Reportable:	YES / ~~NO~~
Circulate to Judges:	YES / ~~NO~~
Circulate to Magistrates:	~~YES~~ / NO
Circulate to Regional Magistrates:	~~YES~~ / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case number: **869/2006**

Date heard: **16, 22-23/05/2007**
Date delivered: **29/06/2007**

In the matter between:
[11.1]

MEEPO YA SECHABA
Appellant

and

[11.2]KOTZE, JAN LOUIS KOEN **1st Respondent**
[11.3]
[11.4]BATHOPELE MINING INVESTMENTS (Pty) Ltd
2nd Respondent
[11.5]
[11.6]THE REGIONAL MANAGER: MINERAL
[11.7]DEVELOPMENT AND ADMINISTRATION
[11.8]NORTHERN CAPE PROVINCE **3rd Respondent**
[11.9]
[11.10]THE MINISTER OF MINERALS & ENERGY
4th Respondent

[11.11]FIRSTRAND BANK LIMITED **5th Respondent**

1.11.1.1Coram: ***Lacock J*** *et* ***Olivier J***

[11.12]JUDGMENT

1.12.1LACOCK *et* OLIVIER J J:

1] Armed with a prospecting right to prospect for diamonds on a property described as the Remainder of the Farm Lanyon Vale no. 376, situate in the district of Hay, in extent 2655 hectares (the Farm), and which prospecting right was issued to it in terms of the Mineral and Petroleum Resources Development Act, no. 28 of 2002 (the MPRDA) by the third respondent on 1 July 2005, the applicant (Meepo) on a number of occasions since the end of July 2005 approached the first respondent (Kotze) as the land owner of the Farm for access to the Farm for purposes of exercising its right to prospect for diamonds on the Farm as authorised by its prospecting right. Kotze, however, refused Meepo access to the farm, contending *inter alia* that Meepo's prospecting right was *"void ab initio"*. This conduct of Kotze prompted Meepo to lodge an application (the main application) for the following relevant relief:

> "2. *That it be declared that the applicant is entitled to immediate access to the farm of the first respondent known as :*
>
> *Remaining extent of the farm Lanyon Vale 376 Northern Cape*
> *In extent 2375, 3214 hectares*
> *Held in terms of the Title Deed no 4256/2004*
>
> *3. That it be declared that the applicant is entitled to immediately commence and carry on prospecting activities on the said farm.*

4. *That the first respondent be and is hereby ordered to allow the applicant immediate access to the said farm and to immediately commence and carry out prospecting activities on the said farm."*

[11] Kotze and the second respondent, a business associate of Kotze for purposes of an application for a prospecting permit in terms of the Minerals Act, no. 50 of 1991 (the Minerals Act) and an applicant for a prospecting right under the MPRDA, in turn applied for *inter alia* the review and setting aside of the prospecting right issued to Meepo (the counter-application). The relevant prayers of the counter-application read,

"2. *That the First and Second Respondents be exempted under Section 7(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') from the obligation to exhaust such internal remedies as may be provided to the First and Second Respondents by Section 96 of the Mineral and Petroleum Resources Development Act, 28 of 2002 ('the Act') in connection with the decisions of the Third and Fourth Respondents to refuse the application for a prospecting right of the First and Second Respondents in respect of the remainder of the Farm Lanyon Vale 376 registration Division Hay, Northern Cape Province ('the Property') and accepting, processing and granting an application for a prospecting right of the Applicant in respect of the said Property.*

3. *That the Third and Fourth Respondents be ordered to receive the application for a prospecting permit filed by the First and Second Respondents on 26th July 2001 (Ref. No NC5/2/2/1339) in terms of the Minerals*

Act no. 50 of 1991 in respect of the Property and to process the said application as a pending application under Item 3 of Schedule II of the Mineral and Petroleum Resources Developments Act No. 28 of 2002 ('the Act').

4. *That the decisions of the Third and Fourth Respondents to grant prospecting right no. 5/2005 dated 1 July 2005 as well as prospecting right dated 24 March 2005 protocol 9/2005 in respect of the Property to the Applicant be reviewed and set aside and that the said two prospecting rights be declared null and void."*

2] There are no real differences for purposes of these proceedings between the interests of Kotze and that of the second respondent. For the sake of convenience we will henceforth refer to the first and second respondents (Kotze and Bathopele Mining Investments (Pty) Ltd) as *"the respondents"*, to the third respondent and/or his predecessor in title as *"the Regional Manager"*, to the fourth respondent as *"the Minister"* and to the deputy-director general in the office of the Minister of Minerals and Energy as *"the DDG"*.

3] We do not intend to deal with all of the many issues raised in the pleadings, but will content ourselves with only those issues argued before us by counsel, since, to our minds, those issues are conclusive for purposes of this judgment. We shall furthermore deal with those issues in the same sequence as dealt with by counsel.

The History of Events

4] It is common cause that during July 2001 Kotze applied for a prospecting permit in terms of the relevant provisions of the Minerals Act to prospect for diamonds on the Farm. The second respondent was subsequently joined as a co-applicant for purposes of this application. It is further common cause that, despite a number of enquiries on behalf of the respondents, they were not informed of the fate of this application before the repeal of the Minerals Act and the commencement of the MPRDA on 1 May 2004.

Meepo too applied for a prospecting permit to prospect for diamonds on the Farm in terms of the Minerals Act.

5] Upon the commencement of the MPRDA Meepo filed an application for a prospecting right to prospect for diamonds on the Farm. The DDG, Mr Mfetoane, who was the Mineral Law Administrative Officer in the Northern Cape (Kimberley) office of the Department of Minerals and Energy at the time, alleges that this application was received in his offices on 3 May 2004 (i.e. 3 days after the commencement of the MPRDA), although the written application itself is dated 5 May 2004. However, a note appears in the handwritten register kept in the office of the DDG (and to which we refer in more detail hereunder) indicating that this application was already received in his

office on 30 March 2004, but was returned to the Kimberley office on 3 May 2004.

6] This application was approved by the DDG on 6 January 2005. On 24 March 2005 a prospecting right *"granted in terms of sec. 17 of the Minerals and Petroleum Resources Development Act, 2002 (Act 8 of 2002) PR 03/2005 NC 30/5/1/1/2/01PR"* was issued to Meepo. This document was signed by the Regional Manager *"For and on behalf of the Minister"*. We shall henceforth refer to this document as the First Prospecting Right.

On 1 July 2005, a second prospecting right was *"granted* (to Meepo) *in terms of Section 17 of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002)".* According to the introductory section of this document *"this right replaces the unregistered right concluded by the Regional Manager and the Holder on the 24th day of March 2005* (the first prospecting right) *in respect of the application of the holder"*. This document too was signed by the Regional Manager *"on behalf of the Minister"*. We shall refer to this document as the Second Prospecting Right. This document, unlike the First Prospecting Right, was duly registered in the Mineral and Petroleum Titles Registration Office on 18 July 2005. On 20 July 2005 the Regional Manager approved Meepo's environmental management program (the EMP) whereby the Second Prospecting Right became effective in terms of

sec. 17(5) of the MPRDA.

Meepo relies on the Second Prospecting Right in support of the relief claimed in the main application.

7] In the meanwhile the respondents firstly on 15 June 2004 objected in writing to the Regional Manager against the granting of a prospecting right to Meepo. This objection was not upheld.

Secondly, on 5 April 2005, the respondents appealed in terms of sec. 96 of the MPRDA to the Director General of the Department of Minerals and Energy (the Defendant) against the granting of the First Prospecting Right. No appeal was filed against the granting of the Second Prospecting Right since, as alleged by Kotze, the respondents only became aware of the Second Prospecting Right when the main application was served.

The aforesaid appeal was still pending when the counter-application was lodged on 2 August 2006.

