IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1590/2007

In the matter of:

DE BEERS CONSOLIDATED MINES LIMITED	Applicant
and	
THE REGIONAL MANAGER, MINERAL REGULATION FREE STATE REGION: DEPARTMENT OF MINERALS AND ENGERGY	1st Respondent
DEPUTY DIRECTOR-GENERAL, MINERAL REGULATION, DEPARTMENT OF MINERALS AND ENERGY	2nd Respondent
MINISTER OF MINERALS AND ENERGY	3rd Respondent
ATAQUA MINING (PROPRIETARY) LIMITED	4th Respondent

CORAM: CILLIé, J *et* EBRAHIM, J

JUDGEMENT: EBRAHIM, J

HEARD ON: 17 MARCH 2008

DELIVERED ON: 15 MAY 2008

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[1] This is an application for the judicial review of a decision taken by the 2nd and 3rd respondents refusing to convert a prospecting permit granted to the applicant in terms of the

Minerals Act, No. 50 of 1991 so as to enable the applicant to continue its prospecting operations lawfully in terms of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (“the MPRDA”) which replaced the Minerals Act of 1991 on the 1 May 2004. In addition the applicant’s have applied for a declaratory order that its old order prospecting rights in respect of subdivision 1, Kings Paddock, (subdivision 16 in the remaining extent of the farm Jagersfontein 14, Magisterial District of Fauresmith, Free State Province (excluding tail dumps, and consisting of prospecting permit 45/2003 and the rights to diamonds held by De Beers by virtue of Noterial Deed of Cession of Mineral Rights 85MR/1973 remains in force for a period of two years after commencement of the MPRDA, that is until the 30 April 2006.

<u>BACKGROUND AND THE MPRDA</u>

[2] It is common cause,

2.1 that immediately before commencement of the MPRDA on the 1 May 2004 the applicant was the holder of Mineral Rights in and upon subdivision 1

(Kings Paddock) and the Remaining Extent of the farm Jagersfontein 14, district of Fauresmith.

2.2 As holder of the said mineral rights the applicant applied for and was granted a prospecting permit for diamonds on subdivisions 1 and 16 and remaining extent of the farm Jagersfontein (excluding the dumps in terms of section 6 of the Minerals Act No. 50 of 1991). The said permit (No. 45 of 2003) was issued for a period of 12 months from 11 of August 2003 until the 10 August 2004.

2.3 When MPRDA commenced the applicant was conducting prospecting operations by virtue of the abovementioned permit and became the holder of an old order prospecting right as defined in the definitions contained in Schedule II to the MPRDA.

2.4 Under the previous Mineral Order, mineral rights were real rights susceptible to ownership, existing in perpetuity. The State later regulated the exercise of these rights and issued, on application prospecting permits and mining permits. Only if a person with mineral rights wished to exercise any of his or her rights did the need for application for the necessary permits or authorisation become necessary.

"The scheme of (South African Mining) legislation was to create or recognise mining rights, exercisable under a system of license and control, which were not dependent on the possession of the full rights of ownership in the ground worked, but were to be reconciled with the concurrent ownership rights of others."

See **UNION GOVERNMENT (MINISTER OF RAILWAYS AND HARBOURS), v SIMMER AND JACK PROPRIETARY MINES, LTD** 1915 AD 368.

2.5 Since 1 May 2004 a new Mineral Right's regime has been introduced. The underlining policy has shifted from privatisation of mineral rights to the State being in control of the granting, exercising and retention of all rights to minerals and petroleum resources. The only relevance of previous mineral rights was that they constitute an element of the transitional arrangements in the MPRDA.

2.6 On the 26 April 2006 the applicant lodged an application for conversion of its prospecting rights relating to prospecting permit 45/2003 in terms of item 6(2) of Schedule II to the MPRDA at the office of the 1st respondent together with all documents and information required by item 6(2). By a letter dated the 21 August 2006, the 2nd respondent as delegatee of the 3rd respondent refused to grant the conversion of the old order prospecting right on the basis that,

"Item 6 of abovementioned scheduled II is not applicable in the case in hand as the relevant application for conversion was not received in good time (that is prior to its expiry date of 10 August 2004)."

