REVIEW OF A REFUSAL TO GRANT A PROSPECTING RIGHT

Global Pact Trading 207 (Pty) Ltd v The Minister of Minerals and Energy; The Regional Manager: Minerals and Energy, Free State Region; The Deputy Director-General: Minerals and Energy (Case Nr 3118/2006 (O) unreported)

1 Introduction

The decision involved an application for the review and setting aside of a refusal to grant a prospecting right in terms of section 17 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "MPRD Act")(par 1). The decision also dealt with the right (and duty) of an applicant to an internal appeal in terms of section 96 of the MPRD Act (par 5) as well as the procedural fairness of the decision (par18). The decision by the state to refuse the application for a prospecting right was reviewed and set aside by the court, without requiring such internal appeal, (par 20) as the decision was regarded as manifestly unfair (par 18). The court referred the matter back to the Minister for reconsideration (par 18).

At the outset some background information is provided. The idea is not to provide a detailed discussion about the application for a prospecting right. Thereupon the facts of the case and decision are dealt with and discussed.

The MPRD Act provides for a three-tier administration, namely: (a) the Minister of Minerals and Energy; (b) the Director-General of the Department of Minerals and Energy; and (c) Regional Managers designated for the specified regions (see the respective definitions in s 1). Owing to the delegation of powers and assignment of duties in terms of the MPRD Act, which will be discussed below, in practice a four-tier administration is created contrary to the three-tier administration envisaged by the MPRD Act.

The Minister is *inter alia* empowered to grant, refuse and administer prospecting rights to minerals (see s 3(2)(a) of the MPRD Act). The Minister is also empowered to take various administrative decisions in terms of the provisions of the MPRD Act (see Badenhorst, Carnelley and Mostert in Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (first published 2004) (revision service 2) (2-3)). Statutory powers conferred upon the Minister may be delegated in writing by the Minister to the Director-General, the Regional Manager or any officer of the Department of Minerals and Energy. The Minister may also assign any of his or her duties to such persons (s 103 (1) of the MPRD Act). On 12 May 2004 the Minister (as

delegans) did just that in a document entitled "Delegation of powers by the Minister of Minerals and Energy to officers in the Department of Minerals and Energy" (the "ministerial delegation") (see Badenhorst, Carnelley and Mostert (2-11 to 2-12)). For present purposes, the power of granting, or refusal of prospecting rights" was delegated to the Deputy Director-General: Mineral Development. These express delegations were made subject to several conditions. Only those conditions relevant to the current decision are listed, namely that:

> "(a) any 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;
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> (b) …
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> (c) only the lowest level is indicated to which the relevant power is delegated. This implies that a specific power is also delegated to officials in higher posts in the same branch of the department which has control over the relevant function;
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> (d) …
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> (e) where an officer is officially appointed to act in any of the indicated posts, it is deemed that the delegation applicable to such a post is also entrusted to him;
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> (f) …
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> (g) the aforesaid powers may nonetheless be exercised by the Minister notwithstanding the fact that they have been delegated;
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> (h) …
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> (i) the said powers may not be further delegated without the consent of the Minister" (Badenhorst, Carnelley and Mostert 2-11).

The Minister may withdraw a delegation or assignment and withdraw or amend any decision made by a delegate (s 103(4)). The Minister is not divested of any power or exempted from any of his or her duty upon delegation or assignment (s 103(5)).

An application for a prospecting right must be lodged at the office of the appropriate Regional Manager (see 16(1) of the MPRD Act). The Regional Manager must accept a lodgement of an application for a prospecting right if the requirements for lodgement are met, and if no other person holds a relevant right in the same mineral and land (s 16(1) and (2)). If the application does not comply with such requirements, the Regional Manager must notify the applicant in writing within 14 days of receipt of the application (s 16(3)). Alternatively, the Regional Manager must notify the applicant in writing of acceptance of the lodgement of the application (s 16(4) of the MPRD Act) (par 13).

