BENGWENYAMA MINERALS (PTY) LTD v GENORAH RESOURCES (PTY) LTD 2010 JDR 1446 (CC)

Importance	A very significant case that provides clarity on five legal points: Firstly, that s 96 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) provides for a process of internal appeal. Secondly, that an internal appeal can only be regarded as 'concluded' once the DMR responds to an application for appeal (in the instant case this occurred after four months had elapsed). This is significant for purposes of bringing a review within the 180 day period allowed by the Promotion of Administrative Justice Act 3 of 2002 (PAJA). Thirdly, the court made it clear that the consultation required under s 16(4)(b) of the MPRDA requires that a the applicant make an attempt in good faith to accommodate the landowner in the impact of the prospecting on his land, and that the landowner must be informed of the prospecting application in detail sufficient for him to assess the impact prospecting will have on his use of the land. Fourthly, it was held that s 104 of the MPRDA accorded communities a preferent right to prospect on community land. The DMR was obligated to notify such communities and afford them a hearing in the event of another prospecting application in respect of the same land. Finally, the court made it clear that a decision-maker must satisfy himself that prospecting operations will not result in unacceptable pollution, ecological degradation or damage to the environment; i.e. environmental satisfaction is a prerequisite or jurisdictional fact to the approval of a prospecting right.
Parties	**First applicant:** Bengwenyama Minerals (Pty) Ltd **Second applicant:** Bengwenyama-Ye-Maswazi Tribal Council **Third – thirteenth applicants:** Trustees of the Council (together with the second applicant referred to as the 'Community') **First respondent:** Genorah Resources (Pty) Ltd **Second respondent:** Minister for Mineral Resources **Third respondent:** Director-General (DG), Department of Mineral Resources (DMR) **Fourth respondent:** Regional Manager, DMR, Limpopo Region **Fifth respondent:** Deputy Director-General, DMR (Deputy DG)
Facts	The case is based on the same set of facts as the earlier Supreme Court of Appeal decision (see related factsheet). However, the Constitutional Court outlined the details of the Community's claim to the land and the consultation process that unfolded between the Community and Genorah Resources in much greater detail. It was noted that of the two farms over which a prospecting right was in contention, the one (Nooitverwacht) had been occupied by the Community for more than a century. The Community had been dispossessed of the other (Eerstegeluk) in 1945 but had successfully lodged a land claim for its formal restoration. As regards the consultation processes the following points are salient: (a)The Community had as early as December 2004 lodged objections with the DMR to the granting of prospecting rights over the

	two farms, and followed these up with a letter in January 2005. No acknowledgement of receipt from the DMR had been forthcoming. (b) A representative of Genorah Resources had visited the traditional leader of the Community in early February 2006 to consult him in regard to prospecting on the farm Nooitverwacht. A prescribed consultation form, which provided for blocks to be ticked 'yes' or 'no' to indicate whether there was an objection and a further five lines to outline the 'full particulars' of the objection, was left with the leader. The form was never signed by anyone on behalf of the Community. (c) In March 2006 the leader wrote to Genorah Resources courteously pointing out that the Community would complete the form once the parties knew each other, but for the moment they did not know each other well. The leader also indicated that the Community had submitted a prospecting application for the farm Nooitverwacht. Genorah Resources did not reply to this letter. (d) No consultation between the Community and Genorah Resources took place in respect of the farm Eerstegeluk, although another tribal authority had informed the company that members of the Community also occupied this property. (e) Genorah Resources had already on 17 February 2006 supplemented its prospecting application to the DMR by indicating that the company had introduced itself to the traditional leader but had not received a response to date. (f) On 20 February 2006 the DMR informed Genorah Resources that its prospecting application had been accepted for further processing, and that it was required to submit an EMP, consult with the landowner or lawful occupier of the land and I&APs and submit the consultation report to the Regional Manager. (g) Genorah Resources submitted their EMP on 21 April 2006 but despite the letter addressed to it by the Community in early March the company made no further attempt to engage or consult with the Community. (h) Genorah Resources was notified on 8 September 2006 that its application for prospecting rights had been approved. However, the financial guarantee for environmental rehabilitation was only provided on 15 September, while the EMP was approved two months later – on 13 November 2006 – and not by the official who approved the application. The court proceeded to outline the manner in which the Community had pursued its own application for prospecting rights (see paras 14 – 18). The DMR accepted a prospecting application from the Community in respect of the two farms on 24 July 2006, indicating that other entities, including Genorah Resources, had applied for prospecting rights on the farms. From as early as 10 May extending until October 2006, the DMR engaged with the Community over certain details of their application, including the investment agreement between Bengwenyama Minerals and the Community, and the amount of the financial guarantee (R20 000) to cover the costs of financial rehabilitation. The court noted that it was 'surprising and perplexing' that 'during these continuing exchanges 'the Department made no mention of the fact that prospecting rights on the farms had already been awarded to Genorah' and that what was even 'more perplexing' was that 'the prospecting rights were granted over the Community's land without any notice to the Community' (para 18).