2.7 The term old order prospecting right is defined in the definitions contained in schedule II to the MPRDA and means:

"Any prospecting lease, permission, consent, permit or license, and rights attached thereto in force immediately before the date on which this Act took effect and in respect of which prospecting is being conducted."

2.8 In terms of items 6(1) of Schedule II, the applicant has the right to continue prospecting in terms of the old order prospecting permit for a period of 2 years from the date on which the MRPDA commenced on 1 May 2004 subject to the terms and conditions under which it was granted or issued or deemed to be granted or issued.

2.9 Item 6(2) provides as follows:

"A holder of an old order of prospecting right must lodge the right for conversion within the period referred to in sub item 1 at the office of the regional manager in whose region the land in question is situated together with

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j) ”

Item 6(3) provides:

“The Minister must convert the old order prospecting right into a prospecting right if the holder of the old order prospecting right –

(a) complies with the requirements of sub item 2

(b)

(c)

(d)

(e)”

Item 6(7) provides:

“Upon the conversion of the old order prospecting rights and the registration of the prospecting rights into which it was converted, the old order prospecting right ceases to exist.”

Item 6(8) provides:

“If a holder fails to lodge the old order prospecting rights for conversion before the expiry of the period referred to in sub item 1, the old order prospecting right ceases to exist.”

THE ISSUES

[3] It is alleged by the applicant that the refusal by the second and third respondent was induced by an erroneous interpretation and application on their part of the provisions of item 6(1) of Schedule II to the MPRDA and that accordingly in terms of section 6(2)(d) of the Promotion of Administrative Justice Act, No. 3 of 2000, this court has jurisdiction to review that decision. It is not disputed that the decision constitutes administrative action.

Section 6(2)(d) provides:

> "A court or tribunal has the power to judicially review an administrative action if –
>
> (a)
>
> (b)
>
> (c)
>
> (d) The action was materially influence by an error of law."

The applicant's also contend that, despite having lodged an internal appeal against the decision of the 2nd and 3rd respondent, no appeal lies in respect of their decision as it was the decision of the 2nd respondent against which no appeal is competent in terms of the provisions of section 96 of the MPRDA. In any event the applicant contends further that it has applied for an exemption in terms of the provisions of section 7(2)(c) of the Promotion of Administrative Justice Act, No. 3 of 2000.

First, second and third respondents' have filed answering affidavits setting out the basis of their opposition to the application. No papers have been filed by the 4th respondent and on the 3 March 2008 a notice of withdrawal of its opposition was received.

The gravamen of the opposition of the 1st, 2nd and 3rd respondents' to the application is that the applicant was enjoined to apply for the conversion before the old order permit expired on the 10 October 2004 and having failed to do so it had waived its right to a conversion. This was so 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. In addition the respondent contends that the application is premature and ought not to be entertained in view of the failure of the applicant to first exhaust internal remedies available to it in terms of section 96 of the MPRDA. This argument is based on the provisions of section 7(2)(a) of the Promotion of Administrative Justice Act, No. 3 of 2000 which respondents allege are prescriptive.

Section 7(2)(a) provides:

"Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this act unless any internal remedy provided for in any other law has first been exhausted."

According to the respondents' the provisions of section 7(2)(c) of the Promotion of Administrative Justice Act, No. 3 of 2000 do not assist the applicant. Firstly because of the absence of exceptional circumstances in this case and secondly and more pertinently because section 7(2)(c) does not apply to administrative decisions taken in terms of the MPRDA.

Section 7(2)(c) provides:

"A court or tribunal may in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal dreems it in the interest of justice."

The issues to be determined are therefore threefold, namely:

1. Is the applicant bound by the provisions of section 96(3) of the MPRDA?
2. What is the duration of the old order prospecting permit as granted to the applicants under permit number 45/2003?
3. 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?

THE INTERNAL REMEDY IN TERMS OF SECTION 96 OF MPRDA

[4] Section 96(1) provides as follows:

> "(1) 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 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 or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section."

The respondents' contend,

(a) that the provisions of section 96 are prescriptive; and

(b) that the provisions of section 7(2)(c) are not applicable to the internal appeal process in terms of section 96 by virtue of its explicit omission from the provisions of section 96(4) and that, accordingly no exemption on any grounds from the obligation to pursue internal remedies in terms of section of section 96(3) is possible or permitted.

