TRANSITIONAL PROSPECTING RIGHTS: A MORATORIAL ESCORT ACROSS THE BRIDGE?

De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy Case 1590/2007 (OPD) Unreported (15-05-2008) ("De Beers (2)")*

> "I see many people trying to cross a narrow bridge. Some are equipped with picks and shovels; some have only yellowish papers in their shaky hands. New Fortunists tag along."**

1 Introduction

On 1 May 2004 the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) not only introduced a new mineral law regime in South Africa but also made provision in the transitional arrangements of Schedule II to the MPRDA (hereinafter "the transitional arrangements") for the conversion of so-called "old-order rights" into (or application for) prospecting or mining rights in terms of the MPRDA. This decision dealt with the duration or term of transitional prospecting rights and the remedies available to a holder of an "old-order prospecting right" upon refusal by the state functionaries to convert the right into a prospecting right in terms of the MPRDA. Item 6 of the transitional arrangements makes provision for the continuation and conversion of "old-order prospecting rights" (see, in general, Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) Revision Service Chapter 25.3.1; and Dale, Bekker, Bashall, Chaskalson, Dixon, Grobler, Ash and Loxton *South African Mineral and Petroleum Law* (2005) SchII-119 to SchII-135).

2 Facts

Before commencement of the MPRDA, the applicant, De Beers Consolidated Mines Ltd (hereinafter "De Beers"), was the holder of mineral rights in respect of Subdivision 1 (Kings Paddock) and the remaining extent of the farm Jagersfontein (hereinafter "the farm") by virtue of notarial deed of cession of mineral rights (85MR/1973) (*De Beers Consolidated Mines Ltd v*

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* I wish to acknowledge the comments of the unknown referees.

** From the sketch of the "bridge on the river *kwaito*" in Badenhorst "Transitional Arrangements in Terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a Narrow Bridge?" 2002 *Obiter* 250 280.

Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy ("*De Beers* (2)" par 2.1 and 1). Upon application, De Beers was granted a prospecting permit (permit 45/2003) for diamonds on Subdivisions 1 and 16 and the remaining extent of the farm (excluding tailing dumps) in terms of section 6 of the Minerals Act 50 of 1991. The prospecting permit was issued for a period of 12 months from 11 August 2003 until 10 August 2004 (par 2.2). Upon commencement of the MPRDA, De Beers was conducting prospecting operations by virtue of the prospecting permit and became the holder of an "old-order prospecting right", as defined in the definitions contained in the transitional arrangements (par 2.3).

On 26 April 2006 De Beers lodged an application for conversion of its prospecting rights (relating to the prospecting permit) in terms of item 6(2) of the transitional arrangements at the Office of the Regional Manager of the Department of Minerals and Energy (hereinafter "1st respondent"). The application was accompanied by all the required documents and information for purposes of item 6(2). On 21 August 2006 the Deputy Director-General (hereinafter "2nd respondent") refused to grant the conversion of the "old-order prospecting right". The Deputy Director-General acted as delegate of the Minister of Minerals and Energy (hereinafter "3rd respondent") (as to the delegation of powers by the Minister of Minerals and Energy, see Badenhorst and Mostert Chapter 2.2.5). The refusal was based on the fact that the 'application for conversion was not received in good time (that is prior to its expiry date of 10 August 2004)' (par 2.6). A prospecting right (7/2006) was, however, issued in terms of the MPRDA on 31 December 2006 to Ataqua Mining (Pty) Ltd (hereinafter "Ataqua Mining") by the Deputy Director-General and the Minister of Minerals and Energy to prospect on Subdivision 16 (see *De Beers Consolidated Mines Limited v Ataqua Mining Limited* (3215/06 (OPD) unreported 13-10-2007 ("*De Beers* (1)" par 2).

