The final judgment

PJ BADENHORST*

NJJ OLIVIER**

C WILLIAMS***

1 *Introduction*

The legal dispute between Bengwenyama Minerals (Pty) Ltd and Genorah Resources (Pty) Ltd regarding prospecting rights in respect of the Bengwenyama traditional community land was finally settled by the constitutional court[1] at the end of 2010, after judgments by both the high court[2] and the supreme court of appeal[3] were appealed. This article firstly examines the background, facts and history of the case in paragraph 2, and this is followed by a discussion of the relevant provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Promotion of Administrative Justice Act 3 of 2000 (with reference to the legal possibility of appeal) in paragraph 3. Paragraph 4 deals with non-compliance with the consultation, hearing and environmental requirements of the Mineral and Petroleum Resources Development Act 28 of 2002, and paragraph 5 with the general remarks by the constitutional court regarding (a) the unequal treatment by the department of mineral resources and (b) discretionary remedies. Paragraph 6 sets out the constitutional court order, and is followed by an analysis of the case under discussion (including a comparison between the three judgments and an examination of the amendments to Act 28 of 2002) in paragraph 7. Paragraph 8 deals with the reaction to the constitutional court judgment, *inter alia* by the department of mineral resources, and paragraph 9 contains the authors' concluding remarks.

* Associate Professor of Law, Deakin University.

** Professor and director of the SADC Centre for Land-related, Regional and Development Law and Policy, University of Pretoria.

*** Lecturer, Faculty of Law, University of Pretoria.

1 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama-ye-Maswati Royal Council Intervening)* 2011 3 BCLR 229 (CC).

2 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* case nr 39808/2007 (unreported) 18-11-2008 (T). References to the "high court" and the "high court case" refer to the high court's judgment in the aforementioned case. For an in-depth discussion of the high court case, see Badenhorst and Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" 2011 *De Jure* 126.

3 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) (Bengwenyama-ye-Maswazi Royal Council Intervening)* 2010 3 All SA 577 (SCA). References to the supreme court of appeal and the supreme court of appeal case refer to the supreme court of appeal's judgment in the aforementioned case.

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2 *Background, facts and history of the case*

2.1 The applications for prospecting rights by Genorah Resources and Bengwenyama Minerals

2.1.1 The application for prospecting rights by Genorah Resources

A prospecting right was granted by the state to the first respondent (Genorah Resources (Pty) Ltd), on properties[4] owned by the applicants (Bengwenyama Minerals (Pty) Ltd). The Bengwenyama traditional community (hereinafter referred to as the "community"), who were prohibited by past racially discriminatory laws from enjoying formal title over their land, applied for the setting aside of the prospecting right that was granted in 2006 to Genorah Resources, a company that qualifies as a historically disadvantaged person.[5]

At the heart of the legal dispute lies Act 28 of 2002, and, specifically, the requirements regarding consultation with landowners or lawful occupiers. The act provides for, among other things, "equitable access to and sustainable development of the nation's mineral and petroleum resources" and gives effect to, *inter alia*, the constitutional norm of equality.[6] In addition, it provides a measure to redress inequalities relating to access to South Africa's natural resources. The provisions impact materially on three levels: 1 individual land ownership; 2 community land ownership; and 3 the empowerment of previously disadvantaged individuals in order for them to enjoy access to the mineral resources of South Africa.[7]

As far back as 2004, the Bengwenyama community showed an interest in acquiring prospecting rights on their properties (Nooitverwacht and Eerstegeluk are the two properties relevant to the dispute). Written objections against the granting of prospecting rights were lodged with the department of mineral resources (hereinafter referred to as the department) in December 2004: the community[8] made it clear that they wished to be accommodated in a meaningful manner in the prospecting projects. In January 2005, another letter was sent by the community to the department, thanking the department for its advice, and stating that no acknowledgement of receipt had been received from the department. However, no prospecting rights on the community's properties were granted by the department in 2004 and 2005 on the properties.[9]

On 3 February 2006, the community's traditional leader[10] was informed by a representative of Genorah Resources that the company wanted to speak with him regarding prospecting applications. A prescribed consultation form, which was left with the traditional leader, remained unsigned on behalf of the community.[11] The traditional leader's reply, dated 13 March 2006, stated that the community also had an interest in the prospecting rights over Nooitverwacht and that they had already submitted an application.[12] The letter also stated that the community would complete the forms "once we know each other". Genorah Resources did not reply to

4 The farms Eerstegeluk and Nooitverwacht in the Limpopo Province.
5 See par 27.
6 See s 1(a) and 9(2) of the Constitution of the Republic of South Africa, 1996. See also par 28.
7 See par 3.
8 A community as defined in s 1 of the act "means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law". See also par 72.
9 See par 8.
10 Kgoshi Nkosi.
11 See par 9.
12 The authors could find no evidence that such an application had in actual fact been lodged.

this request. With regard to the other farm, Eerstegeluk, the community was never consulted.[13]

On 6 February 2006, Genorah Resources submitted its applications for prospecting rights over five properties, including the farms Nooitverwacht and Eerstegeluk. Later that month, Genorah Resources supplemented its application and stated that it had introduced itself to the tribal authority and traditional leader on 3 February 2006, but had not received a response.[14] Genorah Resources was informed on 20 February 2006 of the department's acceptance for further processing of its application, and was required to "[1] submit an environmental management plan;[15] [2] consult with the landowner or lawful occupier of the land, as well as with other interested and affected parties; and [3] to report the results of the consultation to the Regional Manager". Even though Genorah Resources complied with the first requirement, no further attempts were made to comply with the second requirement.[16]

2.1.2 The application for prospecting rights by Bengwenyama Minerals

On 10 May 2006, the community applied for prospecting rights through Bengwenyama Minerals, and on 9 June 2006 Bengwenyama Minerals, the community and other interested parties concluded an initial investment agreement. For a number of reasons, the department did not accept the application.[17] However, on 24 July 2006, Bengwenyama Minerals' second application (dated 14 July 2006) was accepted as proper. Bengwenyama Minerals was informed that it had complied with section 16(2) of Act 28 of 2002, that it had to consult with interested and affected parties and hand in an environmental management plan, and that other entities had already applied for prospecting rights on the properties.[18] It is undisputed that the department was at all times fully aware of the community's interest in obtaining prospecting rights.[19] During September and October 2006, the final investment agreement was concluded; the traditional leader approved Bengwenyama Minerals' acting as "black empowered enterprise" on the community's behalf; the traditional leader informed the department in writing that Genorah Resources (and other companies) failed to consult with him or the community, and objected to the other applications; and Bengwenyama Minerals provided the required financial guarantee for environmental rehabilitation.[20]