The Applicable Legislative Framework

8] The Minerals Act of 1991 was repealed and replaced by the MPRDA on 1 May 2004. The MPRDA introduced a number of fundamental changes to the statutory

regulation of the mineral resources of the Republic of South Africa.

[81] The following such changes appear to be apposite to these proceedings:

a) 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 (sec. 3).

b) No provision is made for the compulsory compensation of a land owner for the surface use of its property for purposes of prospecting or mining for minerals except in cases of expropriation (Sch. 2 par. 12) or by means of arbitration (sec. 54).

c) The holder of a prospecting or 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 (sections 5(1) and 19 (2) (a)).

d) The prevalence of State power of control over the mineral resources of the Republic and the concomitant ousting of the (mineral) rights of

the land owner and/or the holder of mineral rights (sec. 3 (2)).

[82] A consideration of the provisions of the MPRDA inevitably leads to a realisation of the conflict between the interests and/or rights of a holder of a prospecting or mining right and that of a land owner. All these rights are core rights enshrined in the Bill of Rights (see sections 24 and 25 of the Constitution).

[83] We are of the view that, when interpreting the applicable provisions of the MPRDA and more particularly those provisions 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 or mining right on the one hand and that of a land owner on the other hand. See **SABC Ltd v National Director of Public Prosecutions 2007 (1) SA 52 D (CC) at par. 126; Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA) at 375 F**.

The Main Application

9] At the time when Meepo demanded access to the Farm, it was the holder of a prospecting right which right, in terms of sec. 17(5) of the MPRDA, *"became effective"* on 20 July 2005. In terms of sec. 5(3) of the MPRDA, Meepo was therefore *prima facie* entitled to exercise the rights mentioned in these sections, i.e. to enter and to prospect for diamonds on the Farm.

The respondents, represented by Mr Van Heerden, however, submitted that Meepo is not entitled to access to the Farm and to prospect for diamonds on the Farm by reason of its failure to consult with the land owner (Kotze) after it was granted a prospecting right and before demanding access to the Farm as required in sec. 5(4) (c) of the MPRDA. By reason of the aforesaid, so argues Mr Van Heerden, Meepo is not entitled to the relief sought in the main application, and that application was prematurely brought.

10] It is common cause that, but for an effort to agree on compensation payable for the surface use of the prospecting area on the Farm, Meepo did not, subsequent to the granting of the prospecting right, and more particularly the approval of its EMP on 20 July 2005, consult or attempt to consult with Kotze before it demanded access to the Farm. The fate of the main application therefore primarily depends on the interpretation of sec. 5(4) of the MPRDA, and more

particularly whether sec. 5(4) (c) refers to a pre- or post granting of a prospecting right consultation process. Sec. 5 (4) of the MPRDA reads,

> "*(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without-*
>
> *(a) an approved environmental management programme or approved environmental management plan, as the case may be;*
>
> *(b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and*
>
> *(c) notifying and consulting with the land owner or lawful occupier of the land in question."*

11] Mr Danzfuss SC on behalf of Meepo submitted that the relevant provisions contained in sec.5 (4) of the Act are of a general nature and that, once an applicant has complied with the specific provisions of sec. 16, and more particularly sec. 16(4) (b) of the MPRDA, no further consultative process with a land owner is required by sec. 5(4) (c) of the act.

Sec. 16 of the MPRDA reads as follows:

> "*16. (1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application-*
>
> *(a) at the office of the Regional Manager in whose region the land is situated;*
>
> *(b) in the prescribed manner; and*
>
> *(c) together with the prescribed non-refundable application fee.*
>
> *(2) The Regional Manager must accept an application for a prospecting right if-*
>
> *(a) the requirements contemplated in subsection (1) are met; and*
>
> *(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.*

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to submit an environmental management plan; and

(b) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice.

(5) Upon receipt of the information referred to in subsection (4) (a) and (b), the Regional Manager must forward the application to the Minister for consideration.

(6) The Minister may by notice in the Gazette invite applications for prospecting rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted."

Mr Danzfuss, supported by Mr Ntai SC for the Minister and the Regional Manager, developed his argument as follows:

[11.1.] Sec. 5 of the MPRDA forms part of Chapter 2 thereof, the heading of which reads "*Fundamental Principles*", and the contents of sec. 5(4) should be read against the backdrop of these general principles or guidelines. This submission is supported by the wording of the heading to sec. 5 reading *"Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof*". The specific requirements an applicant for a prospecting right has to meet in respect of consulting with a land owner are contained in sec. 16 (4) (b) of the act, as well as where applicable, sec. 10(2) thereof. This latter section provides,

[11.13]

[11.14]"***10. (2) If a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon."***

[112] The aforesaid explains why sec. 5(4) contains no provisions in regard to the subject matter(s) of the consultation envisaged in sec. 5(4)(c), as is mentioned in sec. 10(2) and Regulation 3 of the regulations published under sec. 107 of the MPRDA (the Regulations).

[113] An applicant for a prospecting right is in terms of Reg. 5(1) (g) required to submit a prospecting work program (PWP) contemplated in Reg. 7 to the Regional Manager together with his or her application. This document contains all the detail of the applicant, as well as the proposed method of prospecting, and is to form the subject matter of the consultations envisaged in sec. 16(4) (b) and, if applicable, sec 10(2) of the MPRDA. The environmental management plan (EMP) referred to in sec. 16(4) (a) can be approved subsequent to the granting of the prospecting right (see sec. 17(5) of the MPRDA). If this happens (as in the matter under consideration) no purpose will be served to require a holder of a prospecting right

to consult with the land owner subsequent to the granting of the right, since the approved EMP will be a *fait a complis*. The EMP, which is in standard format, in any event contains all the information required in the PWP.

[114] Since Meepo substantially complied with the provisions of sec. 16(4) (b) and sec. 10(2) of the MPRDA, the provisions of sec 5(4) (c) are not an impediment to Meepo's right of access and its right to prospect for diamonds on the Farm.

In his support of the aforesaid submissions, we were referred by Mr Ntai SC to Dale, *"South African Mineral and Petroleum Law"* (2006) at par. 107.1 and to the case of **Director: Mineral Development, Gauteng Region, and Another v Save The Vaal Environment & Others, 1999(2) SA 709 (SCA)**.

12] Attractive as it may sound, we do not agree with the aforesaid contentions advanced by counsel.

13] Firstly. We agree that Chapter 2 of the MPRDA contains the fundamental principles subjacent to the legislative approach to the development and regulatory regime of the mineral and petroleum resources of the Republic of South Africa. It is our view that the provisions of the act should be interpreted with due regard to the

constitutional rights, norms and values the legislature sought to encapsulate, protect and advance in the act. The more prominent rights, norms and values appear to be 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 (sec. 3(1) of the MPRDA), the State's obligation to protect the environment for the benefit of the present and future generations (sec. 24 of the Constitution and the preamble to the MPRDA); the right to equitable access to the natural resources of the country (sec. 25(4)(a) of the Constitution); and the right not to be deprived of property arbitrarily (sec. 25(1) of the Constitution). See further sec. 2 of the MPRDA.

We accept that it was the intention of the Legislature to make provision in the MPRDA for a rational balance between *inter alia* the rights of a holder of a prospecting right on the one hand and the property rights of a land owner on the other hand, as well as the fundamental right to have the environment protected and that the provisions of the act should be interpreted with due regard to the aforesaid constitutional values and norms. See par. 8 above, and **Director: Mineral Development Gauteng v Save the Vaal Environment** (supra) **at 718 E to 719 D**.

[13.1.] Since the granting of a prospective right as a necessary consequence results in serious inroads

being made on the property rights of a land owner, it is not surprising that the legislature has attempted to alleviate these consequences by providing for due consultations between a land owner and the holder of or an applicant for a prospecting right. It appears that, apart from the mechanisms provided for in sections 10(2) and 54 of the MPRDA, which mechanisms are designed to resolve objections or disputes between an applicant for or a holder of a prospecting right and a land owner, consultation is the only prescribed means whereby a land owner is to be appraised of the impact prospecting activities may have on his land and, for instance, his farming activities.

