

## DUELLING PROSPECTING RIGHTS: A NON-CUSTODIAL SECOND?

*Meepo v Kotze* 2008 1 SA 104 (NC)

“The seconds of both parties shall stand together; having taken their ground, they first command, ‘Make ready,’ which is followed by the word ‘Fire’.”\*

### 1 *Introduction*

This decision of the Northern Cape division dealt with competing “old order prospecting rights” and prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). The decision represents an important contribution to the resolution of tensions between the old mineral law order and the new regime of Act 28 of 2002. This discussion begins by providing some

\* Rule 53 of the French Duelling Code as reproduced from Millingen *The History of Duelling* (1841) <http://duellingpistols.com/Frenchcode.htm> (21-08-2007). The rules of the Duelling Code had been sanctioned by twenty-five general officers, eleven peers of France, fifty officers of rank and the minister of war.

background information to contextualise the problem that arose in the *Meepo* case. This is followed by a synopsis of the facts of the case. The analysis of the decision by Lacock J and Olivier J is preceded by a review of general statements initially made by the court regarding provisions of Act 28 of 2002 and the constitution. We conclude with a few comments on the impact of the decision for the development of the new mineral and petroleum law.

## 2 Background

Act 28 of 2002, which came in effect on 1 May 2004, provides a list of very broad objectives in section 2, namely to:

- (a) recognise the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic;
- (b) give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources;
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- (d) expand opportunities for historically disadvantaged persons, including women, substantially and meaningfully to enable them to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- (e) promote economic growth and mineral and petroleum resources development in the Republic;
- (f) promote employment and advance the social and economic welfare of all South Africans;
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
- (h) give effect to section 24 of the constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

Act 28 of 2002 recognises "old order prospecting rights" in its transitional arrangements in schedule II of the act and makes provision for the conversion of "old order prospecting rights" into (new) prospecting rights (item 6 of schedule II). Before an "old order prospecting right" could have been exercised in terms of the now repealed Minerals Act 50 of 1991, a prospecting permit had to be obtained in terms of section 6 of the Minerals Act. In terms of item 12(1) of the transitional arrangements, any person who can prove that his or her property has been expropriated in terms of any provision of Act 28 of 2002 may claim compensation from the state. Act 28 of 2002 also makes provision for the granting of (new) prospecting rights by the state in terms of the provisions of the act (s 17). (For a brief discussion of the conversion of "old order prospecting rights" into new prospecting rights and the *de novo* application for prospecting rights see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* (2006) 677-681 and 707-708 respectively.)

A distinction should be drawn between compliance with the requirements for an *application* for a prospecting right and the requirements for *granting* a prospecting right. An application for a (new) prospecting right has to be submitted to the office

of the regional manager in whose region the land is situated (s 16(1)(a)). If the prescribed requirements are met, the regional manager must accept an application for a prospecting right (see s 16(2)). After acceptance of the application, consultation with interested or affected parties must take place (see further s 10(1)). Objections to the granting of a prospecting right can also be raised with the regional manager for consideration and advice by the Regional Mining Development and Environmental Committee (see s 10(2)). Upon compliance with other requirements, such as receipt of an environmental management plan and results of consultations with the owner or lawful occupier of land or other affected parties (see s 16(4) and (5)), the regional manager must forward the application to the minister (or her delegate) for consideration (s 16(5)). Upon compliance with the specified requirements (see s 17(1) and (2)), which also include submitting a prospecting work programme, the minister (or her delegate) must grant a prospecting right (s 17(1)).

In terms of section 103(1) of Act 28 of 2002 the minister has by virtue of a delegation on 12 May 2004 *inter alia* delegated the power to grant or refuse a prospecting right to the deputy director-general: mineral development. The further delegation of powers by the delegate was prohibited by the minister in terms of section 103(2) of Act 28 of 2002. (As to the ministerial delegation in general (and the delegation by the director-general on 7 July 2004 in terms of s 103(3) of the act), see further Carnelley in Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004 revision service 3) 2-9 to 2-13. As to the legal problems and uncertainty created by the ministerial delegation (and delegation by the director-general) of powers without assignment of duties, see the detailed discussion of Dale *et al South African Mineral and Petroleum Law* (2005) MPRDA-600 to MPRDA-613.) Since the ministerial delegation, acceptance of an application for a prospecting right must still take place by the regional manager, whilst the deputy director-general has to grant or refuse a prospecting right.

A prospecting right granted is said to become effective on the date of approval of an environmental management plan (s 17(5); the reference to an “environmental management programme” in s 17(5) is clearly a mistake by the legislature). A prospecting right may only be amended or varied by written ministerial consent (s 102; the power to amend a prospecting right has not been delegated by the ministerial delegation of 12 May 2004).