By way of background information, on 12 May 2004 the Minister delegated her power in terms of section 103(1) of the MPRDA to grant or refuse a prospecting right to the Deputy Director-General (Item 5 of a document entitled "Delegation of powers by the Minister of Minerals and Energy to officers in the Department of Minerals and Energy" of 12 May 2004, reproduced in Badenhorst and Mostert pages Related documents-33 to Related documents-36).

De Beers applied for judicial review of the refusal of the Regional Manager and the Deputy Director-General to convert De Beers's "old-order prospecting right" so as to enable De Beers to continue its prospecting operations lawfully in terms of the MPRDA. In addition, De Beers applied for a declaratory order that its "old-order prospecting rights" in respect of the farm (excluding tailing dumps), and consisting of prospecting permit 45/2003 and the rights to diamonds held by De Beers, remain in force for a period of two years after commencement of the MPRDA, that is until 30 April 2006 (*De Beers* (2) par 1). In separate proceedings in *De Beers* (1) it was decided that the tailing dumps situated on subdivision 16 of the farm were movable, and were vested in De Beers's ownership and are not governed by the provisions of the MPRDA. The prospecting right granted to Ataqua Mining in terms of the MPRDA was also set aside (for a discussion of this decision,

see Badenhorst and Van Heerden "Status of tailings dumps: Let's go working in the past?" 2010 *Stell LR* 116).

3 Arguments

De Beers alleged that the refusal by the Regional Manager and the Deputy Director-General was due to their erroneous interpretation and application of the provisions of item 6(1) of the transitional arrangements. De Beers maintained that, in terms of section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter "PAJA"), the court had jurisdiction to review the decision of the Department (par 3). The respondents argued that De Beers was required to apply for the conversion before the old-order permit expired on 10 August 2004 (the reference in the decision to October is incorrect). Owing to its failure to do so De Beers had waived its right to a conversion. This was because the old-order permit was subject to the terms and conditions of that permit, one of which was that it had a life-span of 12 months only (par 3). It was, therefore, crucial for the court to determine whether such right existed for a two-year period (until 30 April 2006), or a shorter period in terms of the permit (until 10 October 2004).

De Beers contended that, despite having lodged an internal appeal against the decision of the Regional Manager and the Deputy Director-General, no appeal lies in respect of their decision, as it was the decision of the Deputy Director-General against which no appeal is competent in terms of the provisions of section 96 of the MPRDA (par 3). De Beers contended further that it had applied for an exemption from the obligation to exhaust internal remedies in terms of the provisions of section 7(2)(c) of the PAJA (par 3). The respondents contended that De Beers's application was premature and ought not to be entertained in view of the failure of De Beers to first exhaust internal remedies available to it in terms of section 96 of the MPRDA. The argument of the respondents was based on section 7(2)(a) of PAJA which respondents alleged were prescriptive and did not assist De Beers (par 3): first, because of the absence of exceptional circumstances in this case and, secondly, because section 7(2)(c) does not apply to administrative decisions taken in terms of the MPRDA (par 3).

4 Issues

The legal issues to be decided were set out as follows by the court:

(a) Is the applicant bound by the provisions of section 96(3) of the MPRDA?

(b) What is the duration of the old order prospecting permit as granted to the applicant under permit number 45/2003?

(c) In the event of the court finding in the applicant's favour in respect of the first two issues, should this court interfere with the decision of the administrative functionary and substitute its own decision for that of the functionary? (par 3).

The court's decision as to these issues will be set out accordingly, followed by a discussion of aspects of the decision.

4 1 Section 96(3) of the MPRDA

Section 96(3) of the MPRDA determines that no person may apply to court for the review of an administrative decision in terms of the Act until that person has exhausted his or her internal remedies.

It was submitted on behalf of De Beers that the decision of the Deputy Director-General was not appealable in terms of section 96 as it was effectively the decision of the Minister of Minerals and Energy (par 4). The respondents, however, contended that the provisions of section 96 are prescriptive (par 4).