The applicant has relied on two unreported judgements handed down in this division by Kruger and Van der Merwe JJ namely:

GLOBAL PACT TRADING 207 (PTY) LTD v MINISTER OF MINERALS AND ENERGY, case number 3118 of 2006 and **MOFSCHAAP DIAMONDS (PTY) LTD v THE MINISTER FOR MINERAL AND ENERGY AND OTHERS**, case number 3117/2006 in support of its submissions that the decision of the 2nd respondent was not appealable in terms of section 96 as it was effectively the decision of the 3rd respondent, that is the Minister of Minerals and Energy. I quote from those indictments:

> "[6] In his well-known work on administrative law, **Administratiefreg**, p. 52 – 57, Prof. Marinus Wiechers distinguishes in the field of delegation of public power *inter alia* between what he terms deconcentration and decentralisation. Delegation of power in the form of decentralisation takes place when powers are transferred to an independent organ or body which carries out these powers and functions entirely in its own name. As a rule the *delegans* (that is the delegating authority) 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 and/or some form of appeal against the decisions of that body. Deconcentration on the other hand, is applicable where the functions are performed by the delegate in the name or on behalf of the *delegans*, in other words the *delegans* acts by means of the delegate. An essential feature of the deconcentration of administrative power is that the *delegans* may withdraw the delegation at any time and perform the function himself or herself. Also, the *delegans* may exercise various forms of control over the delegate. These principles were expressly adopted in **NAIDOO AND OTHERS v JOHANNESBURG CITY COUNCIL AND OTHERS** 1979 (4) SA 893 (W) at 896 E – 898 E and **SA FREIGHT CONSOLIDATORS (PTY) LTD v CHAIRMAN, NATIONAL TRANSPORT COMMISSION, AND ANOTHER** 1987 (4) SA 155 (W) at 164 F – 169 D. We respectfully believe that these decisions are correct. See also Baxter, **Administrative Law**, p. 436 footnote 317 and p. 441, 442 as well as **LAWSA**, 2nd Edition, Volume 1, para 101, p. 81 – 82. This principle is also illustrated in the judgment of **BARTLETT v MUNISIPALITEIT VAN KIMBERLEY** 1966 (2) SA 95 (GW) at 100 E – 102 F, where it was decided that where the exercise by a town clerk of a power delegated to him by the municipal council is attacked, the proper body to sue is the municipal council or municipality as the town clerk acted on its behalf under the delegated authority. The judgment in the case of **ADMINISTRATOR, CAPE v**

> **<u>ASSOCIATED BUILDINGS LTD</u>** 1957 (2) SA 317 (A) at 323 H, referred to on behalf of the respondents, does not support the respondents' argument, as it in fact provides an example of administrative deconcentration."

It is necessary to analyse the written delegation document in the present matter in the context of these legal principles but before doing so reference must be made to the provisions of section 103(4) and section 103(5) of the MPRDA:

> "103 Delegation and assignment
>
> …
>
> (3) The Director-General, the Regional Manager or any other officer to whom a power has been delegated or to whom a duty has been assigned by or under this Act, may in writing delegate any such power or assign any such duty to any other officer.
>
> …
>
> (5) The Minister, Director-General, Regional Manager or officer is not divested of any power or exempted from any duty delegated or assigned by him or her."

In my view the following conditions in the delegated document provide insight into the underlying intention of the Minister that is the 3rd respondent, in delegating to the 2nd respondent the powers contained therein. (The delegated document appears at pages 577 and 578 of the indexed and paginated bundle of pleadings.

(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 act.

(f) Should any doubt exist for any reason as to which decision should be taken regarding any matter, such matter should be referred to me for finality.

(g) The aforesaid powers may none the less be exercised by myself notwithstanding the fact that it has been delegated.

(h) I should be consulted should there be any reason to move away from or revise established policy guidelines and the said power, shall not be further delegated without my consent.

To my mind these conditions leave no doubt that the *delegans*, that is the Minister, was the effective decision maker acting by means of the *delegatee*, (that is the 2nd respondent) and that the delegation to the 2nd respondent was made in a scheme of deconcentration of public power. Accordingly when the 2nd respondent refused the conversion in question he acted on behalf of the 3rd respondent. That decision must consequently be regarded as the decision of the 3rd respondent, which for obvious reasons would not be appealable in terms of section 96 of the MPRDA.