In terms of section 5(4) of the act prospecting may, however, not take place without (a) a prospecting right; (b) an approved environmental management plan; and (c) notification of and consultation with the owner or lawful occupier of the land. If a holder of a prospecting right is prevented from commencing or conducting any prospecting operations because the owner or the lawful occupier of the land *inter alia* refuses to allow such holder to enter the land, provision is made for the regional manager to request the parties to reach an agreement for the payment of compensation for loss or damage as a result of prospecting (see s 54(1)-(3)). Upon failure to reach such an agreement, compensation must be determined by arbitration or by a competent court (s 54(4)).

### 3 Facts

This was not the first duel between the respondents and Meepo (see Badenhorst “Vereistes vir ’n tydelike permit om prospekterwerkzaamhede voort te sit” 2002 *Obiter* 186). For the purposes of this discussion, the following facts of the case are relevant: Kotze, the first respondent, was the owner of a farm (the remainder of the farm Lanyon Vale 376) (108A-109A). On 1 July 2001 Kotze applied for a prospect-

ing permit in terms of section 6 of the Minerals Act 50 of 1991 to prospect for minerals on the farm. Bathopele Mining Investments (Pty) Ltd, the second respondent, was subsequently joined as a co-applicant for purposes of the application (109E-F) (insofar as the court accepted that there was no difference for the purpose of the proceedings between their interests, the court's reference to them as the "respondents" (109B), will also be followed in this case discussion). Despite a number of enquiries on their behalf, the respondents were never informed of the fate of their application before the repeal of the Minerals Act and the commencement of Act 28 of 2002 on 1 May 2004. The applicant also applied for a prospecting permit for diamonds on the farm in terms of the Minerals Act (109F).

Upon commencement of Act 28 of 2002, Meepo applied for a prospecting right to prospect for diamonds on the farm (109G). The deputy director-general of the department of minerals and energy accepted the application on 6 January 2005 (the court actually referred to "approval", which may be misleading). The document, as well as a power of attorney, was signed by the deputy director-general. The deputy director-general purported in the power of attorney to have delegated his power to sign the prospecting right in favour of Meepo to the regional manager (123B). A prospecting right (the "first prospecting right") in terms of section 17 of Act 28 of 2002 was issued to Meepo. The prospecting right was signed on 24 March 2005 by the regional manager "for and on behalf of the minister". Due to technical problems the registration of the prospecting right did not take place in the Mineral and Petroleum Titles Office (124C). The respondents objected in writing on 15 June 2005 (the decision actually refers to 2004) to the regional manager against the granting of the first prospecting right to Meepo. The objection was not upheld. On 5 April 2005 the respondents appealed in terms of section 96 of the act to the director-general against the granting of the first prospecting right (110D). On 1 July 2005 the regional manager and Meepo notarially executed a second document in terms of which a prospecting right (the "second prospecting right") was granted to Meepo in terms of section 17 of the act. According to the introduction of the document of the second prospecting right, this right replaced the first prospecting right. This document was also signed by the regional manager "on behalf of the minister". Unlike the first prospecting right, the second prospecting right was duly registered in the Mineral and Petroleum Titles Office on 18 July 2005 (109I; see also 124G). On 20 July the regional manager approved Meepo's environmental management plan whereby the second prospecting right became effective in terms of section 17(5) of the act (110B). No appeal was filed against the granting of the second prospecting right, because the respondents only became aware of the second prospecting right when the main application (see below) was served. The appeal was still pending when the counter-application (see below) was lodged (110E).

On several occasions since the end of July 2005, armed with its prospecting right to prospect for diamonds on the farm, Meepo approached Kotze for access to the farm for purposes of exercising its rights to prospect for diamonds on the farm. Kotze, however, refused Meepo access to the farm, contending *inter alia* that Meepo's prospecting right was "void *ab initio*" (108C). Meepo applied to court for a declaration that it is by virtue of the second prospecting right (109I) entitled to access to the farm, to commence and carry on with prospecting operations and that Kotze be ordered to allow Meepo to have such access and to commence and carry on with prospecting operations on the farm (108C). In a counter-application lodged on 2 August 2006 the respondents *inter alia* applied for the review and setting aside of the prospecting right issued to Meepo (108F).

#### 4 General remarks about Act 28 of 2002

4.1 At the outset the court made some general remarks about the act which are welcomed at this stage in the absence of reported decisions on provisions of the act. The court's reference to sections of the act and the Constitution of the Republic of South Africa of 1996 are retained in brackets. The general remarks of the court are followed by some brief comments. According to the court the act introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa:

- (a) The following fundamental changes were said to be apposite to the proceedings:
  - (i) the legislature has done away with the traditional concept of "mineral rights". The state is now the custodian of the mineral and petroleum resources of the Republic of South Africa (s 3);
  - (iii) no provision is made for the compulsory compensation of an owner of land for the surface of its land for the purposes of prospecting or mining for minerals except in cases of expropriation (sch 2 item 12) or by means of arbitration (s 54);
  - (iii) the holder of a prospecting or a mining right now has a limited real right in the land which is the subject matter of the right, and this right must be registered (s 5(1) and 19(2)(a));
  - (iv) the prevalence of state power of control over the mineral resources of the Republic and the concomitant ousting of the mineral rights of the owner of the land or holder of a mineral right (s 3(2)) (110G).
- (b) A consideration of the provisions of the act inevitably leads to a realisation of the conflict between the interests and/or rights of a holder of a prospecting or mining right and the owner of land. All these rights are core rights enshrined in the bill of rights (see s 24 and 25 of the constitution) (111A).
- (c) Upon interpretation of the applicable provisions of the act that may be suspect of more than one construction, preference should be given to that construction which would result in the most rational balance between the aforesaid conflicting interests and/or rights of a holder of a prospecting right or mining right on the one hand and the owner of the land on the other hand (111C).