2.1.3 Peculiarities identified by the constitutional court

The constitutional court identified a number of peculiarities with regard to the flow of events. Even though Genorah Resources was informed on 8 September 2006 that prospecting rights had been granted to it (over Nooitverwacht and Eerstegeluk among other properties) and the notarial execution of the award was effected on 12 September 2006, the department informed Bengwenyama Minerals only on 6 December 2006 that its application had been refused as a result of the fact that

[13] See par 10-11.
[14] See par 12.
[15] Consultation with affected persons is also required for purposes of the environmental management plan. No consultation with the community in this regard took place.
[16] See par 13. See also s 16 of the act.
[17] See par 14. The reasons for non-acceptance were deficiencies with regard to the production of a title deed, and the fact that a prospecting right in respect of a third property had been granted to a third party.
[18] See par 15.
[19] See par 16.
[20] See par 17.

prospecting rights had already been granted to other entities (*ie* Genorah Resources). Prior to 6 December 2006, neither the community nor Bengwenyama Minerals had been informed by the department that prospecting rights had already been afforded to Genorah Resources. As a result, the prospecting rights over Nooitverwacht and Eerstegeluk were granted without notice to the community.[21] In addition, Genorah Resources only provided its financial guarantee for environmental rehabilitation[22] after its application was approved and after notarial execution was effected.[23] Genorah Resources' environmental management plan was approved on 13 November 2006 (two months after its application was approved), by an acting regional manager (and not the regional manager who approved the application).[24]

2.2 The appeal process followed by Bengwenyama Minerals and the community

Even though Bengwenyama Minerals and the community requested a copy of Genorah Resources' application from the department in December 2006, it was provided to them only on 17 January 2007. On 13 February 2007, Bengwenyama Minerals and the community lodged an appeal, which was initially based on alleged non-compliance with the provisions of sections 16(4)[25] (notification) and 17(1)(*a*)[26] (access to financial resources and technical ability) of Act 28 of 2002. The following grounds of appeal were added on 9 March 2007:

> "(a) the Community had a preferent community claim to prospecting rights in terms of section 104 of the act;[27] (b) given its interest in the matter, the Community was entitled to a hearing before the department prior to the allocation of the award to Genorah; (c) the allocation of the award was procedurally unfair and (d) the award may have violated the Community's fundamental right to property under section 25 of the Constitution".[28]

A response to the above was forthcoming from the department only on 14 June 2007 (almost four months after the appeal was first lodged).[29]

However, before a response was received from the department, Bengwenyama Minerals and the community launched interdict proceedings on 22 March 2007 to prevent Genorah Resources from exercising its rights to prospect (pending the final determination of their dispute). In its 14 June 2007 response, the department stated that the matter became *sub judice*, and as a result, the minister could not decide an appeal. In addition, the department stated that the matter should be addressed by means of review proceedings,[30] which was started by Bengwenyama Minerals and the community on 22 August 2007 in the high court.[31] The interdict against

21 See par 18.
22 15-09-2006.
23 on 8 and on 12-09-2006 respectively.
24 See par 19.
25 "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" s 16(4).
26 "Subject to subsection (4), the Minister must grant a prospecting right if- (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;" s 17(1).
27 See s 104 of Act 28 of 2002.
28 See par 20.
29 See par 20.
30 See par 21-22.
31 The setting aside of the granting of the prospecting rights was applied for.

Genorah Resources was granted. The high court, however, dismissed the main review application on the following grounds: "that no internal appeal was available and that the review was thus brought out of time; that no review grounds had been established; and that even if some of them had been established, he [Hartzenberg J] would nevertheless have exercised his discretion against granting relief". Leave to appeal was granted.[32]

The supreme court of appeal found that an internal appeal process was available, but that it had been abandoned. In addition, the application for review was brought out of time, and, as a result, the appeal was again dismissed. The grounds of review were not considered by the supreme court of appeal, and discretionary relief was refused.[33] Bengwenyama Minerals and the community then applied to the constitutional court. This court summarised the issues as follows:

a "Whether leave to appeal should be granted;
b Whether the Act provides for internal remedies in the present matter;
c If internal remedies do exist under the Act, whether the review was brought in time;
d In respect of the review grounds:
  i Whether there was proper consultation by Genorah with Bengwenyama Minerals and the Community in terms of the act;
  ii Whether the decision-maker was obliged to afford Bengwenyama Minerals and the Community a hearing before awarding the prospecting rights to Genorah;
  iii Whether proper consideration was given to the environmental requirements of the act prior to the granting of prospecting rights to Genorah;
  iv What relief should be granted if the review is successful."[34]

3 *The provisions of Act 28 of 2002, the Promotion of Administrative Justice Act 3 of 2000 and the legal possibility of appeal (internal remedies and the timeous compliance with requirements)*

The constitutional court found it to be in the interest of justice to hear the matter, and granted leave to appeal, as the matter involved constitutional issues.[35]

3.1 Act 28 of 2002

As stated above, the act seeks to address certain past wrongs (among other things, the fact that black people were in the past prevented from acquiring access to mineral resources).[36] The constitutional court summarised the relevant objects of the act in paragraph 29:

[32] See par 23.
[33] See par 24. See discussion below regarding discretionary relief.
[34] See par 25.
[35] See par 42-43. Genorah Resources, as well as the community, assert rights with regard to the object of Act 28 of 2002 relating to the promotion of equitable access mineral resources to historically disadvantaged individuals (this relates to s 25(4) to (6) of the constitution). Compliance with the requirements relating to environmental concerns is at issue (this relates to s 24 of the constitution). In addition, rights relating to administrative action are also relevant (this relates to s 33 of the constitution). The high court found that there was no internal appeal process, whilst the supreme court of appeal held that the internal appeal had been abandoned. Both courts concluded that Bengwenyama Minerals and the community had 180 days to institute review proceedings (from the date they learnt of the approval of prospecting rights to Genorah Resources).
[36] See 2.1 above, as well as par 28.