[13.2.] For these reasons we have come to the conclusion that these sections of the MPRDA providing for consultations between an applicant for and/or a holder of a prospecting right and a land owner should be widely construed.

14] Secondly. The heading of sec. 5 of the MPRDA reads, *"Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof"*. It therefore appears that the legislature intended that the provisions of this section are applicable to holders of rights already granted under the act. A person can only

be a holder of a right, or a successor in title to a holder, subsequent to the granting of that right. (See the definition of *"holder"*). We are entitled to take cognisance of the heading of sections in an act for purposes of ascertaining the intention of the legislature. See **Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics, 1911 AD 13 at 24**.

[141] The wording of sub-sec. (4) of sec. 5 of the act is in any event indicative thereof that it refers to a person who is the holder of a right. As holder of a (prospecting) right, that person is not allowed to *"prospect ... or commence with any work incidental thereto"* without *"notifying and consulting with"* the land owner. (Our emphasis).

[142] The persons referred to in sections 10 (2) and 16 (4) (b) of the MPRDA are not holders of a prospecting right. Those provisions are applicable to applicants for prospecting rights. An applicant for a prospecting right is not entitled to the rights referred to in sec. 5 of the act. It would be absurd to require from an applicant for a prospecting right to notify a land owner in terms of sec. 5 (4) (c) of the act. We see no reason for reading the words *"notifying and consulting"* in this section disjunctively. What a land owner needs to be notified of and consulted about is the

intention of a holder to commence with his or her prospecting activities and any work incidental thereto.

15] Thirdly. In terms of Reg. 5 (1) (g) an application for a prospecting right must contain a PWP contemplated in Reg. 7. The following provisions contained in Reg. 7 are the only provisions that may have a bearing on the occupational or proprietary rights of an occupier or land owner of affected land:

> *"The prospecting work programme must contain –*
>
> *a)* *...*
> *b)* *the plan contemplated in regulation 2 (2), showing the land to which the application relates;*
> *c)* *...*
> *d)* *the mineral or minerals to be prospected for;*
> *e)* *...*
> f) …
> *g)* *a description of the prospecting method or methods to be implemented that may include –*
> *(i)* *any excavations, trenching, pitting and drilling to be carried out;*
> *(ii)* *any bulk sampling and testing to be carried out; and*
> *(iii)* *any other prospecting methods to be applied;*
> *h)* *...*
> *i)* *technical data detailing the prospecting method or methods to be implemented and the time required for each phase of the proposed prospecting operation;*
> *j)* *...*
> k) …
> (i)…
> (ii)…
> *(iii)* *costs pertaining to the rehabilitation and management of environmental impacts; and*
> *(iv)...”*

In comparison hereto Reg. 52 (2) reads as follows:

> "*(2) An environmental management plan, must substantially be in the standard format provided by the Department and must contain-*
>
> *(a) a description of the environment likely to be affected by the proposed prospecting or mining operation;*
>
> *(b) an assessment of the potential impacts of the proposed prospecting or mining operation on the environment, socio-economic conditions and cultural heritage, if any;*
>
> *(c) a summary of the assessment of the significance of the potential impacts, and the proposed mitigation and management measures to minimise adverse impacts and benefits;*
>
> *(d) financial provision which must include-*
>
> *(i) the determination of the quantum of the financial provision contemplated in regulation 54; and*
>
> *(ii) details of the method providing for the financial provision contemplated in regulation 53;*
>
> *(e) planned monitoring and performance assessment of the environmental management plan;*
>
> *(f) closure and environmental objectives;*
>
> *(g) a record of the public participation undertaken and the results thereof; and*
>
> *(h) an undertaking by the applicant regarding the execution of the environmental management plan."*

A comparison of the required details of the two documents immediately reveals that far more detail are to be submitted and contained in an EMP than in a PWP in regard to the potential impact on the environment of prospecting or mining activities. The environmental disturbances brought about by prospecting and/or mining activities are in particular the concerns that impact upon the occupational and/or proprietary rights of a land owner or occupier of land.

Once a prospecting right had been granted to a holder, he

or she, as soon as that right becomes effective on the date of approval of the EMP, is entitled to enter the relevant prospecting area *"together with his or her employees, and may bring onto the land any plant, machinery or equipment and build, construct or lay down any surface ... infrastructure which may be required for purposes of prospecting ..."* (sec. 5 (3) (a) of the MPRDA). These activities may have a major disruptive effect on a land owner and other occupiers of his property. One can think of many examples of such activities, for instance the ill-considered construction of roads, the breaking down or damaging of fences, the depletion of boreholes or other water resources, the construction of office buildings or housing facilities for employees on unsuitable or dangerous terrain, the construction of an aqueduct through cultivated fields, excavating in the immediate vicinity of dwellings, etc.

In our view the consultative process envisaged in sec. 5 (4) (c) of the act is intended to afford a land owner the opportunity of *"softening the blow"* inevitably suffered as a consequence of the granting of a prospecting or other right under the act. This is the only means afforded in the MPRDA to a land owner to protect his rights as such, barring the mechanisms for the resolution of disputes referred to above. This interpretation accords with the rational balancing of conflicting interests and/or rights as alluded to in par. 8 above.

16] We are accordingly of the view that, by the enactment of sec. 5 (4) (c) of the MPRDA, the legislature intended that, post the granting of a prospecting right and before the commencement of prospecting activities on any land which is the subject of such prospecting right, proper notice of the intention to enter the land for purposes of prospecting should be given to the land owner, followed by a consultative process.

17] As an alternative argument, Mr Danzfuss submitted that, should we hold against him on the main argument (as we did), the provisions of sec. 5 (4) (c) of the act are no bar to Meepo's right to enter the Farm, and that Meepo is therefore entitled to the relief requested in par.2 of the Notice of Motion.

[171] In support of this submission, Mr Danzfuss contended that sec. 5 (3) of the Act distinguishes between (a) the right to enter the land, (b) the right to prospect, and (c) the right to remove minerals. Sec. 5 (4), so the argument continues, merely restricts a holder's rights to prospect for and to remove minerals without notifying and consulting with the land owner, and leaves his right *"to enter"* unencumbered.

[172] This argument can be disposed of without much

ado.

Although Meepo alleged in passing that a *"technical team"* was refused leave to visit the Farm in July 2005, the real purpose of the main application (which is dated 27 July 2006) is clearly to obtain access to the Farm for purposes of conducting prospecting activities. In a letter dated 16 November 2005 addressed by Meepo's attorneys to the attorneys for the respondents, it was said, *"It is further our instructions that Mr Kotze is prohibiting access to our client, its partners and/or contractors in order to prospect on the said area in terms of a legal prospecting right."*

On 5 March 2006 Meepo approached the Regional Director under sec. 54 of the MPRDA where the following was alleged on its behalf:

> "In terms of Section 54(1)(a) of the Minerals a*nd Petroleum Resources Development Act 28 of 2002 you are hereby notified that, as the holder of the prospecting right, our client is prevented from commencing and/or conducting prospecting and that such prevention detrimentally affects the objects of the MPRD Act 28 of 2002.*
>
> *You are kindly requested to take the necessary steps prescribed by Section 54 (2) within 14 days, as stipulated by the said legislation, after receipt of this correspondence.*

Kindly inform us which action the department will follow in order to enable our client to prospect on the area in question. We confirm our client's willingness to mediate the matter and negotiate with the surface owner to ascertain the amount of compensation payable. However, we hold

instructions to approach the High Court on an urgent basis in terms of Section 54 (4) of the Act, should the matter not be mediated or mediated successfully."