4.2 The court does not in (a)(i) and (iv) of 4.1 above clearly distinguish between the subsections of section 3. Section 3(1) determines that "[m]ineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans", whilst section 3(2) empowers the state, acting through the minister, as custodian of the nation's mineral and petroleum resources to grant various rights to minerals and petroleum. The court seemed to have accepted that section 3 has resulted in the state being custodian of the mineral and petroleum resources and in the ousting of the traditional mineral rights because of the state's power of control over mineral and petroleum resources. Suffice it to state that the views as to the meaning of sections 3(1) and (2) differ (see the views of Badenhorst and Mostert *Mineral and Petroleum Law* 13-3 to 13-6, Dale *et al* MPRDA-120 to MPRDA-131, Glazewski *Environmental Law in South Africa* (2005) 464 468, Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (2006 thesis North West University) 149-152). The different views are discussed by Badenhorst and Mostert ("Artikel 3(1) en (2) van die *Mineral and Petroleum Resources Development Act*

28 van 2002: 'n herbeskouing" 2007 *TSAR* 469 and Badenhorst "Mineral rights are dead! Long live mineral rights!" 2008 *TSAR* 156).

It is correct that provision is not expressly made for the compulsory compensation of an owner of land for the surface of its land for the purposes of prospecting or mining for minerals. It seems as if the court suggested that item 12 of the transitional arrangements is not limited to the possible expropriations in terms of the transitional measures. Indeed item 12(1) is cast in very wide terms: "Any person who can prove that his or her property has been expropriated in terms of *any provision of this Act* may claim compensation from the State" (our italics). On the other hand, item 12 forms part of the transitional arrangements of the act. According to the wide interpretation of item 12, an owner of land whose surface use of the land is lost as a result of the granting of a prospecting right may claim compensation for expropriation. Dale *et al* (MPRDA-129) also mention this possibility. This would have far-reaching consequences insofar as every owner of land whose use of land is lost as a result of the granting of a prospecting right, mining right or other rights to minerals would have a claim against the state on the basis of expropriation. These expropriation claims could run into millions of rands (see *eg* Ryan "Ball rolling on 2.7bn mine suit" *Fin24* 09-01-2008, <http://www.fin24.co.za>). It should, however, be noted that the minister is expressly empowered by section 55(1) of the act to expropriate property for purposes of prospecting or mining if it is necessary to achieve the objectives of the act. This would be a formal expropriation incorporating provisions of the Expropriation Act 63 of 1975 (s 55(2) of Act 28 of 2002). Section 54 also makes provision for compensation under certain circumstances by agreement between the owner of the land and holders of prospecting or mining rights, arbitration or decision by a court, in the absence of such agreement. This compensation would, however, not be paid by the state but by the holder of the prospecting right or mining right. Item 12(1) is not stated to be subject to the provisions of either section 54 or 55 of the act. It seems that if an owner or lawful occupier of land does not prevent the holder of a prospecting right or mining right to commence or continue with prospecting or mining operations, compensation for loss of the use of land by expropriation on the granting of prospecting or mining rights against the state could be claimed. If the owner or lawful occupier prevents the prospector or miner from commencing or continuing with prospecting or mining operations, section 54 comes into play. It is beyond the ambit of the current discussion to consider whether such an outcome was indeed envisaged by the legislature, even if it could be regarded as fair from the perspective of the owner or occupier of land.

It is correct that a prospecting right or mining right granted by the state is labelled as a limited real right in section 5(1) of the act and that these rights have to be registered in the Mineral and Petroleum Titles Registration Office. The director-general is empowered in terms of section 5(1)(d) of the Mining Titles Registration Act 16 of 1967 to register such rights. In addition, section 2(4) of the Mining Titles Registration Act states that the registration of a right in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties. It was submitted earlier that in terms of property theory the grant of a prospecting or mining right by the state only creates personal rights, whereas a limited real right is created upon registration of a prospecting right or mining right in the Mineral and Petroleum Titles Office (see Badenhorst "Nature of new order rights to minerals: a Rubikian exercise since passing the mayday Rubicon with a cubic circonium" 2005 *Obiter* 505). As will be seen below, the court in the present case held that the granting of a prospecting right is based upon an agreement between the state and the applicant. In the proposed amendment of the Mineral and Petroleum Resources De-

velopment Act (B10-2007), section 5(1) will read that a prospecting right or mining right granted in terms of the act and registered in terms of the Mining Titles Registration Act is a limited real right. The additional requirement in the subsection of registration of the right is in line with property law doctrine and to be welcomed.

