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THE *BENGWENYAMA* TRILOGY: CONSTITUTIONAL RIGHTS AND THE FIGHT FOR PROSPECTING ON COMMUNITY LAND

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1 Introduction

Prospecting rights over two farms in the magisterial district of Sekhukhuneland, Limpopo province (Nooitverwacht and Eerstegeluk) constituted the bone of contention between the opposing factions in the recently decided *Bengwenyama* trilogy. Spurred on by the prospect of chrome, copper and nickel ore, platinum group metals and sulphur underlying the land, Bengwenyama Minerals – ostensibly the chosen investment vehicle for the Bengwenyama-ye-Maswazi community – clashed with another empowerment firm, Genorah Resources, in cases heard in the Transvaal Provincial Division,¹ Supreme Court of Appeal² and Constitutional Court³ respectively. The judgment in the Constitutional Court departed significantly from the approach taken in the previous courts, where the engagement with the issues had been overwhelmingly procedural. The Constitutional Court decided the case on both the procedural issues and the substantive grounds of review overwhelmingly in favour of Bengwenyama Minerals, at the same time setting a significant precedent on issues relating to consultation with landowners and preferential treatment for communities, and to a lesser extent on the role of environmental considerations in the granting of prospecting rights. The purpose of this note is to provide a brief outline of the range of issues raised in these three cases and how they were resolved, to relate what happened subsequent to the case, and to evaluate the significance of the precedent in respect of a number of issues that have bedeviled

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1 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008) (henceforth "Bengwenyama Minerals (TPD)").

2 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Supreme Court of Appeal, Case No 71/09, 31 March 2010) (henceforth "Bengwenyama Minerals (SCA)").

3 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) (henceforth "Bengwenyama Minerals (CC)").

implementation of the *Mineral and Petroleum Resources Development Act 28 of 2002* (henceforth *MPRDA*).

2 Context

South Africa has been dubbed the country of "geological superlatives".⁴ At 2009, it had the world's largest reserves of the platinum group metals, gold, chromite, manganese, vanadium and refractory metals (alumina-silicates) as well as large reserves of coal, iron ore, titanium, zirconium, nickel, vermiculite and phosphate, amongst others.⁵ On the basis of this natural resource endowment, the corporate structure in South Africa "has evolved around a Minerals-Energy-Complex (MEC) which by virtue of its weight and linkages plays a determining role throughout the rest of the economy".⁶ This complex has gravitated away from a dependence on gold and diamonds to a range of other raw and processed materials with the growth of coal, ferro-chrome, platinum, vanadium and copper mining.⁷ By late 2010, of the top 20 companies by market capitalisation on the Johannesburg Stock Exchange eight operated in the minerals and energy sector directly, with BHP Billiton and Anglo-American amongst the top five companies controlling over a third of the market capitalisation of R5 772 billion.⁸ The investments of 14 out of the top 20 individuals on the 2010 rich list are held overwhelmingly in mining and financial interests, while 16 out of the 20 top earners in South Africa are directors of companies in mining or finance.⁹ Mining thus remains a significant site of power in contemporary South Africa and thus an area of considerable contestation amongst rival factions for control.

It is well known that, like access to the natural resources of land and water, access to the nation's mineral resources came under the shadow of racial discrimination. This took on a myriad of forms, ranging from corporate ownership, to discriminatory practices in labour, to the unequal distribution of the costs of mining pollution.¹⁰

4 ANC *Maximizing the Developmental Impact* (henceforth *SIMS Policy*) para 11.

5 *SIMS Policy* para 11. See also DMR *South Africa's Mineral Industry 2009/2010*.

6 Southall "South Africa's Fractured Power Elite" 9.

7 Southall "South Africa's Fractured Power Elite" 9.

8 Southall "South Africa's Fractured Power Elite" 10.

9 Southall "South Africa's Fractured Power Elite" 13.

10 See Madihlaba "Fox in the Henhouse".

The *MPRDA* was enacted to provide for both equitable access to and sustainable development of South Africa's mineral resources. Developed under the auspices of the constitutional project to advance equality, dignity and freedom¹¹ its objects include promoting equitable access to the nation's mineral resources, substantially and meaningfully expanding opportunities for historically disadvantaged persons to enter the minerals industry, giving effect to the constitutional environmental right, and ensuring that the holders of mining rights contribute toward the socio-economic development of the areas in which they operate.¹²

One of the sea-changes introduced by the Act was the introduction of a concessionary form of mineral exploitation with the State assuming custodianship of all mineral resources and arrogating to itself the right to grant prospecting and mining rights to suitably-qualified applicants.¹³ Previously, under the *Minerals Act* 50 of 1991 (as well as at earlier points in South Africa's mining history), rights to minerals were granted by the owners of land or, where the owner had severed the mineral rights from the land, by the holder of the mineral rights. A licence from the State to exploit such minerals was then additionally required.¹⁴ As a result of the *MPRDA*'s introduction of the concept of State custodianship of minerals, the rights of landowners over mineral resources "disappeared into thin air"¹⁵ and with it the tacit need for them to consent to prospecting for minerals on their land. As a palliative to the inevitable conflict this would generate between surface rights owners and the holders of prospecting or mining rights,¹⁶ the *MPRDA* introduced the need for

11 *Bengwenyama Minerals* (CC) para 3.