Mr. Nthai SC for the respondents' contended that in view of the power granted to the 3rd respondent in terms of section 103 to withdraw such delegation at any time or amend any decision made by her *delegatee* (in this case the 2nd respondent) was an indication of the fact that there was no bar to the Minister hearing an appeal from the decision to refuse the conversion. I must respectfully point out that this is a rather convoluted submission and smacks of an attempt to twist the facts in order to make them fall within the ambit of section 96. The simple fact is that there was no withdrawal of the 2nd respondent's delegation nor a withdrawn of the decision to refuse the conversion and that in accordance with the applicable legal principles the fact that the Minister has the power to withdraw a delegation or amend a decision taken by a *delegatee* only serves to underline the facts that any such decision taken by the *delegatee* is in fact the decision of the Minister. In both circumstances it would be absurd for such a decision to then be the subject of an appeal in terms of section 96(3) of the Act. Mr. Nthai was at pains to point out that the whole administration of the MPRDA would become a nightmare if it were required of the Minister to attend personally to all the powers designated to her in terms of that Act and the effect of that Act was to make that all internal procedures and processes *pro non scripto* whenever she delegated these powers to either the Director General, Deputy Director General or the Regional Manager. That he argued could never have been the intention of the legislature. He argued that persons must apply to the Minister and she grants the application in terms of the MPRDA regarding, for instance, permission, prospecting rights, a renewal of prospecting rights, permission to remove and dispose of minerals, application for mining rights, application for the renewal of mining rights, issuing and duration of mining permits, application for retention permits and the issuing and application of a closure certificate. Of practical necessity these powers must be delegated and if the argument of the applicant is correct, no appeal procedure would be applicable in all the above circumstances. These circumstances cover all the activities and rights regarding the practical execution of mineral rights in the whole of South Africa. I am in complete agreement with his submissions, with one caveat, and that is that they are all submissions made in general. What is important is that one has to examine the terms and conditions of the particular or specific delegation in order to establish whether the powers therein contained are to be wholly exercised in the discretion the *delegatee* concerned or whether such powers are subject to the supervisory and overall approval of the Minister. Only then one can arrive at a conclusion as to which decisions are appealable and which are not. Mr. Nthai's argument that because of the practical necessity of the Minister having to delegate, that therefore no appeal procedures would ever be applicable is on that account fatally flawed.

Much was made in argument by Mr. Grobbelaar SC, for the applicant as to why this court is bound by the decisions in the **GLOBAL PACT TRADING 207 (PTY) LTD** and the **MOFSCHAAP DIAMONDS (PTY) LTD** cases. Mr. Nthai expanded on the principles of *stare decisis* attempting to convince us why we were not so bound. Save to express our acceptance of the legal principles set out in those two judgments, I do not deem it necessary to comment any further on this aspect of the argument.

Of far more interest to the court were counsel's submissions regarding the issue of the application for exemption from the obligation to exhaust internal remedies in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA). In this regard two scenarios were put forth by Mr. Nthai:

(a) Where section 7(2)(c) was not applicable; and

(b) Where it was applicable.

In regards to the first scenario, Mr. Nthai relied heavily in support of his contentions on the decision in **MEEPO v KOTZE & OTHERS** 2008 (1) SA 104 Northern Cape Division. He argued since section 96 of the MPRDA specifically excludes any reference to section 7(2)(c) that its provisions have no application to the internal appeal procedure which is therefore prescriptive. Thus no questions of an application for exemption from such a procedure arises. As authority for his viewpoint he drew heavily on the *dicta* of the court in **MEEPO** at 119 B – C, paragraph 28:

> "[28] Another argument which could possibly have led to the same result would be that the legislature, when promulgating the MPRDA after PAJA had already come into operation (and clearly well aware of the provisions of the latter Act), had intended to 'regulate the whole subject' of access to courts and that the relevant provisions in the MPRDA 'necessarily supersedes and repeals all former Acts, so far as it differs from its prescriptions' (see New Modderfontein Gold Mining Co v Transvaal Provincial Administration 1919 AD 367 at 397 and Mthembu v Letsela and Another 2000 (3) SA 867 (SCA) at 881B - C)."