It is correct that conflicting prospecting rights, mining rights and ownership of land are “property” for purposes of section 25 of the constitution (see in general Badenhorst and Mostert *Mineral and Petroleum Law* 25-22 to 25-22B). It is also correct that resolving conflicting interests between prospecting rights or mining rights and ownership also involves environmental rights in terms of section 24 of the constitution. The court seemed to have suggested that in conflicts between owners of land and holders of prospecting rights or mining rights the property clause comes into play. It is, however, interesting to take note of the recent decision in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* (2007 2 SA 363 (SCA)). The supreme court of appeal regarded it unnecessary to deal with the court *a quo*’s finding that an implied term to conduct open-cast mining would be in conflict with the guarantee against arbitrary deprivation of property afforded by section 25 of the constitution (see 374I/J-375A; as to a discussion and criticism of the court *a quo*’s finding on the constitutional principles, see Badenhorst and Mostert 2007 *TSAR* 419-421). The court, nevertheless, expressed its opinion that the notion of arbitrary deprivation does not enter the picture at all (375D). The need found by the court *a quo* to apply section 39(2) of the constitution was also rejected by the supreme court of appeal. According to the court, resolution of conflicting interests in the case of servitudes and mineral rights does not require that one of these conflicting interests be preferred by any of the values underlying the bill of rights. Application of section 39(2) of the constitution would according to the court not have yielded a different answer from the common law (375E-F). Conflicts between the owner of the land and the holder of a mineral right should, thus, according to the supreme court of appeal be resolved in accordance with servituted principles designed to resolve conflicts between owners and holders of servitudes. The same approach would probably be followed by the supreme court of appeal in resolving conflicts between owners of land and holders of (new) rights to minerals.

The interpretation of the provisions of Act 28 of 2002 proposed and followed by the court in the present case is principally sound, but does not take into account the manner of interpretation prescribed in section 4 of the act. Briefly, a reasonable interpretation consistent with the objectives of the act (as stated in section 2) is preferred and the act prevails over inconsistent common law. (See further Badenhorst and Mostert *Mineral and Petroleum Law* 13-2 to 13-3; Dale *et al* MPRDA-132 to MPRDA-133.) These prescribed forms of interpretation should have been used and should have preceded the court’s proposed mode of interpretation. It is conceded that section 2(h) does make provision for giving effect to section 24 of the constitution by describing the manner of development of mineral resources.

## 5 Decision

For ease of discussion, the chronological order of the decision is altered somewhat in the following analysis. The court decided as follows:

### 5.1 Application for prospecting permit under the Minerals Act

At issue was whether the application for a prospecting permit by the respondents was still a pending application on 1 May 2004 (130G). The court accepted as com-

mon cause that the respondents applied for a prospecting permit in terms of the Minerals Act (130C). On the evidence it was accepted that no decision was taken during February 2004 to refuse the application for a permit (132H-J; see further 130H-133G). It was also accepted that at the commencement of the act on 1 May 2004 the defendants had not been informed by the department of the fate of this application (130C). In the absence of any other evidence, the court accepted that the application for the prospecting permit was still pending when Meepo submitted its application for a prospecting right under the act to the regional manager (134B).

The court held that the application for a prospecting permit should have been processed as a pending application under item 3 of the second schedule of the act. The court ordered that the regional manager and minister be directed to process the application of the respondents for a prospecting permit as a pending application under item 3 of schedule II of the act (134I). This would entail that the application for a prospecting permit must be regarded as having been lodged in terms of section 16 of the act (item 3(1) does, however, not refer to section 16 and is clearly another mistake by the legislature). If such application does not meet the requirements for a prospecting right the regional manager will have to direct the applicant to submit the outstanding information within 120 days (item 3(2)).

## 5.2 Prospecting rights in terms of Act 28 of 2002

### 5.2.1 Main application: exercising of the prospecting right

The court did not agree with the view that a prospecting right only becomes effective in terms of section 17(5) of the act on the date of approval of the environmental management plan. The court correctly explained that the holder of a prospecting right acquires rights as such upon the granting of the right, for instance the right to have his environmental management plan considered and/or approved in terms of section 39 of the act. What is postponed by section 17(5) is the exercising of the right to prospect and to remove minerals (with reference to s 5(4)), but the rights become vested in the holder upon the granting of that prospecting right (125H).

It was argued that Meepo was not entitled to access to the farm and to prospect for diamonds by reason of its failure to consult with the owner of the land (Kotze) after it was granted a prospecting right and before demanding access to the farm as required by section 5(4) of the act. It was further argued that Meepo's application was prematurely brought (111E).