"The promotion of equitable access to the nation's mineral and petroleum resources for the country's people;[37]

The substantial and meaningful expansion of opportunities for historically disadvantaged men and women to enter the mineral and petroleum industries and to benefit from the exploitation of these natural resources; [38] and

To ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating".[39]

The act provides for preference being given to historically disadvantaged persons when applications for prospecting rights are considered,[40] as well as to communities who wish to prospect on communal land.[41] The act provides for an internal appeal process in section 17(5).[42] The minister's authority to grant prospecting rights was delegated to the deputy director general.[43] The constitutional court examined the purpose of the delegation and the terms regulating same and found "no indication in the delegation provisions of the Act or in their contextual purpose that would preclude an internal appeal in the particular circumstances of this case".[44] Internal appeals are governed by section 96 of the act.[45] The constitutional court interpreted section 103(4)(*b*) of the act[46] not to exclude internal appeals.[47] In this regard, and after considering the court's stance in *Koyabe v Minister for Home Affairs* (*Lawyers for Human Rights as* Amicus Curiae)[48] the constitutional court stated as follows:

"Allowing an internal appeal under section 96 of the Act in the circumstances of this case will enhance the autonomy of the administrative process and provide the possibility of immediate and cost-effective relief prior to aggrieved parties resorting to litigation. An internal appeal process will also allow the Minister to develop guidelines for the proper application of the Act in future decisions."[49]

37 See in this regard s 3 of Act 28 of 2002.
38 See in this regard s 9, 100 and 104 of Act 28 of 2002.
39 See also s 2 of Act 28 of 2002 and par 31.
40 See s 9 of Act 28 of 2002 and par 31.
41 See s 104 of Act 28 of 2002 and par 31.
42 See par 37. "The granting of a prospecting right in terms of subsection (1) becomes effective on the date on which the environmental management programme is approved in terms of section 39" s 17(5) of Act 28 of 2002. For an in-depth exposition of the application process, see par 32-36 of the constitutional court judgment.
43 See par 43.
44 See par 45, and also s 103 of Act 28 of 2002.
45 "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) S 6, 7(1) and 8 of the Promotion of Administrative Justice Act apply to any court proceedings contemplated in this section" s 96(1).
46 "The Minister, Director-General, Regional Manager or officer may at any time- (a) withdraw a delegation or assignment made in terms of subsection (1), (2) or (3), as the case may be; and (b) withdraw or amend any decision made by a person exercising a power or performing a duty delegated or assigned in terms of subsection (1), (2) or (3), as the case may be" s 103(4).
47 See par 48.
48 2010 4 SA 327 (CC). See par 49.
49 See par 50.

The constitutional court went on to consider pre-constitutional analytical and conceptual distinctions between deconcentration and decentralisation as two forms of delegation, but made it clear that these distinctions should be approached with caution. According to the court, the issue at hand related to the constitutional provisions regarding public administration. In this regard, "the fundamental constitutional value requiring a democratic system of government to ensure accountability, responsiveness and openness, and the basic values and principles governing public administration" need to be taken into account.[50] The constitutional court also made it clear that section 47 does not provide a further internal remedy, and relates only to conduct that occurs after the prospecting right has been granted.[51] In addition, section 47(1)(*d*) does not cater for information contained in the application for prospecting rights.[52] The constitutional court concluded that an internal appeal was available to Bengwenyama Minerals and the community.[53]

After considering the timelines relevant to the appeal process, the constitutional court stated that the facts did not indicate a deliberate delay on Bengwenyama Minerals and the community's side.[54] The letter from the department addressed to Bengwenyama Minerals dated 14 June 2007 played a key role, as it stated in no unclear terms that no internal appeal was possible:

> "You are hereby advised that since this matter is now *sub judice*, the Minister will not be in a position to decide on your appeal in this matter. The fact that a right has already been granted to Genorah also poses a legal challenge in deciding on the appeal, and it is therefore the view of this department that this matter should be decided by means of a review."

The constitutional court also stated that the letter made it clear that a condonation application would have no effect, and that Bengwenyama and the community were advised to seek a review.[55]

3.2 Act 3 of 2000

The constitutional court considered section 7(1) and (2) of this act with specific focus on the relevant time periods (without unreasonable delay and not later than 180 days after internal remedies "have been concluded"). According to the court, the 180-day period commenced on the date of the letter, and, as a result, the review was brought in time.[56] The two-month delay did not indicate an abandonment of the internal processes, but rather an acceptance of the fact that the process had been concluded. The court decided that a delay was not evident.[57]

[50] See par 51-52. Footnotes omitted. See also s 1(d) and 195 of the constitution.
[51] See par 53.
[52] The court stated that s 96 and 103 of Act 28 of 2002 are relevant here. Par 54.
[53] See par 55.
[54] See par 57. For the timeline, see discussion above and par 56.
[55] See par 58.
[56] The 180-day period commenced on 14-06-2007, as the letter advised that internal appeal had been concluded. In passing, the constitutional court noted that even if no internal appeal was available, there would not have been an unreasonable delay.
[57] See par 59-60.

4 *(Non-)compliance with the consultation, hearing and environmental requirements of Act 28 of 2002*

4.1 The first ground for review: the consultation requirements – non-compliance by both the department and Genorah Resources

Section 6 of Act 28 of 2002 refers to the provisions of Act 3 of 2000 (and the fact that the first is subject to the latter), and specifically to the principles of lawfulness, reasonableness and procedural fairness.[58] The constitutional court made it clear that

> "[i]t is not difficult to see why: the granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen. This is so irrespective of whether one regards a landowner's right as ownership of its surface and what is beneath it 'in all the fullness that the common law allows',[59] or as use only of its surface, if what lies below does not belong to the landowner but somehow resides in the custody of the state."[60]

The concern for the rights of landowners and lawful occupiers is evident from the consultation provisions of Act 28 of 2002. Consultation between the department and the landowner or lawful occupier has to take place in the following phases:

1 The regional manager must, within 14 days after acceptance of a prospecting right application, notify and call upon all interested and affected persons to comment within 30 days of the notice;[61]
2 Objections have to be referred to the Regional Mining Development and Environmental Committee for consideration, who must then advise the minister on the objections;[62] and
3 The regional manager must, within fourteen days after acceptance of a prospecting right application, provide the applicant with a written notification requiring him, her or it to notify and consult with the landowner or lawful occupier. The result has to be submitted within 30 days of the written notification.[63]

[58] See par 61. S 60: "(1) Subject to the Promotion of Administrative Justice Act 3 of 2000, any administrative process conducted or decision taken in terms of this Act must be conducted or taken, as the case may be, within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. (2) Any decision contemplated in subsection (1) must be in writing and accompanied by written reasons for such decision".