I am in respectful agreement however with counsel for the applicant that the court in **MEEPO** was merely repeating legal argument. What happened in that case is that the court, after hearing legal argument on the issue, refrained from deciding on the correctness thereof and coming to any definite conclusion on this aspect. In any event the wording of section 7(1) of the Promotion of Administrative Justice Act, No. 3 of 2000 which is made specifically applicable to the internal appeal process by virtue of the provisions of section 96(4) of the MPRDA is "subject to" the provisions of subsections 2(c).

> "[7] Procedure for judicial review
>
> (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
>
> (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.
>
> (2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

In **YNUICO LTD v MINISTER OF TRADE AND INDUSTRY AND OTHERS** 1996 (3) SA 919 Constitutional Court 995, paragraph 8, the meaning of phrase "subject to" was discussed. Reference was made to the case of **STATE v MARWANE** 1982 (3) SA 717 A at 747H – 748A where these words as they appear in the Constitution of Bophuthatswana were discussed and where it was held as follows:

"The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the

> field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

Applied in the present context, it is clear that the phrase "subject to" in section 7(1)(a) is in a dominant position to section 7(2)(c) of the Promotion of Administrative Justice Act 2000 so that section 7(1)(a) will only apply where it does not conflict or is not inconsistent or incompatible with the provisions of section 7(2)(c). That means that the application of section 7(1)(a) as referred to in section 96(4) of the MPRDA applies only in as much as it is not in conflict with section 7(2)(c), that is in as much as a court has not granted exemption from the obligation to exhaust the internal remedy of an appeal as contemplated by section 96(1) of the MPRDA.

The whole of section 7(1)(a) of PAJA to which section 96(4) of the MPRDA refers is thus subject to section 7(2)(c) which provides that a court or tribunal may, in exceptional circumstances, and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

See **<u>ARCHIBALD BARRY NICHOL AND ANOTHER v REGISTRAR OF PENSION FUNDS AND OTHERS</u>**, unreported SCA case number 467/04.

Thus far from explicitly excluding the applicability of section 7(2)(c) of PAJA, this section is incorporated by reference to sections 7(2)(c) in section 7(1) of PAJA.

See **<u>DALE SOUTH AFRICAN MINERAL AND PETROLEUM LAW, SHEDULE II, 212 (28)</u>** where the following is stated:

> "However despite the provisions of section 96(3) of the Act the power of the High Court in terms of section 7(2)(c) of PAJA is preserved through section 96(4) of the Act."

Moreover PAJA gives effect to section 33 of the Constitution. It was clearly intended to be and in substance is a codification of the rights contained in section 33 of the Constitution which deals with the right to administrative justice. Indeed PAJA is the legislation envisaged in section 33(3)(a) of the Constitution of the Republic of South Africa Act 1996 which provides that national legislation must provide for the review of an administrative action by the court. In a codification of the Constitutional right encompassed in section 33 of the Constitution, PAJA cannot be found to have been excluded by the MPRDA, unless such exclusion was expressly authorised in a constitutionally permissible manner. See **ATTORNEY GENERAL OF LESOTHO AND ANOTHER v SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS** 1997 (8) BCLR 1122 (Lesotho CA) 1132 A–B per Mohamed P. Under the respondents' interpretation of section 96(3) and (4) of the MPRDA section 96(4) excludes the competence of the court to grant exemption and, in such cases, the power of the court to hear the review application. Such an interpretation should be avoided if at all possible; indeed there is a long standing presumption against the ousting of the jurisdiction of courts of law. In **<u>THE SPEAKER OF THE NATIONAL ASEMBLY v DE LILLE AND ANOTHER</u>** 1999 (11) BCLR 1339 (SCA), paragraph 14 Mohamed CJ held as follows:

> "Section 2 of the Constitution expressly provides that law or conduct inconsistent with the constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by a degree, order or action of any official or body which is not properly authorised by the Constitution is entitled to the protection of the courts. No parliament, no official, and no institution is immune from judicial scrutiny in such circumstances."

See also **<u>DE WET v DEETLEFS</u>** 1928 AD 286 at 290:

> "It is a well recognised rule in the interpretation of statutes that in order to oust the jurisdiction of the court of law, it must be clear that such was the intention of the legislature."