At issue was whether section 5(4) of the act (*ie* notification and consultation with the owner or lawful occupier of the land prior to exercise of the prospecting right) "refers to a consultation process pre or post the granting of a prospecting right" (111H). The court held that by enactment of section 5(4)(c) of the act the legislature intended that, after the granting of a prospecting right and before the commencement of prospecting activities on land subject to a prospecting right, proper notice of the intention to enter the land for purposes of prospecting should be given to the owner of land, followed by a consultative process (116H). Access for prospecting is not authorised without prior consultation with the owner of the land (117I). The court accordingly found that the main application by Meepo was, therefore, prematurely brought and could not succeed (117I-J).

The court found it unnecessary to deal with the issue whether a proper consultation was held with Kotze as owner of the land in terms of section 16 of the act. In terms of section 16(4) it is required of an applicant of a prospecting right to notify in writing and consult with the owner of the land. This consultation should not be confused with the consultation with the owner of land in terms of section 5(4) prior



to the exercise of prospecting rights. The court accepted that Kotze was properly invited to attend such consultation in terms of section 16 and had sufficient opportunity to participate therein (117J–118A). The reasoning of the court was as follows: firstly, the court was of the view that the provisions of the act (especially the fundamental principles in chapter 2) should be interpreted with due regard to the constitutional rights, norms and values the legislature sought to encapsulate, protect and advance in the said act. The court's reference to sections of the Act 28 of 2002 and the constitution is retained in brackets. The more prominent rights, norms and values, according to the court appear to be:

- (a) the custodial role of the state over the mineral and petroleum resources of the nation and the concomitant disposal of the traditional concept of state and/or individual rights to unexploited minerals (s 3(1) of the act; s 3(2) should also have been cited);
- (b) the state's duty to protect the environment for the benefit of present and future generations (s 24 of the constitution of 1996 and the preamble of the act);
- (c) the right to equitable access to natural resources of the country (s 25(4)(a) of the constitution); and
- (d) the right not to be deprived of property arbitrarily (s 25(1) of the constitution and s 2 of the act) (113H–114F). It should be noted that only the objective to provide security of tenure in respect of prospecting and mining operations is listed in section 2(g). The question of security of tenure of rights to land does resort under the property clause.

The court was of the opinion that the legislature intended to provide in the act for a rational balance between *inter alia* the rights of the holder of a prospecting right and the "property rights" of the owner of land, as well as the fundamental right to have the environment protected. The provision of the act should accordingly be interpreted with due regard to the constitutional values and norms mentioned above (113H).

The court reasoned that since the granting of a prospecting right results in serious inroads in the property rights of the owner of land, the legislature has attempted to alleviate these consequences by providing for due consultation between the owner of land and the holder of a prospecting right. The court recognised the opportunity to object to an application by the applicant for a prospecting right to the regional manager, consideration of the objection in terms of section 10(2) of the act and payment of compensation in terms of section 54 of the act. Apart from these opportunities the court correctly indicated that consultation is the only prescribed means whereby an owner of land is to be apprised of the impact that prospecting activities may have on his land (114D). The court concluded that for the foregoing reasons "these sections of the MPRDA providing for consultations between an applicant for and/or a holder of a prospecting right and a landowner should be widely construed" (114F).

Secondly, with reference to the heading of section 5, the court was of the opinion that the legislature intended that the provisions of section 5 are applicable to holders of rights already granted under the act. The court correctly explained (with reference to the definition of "holder" in s 1 of the act) that a person can either be the holder of a right or a successor in title of a holder, subsequent to the granting of the right (114G). The wording of section 5(4) was held to be indicative thereof in that it refers to a holder of a right (114I). The court reasoned that the persons referred to in section 10(2) and 16(4)(b) of the act are not holders of a prospecting right but mere applicants for a prospecting right (114J). Applicants of prospecting rights are not entitled to the rights referred to in section 5 of the act, namely to enter land,

prospect for minerals, remove minerals found during prospecting, use water on the land for prospecting and carry out incidental prospecting activities 114J). The court correctly concluded: “What a landowner needs to be notified of and consulted about is the intention of a holder [of a prospecting right] to commence with his or her prospecting activities and any work incidental thereto” (115B).

Thirdly, the court mentioned that an application for a prospecting right must contain a prospecting work programme. More detail with regard to the potential impact of the environment by prospecting has to be submitted and contained in an environmental management plan. Upon approval of the environmental management plan the holder of a prospecting right is entitled to exercise his entitlements in terms of section 5(3). These activities may, according to the court, have a major disruptive effect on the owner or occupiers of the land. The court provided examples of such activities. The court opined that the consultative process envisaged in section 5(4) (c) of the act is intended to afford an owner of land the opportunity of “softening the blow” inevitably suffered as a consequence of the granting of a prospecting right. Barring the other methods of dispute resolution mentioned by the court, section 5(4) (c) provides the only means afforded in the act to an owner of land to protect his rights as such. This interpretation is justified by the court in the sense that it accords with the rational balancing of conflicting interests and/or rights (115C).

