

BENGWENYAMA MINERALS (PTY) LTD v GENORAH RESOURCES (PTY) LTD (FORMERLY TROPICAL PARADISE 427 (PTY) LTD) AND OTHERS (BENGWENYAMA-YE-MASWAZI ROYAL COUNCIL INTERVENING) [2010] 3 ALL SA 577 (SCA)

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| <p>Importance</p> | <p>The primary importance of this case lies in the court’s affirmation that s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 does indeed provide for a process of internal appeal. It also strongly suggested that exhausting this internal remedy constituted a necessary precondition for bringing a review application, as well as for relying on the 180-day period for bringing a review application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The judgment is disappointing for not deeming it necessary to consider the points raised by the appellants regarding notice of the application and proper consultation (fortunately these were subsequently dealt with in the Constitutional Court decision in this matter – see related fact sheet). The obiter remark made by the court regarding the relationship between the Environmental Management Plan (EMP) and financial provision for environmental rehabilitation is interesting because it suggests that the criterion articulated in s 17(1)(a) of the MPRDA (that the Minister must grant the right if the applicant has ‘access to financial resources ... to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme’) excludes consideration of the financial provision for rehabilitation of environmental impacts. On appeal, however, the Constitutional Court confirmed that environmental impacts are part of the jurisdictional facts that must be considered before granting a prospecting right.</p> |
| <p>Parties</p> | <p>First appellant: Bengwenyama Minerals Second appellant: A representative of the Bengwenyama community First respondent: Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) Second respondent: Minister of Minerals and Energy Third respondent: Director-General, DMR (DG) Fourth respondent: Regional Manager, DMR Fifth respondent: Deputy Director-General, DMR (Deputy DG)</p> |
| <p>Facts</p> | <p>The dispute essentially revolved around competing applications for a prospecting right in respect of two farms situated in the magisterial district of Sekhukhuneland in Limpopo Province. Genorah Resources (a black empowerment company) had lodged an application for prospecting on these (and three other farms) with the Regional Manager in February 2006. Bengwenyama Minerals lodged its application for a prospecting right in respect of the two farms in July 2006 and was called upon to submit its EMP by no later than September 2006. In August 2006, however, the Deputy DG (acting under delegated authority from the Minister) approved Genorah Resources’ application. On 6 December 2006 the Regional Manager wrote to Bengwenyama Minerals to notify it that its application had been refused. On 13 February 2007 Bengwenyama Minerals wrote to the Minister, requesting her to cancel Genorah Resources’ prospecting right in terms of s 47 of the MPRDA, as well as to the Deputy DG appealing against the grant of the prospecting right in terms of s 96.</p> |

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| | <p>The main grounds of appeal were as follows:</p> <ul style="list-style-type: none"> • Non-compliance with s 16(4), MPRDA: The appellants alleged that Genorah Resources had failed to consult with the owners/occupants of the two farms; i.e. with the Bengwenyama community • Non-compliance with s 17(1)(a), MPRDA: The appellants alleged that the Deputy DG had failed to apply his mind to the criteria for the granting of a prospecting right, viz. that the applicant had access to financial resources <i>prior</i> to the approval of the prospecting right: While Genorah Resources was granted the prospecting right on 28 August 2006, it only furnished a financial guarantee for rehabilitation or management of negative environmental impacts on 15 September 2006. <p>Subsequent to this, Bengwenyama Minerals addressed further letters to the DMR alleging for the first time that its prospecting application was a community application as contemplated in s 104 of the MPRDA, which should therefore have enjoyed preferential status in the consideration of the competing applications.</p> <p>A telephonic conversation between a director of Bengwenyama Minerals and a DMR official ensued, followed by a letter from the DMR which indicated that the Minister would not be in a position to decide the appeal because the matter was <i>sub iudice</i> and that it was the view of the Department that the matter ‘should be decided by means of a review’. On the basis of this letter the appellants concluded that they would obtain no relief from the administrative processes which they had initiated, and proceeded to lodge an application for review.</p> <p>The matter was heard in the High Court and the appellants lost on all points they raised. They subsequently appealed to the SCA.</p> |
| <p>Relief Sought</p> | <p>Review and setting aside of the prospecting right granted to Genorah Resources in respect of the two farms which were in contention; direction to DG or Deputy DG to issue the prospecting right to Bengwenyama Minerals; or direction to the DG or Deputy DG to reconsider Bengwenyama Minerals’ application as a community application.</p> |
| <p>Legal Issues & Judgment</p> | <p>The appellants had raised a number of issues on appeal which are of significant interest to this review of mining litigation and the environment. They contended that the Regional Manager had in effect granted the prospecting right and was not authorized to do so; that the Department had failed to give adequate notice of Genorah’s application for a prospecting right, as required in terms of s 10 of the MPRDA; and that Genorah had failed to consult with the community in accordance with the provisions of s 16(4) of the MPRDA. In the view the court took of the matter, however, it decided that consideration of these issues was ‘unnecessary’ (para 16). The legal issues considered by the court were therefore as follows:</p> <p>Issue 1: Was the prospecting right invalid on the basis that the EMP for the right was approved more than 180 days after its lodgement?</p> <p>Judgment: The court found it unnecessary to express any opinion on the correctness or otherwise of this submission (para 14). However, the judge made an interesting obiter remark about the relationship</p> |

