THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case number: 71/09

In the matter between:

BENGWENYAMA MINERALS (PTY) LTD	**FIRST APPELLANT**
BENGWENYAMA-YE-MASWAZI TRIBAL COUNCIL	**SECOND APPELLANT**
THE TRUSTEES FOR THE TIME BEING OF THE BENGWENYAMA-YE-MASWAZI TRUST	**THIRD TO FOURTEENTH APPELLANTS**

and

GENORAH RESOURCES (PTY) LTD (formerly TROPICAL PARADISE 427 (PTY) LTD)	**FIRST RESPONDENT**
THE MINISTER OF MINERALS AND ENERGY	**SECOND RESPONDENT**
THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERALS AND ENERGY	**THIRD RESPONDENT**
THE REGIONAL MANAGER, LIMPOPO REGION, POLOKWANE OF THE DEPARTMENT OF MINERALS AND ENERGY	**FOURTH RESPONDENT**
THE DEPUTY DIRECTOR-GENERAL OF THE DEPARTMENT OF MINERALS AND ENERGY	**FIFTH RESPONDENT**
BENGWENYAMA-YE-MASWAZI ROYAL COUNCIL	**INTERVENING PARTY**

Neutral citation: ***Bengwenyama Minerals v Genorah Resources*** (71/09) [2010] ZASCA 50 (31 March 2010)

CORAM: MPATI P, HEHER, MALAN, SHONGWE and TSHIQI JJA
HEARD: **16 FEBRUARY 2010**
DELIVERED:… **31 MARCH 2010**
SUMMARY: Review – Application for a prospecting right submitted by company on its own behalf in terms of s 16 of Act 28 of 2002 not constituting community application envisaged in s 104. Where condonation not obtained for late appeal in

terms of s 96, party seeking review of decision of functionary taken to have abandoned internal remedy. Review thus subject to 180-day period provided in s 7(1) of Promotion of Administrative Justice Act 3 of 2000.

ORDER

On appeal from: North Gauteng High Court, Pretoria,

(Hartzenberg J sitting as court of first instance).

The appeal is dismissed and the first appellant is ordered to pay the respondents' costs.

JUDGMENT

MPATI P (Malan, Shongwe and Tshiqi JJA concurring):

[1] This appeal is against the refusal by the North Gauteng High Court (Hartzenberg J) to review and set aside the grant of a prospecting right to the first respondent in terms of s 17 of the Mineral and Petroleum Resources Development Act ('the Act').[1] The Act makes provision for the State, as the custodian of the nation's mineral and petroleum resources, to grant, issue or refuse, inter alia, prospecting rights, mining rights and mining permits to persons or entities who apply for them (s 2(a)). Section 9 empowers a Regional Manager,[2] who receives applications for these rights, to deal with them in order of receipt if received on different dates (s 9(1)(b)). For convenience I shall refer to the first respondent as 'Genorah', the second respondent as 'the Minister', the third respondent as 'the Director-General', the fourth respondent as 'the Regional Manager' and the fifth respondent as 'the Deputy Director-General'.

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[1] 28 of 2002.

[2] A regional manager is defined in the Act as 'the officer designated by the Director-General [of the Department of Mineral and Energy] in terms of section 8 as a regional manager for a specified area'. Section 8 provides that the Director-General 'must . . . designate an officer in the service of the Department as regional manager for each region contemplated in s 7 who must perform the functions delegated or assigned to him or her in terms of this Act or any other law'.

[2] On 8 February 2006 Genorah lodged an application for a prospecting right in respect of five farms, two of which are known as Eerstegeluk 322 KT ('Eerstegeluk') and Nooitverwacht 324 KT ('Nooitverwacht'), situated in the magisterial District of Sekhukhuneland in Limpopo Province. By letter dated 20 February 2006 the Regional Manager accepted Genorah's application, acknowledging that it complied with the provisions of s 16(2) of the Act,[3] and calling upon Genorah to submit copies of its environmental management plan[4] not later than 21 April 2006. Genorah submitted its environmental management plan ('EMP') on 21 April 2006.