### 5.2.2 Preliminary issue with the counter-application

The legal question was whether, even if the counter-application has been lodged prematurely (in other words prior to the exhaustion of the respondents’ internal remedies), it would have been a nullity which could not be entertained and adjudicated upon by the court (109D).

The court found that on 5 April 2005 the respondents lodged an appeal (presumably in terms of section 96 of the act) against the granting of Meepo’s prospecting right. Despite numerous enquiries regarding the progress with the appeal it was not finalised after the date on which the counter-application had been lodged on 2 August 2006 (118C). The court found further that the respondents’ internal appeal was finalised and dismissed during November/December 2006 and, therefore, well before the date on which hearing of this matter (including the counter-application) commenced (119G).

The court decided that the counter-application had not been lodged prematurely (119G). The court reasoned that even on the assumption that the mere lodging of the counter-application amounted to an application as contemplated in section 96(3) of the act, the fact remained that, by the time the relief applied for in the counter-application was actually argued and considered, the appeal had been finalised and the internal remedies had, therefore, *in esse* been exhausted (119I). The court held that, at the date of the hearing, it was clear that the appeal had in fact in the meantime been turned down, and since all parties were thoroughly prepared to argue the counter-application, the point *in limine* should not have been persisted with (120E) and could not succeed (122F).

The court held that although the provisions of section 96(3) are on the face of it peremptory in nature, the fact that the internal remedies were exhausted by the time the matter was heard constituted substantial and sufficient compliance with those provisions (121B). The court reasoned that the intention of the legislature with section 96 was obviously to ensure that internal remedies are exhausted before decisions contemplated in section 96(3) are subject to the scrutiny of the courts and the cost of such course incurred (121J). It was regarded as inconceivable by the court

that it could be argued that for a court to consider the counter-application under these circumstances would frustrate the legislature's objective with the provisions of section 96(3) (122A). The court explained that the provisions of section 96(3) were clearly intended to give the authorities the "procedural advantage" of not being liable to sanction by the courts before being afforded the opportunity of reconsidering its own administrative actions (122D). According to the court it could also be argued that, in regulations promulgated in terms of the MPRDA, an obligation to give interested parties the opportunity to be heard in the consideration of such an internal appeal, the provisions of section 96(3) were also intended for the benefit of interested parties (122D).

### 5.2.3 Counter-application: validity of the prospecting right

At issue was when, and as a result of whose administrative conduct, the prospecting right as contemplated in the act was granted to Meepo (124F). The court held that the act in terms of which a prospecting right is granted to an applicant is contractual by nature. It entails that the minister, being the representative of the state as custodian of the mineral resources of the Republic of South Africa, consensually agrees to grant to an applicant a "limited real right" (*sic*) to prospect for a mineral or minerals on specified land for specified period and subject to such conditions as may be determined upon or agreed upon. The court then held that, until such terms and conditions had been determined and consensually agreed upon or consented to by an applicant, it cannot be said that a prospecting right had been granted to an applicant: "The right can only be granted once the terms and conditions had been determined and communicated to an applicant for his acceptance" (125F)

The court decided that it is the prerogative of the grantor of the right to determine the terms and conditions to which it would be subject. According to the court, the definitive issue is not the content of the terms or conditions of the right, but the authority of the grantor to determine whatever terms and conditions he/she may wish (127I). The court found that the terms and conditions of Meepo's prospecting right were not determined by the grantor of the right, namely the deputy director-general, but by the regional manager (126F-127G). The regional manager was held not to be authorised to determine the same (127H). The court found that in acting as such, the regional manager acted *ultra vires* his statutory powers (127I).

The court indicated that a prospecting right had been granted to Meepo, firstly, on 24 March 2005 and again on 1 July 2005 (125J). The court found that the second prospecting right held by Meepo was granted by the regional manager who was not authorised to grant the right on behalf of the minister or the deputy director-general (126C). Earlier the court accepted that it was common cause that: (a) the minister had properly delegated her power to grant a prospecting right to the deputy director-general; (b) the deputy director-general had no such original or delegated power; and (c) any further delegation of its delegated powers by the deputy director-general had been expressly prohibited by the minister (123B; the courts reference in (b) to the regional manager should read the deputy director-general). The court found that the granting of the second prospecting right by the regional manager was *ultra vires* his authority, rendering the prospecting right void (126C). The court found that: (a) the power of attorney was not a valid delegation of power by the deputy director-general to the regional manager; (b) the second prospecting right was granted to Meepo by the regional manager; (c) conduct by the regional manager was *ultra vires* his authority, rendering the prospecting right void (126C).

The court also indicated that the second prospecting right differed from the first

prospecting right in material respects (128E). The argument that the regional manager merely rectified errors in the already existing prospecting right was rejected by the court. The court was of the view that the regional manager replaced it with another prospecting right and issued Meepo a fresh prospecting right (129C-G). The regional manager was found to have had no authority and power of attorney to act as aforesaid and his conduct was *ultra vires* his authority (129G).