The court adopted the approach that one first has to examine the terms and conditions of the delegation in order to establish whether the powers therein contained are to be wholly exercised in the discretion of the delegate, or whether such powers are subject to the supervisory and overall approval of the Minister. Only then can one arrive at the conclusion as to which decisions are appealable and which are not (par 4). The following conditions of the document of delegation were taken into account by the court:

(a) power must be exercised judiciously with the necessary discretion and with due regard to the applicable regulations, as well as other instructions and control measures determined in terms of the legislation (condition (a));

(b) should any doubt exist for any reason as to which decision should be taken regarding any matter, such matter should be referred to the Minister for finality (condition (f));

(c) the aforesaid powers may nonetheless be exercised by the Minister notwithstanding the fact that they have been delegated (condition (g));

(d) the Minister must be consulted should there be any reason to move away from or revise established policy guidelines, and the power shall not be further delegated (condition (h)).

In view of these conditions of the delegated document, Ebrahim J held that the Minister as *delegans* was the effective decision-maker acting by means of the Deputy Director-General as delegate. The court decided that the delegation of power to the Deputy Director-General was made in a scheme of deconcentration of public power (par 4). The court accordingly found that when the Deputy Director-General refused the conversion he acted on behalf of the Minister. It was found that the decision had consequently to be regarded as a decision of the Minister, which for obvious reasons would not be appealable in terms of section 96(3) of the MPRDA (par 4). The court decided that section 96(3) of the MPRDA is, therefore, not prescriptive (par 4).

The court held further that the exemption from the obligation to exhaust internal remedies in terms of section 7(2) of PAJA applies to the provisions

of section 96 of the MPRDA (par 4). The court reasoned that the whole of section 7(1)(a) of PAJA, to which section 96(4) of the MPRDA refers, is subject to section 7(2)(c) (par 4).

4 2 Duration of an "old order prospecting right"

Item 6(1) of the transitional arrangements determines that an "old order prospecting right" "continues in force for a period of two years" from commencement of the MPRDA. For such continuation, the "old-order prospecting right" had to be in force immediately before commencement of the MPRDA (item 6(1)). The continuation of the "old order prospecting right" took place subject to the terms and conditions under which it was granted or issued (item 6(1)) provided the terms and conditions were not contrary to the provisions of the MPRDA and the Constitution (item 6(4)). The determination of the duration of an "old order prospecting right" in terms of the said phrase in item 6(1) by the court was resolved by starting with an overview of the interpretation provisions of the MPRDA. According to the court, the provisions of the MPRDA had to be interpreted in terms of section 4 of the Act by adopting a reasonable interpretation which accords with the objects of the MPRDA (par 6). The court cited the main objectives of the MPRDA as contained in section 2 of the Act. The court also highlighted and took into account the following objects of the MPRDA, namely, to give: (a) security of tenure in respect of prospecting operations which were in the process of being undertaken; (b) the holder of an old order prospecting right an opportunity to comply with the new MPRDA so as to make provision for and promote equitable access to and sustainable development of the nation's mineral and petroleum resources (par 6).

The court held that an old order prospecting permit remained valid for two years provided it was converted within that period of two years so as to give effect to the transitional arrangements provided for in the MPRDA. Thus, the court held that an applicant for an old-order prospecting permit had a period of two years to convert the old order permit (par 6). The two-year period for the conversion was construed by the court as effectively being in the nature of a moratorium. The moratorium was perceived as such that, regardless of the period when the old-order permit expires, it continued to be valid and legally enforceable for two years provided it was converted sometime within that two-year period (par 6).

Ebrahim J reasoned that the legislature, whilst appreciating the restrictive nature of the phrase "subject to" and the consequential limitations which flowed from its use, expressly provided for a period of two years for conversion of the old-order right (par 6). Ebrahim J reasoned further:

> "In my view the fact that the legislature chose to provide precisely the same period, that is, two years, for the conversion of the old order permit as for its duration in terms of the new mineral regime, is telling. What it is saying is this: The old order permit is to continue in force for a period of two years with immediate effect from the date of commencement of the MPRDA, that is, 1 May 2004, and every holder of such a permit has two years to convert it" (par 6).