[3] On 14 July 2006 the first appellant also lodged its application for a prospecting right which related only to the farms Eerstegeluk and Nooitverwacht. The Regional Manager notified his acceptance of the application by letter dated 24 July 2006, addressed to the first appellant. The first appellant was also called upon to submit its EMP by not later than 26 September 2006. On 28 August 2006 the Deputy Director-General, by virtue of the authority delegated to him by the Minister, approved Genorah's application and granted the prospecting right in respect of all the farms, including Eerstegeluk and Nooitverwacht. On 8 September 2006 the Regional Manager notified Genorah, in writing, of the grant and also informed it that the prospecting right had to be notarially executed within 60 days from the date of

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[3] Section 16 reads:
'(1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application-
(*a*) at the office of the Regional Manager in whose region the land is situated;
(*b*) in the prescribed manner; and
(*c*) together with the prescribed non-refundable application fee.
(2) The Regional Manager must accept an application for a prospecting right if-
(*a*) the requirements contemplated in subsection (1) are met; and
(*b*) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.
(3) . . ..
(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-
(*a*) to submit an environmental management plan; and
(*b*) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice.
(5) Upon receipt of the information referred to in subsection (4)(a) and (b), the Regional Manager must forward the application to the Minister for consideration.
(6) . . ..'

[4] An environmental management plan is a plan to manage and rehabilitate the environmental impact as a result of prospecting, etc.

the written notification. The notarial execution took place on 12 September 2006. It is recorded under the definition section of the document evidencing the execution of the prospecting right ('the prospecting agreement'), that '"Effective date" means 12 September in the year 2006 (being the date on which the Environmental Management Plan is approved in terms of s 39(4) of the Act)'.[5]

[4] By letter dated 6 December 2006 the Regional Manager wrote to the first appellant notifying it that its application had been refused. The reasons for the refusal were recorded as follows:

'Prospecting right has been granted to other entities that applied before your application for the same minerals on the same properties.'

However, the first appellant's legal representatives addressed a letter to the Minister dated 13 February 2007, requesting her to suspend or cancel Genorah's prospecting right in terms of s 47of the Act.[6] Paragraph 12 of the letter reads:

'. . .

12.2 Our client in the circumstances calls upon the Honourable Minister either to cancel or suspend Genorah's prospecting right in respect of Eerstegeluk en Nooitverwacht since –

12.2.1 Genorah . . . submitted inaccurate, incorrect and misleading information in support of its application when purporting to comply with s 16(4) of the Act;

12.2.2 The provisions of s 16(4) of the Act were not, in fact, complied with; and

12.2.3 The provisions of s 17(1)(a) of the Act were not, in fact, complied with.'[7]

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[5] Section 17(5) of the Act reads:
'(5) The granting of a prospecting right . . . becomes effective on the date on which the environmental management programme is approved in terms of section 39.'

[6] Section 47(1) provides that the Minister may cancel or suspend a prospecting right if the holder
(a) is conducting any prospecting operation in contravention of the Act;
(b) breaches any material term or conditions of such right;
(c) is contravening the approved environmental management programme, or
(d) has submitted inaccurate, incorrect of misleading information in connection with any matter required to be submitted under the Act.

[7] See fn 3 for the provisions of s 16(4). Section 17(1)(a) provides that the Minister 'must grant a prospecting right if the applicant has access to financial resources and has the technical

[5] On the same date the first appellant's legal representatives also addressed a letter to the Director-General, purportedly appealing on behalf of the first appellant, in terms of s 96 of the Act,[8] against the decision of the Deputy Director-General to grant the prospecting right to Genorah. The main grounds of appeal were alleged non-compliance with the provisions of ss 16(4) and 17(1)(a). The alleged non-compliance with the provisions of s 16(4) was said to be Genorah's failure to consult with the owners or occupants of the farms Eerstegeluk and Nooitverwacht, viz the Bengwenyama community, as represented by the second appellant. As to the alleged non-compliance with the provisions of s 17(1)(a), it was averred that the grant of the prospecting right to Genorah was subject, inter alia, to a requirement that Genorah furnish a guarantee for the rehabilitation or management of negative environmental impacts on the land concerned prior to the approval of its EMP and the grant of the prospecting right. It was alleged that the required guarantee was only submitted on 'approximately' 15 September 2006, while the prospecting right was granted on 28 August 2006. It was thus contended that this was in conflict with the provisions of s 17(1)(a), which require the Minister to be satisfied that the applicant has access to financial resources prior to the approval of any prospecting right.

[6] On 9 March 2007 the first appellant's legal representatives addressed further letters to the Minister and the Director-General, supplementing the

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ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme'. There are other requirements under s 17(1) for the granting of the right, which are not strictly relevant for present purposes.