12 Section 2 *Mineral and Petroleum Resources Development Act* 28 of 2002 (henceforth *MPRDA*).

13 Section 3 *MPRDA*.

14 Badenhorst 2011 *TSAR* 328.

15 Per Hartzenberg J in *Agri South Africa v Minister of Minerals and Energy: Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) para 11. This issue has been framed as an "expropriation" of such rights by Agri South Africa and others, for which it is held the State must pay compensation. See also *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171 (GNP) in which the court found that the *MPRDA* did in fact effect an expropriation of such rights. However, when this matter was taken on appeal to the Supreme Court of Appeal (see *Minister of Minerals and Energy v AgriSA* (Centre for Applied Legal Studies as *amicus curiae*) (unreported judgment, Supreme Court of Appeal, Case No 481/11, 31 May 2012)), the court found that there was no ground for a claim of expropriation by private parties.

16 Tensions between the holders of surface rights and the persons who obtain the right to prospect for and win minerals are age-old. As discussed in the *locus classicus* of *Hudson v Mann* 1950 4 SA 485 (T) 488B and E, in South Africa, common law principles on the conflict between surface and subterranean rights holders generally subordinated the surface rights to mineral exploitation. The holder of mineral rights was not obliged to forego ordinary and reasonable enjoyment of those rights merely because his operations and activities were detrimental to the surface rights

consultation with landowners and occupiers as well as interested and affected parties more broadly.¹⁷ These provisions require both the Department of Mineral Resources as well as applicants for prospecting and mining rights to notify and consult with landowners over the proposed applications. Additionally, in line with the broad transformational thrust of the legislation, section 104 recognises that communities in whose name land is registered may wish to prospect or mine on such land. This section allows for the community to be granted a preferent right to prospect for any mineral on such land if upon application to the Minister they can prove: (i) that the right will be used to contribute to the development and social upliftment of the community concerned (as outlined in a development plan); (ii) the envisaged benefits of the project will accrue to the community in question; and (iii) the community has access to technical and financial resources to exercise such a right.¹⁸ A preferent right to prospect or mine, however, may not be granted in respect of areas where such rights have already been granted.¹⁹

As regards the sustainable development of mineral resources, the Act's provisions centre on the preparation of a fairly rigorous environmental management plan or programme (EMP).²⁰

While these objects are laudable enough, recent research points to a variety of problems in implementation. In a review of mining and environment litigation undertaken by the Centre for Environmental Rights in collaboration with Wits Law School, it was found that there are significant issues relating to the process of consultation such as a failure to provide landowners with adequate notice of the pending application, a lack of access to information, and a failure to meet the

holder. He was, however, obliged to exercise his entitlements in a manner least onerous or injurious to the owner of the land. (See Badenhorst 2011 *TSAR* 328 where he discusses these principles in the context of the dispute in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA).) However, the recent Constitutional Court decision in *Maccsand (Pty) Ltd v City of Cape Town* (unreported judgment, Constitutional Court, Case No 103/11, 12 April 2012) potentially reverses the trend of the subordination of surface to subterranean rights, albeit through the need for landowners to consent to the rezoning of their properties to accommodate mining as a land use.

17 See for instance, ss 5(4), 10, 16(4)(b) and 22(4)(b) *MPRDA*.

18 Section 104(1)(2) *MPRDA*.

19 Section 104(4) *MPRDA*.

20 See ss 37-43 *MPRDA*.

"proper" requirements of consultation.²¹ It is also claimed that prescribed processes and content relating to the EMP frequently lack integrity; for instance, the apparent approval of the EMP *after* the grant of the prospecting or mining right.²² A number of issues relating to the granting and resolution of administrative appeals were also raised, such as a failure to suspend the operation whilst the appeal is being decided and a lack of clarity about when the appeal is concluded.²³

With this context in mind, I turn now to an analysis of the facts and issues raised in the *Bengwenyama* trilogy.

3 The facts

The Bengwenyama had ostensibly enjoyed uninterrupted occupation of the farm Nooitverwacht for more than a century. They had been dispossessed of the farm Eerstegeluk in 1945, but had successfully lodged a land claim for its formal restoration.²⁴ Their engagement with Genorah Resources (an "empowerment" company) commenced on 3 February 2006 when a representative of Genorah visited the traditional leader of the community, Kgoshi Nkosi, in order to speak with him about the company's prospecting applications on these two pieces of land. It appears, however, that the community had communicated with the Department of Minerals and Energy (DME)²⁵ about prospecting applications on its land at least 14 months prior to this.²⁶ Whilst it was disputed what exactly transpired at the February meeting between Genorah and Kgoshi Nkosi, it was common cause that the representative of Genorah left a prescribed consultation form. In perfunctory style the form provided blocks to be ticked "yes" or "no" to indicate if there were any objections to Genorah Resources lodging a prospecting application in respect of the two farms. If "yes", a further five lines were provided for the consultee to articulate

21 Centre for Environmental Rights *Mining and Environment Litigation Review* 40.

22 Centre for Environmental Rights *Mining and Environment Litigation Review* 52.

23 Centre for Environmental Rights *Mining and Environment Litigation Review* 33-34.

24 *Bengwenyama Minerals* (CC) para 7.