[59] "Schutz JA's words in *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (AD) at 509B."

[60] See par 63. With regard to the state's custodianship, see also Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) 13-3 to 13-5; Dale *et al South African Mineral and Petroleum Law* (2005) MPRDA-121 to MPRDA-125; Badenhorst and Mostert "Artikel 3(1) en (2) van die *Mineral and Petroleum Resources Development Act* 28 van 2002: 'n herbeskouing" 2007 *TSAR* 469; Van der Schyff "Who 'owns' the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act" 2008 *TSAR* 757; Van den Berg "Ownership of minerals under the new legislative framework for mineral resources" 2009 *Stell LR* 139 145-156; Badenhorst "Ownership of minerals in situ in South Africa: Australian darning to the rescue?" 2010 *SALJ* 646 and Watson "Ownership of and custodianship over unsevered minerals. The impact of Act 28 of 2002" unpublished paper (http://www.landlawwatch.co.za/download/MPL/MPL-WatsonD-Custodianship.pdf) (20-07-2010).

[61] See s 10(1) of Act 28 of 2002.

[62] See s 10(2) of Act 28 of 2002.

[63] See s 16(4)(*b*) of Act 28 of 2002.

In addition, the landowner or lawful occupier must again be notified by the person to whom a prospecting right was granted and consulted prior to the actual commencement of prospecting operations.[64]

Section 16(4)(*b*) of Act 28 of 2002 requires that consultation take place between the applicant for a prospecting right and the landowner or lawful occupier in the following phases:

1 send a written notification of the acceptance of the application for consideration by the regional manager;
2 provide sufficient information of the prospecting operation and what it will entail;[65]
3 consult in order to attempt to reach an agreement (to the satisfaction of both the applicant and the landowner or lawful occupier) relating to the impact of the prospecting; and
4 within 30 days from receiving notification to consult, the applicant must submit the result of the consultation process to the regional manager.[66]

According to the court, the purpose of notification and subsequent consultation is related to the concern for the grave and considerable invasion of the rights of the landowners by the granting of prospecting rights.[67] It enables interested and affected parties to comment and raise objections to an application for prospecting rights.[68]

The consultation requirements have the following two main purposes:

1 To attempt to reach an agreement[69] with regard to the interference and impact of the prospecting right on the landowner's right to use the property.[70]
2 To provide landowners and lawful occupiers with the necessary information in order for them to make an informed decision with regard to representations, internal appeal processes and review proceedings.

In this regard, the constitutional court stated that

> "[t]he consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair".[71]

It was therefore clear to the constitutional court that Genorah Resources did not comply with the consultation requirements. Other than leaving a prescribed form with the traditional leader, Genorah Resources did nothing else (even after being

[64] See s 5(4)(*c*) of Act 28 of 2002. Par 62.
[65] This will enable the landowner or lawful occupier to assess the likely impact of the prospecting operation on his or her use of the land.
[66] See par 67. See also par 8 below with regard to the guidelines issued by the department relating to consultations.
[67] See par 63-64.
[68] See par 70.
[69] or an accommodation. The act does not require agreement on the issues, but parties have to engage in good faith. The possibility of compensation increases when parties cannot reach an agreement – see s 54 of Act 28 of 2002 (this was not provided for in the common law). S 54 of Act 28 of 2002 is skewed in favour of the holder of a prospecting or mining right against the owner of the land. See in this regard Badenhorst "Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle" 2011 *TSAR* 326.
[70] See par 65 and 68. A prospecting contract was required by the common law.
[71] See par 66.

prompted by the department to consult with the community and after receiving a letter from the community requesting Genorah Resources to get in contact with it). With regard to Eerstegeluk, no consultation whatsoever took place. As a result, the review succeeded on this ground.[72]

4.2 The second ground for review: the right to a hearing – non-compliance by the department

Section 3(1) of Act 3 of 2000 provides that administrative action (and decisions in terms of Act 28 of 2002) which "materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." According to the court, procedural fairness requires the following:

1 "adequate notice of the nature and the purpose of any proposed administrative action"; and
2 "a reasonable opportunity for the affected person to make representations in respect of the proposed action".[73]

In this regard, section 10 of Act 28 of 2002 is relevant. Interested and affected parties must be notified. The minister must consider any objections, and make a decision on them on advice of the department.[74] The constitutional court made it clear that "[l]andowners are entitled to adequate notice of the nature and purpose of any contemplated administrative action under the act that will in this manner materially and adversely affect the surface use of their land and the Community was entitled to a reasonable opportunity to make representations in relation to the Genorah application".[75]

Section 25 of the constitution has the following relevance:

1 It "recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources, not only land".[76]
2 It "requires the state to foster conditions which enable citizens to gain access to land on an equitable basis".[77]
3 "A community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."[78]

Communities with rights or interests in community land (in terms of agreement, custom or law) are recognised by Act 28 of 2002. Section 104 of Act 28 of 2002 provides for preferent rights to prospect on community land for a specified period (provided that a prospecting right has not yet been granted).[79] The constitutional court is therefore of the opinion that any application for prospecting rights[80] that will possibly disentitle a community to apply for a preferent right to prospect has a

[72] See par 68. S 6 of Act 28 of 2002 provides for the application of Act 3 of 2000 to administrative decisions taken in terms of Act 28 of 2002.
[73] See par 69.
[74] See par 70.
[75] See par 71.
[76] See s 25(4) of the constitution.
[77] See s 25(5) of the constitution.
[78] See s 25(6) and (7) of the constitution.
[79] See par 72-73.
[80] in terms of s 16 of Act 28 of 2002.