[8] The section provides:

'96 Internal appeal process and access to courts

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

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

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

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

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

(4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section.'

grounds upon which the first appellant relied in the letters dated 13 February 2007 for its request to have the decision of Deputy Director-General to grant the prospecting right to Genorah cancelled or suspended. The additional ground was a claim, proffered for the first time, that the first appellant's application for a prospecting right in respect of the farms Eerstegeluk and Nooitverwacht was, in fact, one in terms of s 104 of the Act,[9] that is, it was a community application lodged by the Bengwenyama-ye-Maswazi community ('Bengwenyama community'). It was accordingly alleged that the Bengwenyama community had a preferent claim and that the community would, but for the failure by the Department of Minerals and Energy ('Department') to comply with the provisions of s 104, 'in all likelihood have been granted the prospecting right that in fact went to Genorah'. It was further alleged that the Bengwenyama community 'had an interest in the award of the permit and was entitled to make representations to, and be heard by, [the Department] . . . under section 3(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) prior to the grant of that permit'.

[7] It appears that a director of the first appellant, Mr Michael Craig Nahon, subsequently had a telephone conversation with a Mr Alberts, an official in the Department, which was followed by a letter dated 14 June 2007, addressed to Mr Nahon. The first two paragraphs of the letter read as follows:

'The recent telephone conversations between your Mr Nahon and Mr Alberts of this Department have reference.

You are hereby advised that since this matter is now *sub-judice*, the Minister will not be in a position to decide on your appeal in this matter. The fact that a right has already been granted to Genorah also poses legal challenge in deciding on the

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[9] The relevant parts of the section reads:

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

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

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

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

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

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

appeal, and it is therefore the view of this Department that this matter should be decided by means of a review.

. . . .'

In the appellants' founding affidavit, deposed to by Mr Zet Timothy Maphanga, a director of the first appellant, it is averred that the letter indicates 'that no relief against the Genorah prospecting right is going to be granted by the second to fourth respondents, whether in terms of sections 47 or 96 of the Act, or at all.'

[8] The appellants accordingly instituted motion proceedings, in terms of rule 53 of the Uniform Rules of Court, seeking an order:

'1. Reviewing and setting aside the decision to award and the award of a prospecting right to the first respondent . . . in respect of, inter alia, the farms Nooitverwacht 324 KT and Eerstegeluk 322 KT . . . .

2. Directing the second respondent, *alternatively* the third respondent, further *alternatively* the fifth respondent, to award a prospecting right to the first applicant in respect of, inter alia, the farms Nooitverwacht 324 KT and Eerstegeluk 322 KT . . . on such terms and conditions as may reasonably be imposed upon the first applicant in terms of the provisions of section 17 of the Act, as read with section 104 thereof.

3. *Alternatively* to prayer 2 above, directing the second respondent, *alternatively* the third respondent, further *alternatively* the fifth respondent, to adjudicate the application for a prospecting right made by the first applicant on 14 July 2006, as an application in terms of section 104 of the Act.'[10]

The court a quo dismissed the application with costs. This appeal is with its leave.

[9] The issues raised and argued in this court were all comprehensively dealt with by the court a quo. In listing them, I do so not necessarily in the sequence in which they were argued before us. The first issue was whether the grant of the prospecting right to Genorah was ultra vires. Section 103(1) of the Act empowers the Minister to delegate in writing 'any power conferred on him or her by or under this Act, . . . and may assign any duty so imposed upon

[10] In the appellants' Notice of Appeal paragraph 2 of the order sought in the notice of motion is amended in that the word 'preferent' is inserted before the words 'prospecting right'.

him or her to the Director-General, the Regional Manager or any officer'. It is common cause that on 12 May 2004 the Minister delegated the authority she holds, under s 17(1), to grant or refuse a prospecting right, to the Deputy Director-General. No further delegation was authorised without the Minister's consent.[11] When he granted the prospecting right to Genorah on 28 August 2006 the Deputy Director-General granted a Power of Attorney in terms of which the Regional Manager was given authority 'to sign the prospecting right contemplated in section 17(1) of the . . . Act, in favour of Genorah . . . according to the approval signed by me today'.