Before a prospecting right may be granted, requirements regarding financial resources, technical ability, estimated expenditure, prevention of pollution, and health and safety must also be met (see further s 17(1)). Upon compliance thereof and additional requirements (*inter alia*, regarding an environmental management plan and notification and consultation with owners and affected parties (see further Badenhorst and Mostert 16.3.1)), the Regional Manager has to forward the application to the Deputy Director-

General for consideration (s 16(5) of the MPRD Act). If all the statutory requirements are met, the Deputy Director-General: Mineral Development is obliged to grant a prospecting right (s 17(1); the Ministerial delegation of 12 May 2004).

However, in terms of the current version of the statute, an applicant 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 (s 96(1) of the MPRD Act).

2 Facts

Global Pact Trading 207 (Pty) Ltd (the "applicant") lodged the application for a prospecting right at the office of the Regional Manager: Minerals and Energy, Free State region (the "second respondent") on 22 September 2005. The application was accepted by the second respondent in a letter dated 16 October 2005. In a letter dated 26 April 2006 the applicant was *inter alia* informed that the application does not comply with section 17(1)(a) and (b) of the MPRD Act due to outstanding information and documents (par 14). The applicant was requested to submit such outstanding information and documents (see further par14). A written response (consisting together with annexure thereto of some 24 pages) to the request letter was send to and received at the office of the second respondent on 10 May 2006 (par 15). As a result of misfiling the written response was not considered by the second respondent when he made his written recommendation to the Deputy Director-General: Minerals and Energy (the "third respondent") to refuse the applicant's application for a prospecting right and was not referred to in the recommendation. It was accepted that the third respondent did not consider the written response when he accepted the recommendation by the second respondent on 19 June 2006 to refuse the application par 16). The decision to refuse the application for a prospecting right by the applicant was taken by the third respondent (par 2).

3 Decision

3 1 It was accepted by the court as undisputed that the decision to grant or refuse an application for a prospecting right constitutes an administrative action, as defined in PAJA (see par 17). The court found that the power to grant or refuse an application for a prospecting right in terms of section 17 of the MPRD Act was delegated by the first respondent to the third respondent (see par 2).

3 2 The court held that the internal remedy of appeal to the first respondent in terms of section 96 of the MPRD Act was not available to the applicant. To put it differently, there was no duty on the applicant in terms of section 96 of the MPRD Act to exhaust internal remedies by

appealing to the Minister (see par 5). It could be questioned whether the appeal from the Deputy Director-General as an "officer" should not have been to the Director-General of the Department and not the Minister.

The court reasoned that in the field of delegation of administrative power a distinction has to be made between deconcentration of power and decentralisation of power: Decentralisation of administrative power takes place when powers are transferred to an independent organ or body which carries out these powers and functions entirely in its own name. Deconcentration of administrative power is applicable where the functions are performed by the delegate in the name or on behalf of the *delegans* (*ie* the delegating authority), in others words the *delegans* acts by means of the delegate (par 6).

The distinction between the two forms of delegation of administrative power is further explained with reference to their respective features: With decentralisation of administrative power the *delegans* has no authority to act on behalf of the delegate and has no control over the independent body other than appointment of the members thereof an/or some form of appeal against the decision of that body. On the other hand, with deconcentration of administrative power the *delegans* may withdraw the delegation at any time and perform the function himself or herself. The *delegans* may also exercise various forms of control over the delegate (par 6) and require reports on the execution of the functions and relieve the delegate of his duties (Burns *Administrative Law under the 1996 Constitution* 2ed (2003) 166; and Badenhorst, Carnelley and Mostert 2-12). To these features may be added another common law principle applicable to deconcentration: Although it is the delegate that performs the function or makes the decision, it is done on behalf of the *delegans* and it is regarded as being performed by the *delegans*. Once the decision has been finally taken or the function performed, the *delegans* is bound by the decision or performance (Burns 166; and Badenhorst, Carnelley and Mostert 2-11 to 2-12).

