c) of the Amendment Act respectively.

application for a prospecting right submitted on an earlier date. It is further proposed that section 9 should also be further amended that to provide that the Minister must give priority status to a community application for a preferential prospecting right over an application for a prospecting right by a third party submitted on an earlier date. In the words of Dale *et al.*: “It has become a matter of style for the Legislature to leave the legal consequences of section 104 to the reader’s imagination”.<sup>117</sup> As an alternative, consideration should be given to the introduction of a reconceptualised approach to ensure community participation, involvement, co-ownership of the prospecting or mining enterprise and sustainable benefits by the replacement of section 104 MPRDA and the relevant parts of section 9 MPRDA with a new provision. This proposed provision should, among others, compel any applicant (whether linked to the community or a third party) to follow a prescribed procedure as regards community consultation and participation with the view on attempting, in a *bona fide* manner, to establish a joint venture or a form of co-ownership in the enterprise concerned, failing which agreements that would ensure employment opportunities and significant substantial benefits to the community as a whole must be concluded as a precondition of the consideration of a section 16 or 22 MPRDA application. In addition, the divergent approaches regarding entities receiving section 16 and section 104 applications (the Regional Manager and the Minister respectively) should be reconsidered, especially as the 2008 version of section 104(2) imposes a number of stringent conditions on such section 104 applications.

## 6 Concluding Remarks

The relationship and distinction between a prospecting right (granted in terms of section 17 MPRDA) and a preferential prospecting right (in terms of section 104 MPRDA) are correctly analysed by the court in the *Bengwenyama* case. The application of the first come, first served principle in terms of section 9(1)(b) MPRDA to more than one application received on different days is also clearly illustrated in the decision. The 2008 amendments to section 104 will have the effect of reducing the Court’s distinction between an application for a prospecting right and an application for a preferential right to prospect.

At present (prior to the commencement of the 2008 Amendment Act), a community who lives on land underlain by minerals and who wants to apply for a prospecting right, but who may not yet have their “ducks in a row”, may make use of the procedure provided for in section 104 MPRDA in order to obtain a preferential prospecting right from the Minister. Such a preferential prospecting right will create a situation where the applications of other would-be applicants for prospecting rights may not be considered before (a) the community has had an opportunity to arrange for the necessary financial assistance to prospect

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117 *South African Mineral and Petroleum Law* par 489.

for minerals, or (b) until it becomes clear that the community will not or cannot succeed with an application for prospecting rights in terms of section 16 MPRDA.

The facts of *Bengwenyama Minerals* decision, however, illustrate the weakness of the current (2002) section 104 MPRDA mechanism in protecting communities if someone else applies in due course for a prospecting right in terms of section 16 MPRDA. After all, anyone may apply for a prospecting right. One may argue that this is in line with a year zero starting-place for new applicants for mineral resources.

The 2008 amendment to section 104 MPRDA clarifies the application procedure and requirements for a preferential right to prospect or mine. The 2008 new definition of “community” is also an improvement by requiring the community to constitute of a group of historically disadvantaged persons. In addition, the 2008 amendments will make it possible for the Minister to promote the rights and interests of the community during prospecting or mining by imposing conditions when granting a prospecting right or mining right. It is suggested that the Department urgently considers promulgating the commencement of the amended section 104 MPRDA.

It is suggested that during the interim period (prior to the commencement of the 2008 Amendment Act), a community would be better served if it applies from the outset for a prospecting right in terms of section 16 MPRDA but with an indication that it also takes place in terms of section 104 MPRDA. Both the requirements of section 17(1) and 104(2) MPRDA will then have to be met. This is because a community which is overtaken in the rush by an applicant for a prospecting right is reduced by the first come, first served principle to mere a spectator of prospecting or mining activity on their land.

In conclusion, it is clear that even the amended (2008) section 104 MPRDA does not go far enough to ensure full community participation, involvement and sustainable receipt of benefits, and that a number of further amendments are urgently required. Furthermore, it is suggested that the development of a comprehensive mechanism to give substantive effect to the preferential right of the community to prospect or mine in the new rush for mineral resources should be a matter of the highest priority for the Department and Parliament.