25 The current ministerial portfolio of mineral resources was previously merged with energy. Under the administration of President Zuma mineral resources and energy were allocated to separate Ministers.

26 *Bengwenyama Minerals* (CC) para 9.

the "full particulars" of their objection. Significantly, the form was never signed by anyone on behalf of the community.²⁷

On 13 February 2006 Kgoshi Nkosi wrote to Genorah indicating, in old-world style, that he would have signed the form but for the fact that the parties did not yet know each other very well. The letter also highlighted that the Bengwenyama-ye-Maswati had themselves applied for prospecting rights on the farms.²⁸

Genorah, however, had already submitted its prospecting application five days prior to this. On 17 February it supplemented its application by indicating that they had introduced themselves to the Kgoshi but had not received a response.²⁹ Having received an indication from the Regional Manager that their application was successful, Genorah proceeded to prepare an EMP for the project and submitted this on 26 April 2006. They did not respond to the Kgoshi's letter and made no further attempt to engage or consult with the community in respect of the farm Nooitverwacht. Significantly, no consultation took place with the community in respect of Eerstegeluk at all.³⁰

The DME reviewed Genorah's prospecting application and on 28 August 2006 the Deputy Director-General approved the grant of the prospecting rights in favour of Genorah. A power of attorney was granted to the Regional Manager: Limpopo Region to sign the prospecting right³¹ and it was duly notarially executed on 12 September 2006. Genorah provided financial guarantees for the environmental rehabilitation of the mining area on 15 September 2006,³² and the EMP was approved, apparently by an acting Regional Manager, on 13 November 2006.³³

The Benwenyama community's own application for prospecting rights over the two farms proceeded in parallel with these developments. After submitting a letter to the DME on 10 May 2006 that outlined their interest, a joint venture agreement was

27 *Bengwenyama Minerals* (CC) para 9.

28 *Bengwenyama Minerals* (CC) para 10.

29 *Bengwenyama Minerals* (CC) para 12.

30 *Bengwenyama Minerals* (CC) paras 11, 13.

31 *Bengwenyama Minerals* (TPD) para 6.8.

32 *Bengwenyama Minerals* (TPD) para 6.12.

33 *Bengwenyama Minerals* (SCA) para 13.

concluded between the Bengwenyama-ye-Maswati Trust and its investment partners (which included a Mr Mhlungu and a Mr Maphanga) during early June. (At the trial before the TPD, however, it was disputed that Mhlungu and Maphanga were members of the Tribal Council or even members of the community).³⁴ Bengwenyama Minerals' application for prospecting rights over the two farms was submitted on 14 July 2006 and accepted some two weeks later. Like Genorah, they were asked to submit an EMP by a particular date. They were informed, however, that there were five earlier applications for the same minerals on the same properties, one of which was the application submitted by Genorah.³⁵ By mid-September 2006 the investment agreement between Bengwenyama Minerals and the community had been finalised and the Kgoshi wrote to the DME stating his concurrence and approval of Bengwenyama Minerals acting as a "black empowered enterprise" on behalf of the community.³⁶ In October he again communicated with the DME, stating his surprise at having learned about the other prospecting applications lodged against the farms and noting his concern that Genorah and the other applicants had failed to meet or consult with the community.³⁷ During this time there was also communication between the DME and Bengwenyama Minerals regarding the furnishing of a R20 000 guarantee to cover the financial costs of environmental rehabilitation, with the requisite guarantee being given on 10 October 2006.³⁸ On 6 December 2006, however, Bengwenyama Minerals' soaring hopes for the exclusive rights to prospect on the community's land came to a dead halt when they were advised that their application for a prospecting right had been unsuccessful.³⁹

Having obtained access to the details of Genorah's application during January 2007, Bengwenyama Minerals' legal representatives wrote to the erstwhile Minister of Minerals and Energy and the Director-General respectively, appealing against the granting of the right. They contended that contrary to section 16(4)(b) of the *MPRDA* Genorah had failed to consult with the owners and occupiers of the farms as represented by the Bengwenyama-ye-Maswati Tribal Council; and that, contrary to

34 *Bengwenyama Minerals* (TPD) para 6.5.

35 *Bengwenyama Minerals* (TPD) para 6.7.

36 *Bengwenyama Minerals* (CC) para 17.

37 *Bengwenyama Minerals* (CC) para 17.

38 *Bengwenyama Minerals* (CC) para 17.