[10] As I have mentioned above, the prospecting right granted to Genorah by the Deputy Director-General was executed on 12 September 2006. The prospecting agreement was signed by the Regional Manager pursuant to the Power of Attorney granted by the Deputy Director-General. It contains the terms upon which the right was granted, such as, inter alia, the commencement date of the right, its duration, the properties in respect of which the right was to apply and payment of prospecting fees and royalties. Because the Power of Attorney did not stipulate the terms upon which the right was granted, it was submitted, on behalf of the appellants, that the terms and conditions contained in the prospecting agreement must have been decided, at his discretion, by the Regional Manager. That being so, the date upon which the prospecting right was actually granted was the date of execution of the right (12 September 2006). It follows, so the argument continued, that the prospecting right was granted by the Regional Manager, who had no authority to do so. The grant of the right was thus a nullity.

[11] The second issue relates to an allegation, in the founding and replying papers, that the Department failed to give adequate notice of Genorah's application for a prospecting right as required by s 10(1) of the Act,[12] read with

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[11] Section 103(3) provides that the Minister 'may, in delegating any power or assigning any duty under subsection (1), authorise the further delegation of such power and the further assignment of such duty by a delegatee or assignee'.

[12] The subsection reads:
'Within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner-

regulation 3 of the Regulations[13] promulgated in terms of s 107(1) of the Act.[14] It was alleged, on behalf of the appellants, that there was no proof of compliance with the Department's chosen manner of giving notice of an application to interested and affected persons, which was by sending the notice per facsimile to the Sekhukhune Magistrate's Office for display on a notice board there. A related issue was an alleged failure by the Department to give a hearing to the appellants, as an alleged community applicant and occupiers of the two farms in issue. Counsel for the appellants argued that the hearing referred to was in addition to the consultation an applicant for a prospecting right is required to conduct with the land owner or lawful occupier of the land concerned, in terms of s 16(4)(b) of the Act.[15] The hearing, so it was contended, is well recognised at common law and under s 3(2)(b)(ii) of PAJA, in that procedurally fair administrative action requires, at a minimum, that affected parties be heard.

[12] The third issue concerns an alleged failure by Genorah to consult with the community, as owners or occupiers of the farms Eerstegeluk and Nooitverwacht, in accordance with the provisions of s 16(4). Whilst Genorah submitted to the Deputy Director-General a document indicating that consultation with the Bengwenyama community of Nooitverwacht, through its leader, Kgoshi Nkosi, took place, it was contended on behalf of the appellants, that such consultation had neither been appropriate nor meaningful. As to the farm Eerstegeluk, it was submitted that although the community with which Genorah consulted had informed the latter that the Bengwenyama community occupied Eerstegeluk, Genorah failed to consult the latter community.

(a) make known that an application for a prospecting right, mining right or mining permit has been received in respect of the land in question; and
(b) call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.'

[13] Regulation 3(3) is in the following terms:
'In addition to the notice referred to in sub-regulation (1), the Regional Manager or designated agency, as the case may be, must also make known the application by at least one of the following methods-
(a) Publication in the applicable Provincial Gazette;
(b) Notice in the Magistrate's Court in the Magisterial District applicable to the land in question; or
(c) Advertisement in a local or national newspaper circulating where the land or offshore area to which the application relates, is situated.'

[14] See Government Gazette 26275, dated 23 April 2004.

[15] Above n 3.

[13] The fourth issue was that the Department allegedly failed to approve Genorah's EMP within 120 days from its lodgement as was required in terms of s 39(4) of the Act. As has been mentioned above, Genorah lodged its EMP on 21 April 2006 and it was approved either on the day that the prospecting right was notarially executed, or on 13 November 2006.[16] It was accordingly contended on behalf of the appellants, that the EMP having been approved more than 180 days from its lodgement, Genorah's prospecting right could not lawfully be brought into effect.

[14] Apart from the fact that I find it unnecessary to express any opinion on the correctness or otherwise of the appellants' submissions on this issue, 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.[17] The same applies to a related issue that financial provision for the rehabilitation or management of negative environmental impacts had allegedly not been provided before the approval of the EMP, as contemplated in s 41(1) of the Act.[18] So also to a further submission that the approval of the EMP was ultra vires, because the person who approved it was an acting Regional Manager who allegedly had no power to approve it.