In par. 26 of the supporting affidavit, the deponent representing Meepo, declared as follows:

> *"This application is extremely urgent.*
>
> *The period allowed for prospecting in the prospecting right commenced on 5 July 2007 ending on 4 July 2007. Almost one half of this time period has already lapsed because of the attitude of the first respondent.*
>
> *The normal time period needed for the completion of all the prior arrangements, the prospecting process and the completion thereof is about two years. That is the main reason why the prospecting right was granted for only two years.*

If this application is not finalised urgently, the applicant will suffer irreparable harm because it will spend millions of rand in the prospecting process without being able to complete and finalise the process."

[173] Access for the aforesaid purpose is not authorised without prior consultation with the land owner.

18] The main application was therefore prematurely brought and cannot succeed.

19] By reason of the aforesaid finding we find it unnecessary to deal with the issue whether a proper consultation was held with the land owner in terms of sec. 16 of the MPRDA prior to the granting of a prospecting right to Meepo. Suffice it to say that, to our minds, the respondents were properly invited to attend such consultations and had sufficient opportunity to participate therein.

The Preliminary Issue in the Counter Application

20] On 5 April 2005 the respondents lodged an appeal (presumably in terms of section 96 of the MPRDA) against the granting of Meepo's prospecting right. Despite numerous enquiries regarding the progress with the appeal it was not finalised before November/December 2006; in other words after the date on which the counter-application had been lodged on 2 August 2006.

21] On behalf of Meepo it was argued *in limine* that the respondents' counter-application should be dismissed on the basis of it having been lodged prematurely. This argument was based primarily on the provisions of section 96 (3) of the MPRDA.

22] Under the heading "*Internal appeal process and access to courts"* section 96 (1) of the MPRDA provides for appeals against certain administrative decisions. The provisions of subsection (3) of section 96 read as follows:

> *"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."*

23] The deference of review applications until domestic remedies have been exhausted has been recognised in our Courts on numerous occasions, both in common law and

on the basis of applicable legislation; even in cases where it was not explicitly agreed upon or provided for (see the discussion in *Erasmus*: Superior Court Practice, Farlam et al, at B1-382 to B1-383).

24] It is now statutorily provided for in section 7 (2) (a) of the Promotion of Administrative Justice Act, 3 of 2000 (*"the PAJA"*), on which all applications for the review of administrative action are now based (see **Transnet Ltd and Others v Chirwa 2007 (2) SA 198 (SCA)**).

25] Subsection 2 (c) of section 7 of the PAJA, however, makes provision for the granting of exemption from the provisions of subsection (2) (a), to enable applicants to approach Courts on review without first exhausting their internal remedies. An order granting such an exemption is indeed part of the relief claimed by the respondents in their counter-application.

26] Mr Danzfuss submitted on behalf of Meepo that the provisions of subsection (2) (c) of section 7 of the PAJA do not apply to matters resorting under the MPRDA and that the respondents are therefore not entitled to the exemption applied for in the counter-application.

27] He based this submission on the maxim *inclusio unius est exclusio alterius*, and on the fact that the legislature, in enacting the provisions of section 96 of the MPRDA,

omitted any reference to section 7 (2) (c) of the PAJA when it provided, in section 96 (4) of the MPRDA, that "S*ections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 …, apply to any court proceedings contemplated in this section"*, and he argued that, against the background of the clear prohibition in section 96 (3) of the MPRDA, the only reasonable inference is that the legislature intended to exclude the application of subsection (2) (c) of section 7 of the PAJA in matters resorting under the MPRDA.

28] Another argument which could possibly have led to the same result would be that the legislature, when promulgating the MPRDA after the 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**).

29] Indications in the MPRDA of such an intention could arguably be the heading of section 96 (*"Internal appeal process and access to courts"*), the fact that the legislature deemed it necessary to specifically exclude

access to Courts before internal remedies are exhausted (which was in any event already provided for in sec. 7 (2) (a) of the PAJA) and the fact that the legislature specifically provided that sections 6, 7 (1) and 8 would be applicable to review proceedings in respect of such matters (which would even in the absence of a reference thereto in any event have been applicable).

30] The result of such an interpretation would then be that these provisions of the MPRDA which regulate access to Courts would apply to the exclusion of those of the PAJA not specifically referred to and made applicable. In view of what follows it is, however, not necessary to come to a final conclusion in this regard.

31] As already mentioned, the respondents' internal appeal was finalised (and dismissed) during November/December 2006, and therefore well before the date on which the hearing of this matter (including the counter-application) commenced. The question is whether, even if the counter-application had 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 this Court. In our view this could never be the case in the present circumstances.

32] Even if it were to be assumed that the mere lodging of the

counter-application amounted to an application as contemplated in section 96 (3) of the MPRDA (see the discussion in *Erasmus:* Superior Court Practice, supra, at B1-201), the fact remains 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.

33] Despite the objection *in limine* on behalf of the applicant, the relief claimed in the counter-application was dealt with extensively on behalf of the applicant and the other respondents, both in heads of argument and at the hearing. To uphold the objection under these circumstances would mean that the main application would have to be considered in isolation, and as though there is no counter-application; whatever the merits of the counter-application. It would also mean that not only the respondents, but all the other parties who were in any event involved and had in any event already canvassed the merits of the counter-application, would have to come back to Court at a later stage on the same issues.

34] This is not a case where proceedings were instituted prior to the accrual of a cause of action (compare **South African Hotels v Wienburg** 1950 (1) SA 516 (CPD) and **Ngani v Mbanje and Another**, **Mbanje and Another v Ngani** 1988 (2) SA 649 (ZS)). The provisions of section 96 (3) of the MPRDA have nothing to do with a party's cause

of action. It merely provides for a procedural deference of the remedy of review, and not a complete ouster thereof.

35] In our opinion it would certainly not be in the interests of justice to dismiss the respondents' counter-application on this basis. We are of the view 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.

36] Although the facts in **Le Grand v Carmelu (Pvt) Ltd 1980 (1) SA 240 (Z)** may be distinguishable, the following remarks of **MacDonald CJ at 242 D to G** are in our view equally apposite in this matter:

> *"The civil courts in common with the criminal courts exist to do justice and not to provide some practitioners with a forum in which, relying upon technical and wholly academic points, to attempt to prevent a court adjudicating upon the real issues.*
>
> *It was said with commendable clarity and forthrightness in **R v Hepworth** 1928 AD 265 at 277 that:*
>
> *'A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.*
>
> *It must with equal force and truth be said that a civil trial is not to be allowed by the presiding judicial officer to degenerate into a contest on technical and wholly academic points which obscure and even frustrate a trial on the real*

issues.'

37] Mr Ntai in our view adopted the correct attitude by not relying upon the provisions of section 96 (3) of the MPRDA in argument and, in fact, conceding that in the circumstances it would be in the interests of justice that the Court considers the counter-application.

38] Although it is, in view of the conclusion to which we have already come, probably not necessary to decide, we are also of the view that, although the provisions of section 96 (3) are on the face of it peremptory in nature, the fact that the internal remedies were in fact exhausted by the time the matter was heard, constituted substantial and sufficient compliance with those provisions (see **Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433 H to 436 A, JEM Motors Ltd v Boutle and Another 1961 (2) SA 320 (N) at 327** and further, **Observatory Girls Primary School and Another v Head of Department of Education, Gauteng 2003 (4) SA 246 (W) at 255, Matloga v Minister of Law and Order 1989 (3) SA 440 (BG), Van Niekerk and Another v Favel and Another 2006 (4) SA 548 (W) at 571 para. 36, Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996 (4) SA 1131 (T) at 1138 D to E and Weenen Transitional Local Council v Van Dyk 2000 (3) SA 435 (N) at 442 B to 444 J**).

39] The provisions of section 96 (3) are clearly distinguishable from provisions which pertain to the very cause of a party's action (compare **Malokoane v Multilateral Motor Vehicle Accidents Fund 1999 (1) SA 544 (SCA)**. There is further no indication that those provisions were promulgated in the public interest (compare **Pio v Smith 1986 (3) SA 145 (ZH)**).