Lastly, the court found that the replacement of the first prospecting right with the second prospecting right amounted to more than a correction of clerical errors. The court held that an amendment of the period of validity of a prospecting right constituted an amendment of a prospecting right for purposes of section 102 of the act which in any event required the consent of the minister or the deputy director-general (129H). It should be noted that this power has not been delegated to the deputy director-general by the minister.

In the light of the above reasons the court concluded that the second prospecting right issued to Meepo was of no force and effect and it was accordingly set aside (130B). The court also found that the acceptance and processing of the application for a prospecting right in terms of the act in disregard to the respondent's pending application for a prospecting permit in terms of the Minerals Act was irregular and *ultra vires* the powers of the regional manager and/or the deputy director-general. The prospecting right of Meepo, therefore, had to be reviewed and set aside (134B). The court ordered that the two prospecting rights be declared null and void (134B-134H).

Nevertheless, the court did not order that the second prospecting right be cancelled or deregistered in the Mineral and Petroleum Titles Office. Cancellation and/or deregistration is affected by the fact that the right legally never existed. It was, after all, granted by an *ultra vires* act. Section 7(1) of the Mining Titles Registration Act 16 of 1967 in the past provided that no registered deed of grant, deed of transfer, certificate of title or cession of a mortgage bond could be cancelled by the director-general except upon a court order. The Mining Titles Registration Amendment Act 24 of 2003 amended section 7(1) by requiring that "a registered deed conveying title to any right may not be cancelled by the director-general except as provided for by law". (By mistake, the heading of section 7 of the Mining Titles Registration Act – "Registered deeds not to be cancelled except upon an order of court" – has been retained.) It is submitted that a procedure should be in place to rectify erroneous registrations in the mining titles register, such as that at stake in the case under discussion. Whether the provision on cancellation of registered rights is the appropriate mechanism for such rectification is a matter open to speculation. Section 6(1)(b) of the amended Mining Titles Registration Act read with section 6(2) determines that the director-general may rectify errors in deeds, diagrams, plans or other documents on file in the Mineral and Petroleum Titles Registration Office, unless it would have the effect of alienating a right. The procedure for cancellation pertains, however, expressly to deeds "conveying title to any right" (s 7(1)). Since no title can be conveyed when, as in the case under discussion, the right granted was void *ab initio*, the section 7(1) cancellation provision would not be appropriate. In the absence of any other legislative provision and/or regulation to the Mining Titles Registration Act to deal with the treatment of erroneous registrations, however, it is submitted that the procedure envisaged by section 7(1), read with regulation 73, should also be applicable in cases such as the present. Ideally, the Mining Titles Registration Act needs to be revised to provide a procedure for the rectification of errors specifically.

## 6 Discussion

6.1 The importance of this decision lies in the fact that it provides some interesting pointers regarding the provisions of Act 28 of 2002, and confirms the operation of the act on a general level (see the general remarks made by the court, discussed at 4.2 above).

Firstly, the grant of a prospecting right to an applicant in terms of the act by a delegate of the minister is construed as a contract in terms of which a right to prospect is granted to a prospector subject to the terms and conditions determined and agreed upon by the parties. The right to prospect is only granted once the terms and conditions of the agreement had been determined and communicated to the applicant for his acceptance. The terms and conditions of a prospecting right agreement have to be determined by the deputy director-general. Amendment of such prospecting right agreement requires the consent of the minister. Upon the grant of a prospecting right the holder thereof acquires rights in terms of their agreement, including the right to prospect. The exercising of the right to prospect and remove minerals is, however, postponed until the approval of the environmental management plan and compliance with section 5(4)(c) of the act.

It can be argued that the granting of a right in terms of the act by the minister or delegate to a holder has to be seen as a consensual agreement (Badenhorst and Mostert 13-13 to 13-14 and 30-3 to 30-4). In *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* (1991 4 SA 718 (A)) the court held that a prospecting lease in terms of section 4 of the Precious Stones Act 73 of 1964 is a consensual agreement (see further Badenhorst and Van Heerden “A comparison between the nature of prospecting leases in terms of the Precious Stones Act 73 of 1964 and prospecting permits in terms of the Minerals Act 50 of 1991” 1993 *TSAR* 159). Eksteen JA explained as follows in the *Ondombo* case (724F-H):

“The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded.”

According to Dale *et al* (MPRDA-134) prospecting rights or mining rights can be compared to prospecting leases or mineral leases (and claim licences) that were available in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964 and legislation prior thereto. These authors maintain that such agreements are partly contractual and partly administrative in nature, but remain creatures of statute (see Dale *et al* MPRDA-134).