The court held that the delegation of power to the third respondent took place in a scheme of deconcentration of public power (par 5) (see also Badenhorst, Carnelley and Mostert 2-11). Upon analysis of section 103(4) and (5) of the MPRD Act and the conditions (a), (f)-(h) of the written delegation by the Minister, the court reasoned that the first respondent has the power to (a) revoke the delegation to the third respondent and to exercise the power delegated herself; and, (b) the power to exercise control over the exercise of the delegated power (par 8).

The court accordingly found that when the third respondent refused to grant a prospecting right to the applicant, the third respondent acted on behalf of the first respondent. The court found further that the first respondent acted through the third respondent and that the decision to refuse must be regarded as the decision of the first respondent (par 8). The court found that the third respondent is an "officer" in terms of the

MPRD Act. The court reasoned that if the decision in law is regarded as a decision of the third respondent, then, in terms of section 96 of the MPRD Act an appeal would lie not to the first respondent, but to the Director-General (par 9). In other words, upon refusal by the Deputy Director-General to grant a prospecting right an applicant for a prospecting right has to appeal to the Director-General in terms of section 96(1)(a) of the MPRD Act. In order to have arrived at this conclusion the court looked at the definitions of "Director-General", "department" and "officer" as defined in section 1 of the MPRD Act (see par 9). The court, however, argued that it had not been intended that the exercise of the power granted to the first respondent could be appealed against to a lower ranking official, to wit the Director-General. According to the court, this anomaly does not arise if the decision is regarded as the decision of the first respondent (par 9).

On the aforegoing basis the court held that no appeal in terms of section 96 of the MPRD Act was available to the applicant (par 8). The court also held that section 103(4)(b) of the MPRD Act does not provide an internal remedy to an applicant for a prospecting right (par 10). According to the court an internal remedy is a remedy that an aggrieved person may exercise as of right. To seek an indulgence, which at best is what the request to act in terms of section 10(4)(b) would amount to, does not constitute a remedy (par 10).

The court noted *obiter* that section 96 creates an absolute duty that internal remedies should be exhausted before taking the matter to court (par 11).

3 3 The court further confirmed that the refusal to grant a prospecting right, as an administrative action which materially and adversely affects the rights or legitimate expectations of a person, must be procedurally fair as set out in PAJA (s 3(1), as read with s 33 of the Constitution of the Republic of South Africa, 1996). If an administrative action is procedurally unfair, the court has the power in terms of section 16(2)(c) of PAJA to review an administrative action (par 7).

The court found that the respondents called for further information from the applicant and indicated that if such further information is received timeously, it will be considered when adjudicating upon the application by the relevant authority. However, it failed to consider relevant information timeously received due to the misfiling of a fax. The court held in conclusion:

> "In our judgment this is manifestly procedurally unfair, as was properly conceded by counsel for the respondents. We conclude, therefore, that the decision to refuse the applicant's application for the prospecting right in question is fatally flawed by procedural unfairness. It follows that this decision must be set aside" (par 18).

4 Discussion

Various issues are noteworthy from the judgment: firstly, the discussion of the differentiation of the two types of delegation by the court and the lack of an appeal in instances of deconcentration, resulting in no internal remedies to be exhausted prior to the approach to the court; secondly, procedural fairness; as well as thirdly, the remedy that the court used, namely referring the decision back for reconsideration. Lastly, the proposed legislative amendment is also relevant.

4 1 The delegation and the exhaustion of internal remedies

It is inevitable that government power has to be delegated and sub-delegated to facilitate the division of labour (Hoexter *Administrative Law in South Africa* (2007) 236; and Burns 164). This is recognised by the Constitution in section 238(a) that an executive organ of state may delegate any power or function that is to be exercised or performed in terms of the legislation provided that the delegation is consistent with the legislation. *In casu* the possibility of delegation is expressly contained and regulated in the statute.

As a result of the ministerial delegation, for purposes of the application of a prospecting right by an applicant, a four-tier administration exists, namely: (a) the Minister of Minerals and Energy; (b) the Director-General of the Department of Minerals and Energy; (c) the Deputy Director-General; and (d) the Regional Manager for the relevant region.