40] The question is simply what the legislature's intention with section 96 (3) was and whether it had in the end been achieved. In **Douglas Hoërskool en 'n Ander v Premier, Noord-Kaap, en Andere 1999 (4) SA 1131 (NC) at 1145 D to F Buys J** quoted with approval the following passage from **Maharaj and Others v Rampersad 1964 (4) SA 638 (A) at 646 C to E**:

> *"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance."*

In **Unlawful Occupiers, School Site v City of Johannesburg**, **2005 (4) SA 199 (SCA) at 209 G to I Brand JA** remarked as follows:

> *"Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statute provision had been achieved..."*

41] In our opinion the legislature's intention with section 96 was obviously to ensure that internal remedies are exhausted before decisions contemplated in subsection 96 (1) are subjected to the scrutiny of the Courts and the costs of such a course incurred. That object was effectively achieved. To put it another way, we cannot for a moment conceive that it could be argued that, for this Court to consider the counter-application under these circumstances, would frustrate the legislature's object with the provisions of section 96 (3).

42] It is therefore also unnecessary to consider whether the plausible attitude adopted by Mr Ntai on behalf of the Regional Manager and the Minister did not perhaps amount to a proper waiver of a statutory right. There is no indication that section 96 (3) was enacted in the public interest (compare **Absa Bank Bpk h/a Bankfin v Louw en Andere 1997 (3) SA 1085 (C)** and **South African Co-operative Citrus Exchange Ltd v Director-General: Truck and Industry and Another 1997 (3) SA 236 (SCA)**. Had these provisions been intended for the exclusive benefit of the department responsible for the administration of the MPRDA such a waiver would be competent (see **SA Eagle Insurance Co Ltd v Bavuma**

1985 (3) SA 42 (A) and **Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)**).

43] Although 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 (compare **Blue Circle Ltd v Valuation Appeal Board, Lichtenburg, and Another** 1991 (2) SA 772 (A) at 795E), it could conceivably be argued that, in view of the regulations promulgated in terms of the MPRDA and the 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 such parties.

44] For these reasons the point *in limine* cannot succeed.

The Validity of the Second Prospecting Right

45] For purposes of determining this issue, it is necessary to sketch a brief history of the administrative process that preceded the granting and/or issuing of the Second Prospecting Right to Meepo, as well as to deal with the statutory authority of the State officials who performed certain functions in this process.

[451] Meepo applied for a prospecting right in terms of

sec. 16 of the MPRDA. This application is dated 5 May 2004. A notice of acceptance (apparently in terms of sec.16 (2) of the act) was issued by the Regional Manager on 17 May 2004. However, Meepo had already been advised of the acceptance of its application by the Regional Manager on 10 May 2004.

On 15 June 2004 the respondents objected in writing to the aforesaid application. On 16 July 2004 the objection was tabled and discussed at a meeting of the Regional Mining Development and Environmental Committee (REMDEC) where all parties concerned were either present or represented. This was apparently done in terms of sec. 10 (2) of the act. The REMDEC recommended that the application be processed further.

The Regional Manager obtained the views of other interested Government Departments in regard to the application, satisfied itself that Meepo would be financially able to execute the proposed prospecting works, and furthermore received the requested EMP from Meepo.

[452] On or about 29 November 2004 a written submission was directed by the Regional Manager to the DDG in Pretoria for the approval of the application. This document contains the following relevant information:

"AIM
To obtain your approval for the granting of a prospecting right to Meepo Ya Sechaba Closed Corporation."

Hereafter follows a detailed confirmation that all statutory requirements had been complied with. The last paragraph of this document reads as follows:

> *"In light of the fact that the applicant has complied with the requirements of sections 17 (1) and 19 (4) (a) of the Act, as well as the fact that the application will have a positive socio-economic impact in the relevant area, as indicated in paragraphs 12 above, it is recommended that you, please –*
> *a) Grant a prospecting right to Meepo Ya Sechaba Closed Corporation in accordance with section 17 (1) of the Act for a period of two years, subject to the terms and conditions as may be determined.*
> *b) Grant permission to Meepo Ya Sechaba Closed Corporation to remove and dispose diamonds in terms of section 20 (2) of the Act, for such holder's own account.*
> *c) Sign the attached power of attorney, authorising the Regional Manager, Northern Cape Region, to sign on your behalf the prospecting right to be granted to Meepo Ya Sechaba Closed Corporation in this regard."*

The document, as well as a power of attorney, was signed by the DDG on 6 January 2005. The power of attorney reads as follows:

> *"I ABIEL MORAKE MNGOMEZULU, in my capacity as Deputy Director-General: Mineral Development*

of the Department of Minerals and Energy, by virtue of the powers delegated to me in terms of section 103 (1) of the Minerals and Petroleum Resources Development Act 2002 (Act 28 of 2002), by the Minister of Minerals and Energy of the Republic of South Africa on 12 May 2004, hereby grant a Power of Attorney to the Regional Manager, Northern Cape Region, of the Department of Minerals and Energy, to sign the prospecting right contemplated in section 17 (1) of the said Act in favour of Meepo Ya Sechaba Closed Corporation, in respect of The Remainder of the Farm Lanyon Vale No 376, Registration division of Hay, Province of the Northern Cape, according to the approval signed by me today."

It is common cause that the Minister has properly delegated her power to grant a prospecting right to the DDG, that a Regional Manager has no such original or delegated power and that any further delegation of its delegated powers by the DDG had been expressly prohibited by the Minister.

[453] On receipt of the aforesaid approval by the DDG, the Regional Manager and Meepo notarially executed a document headed *"PROSPECTING RIGHT"* on 24 March 2005 (the First Prospecting Right). In terms of par. 3.1 of this document *"this prospecting right shall commence on the 24th day of March 2005 and ... will continue in force for a period of two years from the 24th day of March 2005 ending on 23rd day of March 2007."*

[454] On 21 April 2005 Meepo's attorneys advised the Regional Manager as follows:

"*We confirm that the above prospecting right, signed on 24 March 2005, cannot be registered with the Registrar of Mining Titles, due to the fact that a certified sketch plan was not registered at the Registrar of Mining Titles before signature of the agreement.*

We confirm a meeting with Godfrey Mfetoane on 5 April 2005 as well as a telephonic conversation with Thabitha of the Registrar of Mining Titles on 31 March 2005.

Find attached hereto an internal memo dated 22 March 2005, explaining the requirements for registration. We confirm that the said memo was faxed to Godfrey Mfetoane of your offices on 5 April 2005.

Our clients instructed us that your department is following up with the Registrar which necessary steps are to be taken to register the prospecting right in the absence of a certified sketch plan, registered by the Registrar."

[455] On 1 July 2005 the Regional Manager and Meepo notarially executed a second document headed *"PROSPECTING RIGHT"* (the Second Prospecting Right). This prospecting right was hereafter registered at the offices of the Registrar of Mining Titles. This is the prospecting right relied upon by Meepo for purposes of the main application, and which the respondents seek to have reviewed and set aside.

46] The first question that presents itself is when and as a result of whose administrative conduct was the prospecting right granted to Meepo as contemplated in the MPRDA.

[461] Messrs Danzfuss and Ntai submitted that the right was granted to Meepo on 6 January 2005 when the DDG approved and signed the aforesaid recommendation, and that the signing by the Regional Manager of the notarially executed *"Prospecting Right"* on 24 March 2005 and again on 1 July 2005 merely amounted to an administrative formality whereby the granting of the right by the DDG was confirmed and formalised.

We do not agree with these submissions.

[462] When the said recommendation of the Regional Manager was approved by the DDG, so it appears to us from the above quoted wording of the document, the DDG merely approved the recommendation to – at some future unspecified moment in time – grant a prospecting right to Meepo. Hence the words *"... for a period of two years, subject to the terms and conditions as may be determined."*

The two year period was never intended to run from 6 January 2005. In the First Prospecting Right, the two year period was to run from 24 March 2005 to 23 March 2007, and in the Second Prospecting Right from 5 July 2005 to 4 July 2007.