The rights protected in the administrative justice clause of section 33(1) of the Constitution are constitutional matters. In **<u>FREDERICKS & OTHERS v MEC FOR EDUCATION</u>**

AND TRAINING, EASTERN CAPE AND OTHERS 2002 (2) SA 693 CC, paragraph 33 the Constitutional Court stated as follows:

> "…the Legislature may not oust the jurisdiction of the High Court to consider constitutional matters unless it assigns that jurisdiction to a court of similar status, even if at the same time, it confers a similar, though not exclusive jurisdiction upon another tribunal or forum."

I conclude in the light of the aforegoing authorities therefore and it is the finding of this court therefore that section 7(2)(c) is applicable to the provisions of section 96 of the MPRDA and that the provisions of section 96(3) are not prescriptive.

The second scenario put forth by Mr. Nthai deals with the question of exemption. It is the respondents' contention that the applicant has made no case for exemption. In light however of the view I have taken in this judgment in regard to my finding:

(a) That no internal appeal lies from the refusal of the second respondent to grant the conversion; and

(b) That the provisions of section 96(3) with regard to the internal appeal process are non prescriptive,

the question relating to exemption in terms of section 7(2)(c) of PAJA with reference to section 96 of the MPRDA in the context of the facts of the present case are academic.

<u>THE DURATION OF THE OLD ORDER PROSPECTING PERMIT</u>

[6] This is the second issue for determination and is an issue which requires an understanding of the principles surrounding the interpretation of statutes. Section 4 of the MPRDA provides:

> "1. When interpreting a provision of this act, any reasonable interpretation which is consistent with the objects of this act must be preferred over any other interpretation which is inconsistent with such object."

Thus not only must the interpretation decided upon be one which is reasonable, it must also be one which accords with the objects of this act.

Mineral and Petroleum resources are the common heritage of all the people of South Africa and in accordance with the new dispensation introduced by the MPRDA on the 1 May 2004 the state become the custodian of these resources for the benefit of all South Africans. The state acting through the Minister may accordingly grant or refuse a prospecting right be it a mineral or mining right. This is a fundamental change as the state has done away with the legal notion of private ownership of mining and mineral rights and 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 a subject of mineral rights of private persons. Since the 1 May 2004 all mineral resources belong to the nation and the state is vested with the custodianship and control of such mineral resources. All mineral right holders in which ever form, were divested of their rights in respect of their previously held mineral rights. These mineral right holders obtained new rights in terms of the transitional arrangements in Schedule II to the MPRDA. One of the objects of the MPRDA is to give security of tenure in respect of prospecting operations which are in the process of being undertaken and to give the holder of an old order 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 nations mineral and petroleum resources. In this sense the MPRDA is an exemplary model of the State's commitment to Broad Based Economic Empowerment. Broad Based Economic Empowerment is defined in the MPRDA as a social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries.

The main objects of the MPRDA are contained in section 2 of the Act and are the following:

“2 Objects of Act

The objects of this Act are 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) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, 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."

Item 2 of Schedule II to the MPRDA supplements these objects by giving the holder for an old order right (whether prospecting or mining), an opportunity to comply with the MPRDA.

It is a trite principle of the interpretation of statutes that in analysing the wording of a statutory enactment so as to arrive at the intention of the legislature in regard to the specific purpose for which the enactment was legislated, that words are to be given their ordinary grammatical meaning. This is the golden rule in the interpretation of statutes and the point of departure when undertaking the onerous task of interpreting a statute.

See **L C STEYN, Uitleg van Wette, Vyfde Uitgawe** and **L M DU PLESSIS, Interpretation of Statutes.**

Item 6(1) of Schedule II provides:

> "(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period of 2 years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued."

Mr Grobbelaar contended that, in accordance with another trite principle of interpretation, the least restrictive interpretation must be employed in interpreting words and phrases in a statute so as to give them the most benevolent construction. He contends further that in accordance with these two primary rules in the interpretation of statutes the phrase in item 6(1) *"for a period of two years"* means just that. That is that an old order prospecting right remains in force for a period of two years and that it does so irrespective of when the old order permit would otherwise have lapsed. He negates the importance of the words *"subject to"* in item 6(1) on the basis that item 6(1) expressly provides for the duration of the old order prospecting permit as being two years. He argues that had the legislature intended for an old order prospecting right to continue subject to all the terms and conditions under which it was granted or issued including the original duration thereof it would not also and expressly have provided that the old order prospecting right continues in force for two years. It would simply have provided that it continues in force subject to the terms and conditions under which it was granted or issued. As further corroboration for this interpretation we were referred to the wording of item 6(4) which provides:

> "No terms and conditions applicable to the old order prospecting right remain in force if they are contrary to any provision of the constitution or this act."