The application for a prospecting right is submitted to the Regional Manager. Acceptance of lodgement of an application for a prospecting right takes place by the Regional Manager. Upon such acceptance the application is forwarded to the Deputy Director-General. An application for prospecting right is granted or refused by the Deputy Director-General. As the power to do so is delegated to him from the Minister – there is in this instance no right of appeal to the Minister. This is relevant in practice as the applicant can directly approach the court where the decision is questionable, instead of having to go through the internal appeal procedures. The right to appeal, however, would have remained for those decisions that the Deputy Director-General makes that are not a delegated power from the Minister. As no such original powers are conferred in the MPRDA on the Deputy Director-General, he can only act on the delegated powers from the Minister.

In another matter decided on the same day by the same judges, *Mofschaap Diamonds (Pty) Ltd v Minister for Minerals and Energy* (Case Nr 3117/2006 (O) unreported), the court *verbatim* made the same ruling, based on the same arguments and sources, regarding the delegation as well as the subsequent consequence that no right of appeal is available to the Minister (par 11-17).

Although the legislation creates a tiered system for these types of applications, the delegation of the powers has the effect in practice that these structures are not strictly adhered to. Specifically, *in casu*, the decision of the decision-making official is attributed to the *delegans* and as such is not capable of appeal to the *delegans*. It should be noted that in practice there are internal controls within the relationship of deconcentration prior to an issue being finalised (Burns 277). Burns (279) refers to a form of control of an administrative action within the same administrative hierarchy – an "internal appeal" – where the reviewing superior body reviews the administrative action *de novo.* This type of appeal should be distinguished from the appeal to administrative tribunal, an "administrative appeal". It could be argued that the appeal in section 96 is an "internal appeal". If this submission is right, the question is whether the right to appeal in section 96 is now, post this judgment, superfluous. It would appear to be so, as all the powers of the Deputy-General are delegated powers and as such attributed to the Minister – if the *Global* judgment is followed. It should be reiterated that there are distinct advantages to internal remedies being exhausted first. The courts would only be approached where the dispute could not be settled internally in a cheaper and quicker manner. The consequences of this decision for officials acting on a deconcentrated delegation of powers, which include all government departments, are far-reaching. The possibility of an internal appeal would become obsolete and could as a result place an unnecessarily heavy burden on the courts.

The only manner in which the burden on the courts can be alleviated is if the administrative decision-maker could vary or revoke a decision previously made. In general a disgruntled individual cannot have a decision re-considered after it had already been finally made and been published, as the *functus officio* doctrine applies. The Interpretation Act 33 of 1957 (s 10(1)) provides that unless the contrary intention appears, where powers are conferred or duties are imposed these may be exercised "from time to time as occasion requires". Hoexter argues that although this enigmatic provision could be interpreted to allow for a free variation or revocation of decision, the better interpretation would be that it only enables administrators to exercise their powers anew in different situations and not to revisit or revoke their existing decisions whenever they like (Hoexter 246). For considerations of certainty, fairness and legality official decision-makers are regarded as *functus officio* once a decision has been made (Hoexter 247).There are only limited instances where the doctrine would not apply (see Hoexter 247). Although most of these exceptions are not relevant *in casu*, it should be mentioned that the *functus officio* rule would not apply where the legislation provides for such a scenario, explicitly or by implication, such as with the tax authorities that are permitted to reconsider assessments and issue revised assessments (Hoexter 248 with reference to *Carlson Investment Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 3 SA 210 (W)). *In casu,* the legislation, however, does not expressly make provision for a re-consideration of the decision by the *delegans*. The consequences hereof are that once the decision has been made, it is final

and the decision-maker *functus officio*. As mentioned above, the only alternative available is the courts.

The court *in casu* noted *obiter* that PAJA creates an absolute duty that the internal remedies should be exhausted. The duty is a well-established principle in the law. There has, however, always been certain exceptions to the rule in common law and even PAJA allows for the exemption of the obligation in exceptional circumstances (s 7(2)(c). See in general Hoexter 478-482). Apart from the fact that the comment was *obiter*, it is submitted that there is no reason to believe that the court intended to do away with the exceptions to the common law rule.