material and adverse effect on the community's right. The constitutional court then went further and stated that

> "[b]efore a prospecting right in terms of section 16 may be granted under those circumstances, the community concerned should be informed by the department of the application and its consequences and it should be given an opportunity to make representations in regard thereto. In an appropriate case that would include an opportunity to bring a community application under section 104 prior to a decision being made on the section 16 application".[81]

The implications of this viewpoint of the constitutional court are discussed below.[82] The department was at all relevant times aware of the community's wish to obtain prospecting rights. Section 3 of Act 3 of 2000 applies to this situation and obliges the department to inform both Bengwenyama Minerals and the community of the application by Genorah Resources, as well as the "potentially adverse consequences for their own preferent rights under section 104 of the Act".[83] In the circumstances, the department should have granted Bengwenyama Minerals and the community an opportunity to apply for a section 104 preferent right before deciding Genorah Resources' application. As a result, the review succeeded also on this ground.[84]

4.3 The third ground for review: the environmental requirements – non-compliance by Genorah Resources and the department

Section 24 of the constitution protects environmental rights. In this regard, Act 28 of 2002 ensures that South Africa's "mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development".[85] The minister may grant a prospecting right if the following requirements, among others, are met:

1 The proposed prospecting will not lead to unacceptable levels of pollution, ecological degradation or damage to the environment.[86]
2 A prescribed environmental management plan was submitted by the applicant.[87]
3 The prescribed financial provision for the rehabilitation or management of negative environmental impacts was provided by the applicant.[88]

The constitutional court could found no evidence that the first two requirements were considered by the regional manager and that he or she was satisfied that the requirements were fulfilled. Not only was Genorah Resources' environmental management plan approved by a different acting regional manager two months *after* the prospecting right was granted to Genorah Resources, but the financial guarantee was also only provided after the right was granted.[89]

[81] See par 73.
[82] See 7 below. It is therefore clear that the constitutional court focused on non-compliance of the department instead of the absence of an application for a preferent right to prospect (this is in stark contrast with the high court and supreme court of appeal cases).
[83] See par 74.
[84] See par 74.
[85] See par 75.
[86] See s 17(1)(*c*) of Act 28 of 2002.
[87] See s 39(2) of Act 28 of 2002.
[88] See s 41(1) of Act 28 of 2002 and par 75.
[89] See par 76.

An assessment has to take place to ascertain whether the prospecting operation will result in unacceptable pollution, ecological degradation or damage to the environment. The constitutional court distinguished between environmental management plans and environmental management programmes (the latter relate to the implementation of the prospecting project. The granting of the right becomes effective on the approval of the programme – therefore it is important that the environmental management plan be submitted and considered *before* a prospecting right is granted).[90] As a result, this ground of review also succeeded.[91]

5 *General remarks by the constitutional court*

5.1 Unequal treatment by the department

The department's treatment of Bengwenyama Minerals and the community was set out as follows:

1 The department did not assist them in their efforts to obtain prospecting rights over their properties.
2 Unlike Genorah Resources, they were not allowed to lodge financial guarantees late.
3 The department did not inform them that prospecting rights were granted to Genorah Resources.
4 The department responded to their internal appeal only after four months.
5 In terms of section 3(2)(*b*) of Act 28 of 2002 and section 5 of Act 3 of 2000, the community was entitled to:
    a be notified of the nature and purpose of the proposed administrative action with regard to Genorah Resources;
    b a reasonable opportunity to make representations;
    c a clear statement of the administrative action after the administrative decision was taken;
    d adequate notice of any right to a review or internal appeal;
    e adequate notice of the right to request reasons; and
    f reasons.

None of these were complied with by the department.[92]

5.2 Discretionary remedies

The constitutional court judgment can also be distinguished from that of the high court and the supreme court of appeal with regard to the granting of discretionary relief. The other two courts made it clear that they would have refused to grant discretionary relief even if Bengwenyama Minerals and the community succeeded on the merits. In response to the findings of the lower courts, the community argued that the decision not to set aside an unlawful administrative act amounts to a decision to suspend the declaration of invalidity.[93] The constitutional court made it clear that

[90] See s 17(5) and 39 of Act 28 of 2002 and par 77.
[91] See par 78. The constitutional court could not find anything on record indicating that the requirement of s 17(1)(*c*) of Act 28 of 2002 was fulfilled.
[92] See par 79-80.
[93] See par 81. They referred to s 172(1) of the constitution (which states that any law or conduct that is inconsistent with the constitution, must be declared invalid by a court).

the suspension of the invalidity of administrative action would not always include further discretionary relief, and stated as follows:

> "If the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity. In my view it is not necessary to place the just and equitable relief that may be granted under Act 3 of 2000 into this kind of conceptual straitjacket in order for that relief to be constitutionally acceptable."[94]

Act 3 of 2000 provides for a number of just and equitable remedies.[95] The principle of legality is of utmost importance here. "I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case."[96] The high court and the supreme court of appeal made it clear that no discretionary relief should be granted in a case such as this. Four reasons were provided for their stance. The constitutional court commented on all of them:

1 The consequences for the community would more or less be the same if either Genorah or Bengwenyama Minerals exploited the prospecting rights – the constitutional court stated that this was not justified by any evidence.
2 The reliance on section 104 of Act 28 of 2002 was misplaced – the constitutional court stated that a section 104 application is relevant to the case.
3 The viability of the remainder of the project would in all probability be affected if the grant in respect of the community properties was set aside – the constitutional court stated that this was not justified by any evidence.
4 Public interest required finality – the constitutional court stated that the principle of legality is very important here, as well as the fact that Genorah Resources was aware of the community's interest (and was interdicted from proceeding with operations after they went ahead despite their knowledge of the community's interest). As a result, any prejudice suffered by Genorah Resources, was suffered knowingly.[97]

[94] See par 82.

[95] "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders– (a) directing the administrator– (i) to give reasons; or (ii) to act in the manner the court or tribunal requires; (b) prohibiting the administrator from acting in a particular manner; (c) setting aside the administrative action and– (i) remitting the matter for reconsideration by the administrator, with or without directions; or (ii) in exceptional cases– (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or (bb) directing the administrator or any other party to the proceedings to pay compensation; (d) declaring the rights of the parties in respect of any matter to which the administrative action relates; (e) granting a temporary interdict or other temporary relief; or (f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders– (a) directing the taking of the decision; (b) declaring the rights of the parties in relation to the taking of the decision; (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or (d) as to costs" s 8 of Act 3 of 2000.