It is submitted that reference to a right to prospect may have different meanings and may at times be confusing. It could refer to the agreement entered into between the applicant for a prospecting right and the state, a (personal) right to prospect by virtue of such agreement, a (real) right to prospect created upon registration in the Mineral and Petroleum Titles Office and the content of such personal right or real right, namely the entitlement to prospect. For purposes of clarity it is submitted that a distinction should be drawn between a prospecting right contract/prospecting contract and the right to prospect as a personal right acquired in terms of the contract. Other personal rights are also acquired by virtue of the contract. The right to prospect has as its content the entitlement to prospect. The entitlement to prospect

can only be exercised upon compliance with the requirements of section 5(4)(c). Upon registration of a prospecting right agreement, the personal right to prospect is terminated and a real right to prospect is established. Such real right has as its content the entitlement to prospect.

Secondly, the court clearly distinguished between the giving of notice and consultation by an applicant for a prospecting right to and with the owner of land, respectively, in terms of section 16(4) of the act and proper notice and consultation by a holder of a prospecting right to and with the owner of land, respectively, in terms of section 5(4)(c) of the act before commencement of prospecting operations.

Thirdly, the court emphasised the rational balancing of different interests and rights in resolving the conflict between the owner of land and the prospector.

Fourthly, an old order prospecting right was protected by the court against the acceptance and processing of a prospecting right in terms of the act in disregard to the pending application for a prospecting permit in terms of the Minerals Act. It is clear that “old order rights” should receive precedence to new order rights during the respective transitional periods.

Lastly, a liberal interpretation is given to the duty of an applicant to exhaust internal remedies in terms of section 96 of the act by allowing recourse to the court if the internal appeal was finalised when the matter was to be heard by the court.

It must be noted with some concern that the following comedy of errors was made by the state, *ie* the custodian of the mineral resources of the country:

- (a) Despite numerous enquiries, the respondents received no information between 1 May 2001 and 1 May 2004 as to the outcome of their application for a prospecting permit in terms of the Minerals Act.
- (b) The acceptance and processing of an application for a prospecting right in terms of the act by the department was in total disregard of the respondent’s pending application for a prospecting permit in terms of the Minerals Act.
- (c) Meepo’s application for a prospecting right in terms of the act was accepted by the deputy director-general instead of the regional manager.
- (d) The regional manager should have referred the application to the deputy director-general for his consideration, approval or disapproval of the prospecting right.
- (e) The regional manager was not empowered to determine the terms of Meepo’s prospecting right, which had to be determined by the deputy director-general.
- (f) The regional manager was not empowered to grant a prospecting right at all.
- (g) The regional manager was not empowered to grant a prospecting right on behalf of the minister (in the absence of a ministerial delegation) or deputy director-general (who lacked original power to delegate delegated ministerial authority by virtue of a power of attorney to the regional manager, which purported delegation was expressly prohibited by the minister).
- (h) The regional manager was not empowered to replace the first prospecting right with a second prospecting right and amend the period of validity of the prospecting right, which amendment required the consent of the minister.

The impossible task with which the minister was saddled in terms of the act was totally impractical and required delegation of powers and assignment of duties to make implementation of the act possible. The mistakes made by officials in the present case may just be the tip of the iceberg of legal problems expected from the ministerial delegation (and delegation by the director-general). The delegating documents are poorly drafted and only delegate powers but do not assign duties.

These delegations were only published internally and not in the *Government Gazette*. Publication in the *Gazette* is, however, not required in the act. A relatively simple application for a prospecting right should not be hampered by so many mistakes on the part of government officials. This may be a great concern to mining companies intending to invest millions of rands in South Africa. This concern goes beyond the general complaint that the administration of the new mineral law system is more cumbersome and time consuming than in the past. The government should revisit the delegations of power or rather amend the act by clearly designating the official in the act who is empowered to perform specific functions and is subject to specific duties.

It seems that in the duel between holders of old order rights and applicants for new order rights, the state acting as first second in the dispute between such holders may at times not be sufficient to ensure fairness. As illustrated in the present case, the courts may be approached to act as a second *témoins* for both the duellists in order to ensure fairness.

### 7 Conclusion

This decision provides important pointers as to the interpretation of the provisions of the Act 28 of 2002 and is welcomed. The outcome of the decision was correct. The decision illustrates how the conduct of the state as custodian of the mineral resources of the country may become a cause for concern not only due to problems associated with the delegation of powers but also in its administration of applications in general. Whether this indeed constitutes a general pattern must be ascertained by government. The administration of the act in terms of the delegations of power by the minister (and director-general) should be revisited by the legislature. In the duel between old and new order rights, a second *témoins*, the judiciary, is needed to ensure a fair fight upon the narrow bridge of transition to the brave new order. Not only honour but legitimate interests of duellist are at stake. These duels may, however, be at a high cost to applicants for prospecting and mining rights and the economy. The question remains whether the country and its people can afford the processing of applications for rights to mineral resources in a non-custodial manner. In the light of the duties imposed on the state in terms of the constitution and the act, “uncustodial”, as an indigenous or newly created word, may sound even more descriptive of the state of affairs.

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