According to Mr. Grobbelaar the plain meaning of this provision is therefore that the term of validity of the old permit, namely 12 months in this case, can clearly not remain in force in view of the contrary provision in item 6(1) that the old order prospecting permit continues in force for two years and that accordingly the applicant's old order prospecting permit had a two year lifespan from the date of the commencement of the MPRDA on the 1 May 2004. Mr. Grobbelaar also referred us to the wording of item 6(8) to which item 6(1) is subject, namely:

> "If the holder fails to lodge the old order prospecting right for conversion before the expiry of the period referred to in item 1 the old order prospecting right ceases to exist."

He contends that this means that the old order permit ceases to exist only if the holder has failed to lodge it for conversion before the expiry of two years since the commencement of the MPRDA that is the 1 May 2004.

Mr. Nthai SC contends simply that:

(a) The wording of item 6(1) makes it clear that the extension of the duration of the old order prospecting permit to two years is <u>subject to the terms and conditions under which it was granted or issued</u> (my underlining). That being so it is subject to the period of time for which it was issued, namely 12 months as that period is a condition of its validity. Consequently the applicant ought to apply for conversion before the expiry of the period of 12 months for which the permit was validly issued. That is before it expired on the 10 August 2004. After that date the permit lapsed and the applicant possessed no more prospecting rights which could be converted in terms of item 6(1). He argues that if this were not the case and had the legislature intended to fit a period of two years regardless of the lifespan of the old order permit, it would have said so in plain and unambiguous language in enacting item 6(1). In his opinion the legislature would have added the words *"inrespective of when the underlining permit lapses"* in stead of the word enacted *"subject to the terms and conditions under which it is granted or issued".*

(b) Secondly, Mr. Nthai contends that the MPRDA wiped out all old order rights and in providing for transitional arrangements it would not revive or grant a right which is greater than the one which previously existed. This is so because the MPRDA intended to place a *"cap"* on old order rights in line with the fundamental objects of the act such that whatever the position before the coming into operation of the MPRDA, a holder of an old order prospecting right would not be entitled to hold that right under the new mineral regime for a period more than 2 years regardless of the duration for which it was granted. Thus if it was granted for a period of 12 months it would expire at the end of that 12 month period unless converted to a new order right which would then give the holder of that permit a further two years prospecting rights. Should the old order right be granted for more than two years, on conversion it acquired a lifespan of two years. Thus the proper interpretation of item 6(1) is that the duration of the old order permit could never be more than two years. This two year period however, was subject to the period of validity for which the permit had initially been issued.

In analysing and considering these diametrically opposed arguments and submissions of both counsel, I have found a fatal flaw in the submissions made by Mr. Grobbelaar that the duration of the old order permit is two years regardless of the initial period for which it was issued and it is this, it overlooks the fact that, in line with the proper interpretation and ordinary connotation of the phrase *"subject to",* the scope of item 6(1) has to be restricted. In support of this view I quote with approval once again **STATE v MARWANE** 1982 (3) SA 717 A at 747H – 748A were Miller J analysed and discussed the meaning of the phrase *"subject to"*:

> "The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."

In **<u>C & J CLARK v INLAND REVENUE COMMISSIONER</u>** 1973 (2) All ER 513 at 520, Megarry J observed:

> "In my judgment the phrase 'subject to' is a simple provision which merely subjects the provisions of the subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing; if there is collision, the phrase shows what is to prevail."

This means therefore that in contextualising the phrase for present purposes the limitation of 12 months in regard to the validity of the old order prospecting permit, being a condition under which that permit was granted and issued initially, would assume a dominant position in the interpretation of the provision of item 6(1). Taken to its logical conclusion this would mean that the provision was that the old order prospecting permit or right should continue in force for a period of two years from the date of the commencement of the MPRDA provided that the permit had been lodged for conversion before the expiry of the period for which it had been initially granted in this case, 12 months. Applying this interpretation to the facts of the present case also reveals a further shortcoming in the case of the applicant and in the interpretation which Mr. Grobbelaar would have this court give to the provisions of item 6(1). That is that had the legislature intended that the first part of item 6(1), namely:

> "Subject to sub items 2 and 8 any old order prospecting rights in force immediately before this act took effect continues in force for a period of two years from the date on which this act took effect."

to prevail, it would undoubtedly have made its intention clear by using the qualifying word *"notwithstanding"* so that the provision read as follows:

> "Subject to sub items 2 and 8 any old order prospecting right in force immediately before this act took effect continues in force for a period of two years from the date on which this act took effect notwithstanding the terms and conditions under which it was granted or issued or was deemed to have been granted or issued."