	The Community tried unsuccessfully to lodge an internal appeal against the granting of the rights, and subsequently launched a process of judicial review without, however, obtaining relief from either the High Court or the Supreme Court of Appeal.
Relief Sought	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.
Legal Issues & Judgment	***Issue 1:*** Did the MPRDA provide for an internal remedy? ***Judgment:*** The Constitutional Court affirmed that the MPRDA establishes a process of internal appeal (paras 45, 55). There was no indication of an intention on the part of the legislature in s 103, MPRDA (provision dealing with delegation and assignment) to preclude an internal appeal. There was no reason why the Minister's power to withdraw or amend the decision of a person acting under delegation (s 103(4)(b)) could not be exercised by way of an internal appeal (para 46). Allowing for an internal appeal would 'enhance the autonomy of the administrative process ad provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation' (para 50). The constitutional values and principles pertaining to public administration would be enhanced by an internal appeal process (para 52).
	Issue 2: Was the review brought in time? ***Judgment:*** The court found that the conduct of Bengwenyama Minerals and the Community after notification that the prospecting rights had been awarded to Genorah Resources could hardly be said to constitute deliberate delay on their part (para 57). More importantly, however, the court pointed out that s 7(1)(a) of the PAJA requires that review proceedings be brought no later than 180 days after the date on which internal remedies 'have been concluded'. Unlike the SCA, who found that the Community had abandoned the internal appeal, the court held that the internal appeal initiated by the applicants was only concluded when the DMR responded (four months after the appeal had been lodged) to them (on 14 June 2007). The review was thus not brought out of time (para 59). The court noted, *obiter*, that the 'only truly culpable delay was that of the Department who took more than four months to respond to the internal appeal' (para 57).
	Issue 3: Did Genorah Resources properly consult with the Community in accordance with the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)? ***Judgment:*** The court found that Genorah Resources failed to comply with the requirements for consultation. The court noted that the consultation requirements in MPRDA are 'indicative of a serious concern for the rights and interests of landowners and lawful occupiers in the process of granting prospecting rights, continuing: 'It is not difficult to see why: The granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen' (para 63). The general purposes of consultation included: (i) To see whether

	some accommodation was possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's right to use the property was concerned (para 65). The MPRDA does not impose agreement on the part of the landowner as a requirement for granting the prospecting right, but this 'does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation (para 65). (ii) To provide landowners or occupiers *with the necessary information* on everything that has to be done so that they can make an informed decision (para 66). In summary, the court indicated that the consultation process envisaged by s 16(4)(b) requires of the applicant: (a) to inform the landowner in writing that his application for prospecting rights on the land has been accepted; (b) to inform the landowner *in sufficient detail* of what the prospecting operation will entail on the land, *in order for the landowner to assess what impact the prospecting will have on the landowner's use of land*; (c) to consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) to submit the result of the consultation process to the Regional Manager (para 67). The court made no comment about all this needing to be done within 30 days of receiving the notification to consult.
	Issue 4: Was the decision-maker obliged to afford Bengwenyama Minerals and the Community a hearing before awarding the prospecting rights to Genorah Resources? ***Judgment:*** The applicants were entitled to a hearing. Section 104 of the MPRDA provides for a community to obtain a preferent right to prospect on community land - a 'special category of right' which stands in addition to their rights as owners (para 73). Any application for a prospecting right in terms of s 16 materially and adversely affects that right of a community. Where these circumstances apply, the DMR is obligated to inform the community of the application and its consequences and allow the community to make representations. In appropriate cases this could include the right to bring a s 104 application prior to a decision being made on a s 16 application (paras 73, 74).
	Issue 5: Was proper consideration given to the environmental requirements of the MPRDA prior to the granting of prospecting rights in terms of s 17(1) of the MPRDA? ***Judgment:*** No, contrary to the position argued by the respondents, the court affirmed that environmental satisfaction is a prerequisite or jurisdictional fact for the granting of a prospecting right (para 77). The court held that '[a]pproval 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' (para 77).
Outcome	The appeal was upheld with costs.
Obiter	Under the heading 'Public accountability and fairness', the court had the following to say regarding the manner in which the Bengwenyama Community was treated by the Department:

	‘I think it is necessary and apposite to make some general remarks on the treatment of Bengwenyama Minerals and the Community by the Department. They were not properly assisted in what was obviously an effort to acquire prospecting rights on their own property. Genorah was allowed to lodge financial guarantees late; they were not. They were not told of the grant of the prospecting rights to Genorah, which effectively put paid to their own application. Their internal appeal was responded to only after four months had elapsed.’ (para 79) ‘The Community was entitled to adequate notice of the nature and purpose of the administrative action that was proposed in relation to the Genorah application. It was entitled to a reasonable opportunity to make representations in relation to the Genorah application. Once the administrative decision was taken the Community was entitled to a clear statement of the administrative action. It was entitled to adequate notice of any right to a review or internal appeal. It was entitled to adequate notice of the right to request reasons in terms of section 5 of PAJA. It was entitled to reasons. None of this was done or complied with by the Department and, finally, the Community’s appeal was ignored for four months before it was told to bring a review application in court. This is not the way government officials should treat the citizens they are required to serve.’ (para 80)