[96] See par 83-85. Footnotes omitted from quotation.

[97] See par 86-87.

6 *The constitutional court order*

The nine other constitutional court judges concurred with Froneman J's judgment. Leave of appeal was granted and the appeal was upheld. The high court and supreme court of appeal orders, as well as the decision to grant prospecting rights to Genorah Resources on Nooitverwacht and Eerstegeluk, were set aside. A cost order was made against the first to fifth respondents (this entailed that Genorah Resources and the state respondents were ordered to jointly and severally pay the high court, supreme court of appeal and constitutional court costs of the applicants).[98]

7 *Analysis of the case under discussion*

7.1 Comparison between the three judgments

7.1.1 Introductory remarks

The outcome of the decisions in Bengwenyama in the high court and the supreme court of appeal illustrate the lack of protection afforded to communities by section 104 of Act 28 of 2002.[99] Protection is now afforded by the decision of the constitutional court. Act 28 of 2002 makes provision for the state's custodianship of South Africa's mineral and petroleum resources.[100] The decision of the constitutional court in the case under discussion entails that the state, as custodian of the mineral resources of South Africa, has a duty to inform communities of their right to apply for a preferent right to prospect if another party applies for a prospecting right on community land. This duty is based upon Act 3 of 2000 and read into Act 28 of 2002. The constitutional court judgment paves the way for the further development and formulation of the custodial duties and responsibilities of the state towards communities and all South Africans.

The issues raised in the supreme court of appeal case were as follows:

1 Whether the grant of the prospecting right to Genorah Resources was *ultra vires*.[101]
2 Whether the department failed to give (a) adequate notice regarding Genorah's application (s 10(1) of Act 28 of 2002 and regulation 3[102]) and (b) the community a hearing.[103]
3 Whether Genorah Resources failed to consult with the community (s 16(4) of Act 28 of 2002).[104]
4 What the impact of (a) the alleged failure by the department to approve Genorah Resources' Environmental Management Plan within 120 days of its lodgement (s 39(4) of Act 28 of 2002), (b) the fact that the financial provision relating to negative environmental impacts was not provided prior to the approval of the Environmental Management Plan (s 41(1) of Act 28 of 2002), and (c) the fact that the Environmental Management Plan was approved by an acting Regional Manager, was.[105]

98 See par 88-89.
99 See Badenhorst and Olivier 2011 *De Jure* 126 for, amongst others, recommendations to further protect the rights and interests of communities.
100 See s 2(b) of Act 28 of 2002.
101 See par 9 of the supreme court of appeal case.
102 *GG* 26275, 23-04-2004.
103 See par 11 of the supreme court of appeal case.
104 See par 12 of the supreme court of appeal case.
105 See par 13 and 15 of the supreme court of appeal case.

5 Whether the department failed to respect, protect and promote the community's property rights (s 25 of the constitution and s 104 of Act 28 of 2002).[106]
6 Whether the community and Bengwenyama Minerals complied with the review requirements of Act 3 of 2000 (s 7 of Act 3 of 2000).[107]

The high court found against Bengwenyama Minerals and the community on all the above issues, except the last, and the supreme court of appeal did not believe it to be necessary to deal with all the issues.[108]

7.1.2 A shift in focus: section 16 applications versus section 104 applications

A comparison between the high court, supreme court of appeal and constitutional court cases makes it clear that there was a definite shift in focus in the different judgments. The high court and supreme court of appeal judgments focused on, among other things, the difference between section 16 applications (for prospecting rights) and section 104 applications (for preferent rights to prospect). The fact that the community did not apply for a preferent right to prospect prior to Genorah Resources' application for a prospecting right prejudiced them.

The supreme court of appeal concurred with the high court in finding that the application that was lodged by Bengwenyama Minerals was for a prospecting right (in terms of s 16 of Act 28 of 2002), and not for a preferent right to prospect (in terms of s 104 of Act 28 of 2002).[109]

However, in the constitutional court case the court made it clear that even if a community had not applied for a preferent right prior to a prospecting right application by a third party, the community should not be prejudiced by the later application. Therefore, a community should (in some instances) be granted an opportunity to apply for a preferent right *after* a prospecting right application has been received by the department.[110] On the one hand, this interpretation by the constitutional court is a wide interpretation of the consultation provisions contained in Act 28 of 2002, and provides direct protection to the rights communities have with regard to the use of their properties and the preference granted to them to gain prospecting rights. On the other hand, the constitutional court approach will probably have a negative impact on investor confidence in Act 28 of 2002 processes, as investors' applications for prospecting rights will likely be put on hold for a couple of years if the rights concerned are on community land and the community has not yet applied for a preferent right to prospect. In a time when investor confidence in the South African mining industry is low (as a result, among other things, of the call by some prominent South African political figures for the nationalisation of mines), the approach of the constitutional court might hamper relations even further.

7.1.3 Notice requirements of Act 28 of 2002

The high court held that the purpose of section 10 of Act 28 of 2002 is to give notice to interested parties regarding pending applications.[111] Upon examining the

[106] See par 15 of the supreme court of appeal case.
[107] See par 16 of the supreme court of appeal case.
[108] See par 16 of the supreme court of appeal case.
[109] See par 18 of the supreme court of appeal case.
[110] See par 73. The high court specifically focused on the "first come, first served principle" of s 9(1) (*b*) of Act 28 of 2002. The high court's (narrow) interpretation of Act 28 of 2002 entails that an application received on an earlier date has to be dealt with first.
[111] See par 47 of the high court case.

conflicting facts,[112] the high court accepted that notice was received and displayed by the magistrate.[113] It also accepted that Bengwenyama Minerals was aware of the application.[114] According to the high court, the provisions of section 16(4) of Act 28 of 2002 have been complied with if it is clear that there was communication between the applicant for a prospecting right and the landowner, and the landowner was aware of the applicant's intention to apply for a prospecting right.[115] The high court also indicated that notice to interested parties and consultation may not be possible under certain circumstances.[116] The high court found that there was consultation with the community who occupied the land and that the community was made aware of Genorah Resources' intention to apply for a prospecting right.[117] As set out above, this view is in stark contrast to that of the constitutional court.