It should be noted that a new prospecting right endures for a maximum of five years and not two years (see s 17(6)). The court was satisfied that its interpretation accorded with the main objects of the MPRDA and, in particular, gave effect to the legislature's intention to provide security of tenure in respect of prospecting operations (par 6).

The court found that the duration of De Beers's old order prospecting permit was two years, calculated from the date of the commencement of the MPRDA. The decision to refuse to convert De Beers's application in terms of 6(1) of the Schedule II to the MPRDA was accordingly set aside (par 8).

4 3 Substitution of administrative decision

The court found that as the period of the duration of the old-order permit in terms of the new regime had long lapsed, no useful purpose would be served in remitting the matter to the Deputy Director-General and the Minister for their reconsideration (par 7). The court ordered that the Deputy Director-General and the Minister were directed to convert de Beers's old-order prospecting right (par 8).

5 Comments

5 1 Old and new mineral law regime

Some general comments of the court regarding the old and new mineral law regime are important and are restated:

(a) Mineral rights prior to the commencement of the MPRDA were described as real rights susceptible to ownership, existing in perpetuity (par 2.4);

(b) The state regulated the exercise of mineral rights and issued, on application prospecting permits and mining permits in terms of the Minerals Act (par 2.4);

(c) Since 1 May 2004 all mineral resources belong to the nation and the state is vested with the custodianship and control of the mineral resources (par 6);

(d) All mineral rights holders, in whichever form, were divested of their rights in respect of their previously held mineral rights (par 6);

(e) The only relevance attached to mineral rights by the court after commencement of the MPRDA was that they constitute an element of the transitional arrangements in the MPRDA (par 2.5);

(f) The mineral right holders obtained new rights in terms of the transitional arrangements (par 6);

(g) The underlying policy in the previous dispensation shifted from privatisation of mineral rights, to the state being in control of granting, exercising and retention of all rights to mineral resources (par 2.5). This was perceived as a fundamental change as the state had done away with the legal notion of private ownership of mining and mineral rights; and

(h) The state, in granting prospecting benefits or permits, is not dealing with the mineral resources of the public as a holder of common-law rights, nor does it deal with these minerals as the subject of mineral rights owned by private persons (par 6).

A huge shift has indeed taken place from private mineral rights, exercisable upon authorization by the state, to rights which have been divested to public-law rights to minerals being granted, regulated and controlled by the state as the custodian of the mineral resources that belong to the nation (see Van der Berg "Ownership of Minerals Under the New Legislative Framework for Mineral Resources" 2009 *Stell LR* 139 156 and 157).

5 2 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd

In the decision of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (39808/2007 (NGHC) (Unreported 18-11-2008)) a prospecting right was granted by the Deputy Director-General to a first-in-time applicant, Genorah, upon compliance with the requirements of the MPRD Act. The Deputy Director-General refused an application for a prospecting right in respect to the same land by a second-in-time applicant, *Bengwenyama Minerals*. An aggrieved *Bengwenyama* requested the court to review and set aside the grant of the prospecting right to Genorah. The North Gauteng High Court found that the decision to grant a prospecting right to Genorah was properly taken by the Deputy Director-General, having been duly authorized by the Minister to do so on her behalf (par 23). It was held that the decision was, therefore, the decision of the Minister (par 24). This is in line with the *De Beers (2)* decision. On appeal in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd) (formerly Tropical Paradise 427 (Pty) Ltd) (Bengwenyama-ye-Maswazi Royal Council intervening)* ([2010] 3 All SA 577 (SCA)) the Supreme Court of Appeal, however, held that a delegate who acts in his own right is held to be responsible for his exercise of power (par 21). The court found that the Minister fully delegated her power to grant or refuse an application for a prospecting right to the Deputy Director-General. It was found that the Deputy Director-General, in deciding whether or not to grant the prospecting right to Genorah, had exercised his own discretion. It was further found that the Deputy Director-General acted in his own right and did not represent the Minister as delegator (par 21 and 35). This was, according to the court, not a case of an appeal being lodged against the Minister's own decision or a question of the delegator sitting in his own judgment on appeal (par 21 and 35).