No *"terms and conditions"* were *"determined"* in this document. This is a clear indication that the terms and conditions were intended to be determined at some future time and that the right, when granted, would be subject to those terms and conditions to be determined.

[463] Viewed from the perspective of an applicant for a prospecting right, the question is when do the rights and privileges pertaining to a prospecting right vest in him or her as holder of that right. The word *"holder"* in relation to a prospecting right is defined in the act as *"the person to whom such right has been granted or such person's successor in title."* In our view it cannot be said that Meepo acquired any rights as holder of a prospecting right at the time of approval of the aforesaid recommendations and before any terms or conditions in respect of the prospecting right, as well as the period of its validity, had been determined. These were only determined and communicated to Meepo at the execution of the aforesaid notarial deeds on 24 March 2007 and 1 July 2007 respectively.

In our view, the legal nature of the act in terms whereof a prospecting right is granted to an applicant, is a contractual one whereby the

Minister, as the representative of the State as the custodian of the mineral resources of the Republic of South Africa, consensually agrees to grant to an applicant a limited real right to prospect for a mineral or minerals on specified land for a specified period and subject to such conditions as may be determined or agreed upon. See sec. 17 of the MPRDA. 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. See **Ondombo Beleggings v Minister of Mineral and Energy Affairs, 1991 (4) SA 718 (AD) at 724 to 725**. This was done in this matter when the notarial deed referred to above was executed by the Regional Manager and the representative of Meepo.

[464] To say that a prospecting right only becomes effective in terms of sec. 17 (5) of the MPRDA on the date of approval of the EMP, is no answer to the aforesaid. A holder of a prospecting right acquires rights as such upon the granting of the right, for instance the right to have his EMP considered and/or approved in terms of sec. 17

(5). What is postponed by this section is the exercising of the right to prospect and to remove minerals (see sec. 5 (4) (a) of the act), but the rights become vested in a holder upon the granting of that prospecting right.

[465] We therefore find that a prospecting right had been granted to Meepo firstly on 24 March 2005 and again on 1 July 2005. That this was the stance of Meepo at all relevant times is undoubtedly clear.

In par. 10 of its founding affidavit, Mr Shuping, on behalf of Meepo, alleges, *"The right* (the Second Prospecting Right) *was granted on 5 July 2005 for the period commencing on 5 July 2005 and ending on 4 July 2007"* (The first date of 5 July 2005 is an error and should have read 1 July 2005.)

47] If the relevant prospecting right (the Second Prospecting Right) was granted to Meepo on 1 July 2005, that right was granted by the Regional Manager, who was not authorised to grant the right on behalf of either the Minister or the DDG. It was conceded by Mr Ntai that the aforementioned power of attorney was not a valid delegation of power by the DDG to the Regional Manager, and it was further conceded that, should we find that the Second Prospecting

Right was granted to Meepo by the Regional Manager, that conduct by the Regional Manager would be *ultra vires* his authority, rendering the right void. These concessions were properly made.

48] The aforesaid finding is dispositive of the counter-application. However, and if we wrongly concluded that the prospecting right was not granted by the DDG on 6 January 2005, the Minister has a further difficulty which appears to us to be insurmountable.

[481] What the DDG empowered the Regional Manager to do in terms of the aforementioned power of attorney, was *"... to sign the prospective right contemplated in sec. 17 (1) of the said Act ... according to the approval signed by me today."* (Our emphasis). According to the approval signed by the DDG on that day (6 January 2005) he approved the granting of a prospecting right to Meepo *"subject to the terms and conditions as may be determined."* It is common cause that the DDG did not determine any such terms or conditions. The documents comprising the Prospecting Right that was signed by the Regional Manager contain a number of terms and conditions not to be found in the approval. The following are only a few of these terms and/or conditions:

[48.11] The period of duration of the right.

[48.12] "The Holder shall pay to the Minister throughout the duration of this prospecting right any levy, fee, royalty or consideration payable in terms of any relevant Act of Parliament. All payments required in terms of this Act shall be made by the Holder to the South African Revenue Services (SARS) at the relevant time-periods determined by the said Act. The prospecting fees payable under this right is R2 326-00 (two thousand three hundred and twenty six rand) for the first, escalating by 50c (fifty cents) for the duration of the right." (sic)

[48.13] "The Holder is entitled to the rights referred to in section 5 (2) and (3) and any other relevant provisions of the Act, and such other rights as may be contained in this prospecting right or such other right as may be granted, acquired, or conferred upon it by any other applicable law."

[48.14] "No boreholes sunk by the Holder during the currency of this prospecting right shall be sealed or closed up by the Holder without the prior written approval

of the Minister, but the Holder shall fence and render safe all boreholes, shafts, openings and excavations in accordance with the provisions of the Act, the Mine Health and Safety Act, 1996 and any other applicable laws and regulations."

[48.15] "The Holder, its successors in title and/or assigns, shall during tenure of this prospecting right take all necessary and reasonable steps while carrying out their prospecting operations:

to safeguard and protect the environment, the prospecting area and prevent damage or harm to any person or persons using or entitled to use the of the prospecting area;

to prevent any damage which may be caused by or through or in consequence of the exercise by the Holder of its aforesaid right to conduct prospecting operations under this prospecting right;

in so far as there is legal liability arising, compensate such person or persons for any damage or losses, including but not limited to damage to the surface, crops or improvements, which such person or persons may suffer as a result of, or arising from or in connection with the exercise of its rights under this prospecting right or of any act or omission in connection herewith."

[48.16] "In the furthering of the objects of the Act, the

> Holder acknowledges to be bound by the provisions of the Memorandum of Agreement ('MOA') entered into between the members of the Holder on 04*th* *MARCH, (Attached hereto marked Annexure C.) Where any of the provisions of the said MOA is changed in full or in part, the Holder must, in writing, inform the Minister through a resolution signed by the directors of the Holder and obtain a written approval of such change from the Minister. The notice to the Minister must be submitted sixty days (60) before the intended change may take effect."*

[482] It is not in dispute that these terms and conditions were determined by the Regional Manager and not by the DDG. The Regional Manager was not authorised to determine same.

[483] Mr Ntai submitted that most of the conditions inserted in these Prospecting Rights are in any event statutory conditions contained in the act, were therefore superfluous, did not require the exercise of a discretion by the Regional Manager or the DDG, and should therefore not be regarded as the determining of terms and conditions in the

exercise of an administrative function subject to review.

This argument begs the question. Sec. 17 (6) of the act reads,

> "*A prospecting right is subject to this Act, any other relevant law and the terms and conditions stipulated in the right and is valid for the period specified in the right, which period may not exceed five years.*"

It is clearly the prerogative of the grantor of the right to determine the terms and conditions to which it would be subject. The determining issue is not the contents of the terms and conditions of the right, but the authority of the grantor to determine whatever terms or conditions.

In *casu* the terms and conditions of Meepo's prospecting right were not determined by the grantor of the right. These terms and conditions were determined by the Regional Manager. In acting thus, he acted *ultra vires* his statutory powers.

49] There is a further reason for holding that the Second Prospecting Right is invalid.

[491] If one is to accept that the Regional Manager was authorised by the DDG to sign the First Prospecting Right on his behalf (which the Regional Manager did), the Regional Manager was never granted authority to sign the Second

Prospecting Right on behalf of the DDG. (It is common cause that the only recommendation and power of attorney signed by the DDG were the aforementioned documents signed by him on 6 January 2005).

[492] The Second Prospecting Right differs from the First Prospecting Right in the following material respects:

[49.21] The period of validity, as referred to hereinbefore, differs.

[49.22] The description and size of the prospecting area differs. In the First Prospecting Right the prospecting right area is described as

"The prospecting right area shall comprise the following:

Certain: Remainder of the Farm Lanyon Vale No 376

Situate: District of Hay, Northern Cape Province

Measuring: 2375, 3214 hectares in extent.