[15] The fifth issue relates to the alleged failure by the Department to respect, protect and promote the Bengwenyama community's property rights entrenched in s 25 of the Constitution, and the alleged failure to give effect to s 104 of the Act, which, according to counsel for the appellants, gives legislative effect to those rights. I think the real question here is whether or not the first appellant's application for a prospecting right was a community application. The last issue I wish to mention was whether the appellants had

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[16] It appears from an official stamp on the EMP document that the EMP was approved by the Regional Manager, Limpopo Province, on 13 November 2006.

[17] Compare *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 31.

[18] The sub-section reads:
'An applicant for a prospecting right, mining right or mining permit must, before the Minister approves the environmental management plan or environmental management programme in terms of section 39(4), make the prescribed financial provision for the rehabilitation or management of negative environmental impacts.'

brought themselves within the provisions of s 7 of PAJA, in particular, whether their review application was launched 'without unreasonable delay and not later than 180 days after the first appellant became aware of the grant of the prospecting right to the first respondent (s 7(1)(b)), and whether any internal remedies had been concluded prior to the institution of the review proceedings (s 7(1)(b) and (2)).

[16] The court a quo found against the appellants on all these issues, except the last. In the view I take in this matter, it is unnecessary to consider all of them. It would be convenient, however, to deal briefly with the question whether the first appellant's application constituted a community application.

[17] The prescribed form used by the first appellant when applying for a prospecting right was one used in an application 'in terms of section 16 of the [Act]'. The first appellant is reflected on the form as the only applicant. There is no mention whatsoever of s 104, or its provisions, or the Bengwenyama community, in the first application, nor in the subsequent application submitted on 14 July 2006.[19] Relying on *Shaikh v Standard Bank of South Africa Ltd & another*[20] counsel for the appellants argued that nothing turns on the question whether an application expressly referred to the provision under which it is made, and that the pertinent question is whether the application was, as a matter of fact, an application made in terms of, and in compliance with, s 104. Counsel was unable, however, to point to any portion of the contents of the application that should have directed the recipient's attention to the provisions of s 104.

[18] Moreover, on 24 July 2006 the Department notified the first appellant, in writing, of the acceptance of its application. The subject matter of the latter is recorded thus:

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[19] The first appellant submitted its first application on or about 10 May 2006. That application was received by the Department on 14 July 2006, but was rejected. The first appellant was advised of the rejection by letter dated 20 July 2006.

[20] 2008 (2) SA 622 (SCA) paras 16-19.

'NOTICE OF ACCEPTANCE OF AN APPLICATION FOR A PROSPECTING RIGHT IN TERMS OF SECTION 16 OF [THE ACT]: EERSTEGELUK 322 KT AND NOOITVERWACHT 324 KT.'

The second paragraph of the letter reads:

'I wish to inform you that your application complies with the provisions of Section 16(2) of the Act, as I have accepted it for further processing . . . '

And further:

'Your application will consequently be processed in accordance with the provisions of Section 9 of the Act.'[21]

No objection was raised to the clear reference, in the letter, to the application being one in terms of s 16.[22] In addition, mention of the application being a community application was made for the first time in the second letter (of 9 March 2006) addressed to the second and third respondents respectively, asking for the first respondent's prospecting right to be cancelled or suspended. This, in my view, clearly indicates that the first appellant's application was, until then, never considered by the first appellant itself as a community application. Indeed, counsel for the appellants contended that the application underwent 'a metamorphosis'. However, that 'metamorphosis' never came to the attention of the Deputy Director-General before the date upon which he granted the prospecting right to Genorah. The appellants rely on a letter dated 10 May 2006 addressed to 'the Director' of the Department and assert that it is clear from its contents that the first appellant's application fell within the ambit of s 104 of the Act. The letter covered the first appellant's first application which was rejected. In any event, the letter merely spelled out the relationship between the first appellant and the Bengwenyama community and the fact that the community owned the surface rights over the land in issue. Nowhere does it state that the application was in fact a community application. Another letter dated 6 October 2006 purporting to set out the shareholding in the first appellant was written after the prospecting right had been granted to Genorah. It follows that the court a quo correctly found against the appellants on this issue.

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[21] Section 9 is referred to in para 1 above.
[22] Above n 3.

[19] I proceed to consider the question whether the review application was out of time, and whether internal remedies, if any, were exhausted. In the appellants' founding affidavit the deponent states that 'according to his recollection' the Department's letter[23] by which the first appellant was advised of the refusal of its application 'was only received during or after December 2006'. The case was, however, conducted on the basis that the first appellant received the letter during December 2006. According to the provisions of PAJA, where any internal remedies exist, they must, except in exceptional circumstances, first be exhausted before review proceedings may be instituted.[24] It is not in dispute that by addressing the letters of 13 February 2007 to the Minister and Director-General respectively, the first appellant was seeking to pursue an internal appeal. The question is whether any appeal procedure was available to it under the Act.