39 *Bengwenyama Minerals* (TPD) para 6.13.

the dictates of section 17(1)(a) of the *MPRDA*, the financial guarantees for environmental rehabilitation had been submitted only after approval of the right.⁴⁰

On 9 March 2007 Bengwenyama Minerals addressed a further letter to the Minister and Director-General claiming, for the first time, that Bengwenyama Minerals' claim to the prospecting right was a *community* application in terms of section 104 of the *MPRDA*. It was consequently argued that the community had a preferential right to prospect on the two farms, and that they should have been afforded the right to make representations and be heard in terms of section 3(2)(b) of the *Promotion of Administrative Justice Act* 3 of 2000 (henceforth the *PAJA*) prior to the right's being granted to Genorah.⁴¹

During March 2007 Bengwenyama Minerals successfully launched interdict proceedings to prevent Genorah from exercising its prospecting rights to the farms pending the final determination of its challenge to the prospecting right. On 14 June, the first time the DME had responded to Bengwenyama Minerals on its appeal, a departmental official advised Bengwenyama Minerals that the matter was *sub iudice* and that in their view it should be decided by means of a review.⁴² The review application was subsequently launched on 22 August 2007.

4 Issues⁴³

4.1 *The procedural issue: the availability of an internal appeal*

The procedural issue that consumed the gaze of the Transvaal Provincial Division and the Supreme Court of Appeal was the availability of an internal appeal to the Minister in terms of section 96 of the *MPRDA*. This in turn was the key determinant to whether Bengwenyama Minerals had brought its review application within or outside the 180-day deadline afforded by section 7(1)(a) of the *PAJA*.

40 *Bengwenyama Minerals* (SCA) para 5.

41 *Bengwenyama Minerals* (SCA) para 6.

42 *Bengwenyama Minerals* (SCA) para 7.

43 For additional discussion of the issues arising from this set of cases see Badenhorst and Olivier 2011 *De Jure*; and Badenhorst, Olivier and Williams 2012 *TSAR*.

The availability of an internal appeal rested upon the prior factual question: who actually decided to grant the prospecting right? The DMR, it appears, has somewhat convoluted administrative procedures in place with decisions and actions being spread between its head office (in Tshwane) and the regional offices where the applications are actually lodged (and where consideration of the EMP also takes place). According to evidence submitted by the DMR, the official who applied his mind to the application was the deputy Director-General, who acted in terms of powers defined in a Ministerial delegation of 12 May 2004.⁴⁴ At the time of deciding to grant the right, the deputy Director-General also signed a power of attorney authorising the Regional Manager to attend to the notarial execution of the prospecting right.⁴⁵ What mattered to the judges of the Transvaal Provincial Division and the Supreme Court of Appeal was not that the prospecting right bore the signature of the Regional Manager, but if he had authority to introduce any "independent decisions" into the grant of the right. The facts supported the conclusion that the Regional Manager was, in the words of Hartzenberg J, a "mere scribe" and the courts accordingly held that the Director-General made the decision.⁴⁶

The two courts, however, differed on the implications of this finding for the question of whether or not a further appeal from this decision was allowed to the Minister. Hartzenberg J decided that when the deputy Director-General took the decision, he did so on behalf of the Minister – the decision was thus that of the Minister,⁴⁷ and the only remedy available to the applicants was a judicial review. As this had been brought out of time (359 days after the decision was taken), the application failed on that ground alone.⁴⁸

This stance follows the approach taken in two decisions of the Free State High Court – *Mofschaap Diamonds (Pty) Ltd v The Minister for Minerals and Energy*⁴⁹ and

44 *Bengwenyama Minerals* (SCA) para 9.

45 *Bengwenyama Minerals* (TPD) para 20.

46 *Bengwenyama Minerals* (TPD) para 23.

47 *Bengwenyama Minerals* (TPD) para 24.

48 *Bengwenyama Minerals* (TPD) para 25.

49 *Mofschaap Diamonds (Pty) Ltd v The Minister for Minerals and Energy* 2007 SAFSHC 51 (14 June 2007) paras 8-16.

*Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy*⁵⁰ - in which denial of the existence of an internal appeal was based on a distinction drawn by Wiechers in his *Administratiefreg*⁵¹ between delegation as "deconcentration" and "decentralisation" respectively. The former implies a form of power transfer where the delegans retains the power to withdraw the delegation at any time and perform the function herself. Based on an analysis of sections 103(4) and (5) of the *MPRDA* as well as the content of the 2004 delegation, the courts in these cases concluded that the delegation of power to the deputy Director-General was a form of deconcentration and no appeal was therefore available.

