

BRIGHT COAL-COMMISSIEKRAAL

Importance:	<p>The primary significance of this case would appear to lie in the sensitivity of the area in which prospecting had been authorized by the Department of Minerals (DMR), being the headwaters of the Pongola river system. It thus not only raises questions about the manner in which the minerals regulator is interpreting the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) relating to the prevention of ecological degradation, but also whether the legislative guidelines are sufficient. Additionally, it serves as a useful study for situations where the landowner is willing to allow, and indeed even encourages, prospecting or mining to take place on their land, and may accordingly treat the matter as one that is 'none of the business' of neighbours or downstream users of water resources.</p>
Alleged Facts:	<p>This case relates to the granting of a prospecting right for coal on Portions 2, 3 and 8 of the Farm Commissiekraal no. 90 HT. This property is situated at the headwaters of the Pongola River in the district of Utrecht, KwaZulu-Natal. The DME granted a prospecting right in respect of this property to Samancor Chrome Limited, commencing for a period of three years from 24 January 2007. The holder of the right applied for a renewal thereof on 27 August 2008, and this was granted by the Minister on 28 April 2009. The right was renewed for a three-year period commencing 26 March 2010. Although the holder of the authorization is identified as Samancor Chrome Limited, it appears that at some time these rights were ceded to Commissiekraal Coal (Pty) Ltd in which Bright Coal (Pty) Ltd held shares. The latter is a subsidiary of the Cape Town and Johannesburg-based mining finance house the Bright Group.</p> <p>What is unusual about this case, is that the owner of the property concerned (Nico Lens) appears to have been keen to facilitate prospecting on his property. This differs from other case studies where landowners have been resistant to allowing prospecting to commence on their land. The interested and affected parties in opposition to the prospecting are thus primarily downstream users of the Pongola River system. Such users found out about the proposed prospecting operations by chance (a consultant/contractor of the mining company visiting one of the guest houses in the region and informing them that the company he represented was about to commence with prospecting in the area). The I&APs quickly mobilized themselves into the Greater Pongola River Catchment Protection Association (GPRCPA). None of the members of this association had ever been contacted by Commissiekraal Coal/Bright Coal.</p> <p>Three letters of objection were subsequently submitted to DMR and Bright Coal regarding the prospecting right, one each on the part of the GPRCPA, WWF (per Angus Burns) and the Impala Water Users Association. A representative of Commissiekraal Coal sent a letter to the GPRCPA in December 2010 indicating that a variety of consultations with stakeholders in the area had taken place. The initial scoping exercise in 2008 had apparently been conducted by Golder and Associates. Commissiekraal Coal also indicated that they did not regard the letters of objection that had been submitted as any formal objection or appeal in terms of the MPRDA and that the matter would be dealt with <i>inter partes</i>. They invited the GPRCPA to attend a meeting mid-</p>

	<p>January 2011 in order to be appraised of the company's activities.</p> <p>The meeting subsequently took place on 21 January 2011. At the meeting Angus Burns of the WWF noted that although a consultant had conducted a risk assessment in the upper reaches of the Pongola in 2008, he would not reveal the identity of the client. A strongly-worded letter of concern had been drafted by Burns, but this had apparently not been passed on to Commissiekraal Coal/Bright Coal. In this letter, dated 7 November 2008, Burns had stated that the WWF was in principle opposed to mining/prospecting at the headwaters of river systems and would thus strongly object to any proposed future mining operations in such areas. The letter also pointed out that the risk assessment being conducted by the consultant did not constitute a process of consultation, as the prospecting right had already been granted. Finally, Burns requested access to the EMPs and Prospecting and Work Programmes for the proposed operations. At the meeting the representatives of Bright Coal/Commissiekraal Coal indicated that these documents would not be supplied and that PAIA requests would need to be lodged in order to obtain them. The company representative also indicated that this course of access to information had been recommended to them by the DMR.</p> <p>A notice of appeal to the Minister against the granting of the prospecting right was subsequently lodged on 15 February 2011. The DMR articulated its reasons for the granting of the right on 20 July 2011 – these were only forwarded to the appellants, however, on 3 October 2011.</p>
Forum:	Administrative appeal to the D-G/Minister of the Department of Minerals in terms of s 96 of the MPRDA.
Issues:	<p>This case raises the following three issues:</p> <ul style="list-style-type: none"> • Grossly inadequate consultation with interested and affected parties. In this instance, it seems that the consultative procedures required by the MPRDA were not followed at all though the issue is obscured by the fact that the landowner appears to have been strongly in favour of the prospecting right being granted. • The Minister's decision to grant a prospecting right in a highly sensitive area such as the headwaters of the Pongola river system. This raises issues relating to whether the criteria which must guide the exercise of the Minister's discretion were properly exercised, but also whether they are sufficiently robust to ensure that the sensitivity of ecosystems is properly protected in the licensing process. • Transfer/cession of prospecting right. From the documentation available it is not clear how transfer/cession of the prospecting right took place between Samancor Chrome Ltd and Bright Coal/Commissiekraal Coal (Pty) Ltd and whether there was compliance with s 11 of the MPRDA.

Paper Trail:

Document	Author /Originator	Date
Grant of prospecting right	DMR	24 January 2007
Renewal of prospecting right	DMR	26 March 2010

Written reasons for granting of prospecting right	DMR	3 October 2011
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