This decision again illustrates that the ministerial delegation of powers as well as the appeal procedures in terms of section 96 should be revisited by the legislature (See Badenhorst "Duelling of Prospecting Rights: A Non-Custodial second? – *Meepo Ya Sechaba v Kotze and Bathopele Mining Investments (Pty) Ltd and others* 869/2008 (NCD) unreported" (submitted for publication in 2008 *TSAR*).

4 2 Procedural fairness

Section 96(1) of the MPRD Act provides that an applicant whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision has a right to appeal the decision.

In the *Global Pact Trading* matter, the court confirmed that where an administrator, such as the regional Manager, requests further information from an applicant and expressly indicates that such further information, if received timeously, will be considered upon adjudication; a failure to do so will constitute an administrative action which is procedurally unfair and can be set aside on review by a court of law.

It should be noted that the applicant did not automatically have a right to provide *further* information to its already submitted application to rectify defects therein. He/she also did not have a right for such information to be considered by the official. The statute does not make provision for such a possibility. The opportunity to rectify defects in the application documents arose from the invitation by the officials. The applicant merely has a legitimate expectation based on the express promise by the official that it would be done. This principle of legitimate expectation has been accepted as part of the South African law in *Administrator, Transvaal v Traub* (1989 4 SA 731 (A)) and confirmed in the (interim) Constitution of the Republic of South Africa 200 of 1993 as well as PAJA. There is some uncertainty as to what exactly would qualify as a legitimate expectation (Hoexter 376-380). On the one hand it is argued that a legitimate expectation is dependant on an express promise on behalf of the public authority or the existence of an established practice as set out in *Claude Neon Ltd v City Council of Germiston* (1995 3 SA 710 (W)); *Premier, Mpumalanga v Executive Committee, Association of State-aided Schools, Eastern Transvaal* (1999 2

SA 91 (CC)); *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* ([2005] 3 All SA 33 (SCA)); and *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier van die Provinsie Vrystaat* (1996 2 BCLR 248 (O)). Hoexter (378) paraphrased the requirements as set out in *NDPP v Phillips* (2002 4 SA 60 (W) as endorsed in *SA Veterinary Council v Szymanski* 2003 4 SA 42 (SCA) par 20) as follows: "(i) a reasonable expectation that was (ii) induced by the decision-maker based on (iii) a clear, unambiguous representation which it was (iv) competent and lawful for the decision-maker to make". On the other hand there is some authority that something less is required for a legitimate expectation (*Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA); and *President of the RSA v SARFU* 2000 1 SA 1 (CC)). As the facts *in casu* meet the more stringent requirements of the *Phillips* case, this debate is ignored for purposes of this discussion. The bottom line remains that the officials must act in the spirit of the Constitution which means that they must act fairly, responsibly and honestly (*Goodman Bros v Transnet Ltd* 1998 4 SA 989 (W) 997B-D). The question is why the court did not mention the issue of legitimate expectation. It merely accepted that a right or a legitimate expectation was materially and adversely affected and as such had to be procedurally fair. The answer can probably be described as one of avoidance. Although section 33(1) of the Constitution gives everyone the right to administrative action that is lawful, reasonable and procedurally fair, PAJA limits this to a right (and not a legitimate expectation) by the definition of "administrative action" in section 1 (PAJA). The reference to a legitimate expectation in section 3 of PAJA appears illogical and a contradiction (see in general Hoexter (358-359) and her discussion of the various solutions offered by academic writers). It seems as if the court *in casu* simply ignored this anomaly as did the courts in *inter alia Minister of Defence v Dunn* ([2007] JOL 20005 (SCA) par 31); *Xaluva v MEC, Department of Education* ([2006] JOL 18348 (Ck) par 66); *Tirfu Raiders Rugby Club v SARU* ([2006] JOL 16604 (C)); and *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* ([2006] JOL 17851 (LC)). One can only agree with Hoexter (359) that the legislature should amend either section 1 or section 3 to rectify the discrepancy.