The Supreme Court of Appeal, relying on Baxter's *Administrative Law*,⁵² came to a different conclusion: that the delegatee acted in his own right and was responsible for the exercise of his power. There had been a "full" delegation of powers to the deputy Director-General.⁵³ Having relied on a strict interpretation of regulation 74(4) of the *MPRDA* regulations, the court concluded that the Minister had not formally condoned the late lodging of the appeal. Because Bengwenyama Minerals had not pursued a condonation request, its rights under section 7 of *PAJA* had to be assessed on the basis that it had abandoned the appeal.⁵⁴ Thus the Supreme Court of Appeal reached the same conclusion as the court *a quo*, albeit by a different route: the appellants were out of time with the 180-day judicial review deadline.⁵⁵

The Constitutional Court approached this issue from a different point of orientation than that adopted by the two prior courts. The starting point for an analysis of delegation as a legal concept, the court held, had to be the demands of the *Constitution* itself.⁵⁶ It was a "practical necessity" of modern government that functions assigned by the *Constitution* and legislation often needed to be performed by administrative officials. While delegation was distinguished from assignment in the delegator retaining final control over the decision taken by the delegatee in her

50 *Global Pact Trading 207 (Pty) Ltd v Minister of Minerals and Energy* 2007 SAFSHC 68 (14 June 2007) paras 4-11.

51 Wiechers *Administratiefreg*.

52 Baxter *Administrative Law*.

53 *Bengwenyama Minerals* (SCA) para 21.

54 *Bengwenyama Minerals* (SCA) para 24.

55 *Bengwenyama Minerals* (SCA) para 27.

56 *Bengwenyama Minerals* (CC) para 52.

name, there was nothing to prevent final control being exercised *by way of* an internal appeal.⁵⁷ Allowing an internal appeal would enhance the autonomy of the administrative process "and provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation."⁵⁸ It would also allow the Minister to develop guidelines for the proper application of the *MPRDA* in future decisions.⁵⁹

Whilst agreeing with the Supreme Court of Appeal on the existence of the internal appeal, the Constitutional Court ignored the emphasis they had placed on the formal condonation of the late lodging of the appeal. Pointing to the fact that section 7(1)(a) of the *PAJA* requires that judicial proceedings must be instituted "without unreasonable delay" and not later than 180 days after internal remedies "have been concluded", the court found that the internal appeal had been concluded in the sense required of this section when the DMR responded to the appellant's appeal on 14 June 2007.⁶⁰ The court found that it could hardly be said that there was any deliberate delay in the steps Bengwenyama Minerals and the Community had taken to correct what they considered to be an unlawful granting of prospecting rights. "The only true culpable delay", the court held, "was that of the Department who took more than four months to respond to the internal appeal."⁶¹ The review was thus brought in time.

4.2 Substantive grounds of review

The three substantive issues on which the Constitutional Court made a definitive interpretation of the *MPRDA* related to consultation requirements, communities' preferential rights, and the place of environmental considerations in the granting of a prospecting right.

57 *Bengwenyama Minerals* (CC) paras 45, 48.

58 *Bengwenyama Minerals* (CC) para 50.

59 *Bengwenyama Minerals* (CC) para 50.

60 *Bengwenyama Minerals* (CC) para 59.

61 *Bengwenyama Minerals* (CC) para 57.

4.2.1 *Compliance with the consultation requirements*

After introducing the idea that the *MPRDA* contains provisions that are more and less mandatory,⁶² Hartzenberg J in the Transvaal Provincial Division posited "awareness" as the test for compliance with the consultation requirements of the *MPRDA*. "If it is clear that there was communication between the applicant and the landowner, and the landowner was aware of the applicant's intention to apply for the rights it is sufficient to constitute compliance with [section 16(4)(b)]."⁶³ Since Genorah had visited the chief on 3 February 2006 and made him aware of the application, there was sufficient compliance despite the fact that he indicated that he did not support the application.⁶⁴

The Constitutional Court, in contrast, came out in support of a far more rigorous "good faith" standard in relation to the consultation requirements. Its deliberations in this regard were framed by a particular view on the nature of prospecting rights as representing "a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen."⁶⁵ The different notice and consultation requirements were indicative of a "serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights". The purpose of these requirements therefore had to be related to the *impact* that the granting of a prospecting right would have on a landowner or lawful occupier.⁶⁶ The court accordingly held that the consultation requirements in the Act served at least two general purposes. The first was to see if some accommodation was possible between the prospecting right applicant and the landowner insofar as interference with the landowner's property was concerned. "Of course the Act does not impose agreement on these issues ..." noted the court, "but that does not mean that consultation under the Act's provisions does not require engaging in good faith to

62 *Bengwenyama Minerals* (TPD) paras 28-30.

63 *Bengwenyama Minerals* (TPD) para 38.

64 *Bengwenyama Minerals* (TPD) para 38.

65 *Bengwenyama Minerals* (CC) para 63.

66 *Bengwenyama Minerals* (CC) paras 63-4. Although the Constitutional Court referred to both landowners and lawful occupiers in these framing remarks, its subsequent holding on the application of the consultation requirements was restricted to the position of landowners (see para 64).

attempt to reach accommodation in that regard.⁶⁷ The second was to provide landowners or occupiers with the necessary information on everything to be done in respect of the prospecting operation, so that they could make an informed decision, for instance, whether to object to the application or take it on appeal or review. It was therefore important to inform the landowner "in sufficient detail" of what the prospecting operation would entail on the land so that the landowner could properly assess what its impact would be.⁶⁸

4.2.2 Communities' preferent right to prospect

Both the Transvaal Provincial Division and the Supreme Court of Appeal found that the application initially lodged by Bengwenyama Minerals was an "out-and-out application" for a prospecting right in terms of section 16, and not an application for a community preferent right to prospect in terms of section 104.⁶⁹ Much significance was therefore attached to the reliance on section 104, which was raised only in Bengwenyama Minerals' supplemental appeal of 9 March 2007, being an "afterthought".