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| | <p>between the approval of the EMP and the grant of the prospecting right (see below).</p> |
| | <p>Issue 2: Did the appellants' application constitute a 'community application as contemplated in s 104 of the MPRDA? Judgment: This issue was largely decided with reference to the information Bengwenyama Minerals had provided in its application for the prospecting right. The court found that up until the letter written on 9 March 2007, there was nothing in the application or in the first appellant's correspondence with the DMR that would have alerted the latter to the application being one under s 104 of the MPRDA. The court accordingly found that the High Court was correct in finding that the application was not a community application (para 18).</p> |
| | <p>Issue 3: Was the review application brought out of time? And were internal remedies exhausted? Specifically, was an appeal procedure available to the appellants in terms of s 96 of the MPRDA? Judgment: According to PAJA where any internal remedies exist they must, except in exceptional circumstances, first be exhausted before review proceedings are instituted (para 19). The court agreed with the court <i>a quo</i> that s 47 of the MPRDA (which deals with the Minister's right to suspend or cancel rights) does not provide for an internal process whereby affected third parties can have administrative decisions reviewed (para 20). In regard to s 96, however, the High Court had held that it does <i>not</i> provide for an internal remedy, because when the Deputy DG granted the prospecting right to Genorah Resources, he exercised a power delegated to him by the Minister, accordingly his decision was the decision of the Minister. The High Court therefore concluded that the only remedy available to Bengwenyama Minerals was an application for a review of the decision, but held that this was brought well out of time of the 180 days provided for by s 7(1)(b) of PAJA. The Supreme Court of Appeal disagreed with the High Court's finding, instead holding that a 'delegatee or subdelegatee who acts in his or her own right is responsible for his or her exercise of the power'. A full delegation of powers was made to the Deputy DG by the Minister in terms of a delegation authorized on 12 May 2004 (para 21). As such s 96 <i>did</i> provide for an internal appeal since in deciding to grant the prospecting right the Deputy DG acted in his own right and did not represent the Minister (para 21). The court subsequently found, however, that Bengwenyama Minerals had failed to seek condonation of its late submission of the internal appeal and that no condonation had in fact been granted. Its rights under s 7 of the PAJA had to therefore be assessed on the basis that the internal appeal was abandoned. The court assumed (without deciding) that the appellants could still rely on s 7 of PAJA, but then found that the review application – launched on 22 August 2007 – was well out of the 180 days allowed for the bringing of the review by PAJA. The appellants had failed to formally apply for an extension of the 180-day period. The appellants accordingly failed to place any facts before the court that would assist it to properly consider whether the interests of justice required that the period be extended (para 27).</p> |

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| Outcome | The appeal was dismissed with costs. |
| Obiter | On the relationship between the late approval of the EMP and the validity of the grant of a prospecting right, the court said: 'I fail to see the basis upon which the alleged late approval of the EMP could affect the validity of the grant, or coming into effect of the prospecting right, whilst the decision to approve the EMP has not been set aside. The same applies to a related issue that financial provision for the rehabilitation or management of environmental impacts has allegedly not been provided before the approval of the EMP as contemplated in s 41(1) of the Act' (para 14). |