It therefore cannot be contended that the legislature in enacting the provisions of item 6(1) used the words "subject to" without a proper appreciation of its ordinary connotation and effect.

That however, does not mean that, the legislature, whilst appreciating the restrictive nature of the phrase "subject to", and the consequential limitations which flowed from its use, intended that the old order prospecting permit should continue in force subject to it being converted before the expiry of the initial period for which it had been issued, namely 12 months.

I say so for the simple reason that the legislature expressly provided a period of 2 years for conversion of the old order permit.

Item 6(2) provides as follows:

> "(2) A holder of an old order prospecting right must lodge the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with …"

This means that the old order permit continues to be of force and effect for a period of two years provided it is converted within that period of two years so as to give effect to the transitional arrangements provided for in the MPRDA. Thus the applicants had a period of two years to convert the old order permit. 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 2 years with immediate effect from the date of commencement of the MPRDA, that is the 1st May 2004 <u>and</u> every holder of such a permit has two years to convert it.

The two year period for the conversion is effectively in my view in the nature of a moratorium such that, regardless of the period when the old order permit expires (in this case on the 10 August 2004), it continues to be valid and legally enforceable for two years provided it is converted sometime within that two year period. This the applicants did. They applied for a conversion on the 26th April 2006. Had the legislature not provided for a period within which the conversion was to take place, the initial period of validity would have been critical in deciding upon the overall validity of the applicants permit. However that period of validity is no longer relevant in view of the moratorium granted to all old order permit holders to convert their permits within two years of the MPRDA coming into operation and in terms of the provisions of item 6(4), can no longer be enforced as being contrary to the provisions of item 6(2).

I conclude therefore that the duration of the applicant's old order prospecting permit is two years, calculated from the date of the commencement of the MPRDA that is the 1 May 2004 and that accordingly the said permit would have expired on the 30 April 2006. Such an interpretation would accord with the main objects of the MPRDA and, in particular, give effect to the legislature's intention to provide security of tenure in respect of prospecting operations.

SUBSTITUTION OF THE DECISION OF THE FUNCTIONARY

[7] The application for conversion was refused by the 2nd and the 3rd respondent solely on the basis that the validity of the permit in question had lapsed. As the period of the duration of the old order permit in terms of the new regime has long lapsed, no useful purpose would be served in remitting the matter to the 2nd and 3rd respondents for their reconsideration.

[8] In the result the following order is made:

8.1 The decision to refuse to convert the applicant's old order prospecting permit in terms of item 6(1) of Schedule II to the MPRDA is hereby reviewed and set aside.

8.2 The 2nd and 3rd respondents are directed to convert the applicants' old order prospecting permit (No. 45/2003) in respect of subdivision 1, (Kings Paddock), Subdivision 16 and the Remaining Extent of the farm Jagersfontein 14, Magisterial District Fouriesmith, Free State Province (excluding tail dumps) and consisting of the rights to diamonds held by the applicants by virtue of Notarial Deed of Cession of Mineral Rights 85MR/1973 into a prospecting right in respect of the said properties and to do all things and take all steps necessary for the execution and registration of such converted right as envisaged in the Mineral and Petroleum Resources Development Act 28 of 2002.

8.3 The 1st, 2nd and 3rd respondents are ordered to pay the applicant's costs which costs are to include the costs consequent upon the employment of two counsel.

S. EBRAHIM, J

I concur.

C. B. CILLIé, J

On behalf of applicant:	Adv. G. L. Grobbelaar SC and J. L. Gildenhuys Instructed by: Denys Reitz BLOEMFONTEIN
On behalf of respondents:	Adv. S. Nthai SC and J. Claasen Instructed by: State Attorneys BLOEMFONTEIN

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