The Constitutional Court, by contrast, placed great store in the Department's awareness of the fact that they were dealing with a "community" on the basis of the nature and content of the communications that took place during 2006 and even prior to that.⁷⁰ The court found that the MPRDA creates a special category of rights for "communities", namely a preferent right to prospect on their own land. As noted above, such a right cannot be granted where a prospecting right has already been issued to another party in respect of communal land. Any application for a prospecting right under section 16 would therefore have the effect of disentitling a community of its right to apply for a preferent prospecting right. Since their right would be materially and adversely affected, before a prospecting right could be granted in these circumstances (presumably when it related to communal land), the community concerned had to (i) be informed by the Department of the application and its consequences, and (ii) be given an opportunity to make representations in

67 *Bengwenyama Minerals* (CC) para 65.

68 *Bengwenyama Minerals* (CC) para 67.

69 *Bengwenyama Minerals* (TPD) para 11; *Bengwenyama Minerals* (SCA) para 18.

70 *Bengwenyama Minerals* (CC) para 74.

regard thereto. In an appropriate case that would include an opportunity to bring a section 104 application prior to a decision being made on a section 16 application submitted by another party.⁷¹ Because the Department "was at all times aware that the community wished to acquire prospecting rights on its own farms", the court held that it had an obligation (founded on section 3 of *PAJA*) to directly inform the community and Bengwenyama Minerals of Genorah's application and its potentially adverse consequences for their own preferential rights, to make representations in relation thereto, and to make a section 104 application before Genorah's application was decided.⁷²

4.2.3 Environmental considerations in the granting of a prospecting right

There were a number of sub-issues related to the broader question of the role environmental considerations play in the granting of a prospecting right. These included the appellants' contentions regarding the late approval of the EMP (i.e. more than 120 days after it had been lodged); Genorah's failure to provide financial provision for the rehabilitation or management of environmental impacts prior to the granting of the prospecting right; and that the EMP had been approved by an acting Regional Manager (i.e. not by the official who had granted the prospecting right). Hartzenberg J in the Transvaal Provincial Division remarked *obiter* that *MPRDA* provisions in respect of environmental requirements may be "less mandatory" so that certain deviations from what the Act requires may be acceptable. It all depended on the construction of the particular provision.⁷³ The Supreme Court of Appeal almost completely sidestepped deciding these issues, confining itself to the observation that they failed to see how the environmental sub-issues could affect the validity of the right or its coming into effect, whilst the decision to approve the EMP had not been set aside (thus assuming that the approval of the EMP was a separate administrative action).⁷⁴

In the case before the Constitutional Court, counsel for Genorah argued that environmental satisfaction was not a jurisdictional fact for the granting of a

71 *Bengwenyama Minerals* (CC) para 73.

72 *Bengwenyama Minerals* (CC) paras 71, 74.

73 *Bengwenyama Minerals* (TPD) para 30.

74 *Bengwenyama Minerals* (SCA) para 31.

prospecting right based on the wording of section 17(5) of the Act (which provides that the granting of a prospecting right in terms of section 17(1) "becomes effective" on the date on which the EMP is approved). The Constitutional Court rejected this argument, pointing to a distinction between the *approval* of the prospecting right and its *implementation*.⁷⁵ While they were clear in stating that 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"⁷⁶ – thus affirming that environmental considerations *are* part of the jurisdictional facts relating to the grant of a prospecting right – they were largely silent on what this meant, practically, for the approval of the EMP and financial provision for the rehabilitation or management of negative environmental impacts (though they seemed to disapprove of the fact, for instance, that the EMP was "approved" by an acting Regional Manager two months after the granting of the right).⁷⁷

5 Developments subsequent to the judgment⁷⁸

The judgment setting aside the right to Genorah Resources was handed down on 30 November 2010. Within hours of the judgment being given, Bengwenyama Minerals (as the investment vehicle for the Bengwenyama Tribal Council) submitted a new application for a preferential prospecting right at the DMR's offices in Polokwane. The DMR subsequently informed Bengwenyama Minerals that it was prepared to afford the community a hearing on 24 December 2010. When the applicant and the community rightfully protested about the inconvenience of this date, they then suggested 2 January 2011! The hearing was eventually rescheduled to 19 January 2011. The community, as represented by Bengwenyama Minerals and members of the Tribal Council, presented their case to a panel of six, which included the Regional Manager. They were aware that there were competing applications for prospecting rights to both Nooitverwacht and Eerstegeluk and asked for copies of these applications but were refused access. After putting in a request for access to

75 *Bengwenyama Minerals* (CC) para 77.