7.1.4 Environmental requirements of Act 28 of 2002

The high court also regarded it as essential that the department take proper steps to protect the ecology and the environment as far as possible by requiring an environmental impact assessment and the submission of an environmental management plan.[118] However, the high court stated that non-compliance with the requirement that the environmental management plan must be approved within 120 days will, however, not automatically invalidate the approval of such plan outside the said period.[119] The high court reasoned that the scheme of Act 28 of 2002 did not indicate that an environmental management plan, once approved, was cast in stone.[120] The protection of the environment was not perceived as static, because amendments to an environmental management plan are possible before and even after its approval.[121] Insofar as the granting of a prospecting right only becomes effective on the date on which the environmental management plan is approved, the legislature contemplated approval of the environmental management plan after approval of the application.[122] The high court found that Genorah did submit its environmental management plan timeously and it was, in fact, the department that approved the plan outside the 120-day period. The high court found that the department's late approval did not invalidate the granting of the prospecting right to Genorah. In addition, the late provision of guarantees also did not vitiate either the decision to grant or the grant of the prospecting right.[123]

The supreme court of appeal[124] mentioned in passing that late approval of the environmental management plan and making of financial provision for remediation

[112] See par 41-46 of the high court case.
[113] See par 46 of the high court case.
[114] See par 47 of the high court case.
[115] See par 37 of the high court case.
[116] See par 37 of the high court case. The court provided examples: s 105 of Act 28 of 2002 contemplates the situation where the landowner or lawful occupier cannot be traced. In such a case, it is unlikely that meaningful consultation can take place. In addition thereto, there may be circumstances where the registered owner is not really the interested party (*ie* when the property had been sold but not yet transferred, or when a community is not yet the registered owner but has a *spes* to become the landowner as a result of a land claim) (par 37 of the high court case).
[117] See par 38 of the high court case.
[118] See par 35 of the high court case.
[119] See par 36 of the high court case.
[120] See par 36 of the high court case.
[121] See par 36 of the high court case.
[122] See par 36 of the high court case.
[123] See par 36 of the high court case.
[124] See par 14 of the supreme court of appeal case.

of environmental damage after approval of the environmental management plan could not affect the validity of the prospecting right, if the decision to approve the environmental management plan has not been set aside. The same applied to the submission that the approval of the environmental management plan was *ultra vires*, because the person who approved it was an acting regional manager who allegedly had no power to approve it.[125]

As discussed above,[126] the constitutional court made it clear that it is important that the environmental management plan be submitted and considered *before* a prospecting right is granted.[127]

7.1.5 Internal processes, leave to appeal and review

The issues regarding leave to appeal and appeals themselves were also focused on by all three courts. While the high court found no internal appeal process applicable to the case at hand, the supreme court of appeal found that there had been an internal appeal, but that it had been abandoned. The constitutional court considered sections 7(1) and (2) of Act 3 of 2000, with specific focus on the relevant time periods (without unreasonable delay and not later than 180 days after internal remedies "have been concluded"). According to this court, the 180-day period commenced on the date of the letter, and, as a result, the review was brought in time.[128] The two-month delay did not indicate an abandonment of the internal remedies process, but rather an acceptance of the fact that the process had been concluded. The constitutional court decided that a delay was not evident.[129]

The supreme court of appeal also focused on the issue relating to compliance with the review requirements contained in section 7 of Act 3 of 2000. The high court found that section 96 of Act 28 of 2002 does not provide internal procedures with regard to the decisions and conduct of the minister, and that only an application for a review of the decision was available to Bengwenyama Minerals and the community (which was, according to the high court, brought out of time (the high court, however, found that this did not result in the application being fatally defective)).[130] The supreme court of appeal emphasised its viewpoint with regard to the delegation, and made it clear that

> "[i]n my view, a full delegation of powers was made to the Deputy Director-General. In deciding whether or not to grant the prospecting right to Genorah he exercised his own discretion. As delegatee he acted in his own right and did not represent the delegator. This is therefore not a case of an appeal being lodged against the Minister's own decision or a question of the delegator sitting on his own judgment on appeal".[131]

The supreme court of appeal made it clear that only if non-compliance with the stipulated time periods has been condoned will it lead to an appeal not necessarily

[125] See par 14 of the supreme court of appeal case. See also 7.1.5 below.
[126] in 4.3 above.
[127] See s 17(5) and 39 of Act 28 of 2002, as well as par 77-78. The constitutional court could not find anything on record indicating that the requirement of s 17(1)(*c*) of Act 28 of 2002 had been fulfilled – see n 91 above.
[128] The 180-day period commenced on 14 June 2007, as the letter advised that internal appeal had been concluded. In passing, the constitutional court noted that even if no internal appeal was available, there would not have been an unreasonable delay – see n 57 above.
[129] See par 59-60.
[130] See par 19-22 of the supreme court of appeal case.
[131] See par 21 of the supreme court of appeal case. Footnotes omitted.

being a nullity.[132] According to the supreme court of appeal, no condonation was granted, and the attempt to appeal in terms of section 96 of Act 28 of 2002 was of no effect. The internal remedy had been abandoned due to the fact that Bengwenyama Minerals and the community did not pursue their condonation request. In addition, they failed to bring themselves within the terms of section 7(1) of Act 3 of 2000.[133] Bengwenyama Minerals and the community did not apply for an extension of the 180-day period stipulated in Act 3 of 2000.[134] The supreme court of appeal also stated that even if a condonation application was successful, and if the grant of the prospecting right was found to be invalid, "it does not follow that the decision will be set aside".[135] Lastly, the supreme court of appeal agreed with the reasoning of the high court with regard to discretionary relief: "I can find no fault with this reasoning and no argument was advanced as to why this court should interfere with the exercise of its discretion by the court a quo. The appeal must accordingly fail. In view of this conclusion, it becomes unnecessary to consider the remaining issues listed above."[136]

7.2 Amendments to Act 28 of 2002: The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (not yet commenced)

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 was assented to on 19 April 2009, but its date of commencement still has to be proclaimed. One of the most profound changes to the current act's provisions is the amendment of the definition of "community". Where the definition currently states that "'community' means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law", the amended definition will read as follows:

> "'community' means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect [*sic*] by mining on land occupied by such members or part of the community".