[20] I agree with the court a quo that s 47 of the Act [25] does not provide for an internal process which is 'available to affected third parties to have administrative decisions reviewed'. I agree too that the section is an empowering provision in terms of which the Minister can take action if the holder of a prospecting right exercises his or her right in contravention of the provisions of the Act. But the court a quo also held that because the Deputy Director-General, when granting Genorah's application for a prospecting right, exercised a power delegated to him by the Minister, his decision was the decision of the Minister. Consequently, so the court held, s 96[26] 'does not provide for any internal procedure to remedy decisions and conduct of the Minister'. The court thus concluded that the only remedy available to the

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[23] Although the deponent states that the letter 'is undated' it was signed by the respondent on 6 December 2006.

[24] Section 7(2) of PAJA provides as follows:
'7(2) *(a)* Subject to paragraph *(c)*, no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

[25] Above N 6.

[26] Above n 8.

appellants was an application for a review of the decision, but held that the application was 'well out of time . . . [that is, it was brought well after the 180 days provided for in s 7(1)(b) of PAJA], assuming that [the appellants] only became aware of the decision on 31 December 2006', and that the review application fell to be dismissed on that ground alone.

[21] The court a quo assumed, however, for purposes of considering whether the appeal to the Director-General was out of time, that s 96 provided for an internal remedy and that the internal remedy was available to the 'appellants'. Bearing in mind that '[o]ur system of administrative justice seeks to encourage internal remedies to resolve disputes that arise out of administrative action',[27] that assumption was correctly made. In the present matter the Minister delegated her powers to grant or refuse an application for a prospecting right to the Deputy Director-General. A delegatee or subdelegatee who acts in his or her own right is responsible for his or her exercise of the power.[28] In my view, a full delegation of powers was made to the Deputy Director-General. In deciding whether or not to grant the prospecting right to Genorah he exercised his own discretion. As delegatee he acted in his own right and did not represent the delegator. This is therefore not a case of an appeal being lodged against the Minister's own decision or a question of the delegator sitting on his own judgment on appeal.[29]

[22] Regulation 74(1) provides that any person who appeals against an administrative decision in terms of s 96 must do so within 30 days after he or she has become aware, or should reasonably have become aware, of the administrative decision concerned. The first appellant's letter of appeal, in terms of s 96, dated 13 February 2007, was lodged more than 30 days from, the latest, 31 December 2006. But the court a quo held that the 30-day period 'is not an absolute maximum period within which an appeal has to be lodged', and that non-compliance 'will not necessarily lead thereto that such an appeal

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[27] *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) para 142.
[28] See Lawrence Baxter *Administrative Law* (1984) on p 442.
[29] See *Thompson, Trading as Maharaj & Sons v Chief Constable, Durban* 1965 (2) SA 296 (D & CLD) at 302E-H; *Bartlett v Munisipaliteit van Kimberley* 1966 (2) SA 95 (G.W.P.A) at 101D-F.

is a nullity'. The court accordingly held that the appeal in this case was not fatally defective even though it was not brought within the 30-day period.

[23] It is true that non-compliance with the 30-day period provided for in the Regulations will not necessarily lead to an appeal being a nullity, but that will be so only if the non-compliance has been condoned.[30] Although in its letter of appeal to the Director-General the first appellant sought condonation for the late lodging of their appeal, there is no evidence on the papers that condonation was granted. In fact, the evidence points to the opposite. The letter written by Mr Alberts dated 14 June 2007[31] and addressed to Mr Nahon, advised the addressee that the matter – the subject of the appeal – was *sub judice*; that therefore the Minister would not decide the appeal and that the view of the Department (including the Director-General) was that the matter be decided by means of a review. It has not been explained on the papers what was meant by the matter being *sub judice*, but clearly no proceedings concerning the subject matter of the appeal had, by that date, been instituted out of any court. It seems to me that the writer of the letter, and any other official of the Department involved, were more concerned about the 'legal challenge' posed by the fact that the prospecting right had already been granted to Genorah and the legal consequences that would follow were the grant of the right to be reversed. In my view, the Director-General, as the official to whom the appeal was addressed, was obliged to consider the condonation application and, if granted, the appeal. The letter written by Mr Alberts can by no means be interpreted to mean that the first appellant's condonation application was granted and the appeal dismissed, or that condonation was refused. These issues were simply not dealt with.