76 *Bengwenyama Minerals* (CC) para 77.

77 *Bengwenyama Minerals* (CC) para 76.

78 The information in this section is drawn from an interview with Michael Nahon, the chief executive officer of Bengwenyama Minerals, conducted on 11 May 2012.

information in terms of the *Promotion of Access to Information Act* 2 of 2000, they did receive portions of each of the competing applications.

Almost six months passed before the Community learnt that their application had once again been refused, this time because they did not own the land in question. The Bengwenyama dispute this: their land claim for Eerstegeluk, of which they were dispossessed a number of times, was lodged some thirteen years ago and is still being processed, whilst they claim to have been in occupation of Nooitverwacht for more than one hundred years. The DMR nevertheless re-awarded the prospecting rights to Eerstegeluk to Genorah Resources and the Pedi-aligned Roka-Pashe Community; and awarded the prospecting right to Nooitverwacht to two gentlemen who claim to represent the Bengwenyama Community but whose authenticity the Bengwenyama Tribal Council questions. In 2011 the Bengwenyama community therefore reinstated review proceedings to have these prospecting rights set aside, and the matter is still pending.

6 Discussion

The Constitutional Court's judgment in this trilogy provides welcome clarity on some of the interpretive uncertainties that have bedeviled implementation of the *MPRDA*. These include the existence of an internal appeal, the nature of consultation, the role of environmental considerations in the granting of prospecting rights, and the procedural obligations of the DMR in relation to the community preferential right to prospect or mine. These are discussed under the headings below.

6.1 *The existence of an internal appeal*

It is now clear that an internal appeal against the granting of a prospecting or mining right exists under the *MPRDA*. In the ordinary course of events, therefore, it would be necessary for any party to submit an appeal against the granting of such a right prior to instituting judicial review proceedings. The court's finding that the appeal was "concluded" when the Minister responded to the applicants on 14 June 2007 is also helpful as it shows that courts are prepared to recognise the closure of the process

even where there has not been official closure in the sense of the appeal having been decided. Whilst this does much to dispel some of the uncertainty that previously prevailed, it does not address the concern that where the object of the appeal is the protection of the environmental resource base this may be undermined by the fact that no time limits are set on the Minister deciding the appeal and that it is in her discretion to suspend the operation of the prospecting or mining right while the appeal is being granted. In practice the Minister almost never grants a request to suspend the relevant right⁷⁹ and the appeal takes months – or even years – to finalise, during which time the environmental resource base is frequently degraded. For example, in the Xolobeni case on the Wild Coast the community's appeal against the granting of a mining right in respect of titanium-rich sands was decided nearly *three years* after it was initially submitted, and then only after the community had lodged a complaint with the Public Protector.⁸⁰

6.2 *The duty to consult*

The Constitutional Court's affirmation of a "good faith" standard for public participation is significant. The overwhelming impression of the public participation process followed by Genorah in this case is that it was a perfunctory formality. A good faith standard should require that mining applicants invest more time and money in the public participation process. Forms of engagement where the consultants employed by mining companies simply leave a form for the landowner to complete or where there is no evidence of an attempt to engage with the concerns landowners raise should no longer be acceptable. Where the DMR nevertheless grants prospecting and mining rights applications in these circumstances, they are now vulnerable to being set aside on review on the basis of their shortfall from the good faith standard.

It is also significant that the court emphasised the need for providing "necessary information" concerning the application, though it seems that the group who will benefit from these interpretations is restricted to landowners. The Constitutional Court was somewhat parsimonious in its identification of the "necessary information"

79 Centre for Environmental Rights *Mining and Environment Litigation Review* 34.

80 Centre for Environmental Rights *Mining and Environment Litigation Review* 33.

that needs to be made available and it would have been better if they had outlined this in greater detail. Together with a prospecting rights application, for instance, an applicant must submit a prospecting and works programme that sets out the nature of the proposed operation, and yet this document is routinely withheld from the parties with whom applicants interact for the purpose of the consultation process.⁸¹ The Constitutional Court's identification of an "outcomes-based" standard (all of the information necessary for the landowner to assess the *impact* of the proposed operation), however, is a broad one that should include, at the very least, the prospecting and works programme.

The "lopsidedness"⁸² of a system where landowner consent is not required in order for prospecting or mining to commence on land was not interrogated in this case. Depending on the outcome of the *Agri South Africa* case currently before the Supreme Court of Appeal,⁸³ where the court will decide whether the *MPRDA* expropriated landowners' mineral rights and whether compensation is accordingly payable, the constitutionality of this model in terms of the right to a clean environment and the right to property may come under scrutiny in future.