Which Prospecting Right Area is described in detail on the attached Diagram/Sketch Plans marked Annexure B"

In the Second Prospecting Right the area is described as

"Certain ABCD, Orange River;

DE and A representing an area on the Remainder of the Farm Lanyon Vale

No 376,

Situate in the District of Hay,

Northern Cape Province,

In extent of 2655 Hectares in total,"

The two sketch plans attached to the two documents differ as well.

[493] It is alleged on behalf of the Minister and the Regional Manager that, because of clerical errors in the First Prospecting Right, the errors were corrected before registration thereof, and the Second Prospecting Right represents the corrected copy of the prospecting right granted to Meepo.

This construction appears to be an over simplification of the legal concept of a prospecting right; and of what actually transpired.

[49.31] Meepo acquired certain rights at the granting of the First Prospecting Right. In terms of that Right, Meepo's right to prospect on the Farm ran from 24 March 2005 to 23 March 2007. Had the Regional Manager approved of Meepo's EMP in terms of sec. 17 (5) of the MPRDA before the notarial deed dated 24 March 2005 was lodged for

registration, that prospecting right would have become effective in terms of sec. 17 (5) of the Act. (All parties were *ad idem* that registration of a prospecting right is no prerequisite for its validity. We agree).

[49.32] What the Regional Manager did, was not to merely rectify errors in the already existing prospecting right. He in fact replaced that right with another prospecting right and issued to Meepo a fresh prospecting right. This much is clear from the introductory section of the Second Prospecting Right where it is stated,

> *"AND WHEREAS the Minister has granted to MEEPO YA SECHABA CLOSE 23 a prospecting right in terms of section 17 of the Act,*
>
> *AND WHEREAS this right replaces the unregistered right concluded by the Regional Manager and the Holder on the 24th day of March 2005 in respect of the application of the holder.*

NOW THEREFORE THE MINISTER GRANTS A PROSPECTING RIGHT SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS:"

[49.33] If it was the intention of the Regional Manager to merely correct clerical errors, why then was the period for

which the right was granted, altered? On what authority was this period of validity not only altered, but in effect extended to beyond a period of 2 years as authorised by the DDG? (The right was, on the version of Meepo, the Minister and the Regional Manager effectively granted for a period which commenced on either 6 January 2005 or on 24 March 2005 and ending on 4 July 2007).

The Regional Manager had no authority and no power of attorney to act as aforesaid, and his conduct was therefore *ultra vires* his authority.

50] In the last instance: sec. 102 of the MPRDA reads:

> "A reconnaissance permission, prospecting right, mining right, mining permit, retention permit, technical corporation permit, reconnaissance permit, exploration right and production right work programme, mining work programme, environmental management programme, and environmental management plan may not be amended or varied (including by extension of the area covered by it or by the addition of minerals or a share or shares or seams, mineralised bodies, or strata, which are not at the time the subject thereof) without the written consent of the Minister."

If it is to be accepted that the replacement of the First Prospecting Right by the Second Prospecting Right merely amounted to the correction of clerical errors, the difference in the period of validity between the two Rights

can certainly not be labelled as a *"clerical error"*. To this end at least, the Regional Manager was, in our view, not entitled or authorised to amend the period of validity of the First Prospecting Right without the consent of the Minister or the DDG.

51] For these reasons we conclude that the Second Prospecting Right issued to Meepo is of no force and effect and should be set aside.

The Respondents' application under the Minerals Act

52] The respondents applied in July 2001 for a prospecting permit on the Farm in terms of the applicable provisions of the Minerals Act. At the commencement of the MPRDA on 1 May 2004, the respondents had not been informed by the Department of the fate of this application. This much is common cause.

53] The respondents aver that, when Meepo's application for a prospecting right dated 5 May 2004 under the MPRDA was accepted and processed, its aforesaid application was a pending application as envisaged in par. 3 of Schedule II to the MPRDA, and should therefore have been considered in terms of sec. 16 of the MPRDA. Par. 3 (1) of the said schedule to the Act reads:

"Any application for a prospecting permit, mining

> authorisation, consent to prospect, consent to mine or permission to remove and dispose of any mineral lodged, but not finalised, in terms of section 6, 8 or 9 of the Minerals Act immediately before this Act took effect must be regarded as having been lodged in terms of section 13, 22, 27, 79 or 83 of this Act, as the case may be."

(The omission of a reference to sec. 16 of the act is clearly a *casus omissus* and of no consequence.)

54] It had been conceded, correctly so in our view, that, if the said application of the respondents was still pending at the commencement of the MPRDA, it should have been considered in accordance with the provisions of sec.9 of the act in preference to the application of Meepo, in which event the counter-application has to succeed.

What therefore needs to be determined is whether the 2001 application of the respondents (the 2001 application) was still a pending application on 1 May 2004.

55] The Minister and the Regional Manager aver that the 2001 application was refused on 27 February 2004. In support of this allegation these parties rely on a handwritten note in a handwritten register. Each page of this register contains 6 columns. The heading of each column from left to right reads:

"Date Regions	*Date received*	*Type of application Surname/ Names/Farm*	*Ref. no's File no's*	*Allocated to who*	*Action Required Date to Managemen*

		s			*t"*

On one of the pages one finds the following reference to the 2001 application: The first two columns are blank. In the third column the following is noted, *"Jan Louis Koen Kotze*
Refusal (sic) of the granting to Prospect / Remove / Dispose of Diamonds on the farm Lanyonvale."

The fourth column contains a reference number. The fifth column reads, *"DDDRR – Mokolo*

30 – 1 – 04"

The sixth column contains two notes. The first one reads *"Grants permission to the applicant."* The second one reads, *"Refused permission on the 27 – 2 – 04."*

This last mentioned written note contained in this register is the only piece of *"evidence"* relied upon by the Department that the 2001 application was considered and refused on 27 February 2004.

56] In application of the rule in **Plascon-Evans Paints v Van Riebeeck Paints, 1984 (3) SA 623 (A) at 635 C**, we are convinced that the aforesaid allegation on behalf of the Minister and the Regional Manager is so clearly untenable that we should reject same on the papers before us.

57] In his answering affidavit the DDG avers,

> "Both the Applicant and the First Respondent had applied for prospecting rights on the same property in terms of the Minerals Act. The application was refused on 27 February 2004. A decision by the Director-General to refuse the application was taken on 27 February 2004. The Court is referred to a copy of an extract from the register evidencing the entry in regard to the dates of receipt of the application and the refusal thereof, attached hereto and marked Annexure 'GM1'. The First Respondent was notified of the refusal in May 2004 by the Regional Office (Kimberley)."

(Annexure GM1 is an extract of the above mentioned register.) We find this averment, to say the least, extremely suspicious.

[57.1.] On 15 March 2004 the attorney for the respondents addressed a letter to the Chief Director of the Department, Pretoria, reading,

> "The above matter and our letter to you dated 10*th* *February 2004, a copy of which is attached hereto, has reference.*
>
> *We have been informed that the above application was handed to you by Mr. Raboo of the Kimberley office on 3rd February 2004.*
>
> *Kindly let us have your confirmation thereto and whether there are any further outstanding requirements."*

This letter was followed up by another letter dated 21 April 2004.

[57.2.] In the meanwhile, the Regional Manager

addressed a letter to the said Chief Director dated 8 April 2004. This letter reads as follows:

> "*Re: enquiry on an application for a prospecting permit on certain surveyed portion of the farm Lanyon vale no 376: diamonds*
> *Applicant: J L K Kotze*

Your facsimile dated 07 April 2007 bears reference.
We have forwarded a submission for refusal of the Minister's consent dated 23/01/2004 on behalf of the above-mentioned applicant. Mr Rapoo personally handed the submission as the applicant alleges.