[24] The result was that no condonation was granted to the first appellant and the attempt to appeal under s 96 was of no effect. Because the first appellant did not pursue its condonation request, its rights under s 7 of PAJA must be assessed on the basis that it had abandoned the internal remedy of

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[30] Regulation 74(4) reads:
'The Director-General or the Minister, as the case may be, may in his or her discretion and on such terms and conditions as he or she may decide, condone the late noting of an appeal.'
[31] The relevant part is quoted in para 7 above.

appeal that it had initiated. As far as it was concerned no remedy any longer existed which it was obliged to exhaust. This raises another question, which is whether the first appellant, having abandoned its internal remedy, could still have the decision to grant Genorah's prospecting rights reviewed under PAJA. I shall assume, without deciding, that it could, although the provisions of s 96(3) appear to bar a review 'until that person has exhausted his or her [internal] remedies'.[32] Section 7(1)(b) therefore applied to it. Section 7(1)(c) possessed no significance because there was no obligation in existence from which it could be exempted.

[25] On the preceding analysis the period of 180 days laid down in s 7(1) began to run, at the latest, when the first appellant became aware of the decision to refuse its prospecting. The review proceedings were not instituted before 22 August 2007 when the application was filed with the Registrar of the High Court, ie more than 180 days it was informed of the refusal of the prospecting application. The onus rested on the appellants to bring themselves within the terms of s 7(1). It failed to do so.

[26] No formal application was made before the court a quo for the extension of the 180-day period within which the review proceedings should have been instituted.[33] Counsel informed us, however, that an application was moved from the bar before the court below. It appears that the application was unsuccessful. We were urged from the bar (by counsel for the appellants) that this court should extend the 180-day period since all the facts or information necessary to explain the delay in instituting review proceedings timeously were before us. As was said in *Gqwetha v Transkei Development Corporation*

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[32] See s 96(3) above n 8.
[33] Section 9(1) and (2) of PAJA are in the following terms:
(1) The period of-
(a) . . . ;
(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,
by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.
(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

Ltd & others,[34] whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including an explanation that is offered for the delay.[35] It was argued, on behalf of the appellants, that their belief that they were entitled, in terms of s 96 of the Act, to appeal the decision to grant the prospecting right to the first respondent was reasonable. They pursued the appeal remedy within a reasonable time and once they were informed that their appeal would not be considered they launched the review proceedings expeditiously.

[27] Assuming that the appellants' explanation for the delay was reasonable and that the decision to grant the prospecting right was invalid, it does not follow that the decision will be set aside. This is because in appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act.[36] In terms of s 9(2) of PAJA a court may grant an application for the extension of the 180-day period 'where the interests of justice so require'. In the present matter Genorah raised, in its answering affidavit, the fact that the review application was out of time and that condonation for the delay had to be sought. Except for stating, in the replying affidavit, that they had at all times acted in good faith and as expeditiously as possible, the appellants did not, as has been mentioned above, apply for an extension of the 180-day period. They therefore failed to place any facts before the court a quo to assist it properly to consider whether the interests of justice require that the period be extended. Nor was any argument advanced in this court in this regard.

[28] Finally, the court a quo considered that even if there was 'some or other fatal defect' in the procedure leading up to the making of the challenged decision, the present is one of those cases where a court, in its discretion, ought to decline to set aside an invalid administrative act. The court set out its reasons for that view as follows:

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[34] 2006 (2) SA 603 (SCA).
[35] Para 24. See too *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkomitee, & 'n ander* 1986 (2) SA 57 (A) at 86D-F.
[36] *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 28 and the cases there cited.

'49.1 The applicants' main and emotive argument was that it represents the community and that the individual members of the community stand to benefit from a grant of the rights to it. 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.

49.2 The applicants rely on section 104 of the Act. The application of the first applicant was an ordinary section 16 application until 9 March 2007 when somebody alerted Mr Shapiro to the provisions of section 104. That was long after the rights in question had already been granted to Genorah. This whole application negates the rights of applicants for the rights whose applications were submitted and accepted between the application of Genorah and that of the first applicant.