6.3 The role of environmental considerations

The court's affirmation that environmental considerations are part of the jurisdictional facts for the granting of a prospecting right is important, notwithstanding that this should have been abundantly clear from the provisions of the *MPRDA*, which states that the Minister may grant a prospecting right only if she is satisfied that the prospecting will not result in "unacceptable pollution, ecological degradation or damage to the environment".⁸⁴ However, while this case highlights some of the curiosities of the DMR's practices relating to the approval of the EMP (the split between the approval of the EMP at regional level and the granting of the right at a central level, for instance, or the fact that the EMP is routinely "approved" after the granting of the right), it does not go far enough in examining them and deciding if they conform to constitutional and statutory standards regarding the integration of

81 Centre for Environmental Rights *Mining and Environment Litigation Review* 43.

82 Badenhorst 2011 *TSAR* 328.

83 See fn 15.

84 Section 17(1)(c) *MPRDA*.

environmental considerations in administrative decision-making. The question whether the approval of the EMP constitutes a separate administrative action or is rather part of the administrative action of granting the prospecting right also remains an open one.⁸⁵

6.4 *Procedural implications of the preferent right to prospect or mine*

Though theoretically in line with the dictates of administrative justice that have ensued with the enactment of the *PAJA*, the obligation placed on the DMR to both notify the relevant "community" of prospecting rights applications in respect of their land and to allow the community to make representations in relation thereto may be an onerous one. This is related to what is perhaps one of the central flaws in the Constitutional Court's reasoning, which is its reification of the notion of the Bengwenyama "community" as a homogenous, unified entity. Anthropological research has on the contrary highlighted the fracturing effect resource endowment frequently has on communities and the strategic positions they adopt in relation to both the state and mining companies in the process of the exploitation of the resource.⁸⁶

Rather than alleviating the administrative difficulties involved in determining *who* within a particular community should be afforded a hearing, the amended definition of "community", as set out in the *Mineral and Petroleum Resources Development Amendment Act 49 of 2008* (which has not yet entered into effect) may in fact make this worse. In terms of the current definition a "community" 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".⁸⁷ The amended definition posits "community" 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,

85 This issue is discussed further in Humby (forthcoming) *SALJ*.

86 See the review article by Ballard and Banks 2003 *Annual Review of Anthropology*.

87 Section 1 *MPRDA*.

the community shall include the members, or part of the community directly affected by mining on land occupied by such members or part of the community.

Although the amended definition seems to recognise the possibility of a non-homogenous community, it still links the definition of community to the chaotic state of communal land tenure in South African law.⁸⁸

It is also problematic that section 104 of the *MPRDA* states, as a criterion of eligibility for the lodging of a preferent right, that the land in question "is registered or to be registered in the name of the community concerned." The reference to possible future registration ("to be registered") rightly takes into account the possibility of a community having a land claim to a particular piece of land, but this in turn is then linked to the problems that arise from the glacial pace at which land claims are seemingly processed. It seems entirely unacceptable that the Bengwenyama community's land claim to Eerstegeluk, for example, is still unprocessed *thirteen years* down the line and that their lack of ownership was then used by the DMR as the primary reason for refusing their second application for a preferent right to prospect.

7 Conclusion

The Constitutional Court's decision in the *Bengwenyama* matter is ostensibly a welcome one for clarifying the existence of an internal appeal and affirming the role of environmental considerations in the granting of prospecting rights. However, its deliberations on the duty to consult and particularly the procedural implications of the community preferent right to prospect do not go far enough into the dynamics underlying the implementation of the law or address the problematic relationship between the *MPRDA*, the law relating to communal land tenure, and the processing of land claims.

88 Post the Constitutional Court's decision in *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), in which the court held that the *Communal Land Rights Act* 11 of 2004 was unconstitutional in its entirety. As a result of being tagged as an s 75 rather than an s 76 Bill, the policy direction on communal land is not yet clear.

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List of abbreviations

ANC	African National Congress
CC	Constitutional Court
DME	Department of Minerals and Energy
DMR	Department of Mineral Resources
EMP	Environmental Management Plan/Programme
MEC	Minerals Energy Complex
MPRDA	Mineral and Petroleum Resources Development Act
PAJA	Promotion of Administrative Justice Act
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
TPD	Transvaal Provincial Division

TSAR

Tydskrif vir die Suid-Afrikaanse Reg

THE *BENGWENYAMA* TRILOGY: CONSTITUTIONAL RIGHTS AND THE FIGHT FOR PROSPECTING ON COMMUNITY LAND

T Humby*

SUMMARY

Although developments subsequent to the judgment have undermined the value of the decision for the community involved, the Constitutional Court's judgment in the *Bengwenyama* matter provides a welcome precedent on the provisions of the *Mineral and Petroleum Resources Development Act* 28 of 2002 that deal with the existence of an internal appeal, the nature of consultation with interested and affected parties, the role of environmental considerations in the granting of prospecting rights, and the procedural obligations of the DMR in relation to the community preferential right to prospect or mine. However, its deliberations on the duty to consult and particularly the procedural implications of the community preferential right to prospect do not go far enough into the dynamics underlying the implementation of the law, or tackle the problematic linkages between the *MPRDA*, the law relating to communal land tenure, and the processing of land claims.

KEYWORDS: *Mineral and Petroleum Resources Development Act*; *Bengwenyama*; mining and communities; preferential prospecting right

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