The *Bengwenyama* decision of the Supreme Court of Appeal overrules the *De Beers (2)* decision in so far as it relates to the delegation of power in terms of the MPRDA. The view of the Supreme Court of Appeal would also impact on the obligation to exhaust internal remedies in terms of section 96 of the MPRDA. In future, prior to a review of a refusal to grant a prospecting right by the High Court being undertaken, an aggrieved applicant will first

have to appeal against the decision of the Deputy Director-General to the Minister.

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (2011 3 BCLR 229 (CC)) the Constitutional Court held that the starting point with delegation analysis has to be the demands of the Constitution (par 52). The problems regarding the delegation of powers were not preceived as uniform by Justice Froneman:

> "In some instances the question will arise whether delegation of power by a legislature is valid, having regard to the constitutional separation of powers. In other cases it might involve questions of whether the correct organ of State has been cited" (par 52).

In casu, delegation of power was, however, not perceived as an issue by the Constitutional court because the MPRDA makes it clear in whom powers may be delagated (52). The constitutional provisions relating to public administration was rather seen as the issue at hand:

> "It is in the context of the fundamental constitutional value requiring a democratic system of government to ensure accountability, responsiveness and openness, and the basic values and principles governing public administration that the issue of delegation and internal appeals and remedies should be assesed" (par 52).

The court also found that the delegation provisions of the Act did not preclude an internal appeal in the particular circumstances of this case (par 45; for a more detailed discussion of the *Bengwenyama* decisions, see further Badenhorst and Olivier "Host Communities and Competing Applications for Prospecting Rights in Terms of the Mineral and Petroleum Resources Development Act 28 of 2002" forthcoming 2010 2 *De Jure*; and Badenhorst, Oliver and Williams "The Final Judgment: *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC)" forthcoming 2012 1 *TSAR*).

5 3 Duration of "old-order prospecting right"

The decision of the court in regard to the duration of transitional prospecting rights is correct. The courts reference to an old-order prospecting permit should rather have been to the encompassing notion of an "old-order prospecting right" as the term is used in the statute. It should be kept in mind that an "old-order prospecting right" is made up of different rights. For instance, in the present decision, the old-order prospecting rights consist of "the common-law mineral right, together with a prospecting permit obtained in connection therewith in terms of section 6(1) of the Minerals Act" (Category 1 of Table 1 of Schedule II to the MPRDA).

The prospecting permit *in casu* expired on 10 August 2004. The common-law mineral right would have existed in perpetuity but for the enactment of the MPRDA. The problem of varying terms of different kinds of rights is, however, overcome if the different rights are bound together, like a Roman *fasces,* and subjected to the moratorium period. In terms of this *fasces* approach the different rights are tied together, and everything which is tied

together shares the same fate: rights, consents and authorizations are terminated or converted together as a bundle, even though the holders of different rights, consents and authorizations may be involved (Badenhorst and Mostert 25-3). This results in the respective terms of the rights becoming of lesser importance. What is important, as indicated by the court, is that a moratorium was created for holders of old-order prospecting rights during which they could convert prospecting rights. The moratorium could have been to the benefit of the holder of a prospecting permit, as in the present case, because the term of the prospecting permit was for less than two years. The moratorium could have been disadvantageous to the holder of the prospecting right (for instance, by virtue of a prospecting contract) in the sense that the term of the prospecting right may have been for longer than two years. The entitlement of a holder of a common-law mineral right would even have existed in perpetuity. Security of tenure is, however, advanced in the sense that during the moratorium period "old-order prospecting rights" continued to exist and could be converted into new prospecting rights. As we have seen from this judgment, providing security of tenure of prospecting operations (and not the underlying mineral rights) is one of the objects of the MPRDA. Even if the prospecting permit is scrutinized in isolation, it should be kept in mind that the acquisition and validity of a prospecting right did not depend on the granting of a prospecting permit in terms of the Minerals Act. A prospecting right was acquired by cession of mineral rights or conclusion of a prospecting contract. Only the exercise of a prospecting right was dependent on the grant of statutory authority by means of the prospecting permit. Even in the absence or upon expiry of a prospecting permit, the prospecting right still existed as an entitlement of common-law mineral rights or in terms of the prospecting contract. The bundle of rights is, however, subject to the two-year moratorium which enables complying with the transitional measures of the MPRDA.