> *This is a historical application, which was initially on a competing basis with that of Meepo Ya Sechaba Closed Corporation on the same property. Mr Kotze is the farm owner of the abovementioned property and has successfully interdicted Meepo Ya Sechaba from carrying out prospecting on his farm through a Court Interdict during the year 2002. A liquidation order was granted against Meepo. After an inspection, The Directorate; Mine Economics divided the property in two equal half* (sic) *to accommodate both applicants. Then the applicant successfully filed a liquidation order against Meepo Ya Sechaba CC.*

This application (Mr Kotze) is only on the other half of the property and is therefore recommended for refusal. The reasons for refusal are clearly indicated on the said submission. Meepo has successfully been compo suited by the court and have been re-instated to continue trading under same through the Registrar of Companies and their application on the other half of the property has also been forwarded for Ministerial consideration for consent to prospect for a period of one year.

> *Based on the historical background of this application, the Acting Director: Mineral Development would appreciate if the application were expedited before the implementation of the MPRDA."*

(emphasis supplied).

What clearly emerges from this letter are the following:

1. The reference to *"Mr Rapoo"* and the words *"as the applicant alleges"* refer to the abovementioned enquiry directed by the respondents' attorney to the Chief Director dated 15 March 2004.

2. A facsimile dated 7 April 2004 was directed by the Chief Director to the Regional Manager in regard to the 2001 application.

3. The said letter was addressed by the Regional Manager to the Chief Director in reply to the said facsimile.

4. In his reply to the Chief Director, the Regional Manager requested the Chief Director to consider the application before the implementation of the MPRDA.

This much was conceded by Mr Ntai.

We were unable to find any reference in this register to the application of Meepo under the Minerals Act.

[57.3.] During the first day of the hearing of this matter on 16 May 2007, we raised this anomaly with Mr Ntai. He requested a postponement to clarify same and the matter was postponed to 22 and 23 May 2007. We pertinently requested Mr Ntai, and allowed the Minister and the Regional Manager to

file supplementary affidavits in this regard, to submit to us a copy of the facsimile referred to in the letter of the Regional Manager quoted above since no copy thereof could be found in the records discovered; to explain when and by whom the decision was taken to refuse the 2001 application on 27 February 2004 and to submit any written documents or notes in support thereof, to explain the reason for the enquiry dated 7 April 2004 addressed to the Regional Manager if the 2001 application had already been refused in February 2004, when and how the Regional Manager had been informed of the alleged decision of 27 February 2004; and why that decision had only been conveyed to the respondents on 11 May 2004.

The DDG filed a supplementary affidavit dated 17 May 2007. In this affidavit the DDG

a) alleges that his letter to the Chief Director dated 8 April 2004 (it will be remembered that Mr Mfetoane was the Regional Manager at the time in the Kimberley office) was an enquiry addressed by him to the Chief Director! (This is patently not correct);

b) failed to attach or even refer to the contents of the facsimile dated 7 April 2004;

c) did not explain when or by whom the 2001 application was refused;

d) explained that once a decision is taken by head office, such decision *"is captured in the register similar to the one referred to above"*, i.e. the original of annexure *"GM1"*;

e) explained why the regional office is not always timeously advised of decisions taken by head office;

f) failed to state when the Kimberley office was advised of the decision to refuse the 2001 application;

g) explained that the respondents were only advised of the said decision on 11 May 2004; and

h) was unable to state when Meepo was advised of the refusal of its earlier application, save to advise that he *"seem(s) to recollect that a letter would have been dispatched at the same time when the first respondent was informed"*. No such letter could be traced.

> No further explanation was proffered on behalf of the Department in regard to our main concern, viz. the apparent discrepancy between the alleged date (27 February 2004) on which the 2001 application was refused and the enquiry by the Chief Director on 7 April 2004. No affidavit or any other documentary proof was submitted to corroborate the hearsay evidence of Mr Mfetoane that the 2001 application was in fact considered and refused in February 2004. If that application was in fact refused in February 2004, we would at least have expected confirmation of this by the person who took that decision or someone who could positively or convincingly confirm such a decision.

58] As pointed out above, the attorneys for the respondents made a number of enquiries to the Chief Director regarding the fate of the 2001 application subsequent to 27 February 2004. If the application was in fact refused by the Chief Director on 27 February 2004, we would have expected a reply to that effect to the respondents or their attorneys. The absence of such a reply or even an explanation therefore by the Chief Director, and the aforementioned enquiry by the Chief Director to the Regional Manager on 7 April 2004, strengthens the inevitable inference that no decision was taken on

27 February 2004 to refuse the 2001 application.

59] But for the hearsay *ipsi dixit* of the DDG and the highly doubtful *"support"* of that statement, there is no evidence on which we can find that the 2001 application had been refused in February 2004. We therefore find that the respondents' contention that the 2001 application was only refused on the day they were notified of such refusal, i.e. on 11 May 2004, must, on a balance of probabilities, be accepted.

60] In the absence of any other evidence, it therefore follows that the 2001 application was still pending when Meepo submitted its application under the MPRDA to the Regional Manager. The acceptance and processing of that application in disregard of the respondents' pending application was therefore irregular and *ultra vires* the powers of the Regional Manager and/or the DDG. The prospecting right of Meepo therefore falls to be reviewed and set aside.

It further follows that the 2001 application should have been processed as a pending application under item 3 of the second Schedule of the MPRDA. The respondents are therefore entitled to the relief requested in par. 4 of the counter-application.

COSTS

61] This matter was initially enrolled for 28 March 2007. By reason of the incompleteness of the departmental records that were filed, the matter had to be postponed and could not proceed on that date.

Mr Danzfuss argued that it was the duty of the respondents to see to it that the records were complete and filed, and therefore the respondents should be held responsible for the payment of the wasted costs occasioned by the postponement.

Mr Ntai conceded that the Department too was to some extent to blame for the incompleteness of the records, and that those costs should be borne by all the respondents. We agree with this submission.

62] Counsel are *ad idem* that the costs of the main and counter-application should follow the result of the applications. We are, however, of the view that, although the Minister and the Regional Manager supported the main application, there is no justification for holding these parties liable for the respondents' costs in the main application.

63] We therefore make the following orders:

A. The main application is dismissed.

A1 The Applicant is directed to pay the first and second Respondents' costs in the main application.

A2 No order is made in respect of the costs of the third and fourth Respondents in the main application.

B. The counter-application succeeds.

B1 The Prospecting Right granted to the Applicant in respect of the Remainder of the farm Lanyon Vale No. 376, situate in the district of Hay, Northern Cape, as embodied in notarial deed Protocol no. 011/2005 dated 1 July 2005, and registered in the Mineral and Petroleum Titles Registration Office: Pretoria, on 18 July 2005, is declared null and

void.

B2 The third and/or fourth Respondents are directed to process the application of the first and second Respondents for a prospecting permit submitted in terms of the Minerals Act no. 50 of 1991 on 26 July 2001 (ref. no. NC5/2/2/1339) as a pending application under item 3 of Schedule II of the Mineral and Petroleum Resources Development Act. No. 28 of 2002.

B3 The Applicant and the third and fourth Respondents are directed to pay the first and second Respondents' costs in the counter-application jointly and severally, the one paying the others to be absolved.

C. The first, second, third and fourth Respondents are directed to pay the applicant's wasted costs caused by the postponement of the case on 28 March 2007 jointly and severally, the one paying the others to be absolved.

_____ _____

1.14.1.1.1HJ Lacock ***CJ Olivier***

JUDGE **JUDGE**

For the applicant:	**Adv FWA Danzfuss SC** (Instructed by Du Toit & Bomela, Kimberley)
For the 1st and 2nd respondents:	**Adv CN Van Heerden & Adv RS Willis** (Instructed by Van De Wall & Partners, Kimberley)
For the 3rd and 4th respondents:	**Adv Ntai SC and Adv SP Mothle** (Instructed by the State Attorney)