

MEEPO v KOTZE 2008 (1) SA 104 (NC)

<p>Importance</p>	<p>This case is important for the court’s finding on the interpretation of s 5(4)(c) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), namely that the process of consultation envisaged in this section occurs <i>after</i> a prospecting right has been granted. Such consultation amounts to more than notice – the prospecting rights holder must attempt to obtain the consent of the landowner as regards entry upon the land for the purposes of prospecting. The case is also significant for articulating an important general principle of interpretation in relation to the MPRDA, namely that when there is uncertainty the interpretation to be preferred is the one that gives effect to the most <i>rational balance</i> between the holder of mineral rights and the landowner respectively. A second point of interpretation – whether a party can, on the basis of s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) apply for an exemption from the requirement to exhaust internal remedies in s 96 of the MPRDA – was not finally decided.</p>
<p>Parties</p>	<p>Applicant: Meepo First Respondent: Kotze Second Respondent: Bathopele Mining Investments (Pty) Ltd Third Respondent: Regional Manager Fourth Respondent: Minister of Minerals & Energy Fifth Respondent: DDG (Minerals and Energy)</p>
<p>Facts</p>	<p>This case involved both an application for a declaration and enforcement of the rights of a prospecting rights holder (initiated by Meepo) especially as regard access to the property to which the right related, and a counter-application for a review of the prospecting right granted to the applicant (initiated by Kotze).</p> <p>During July 2001 Kotze applied in terms of the Minerals Act, 1991 for a prospecting permit to prospect for diamonds on his farm. The farm was described as Lanyon Vale No 376 situated in the district of Hay (and 2655 ha in extent). Meepo had also applied for a prospecting permit in respect of the same farm in terms of this legislation. Upon commencement of the MPRDA, Meepo filed an application for a prospecting right to prospect for diamonds on Kotze’s farm. Notwithstanding some administrative issues (which entailed Meepo being awarded two prospecting rights but which are not significant for purposes of this research), the prospecting right was granted to Meepo and registered in the Mineral and Petroleum Titles Office on 18 July 2005. The EMP was approved two days later.</p> <p>Kotze and Bathopele Mining Investments had initially objected in writing to the Regional Manager against the granting of a prospecting right to Meepo in June 2004. They subsequently appealed in terms of s 96 of the MPRDA against the granting of the first prospecting right to</p>

	<p>Meepo in April 2005. By 2 August 2006, when the application was heard, the internal appeal had not yet been finalized.</p> <p>From July 2005 Meepo had on a number of occasions approached Kotze, as the landowner, for access to the farm for purposes of exercising its right to prospect for diamonds. Kotze, however, refused Meepo access to the farm contending the Meepo's prospecting right was void <i>ab initio</i>.</p> <p>The section of the case dealing with the validity of the grant of the prospecting right to Meepo (para 45ff) is not relevant to issues of mining and the environment or public participation. The analysis of the issues in this case therefore focuses on those raised in the first 45 paragraphs.</p>
Relief sought	<p>In respect of the application: A declaration that Meepo be granted immediate access to the farm for purposes of carrying out his prospecting activities.</p> <p>In respect of the counter-application: A declaration that the respondents be exempted from the obligation to exhaust internal remedies as per s 96 of the MPRDA and the accepting and processing, by the authorities, of its own application for a prospecting right over the property.</p>
Legal Issues & Judgment	<p>The court commenced its judgment of this matter by articulating a principle of interpretation which is of some importance. The court noted that the MPRDA had done away with the traditional concept of 'mineral rights', and that while the holder of a prospecting or mining rights now has a limited real right in the land which is the subject-matter of the right, no provision is made for the compulsory compensation of a landowner for the surface use of its property for purposes of prospecting or mining for minerals (para 8.1). This, the court observed, 'inevitably leads to a realization of the conflict between the interests and/or rights of a holder of a prospecting or mining right and that of a landowner. All these rights are core rights enshrined in the Bill of Rights (see ss 24 and 25 of the Constitution)' (para 8.2). Given this, it was important when interpreting the provisions of the MPRDA, and especially those provisions that were capable of more than one construction, to give preference to the construction that would result in the most rational balance between such conflicting rights (para 8.3).</p> <p>Issue 1: Was Meepo required to consult with Kotze in terms of s 5(4)(c) of the MPRDA prior to demanding access to the farm? In other words, does s 5(4)(c) refer to a consultation process pre or post the granting of a prospecting right?</p> <p>Judgment: Both the applicant and the government relied on an interpretation whereby s 5(4)(c) refers only to a <i>general</i> obligation to consult, with the <i>specific</i> requirements an applicant had to meet regarding consultation set out in ss 10 and 16(4)(b) respectively. The court, however, decided that s 5(4)(c) did in fact require an additional</p>