Leaving aside these issues, the court *in casu* confirmed that where an express promise was made by an official, it should be kept, otherwise it would result in procedural unfairness. The facts in the *Mofschaap* matter referred to *supra*, also deal with a prospecting permit and procedural fairness. The applicant attempted to interdict the Minister from awarding such a permit (par 1). The Minister previously refused the application of *Mofschaap* based on the fact that their application did not meet the statutory requirements. *Mofschaap* unsuccessfully argued, *inter alia*, that the decision of the Minister was procedurally unfair. The crux of this judgment was that the court confirmed that competing applications are dealt with in order of receipt of the applications. A competing application would thus not be processed before an earlier application had been disposed of. This is indeed so, if the papers of the application are in order. However, where there is an error or an omission in the application, the applicant loses its place in the

queue, as there is no obligation on the Department to give an applicant an opportunity to rectify errors or to inform it of any shortcoming in the application. Such an obligation would, according to the court, lead to administrative chaos and cannot be regarded as procedurally unfair (par 18). It is thus the responsibility of the applicant to meet all the statutory requirements prior to submission. It cannot expect the Department to revert back to it each time a mistake or an omission is made.

4 3 Remedy

The court *in casu* did not make the decision whether or not to grant the prospecting right, but referred the issue back to the relevant decision-maker. This is in line with the general rule and the notion of separation of powers. This is also the preferred option in PAJA (s 8(1)(c)(ii)). The administration is after all best equipped to deal with the issue as it has the necessary knowledge and experience. The courts are reluctant to usurp the powers of the adminstration that were delegated to them by the legislature, unless there are specific reasons to divert from the general rule (Hoexter 485-492).

4 4 Legislative amendment

It should be noted that the legislature intends to amend section 96(1) of the MPRD Act as follows:

> ''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 within 30 days of becoming aware of such decision in the prescribed manner to –
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> (a) the Director-General, if it is an administrative decision taken by a Regional Manager or any officer to whom the power has been delegated or a duty has been assigned by or under this Act; or
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> (b) the Minister, if it is an administrative decision taken by the Director-General or the designated agency'' (s 69 of the Mineral and Petroleum Resources Development Amendment Bill [B10-2007] ("Amendment Bill").

"Officer" in section 96(1) is to be replaced to make provision for the officer to whom powers have been delegated and duties have been assigned. The right of appeal is said to accrue "within 30 days of becoming aware of such decision". The proposed amendments to sections 16 and 17 are not relevant for purposes of present discussions.

Section 103(4)(b) of the MPRD Act is to be amended in so far as the power of the Minister, Director-General, the Regional Manager or officer to withdraw or amend a decision by a delegate is subject to the proviso that existing rights may not be affected by such withdrawal and amendment of the decision (s 74 of the Amendment Bill). Even though it speaks for itself the clarification of the power is to be welcomed.

In the present case section 96(1) has already been interpreted in the way the amendment envisages. The court's decision regarding sections 96(1)

and 103 will remain unchanged even if sections 96(1) or 103 of the MPRD Act are amended as envisaged.

5 Conclusion

The end result achieved in the *Global Pact Trading* case and the *Mofschaap* decisions can perhaps not be faulted, especially with regard to their conclusion on the issue of procedural fairness arising from a legitimate expectation based on an express promise of an official. The impact of the two decisions is, however, cause for concern. An application for a prospecting right is submitted to the Regional Manager and considered by the Deputy Director-General. Upon refusal of such an application, the applicant can directly apply to court for relief and is not obliged to appeal to either the Director-General or the Minister of the Department of Mineral and Energy Affairs. As the power to refuse a prospecting right has been delegated by the Minister to the Deputy Director-General and the decision of the Deputy Director-General is deemed to be that of the Minister, there is no possible appeal to a subordinate of or the Minister herself. Whether such lack of appeal was intended by the legislature is to be questioned. This decision again illustrates that the delegation of powers as well as the appeal procedures in terms of section 96 of the MPRD Act should be revisited by the legislature.

The discrepancy between section 1 and section 3 of the Promotion of Administrative Justice Act also remains unresolved, making legislative intervention necessary.

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