The duration or term of a transitional prospecting right by virtue of item 6(1) can be contrasted with the duration of a transitional mining right in terms of item 7(1) of the transitional arrangements. Item 7(1) provides that an "old-order mining right" in force immediately before the MPRDA took effect "continues in force for a period of not exceeding five years" from commencement of the MPRDA. In *Idada Trading (Edms) Bpk v Top Coat Property Investments 23 (Edms) Bpk* (2009 JDR 0192 (NCK) par 9.1 and 10.2) the court held that the legislature intended to reduce the duration of an "old-order mining right" to five years, namely until 30 April 2009 and not to extend it beyond the five-year period. The court reasoned that if the legislature indeed intended to extend the duration of an old-order mining right, it would have used the same wording as item 6(1), namely, "continues in force for a period of …" Instead, the legislature used the words "for a period not exceeding …" (par 10.2). The continuation of the "old-order mining right" took place subject to the terms and conditions under which it was granted or issued (item 7(1)), provided the terms and conditions were not contrary to the provisions of the MPRDA and the Constitution (item 7(4)). The duration of the mining authorization is one of those terms or conditions (*Idada Trading (Edms) Bpk supra* par 9.3). Thus, if a mining permit expired before the end of the five-year period the "old-order mining right" is

terminated upon such earlier date (*Kowie Quarry CC v Ndlambe Municipality* 2008 JDR 1380 (E) par 27 and 31; see also *Idada Trading (Edms) Bpk supra* par 12). If a mining permit was supposed to expire after the five-year period, it would expire upon 30 April 2009 (*Idada Trading (Edms) Bpk supra* par 9.1). In short, the interim period for an "old-order mining right" could be the full five-year period or less than five-year period, depending on the terms of the grant (see also *Kowie Quarry CC v Ndlambe Municipality supra* par 6).

The legislature also intended to amend item 7(1) of Schedule II to the MPRDA by section 83(a) of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 which determines as follows:

> "any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect or the period for which it was granted, whichever period is the shortest, subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued".

The proposed amendment of item 7(1), which is still not on the statute book, would in any event be in line with the decisions of *Idada Trading (Edms) Bpk* and *Kowie Quarry CC.*

6 Conclusion

The court's decision in *De Beers* (*2)* regarding the delegation of power in terms of section 103(1) of the MPRDA has been overruled and contextualised by the Supreme Court and the Consitutional Court, respectively, in *Bengwenyama*. This would also impact on the decision in *De Beers (2)* about section 96(4) of the MPRDA. It would seem that, in future, an appeal will have to be undertaken against the decision of the Deputy Director-General to the Minister before the decision may be reviewed by the High Court.

The decision of the court *in casu* is especially important in regard to the duration or term of transitional prospecting rights in terms of item 6(1) that may have been refused by the Director-General for not having been submitted in time. This decision has gone a long way towards removing uncertainty regarding the duration of transitional prospecting rights in terms of item 6 of the transitional arrangements. Such duration is two years from commencement of the MPRDA if an application was made for conversion of such rights during the two-year moratorium by a holder of an old-order prospecting right, who was conducting prospecting operations on the land immediately before commencement of the MPRDA. Transitional prospecting rights should be treated as a bundle of rights, which shares the same fate of termination or conversion in terms of the MPRDA. The two-year moratorium can be seen as an escort across the MPRDA Bridge of transition.

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