49.3 Rights have been granted to Genorah over five farms and a large area. If the grant in respect of the two farms or one of them is set aside it will no doubt affect the manner of mining and may affect the viability of a project.

49.4 In my view there is a public interest element therein that there must be finality in this particular case.'

[29] I can find no fault with this reasoning and no argument was advanced as to why this court should interfere with the exercise of its discretion by the court a quo. The appeal must accordingly fail. In view of this conclusion, it becomes unnecessary to consider the remaining issues listed above.

[30] There remains the issue of costs. At the first hearing of this matter the court a quo ordered that the intervening party be provisionally joined as a party in the proceedings. The intervening party wished to counter the first appellant's assertions, as supported by the second and third appellants, that its application was in fact a community application. In its judgment the court a quo held that in the light of its finding – without having had to resolve a dispute as to the authority and standing of the intervening party – that the application of the first appellant was not a community application 'the whole question of intervention has become academic'. It made no costs order either

for, or against, the intervening party. Despite the finding that the intervention had become academic, the intervening party took part in the appeal. Although the submissions on behalf of the intervening party were by no means unhelpful, I am not inclined to award any costs in its favour.

[31] Relying on the decisions of the Constitutional Court in *Affordable Medicines Trust v Minister of Health*[37] and *Biowatch Trust v Registrar, Genetic Resources & others*[38] counsel for the appellants reminded of the well-established rule that unsuccessful litigants who have sought, in good faith, to vindicate constitutional rights, should not have costs awarded against them. The finding that the first appellant's application for a prospecting right was not a community application is, in my view, of importance in considering the issue of costs. I am unable to hold that the litigation was undertaken to assert constitutional rights, at least as regards the first appellant. It was undertaken to assert a commercial interest, but with the assistance of the second and third appellants. I am not persuaded that the rule just referred to should be applied to the benefit of the first appellant. Counsel for the respondents sought no costs order against the second and third appellants.

[32] In the result the appeal is dismissed and the first appellant is ordered to pay the respondents' costs.

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L Mpati
Judge Of Appeal

[37] 2006 (3) SA 247 (CC).
[38] 2009 (6) SA 232 (CC).

HEHER JA:

[33] I agree that the appeal should fail.

[34] A community application for a preferent right to prospect or mine (s 104 of the Mineral and Petroleum Resources Development Act 28 of 2002) requires that an application be lodged with the Minister. The specific considerations set out in ss (2)(a) to (d) must be addressed in the application. The Minister must expressly or by necessary implication be made aware that the applicant relies on the terms of the section, whether or not another application has been lodged for a prospecting or mining right in terms of secs 16 or 22 respectively. The first appellant's application satisfied none of these requirements. That is because it was conceived as a s 16 application. Recourse to s 104 was clearly an afterthought, and too late to influence the process.

[35] I agree with Mpati P that the appeal against the refusal to grant a prospecting right to the first appellant was an appeal to the Minister against the decision of a functionary and not one against a decision of the Minister himself, for the reasons enunciated in the main judgment. All the grounds relied on in the review (save, perhaps, the s 104 question) were matters that could properly have been dealt with in an appeal under s 96(1). But s 96(3) has made what is usually a matter for the court's discretion a peremptory bar to the bringing of review proceedings. (The constitutionality of the bar was not challenged in the appeal before us.) The first appellant did not obtain condonation in terms of regulation 74(4) for the late noting of his s 96(1) appeal. Consequently he could not and did not pursue the appeal and, thereby, exhaust his remedies in terms of that subsection. Review proceedings in which he raised any ground which could have been answered by such an appeal were thus closed to him.

[36] In any event, having failed to pursue a condonation application, the first appellant's appeal was writ in water. He must be taken to have abandoned it. Any review instituted under the Promotion of Administrative Justice Act 3 of

2000 was subject to the time limit of 180 days in s 7(1), which fell to be calculated from the date on which the first appellant was notified of the rejection of its application for prospecting rights. That period expired before the review proceedings were launched. The court did not extend the period (under s 9(1)(b) or exempt the first appellant from its obligation to exhaust the internal remedy (under s 7(1)(c)).[39]

[37] I concur in the order proposed by Mpati P.

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J A Heher
Judge of Appeal

[39] I leave open the question of whether an exemption under s 7(1)(c) would also have surmounted the bar created by s 96(3) of the Minerals Act.

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