process of consultation post obtaining a prospecting right and approved EMP and pre- the commencement of prospecting operations (para 12). This process required both proper *notice* of the intention to enter the land for purposes of prospecting, followed by a consultative process (para 16). The court's reasons for its decision on this issue was essentially three-fold: (1) The court noted the constitutional context in which the matter had to be decided before remarking that since the granting of a prospecting right as a necessary consequence results in serious inroads being made on the property rights of a landowner, it is not surprising that the legislature attempted to alleviate these consequences between the landowner and the holder of a prospecting right. It appeared that consultation was the only prescribed means whereby a landowner could be apprised of the impact prospecting activities could have on his land (para 13.1). As such the provisions in the MPRDA providing for consultation between the parties had to be widely construed (para 13.2). (2) The court also observed that the heading to s 5 of the MPRDA refers to the rights of *holders*; i.e. persons who have already obtained a prospecting or mining right. This suggested that s 5(4)(c) referred to an additional process of consultation – since the forms of consultation in ss 10 and 16(4)(b) of the MPRDA took place before the granting of the relevant right (para 14). (3) The court noted that the EMP contains far more details than the Prospecting Work Programme regarding the potential impact on the environment of prospecting or mining activities. The consultative process envisaged in s 5(4)(c) was thus aimed at 'softening the blow' (the court appeared to accept that the EMP could be submitted post the approval of the prospecting right) (para 15).

Issue 2: Could Kotze and Bathopele investments rely on the exemption to exhaust internal remedies set out in s 7(2)(c) of the PAJA as regards the lodging of their appeal against Meepo's prospecting right? The authorities had finalized the appeal relating to Meepo's prospecting right in November/December 2006, i.e. a few months after the counter-application in the matter had been launched (despite the appeal being lodged in April 2005). The applicant held that the counter-application had been brought prematurely since s 96(3) of the MPRDA states no person may apply to the court for a review of an administrative decision until that person has exhausted the remedy of internal appeal. The applicant also contended that s 7(2)(c) of PAJA does not apply to matters under the MPRDA and that the respondents were accordingly not entitled to rely thereon. The basis of the applicant's argument was that since s 96 of the MPRDA specifically states that s 6, 7(1) and 8 of the PAJA apply to court proceedings contemplated in s 96, and thus explicitly excludes mention of s 7(2), on the basis of the principle of statutory interpretation *inclusio unius est exclusio alterius*, the legislature thus intended to exclude the application of at least s 7(2)(c) of PAJA to s 96 of the MPRDA.

	Judgment: This point of interpretation was, unfortunately, was not finally resolved as the court found it unnecessary, for purposes of this case, to reach a final conclusion on the issue (para 30).
Outcome	The main application was dismissed and the counter-application succeeded mainly on the finding that the second prospecting right granted to Meepo was invalid for a variety of administrative reasons. In regard to the application, on the facts Meepo had also failed to consult with Kotze in the manner envisaged by s 5(4)(c) of the MPRDA.
Obiter	None.