The amended definition not only limits the application of Act 28 of 2002 provisions dealing with communities to those consisting of historically disadvantaged persons (and who, therefore, comply with the requirements of historically disadvantaged persons in its definition), but will also stipulate which members of a community will have to be consulted. Historically disadvantaged persons also include juristic persons. It needs to be noted that the amended definition of a community may lead to the exclusion of the real community in instances where a juristic person is seen as a community.

The amended section 2(d) provides for the expansion of opportunities for historically disadvantaged persons (which includes not only women, but also communities) to enter and actively participate in the mineral and petroleum industries.

[132] See par 23 of the supreme court of appeal case.
[133] See par 24-25 of the supreme court of appeal case.
[134] See par 26 of the supreme court of appeal case.
[135] See par 27 of the supreme court of appeal case.
[136] See par 28-29 of the supreme court of appeal case.

Other relevant amendments include the requirement regarding the submission of relevant environmental reports as required in terms of chapter 5 of the National Environmental Management Act 107 of 1998 within a period of 60 days after notice of acceptance of an application (instead of only an environmental management plan). Results of the consultation process with the landowner or lawful occupier must be included in the environmental reports.[137] The date on which the grant becomes effective is also amended to the "effective date" (meaning "the date on which the relevant permit is issued or the relevant right is executed") instead of the date on which the environmental management programme is approved in terms of section 39.[138]

With regard to the appeal process, the amendments limit the time period in which an appeal may be lodged (30 days from becoming aware of the administrative decision). It also provides for appeals against administrative decisions by an officer to whom a power has been delegated or a duty assigned. In addition, it provides that subsequent applications must be suspended pending the finalisation of an appeal.[139] The amendments also limit the power to withdraw or amend decisions by providing that "no existing rights of any person shall be affected by such withdrawal and amending of a decision".[140] The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 also amends section 16(1) of Act 28 of 2002, and states that an applicant must apply for an environmental authorisation simultaneously with an application for a prospecting right. Section 16(2) of Act 28 of 2002 is also amended and limits situations in which an application for a prospecting right must be accepted (acceptance may take place, amongst others, only if no prior application has been accepted for the same mineral on the same land (which remains to be granted or refused)).

8 *Reaction to the constitutional court judgment*

The official response from the department, issued on 2 December 2010, was that the constitutional court judgment brought final clarity relating to the availability of internal remedies to parties aggrieved by a departmental decision. It also indicated that its future administrative conduct, as well as the envisaged legislative amendments[141] (amongst others, to section 104 of Act 28 of 2002 that provides for preferent prospecting or mining rights in respect of communities)[142] relating to matters identified in the constitutional court judgment, would take cognisance of the judgment. The department indicated that "the consultation process with landowners, lawful occupiers and communities" is "one of the key areas currently the subject of legal scrutiny", and that the constitutional court's exposition of the need for these stakeholders to be dealt with in accordance with the requirements of fairness (as determined in Act 3 of 2000) will be complied with. It concluded that

[137] See s 16(4) of Act 28 of 2002.
[138] See s 17(5) of Act 28 of 2002.
[139] See s 96 of Act 28 of 2002.
[140] See s 103(4) of Act 28 of 2002.
[141] The minister responsible for mineral resources has recently indicated that possible amendments to Act 28 of 2002 are being considered to deal with "ambiguous" issues (http://www.miningmx.com/opinion/columnists/ ConCourt-ruling-adds-layer-of-red-tape.htm (05-04-2011)).
[142] McKay "Mineraleregte: hof gee gemeenskap gelyk" *Sake24* (2-12-2010) 19, quoting the then director-general of the department.

> "the judgement is a very positive one for the department and could not have come at a better time as we are looking towards the amendment of Act 28 of 2002 and as we have said consistently, the issue of consultation presents the department with serious challenges in its implementation of its mandate. The highest court in the land has given us direction and we welcome it."[143]

Genorah, the black majority (63%) shareholder of Nkwe Platinum (listed on the Australian Stock Exchange, but not on the Johannesburg Stock Exchange), has allegedly received the backing of the Roka-Phasha Traditional Council, which has stated that it was the rightful owner of Eerstegeluk, one of the two farms affected by the constitutional court judgment.[144] The Roka-Phasha community has also indicated that it would institute legal action against the Bengwenyama traditional community.[145] One commentator mentioned that a 2007 interdict granted against Genorah that prohibited it from accessing Eerstegeluk and Nooitverwacht (the subject matter farms in the constitutional court judgment) was ignored and had to be enforced by a subsequent court order resulting in the removal, by the end of 2007, of all Genorah equipment and employees.[146] After the prospecting rights over these two, and three other, farms had been awarded to Genorah in 2006, its environmental management plan was approved by the department only two months subsequently.[147] In 2007 Anglo Platinum lodged a review application with the department in respect of these prospecting rights on the five farms concerned. Although it is alleged that it was withdrawn in February 2008 with a view to a "possible joint collaboration on the five farms" (between Nkwe Platinum, Genorah, Anglo Platinum and African Rainbow Minerals (ARM)), a recent note in *Miningmx* indicated that ARM and Anglo Platinum were proceeding with their review applications in respect of the other three farms.[148] ARM and Anglo Platinum entered into the 50:50 Modikwa joint venture in respect of nine farms, which included the five farms referred to above. Notwithstanding the fact that Anglo Platinum had owned the so-called old order prospecting rights to these nine farms, the prospecting rights of five of these farms were granted to Genorah in 2006.[149] It has also been stated that Anglo Platinum has recently indicated that it would seek review in terms of the provisions of Act 3 of 2000.

Recent reports also indicate that both Genorah and Bengwenyama Minerals have submitted section 104 applications in the wake of the constitutional court judgment. Taking into account the threat of court action by the Roka-Phasha community (see above) and the various review applications of Anglo Platinum and ARM (see above), the department will be confronted with an extremely complex set of facts and considerations when awarding prospecting rights; this will, of course, be exacerbated by the need for comprehensive consultation with the community (or communities)

[143] http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=15669&tid=26794 (05-04-2011).
[144] http://www.miningmx.com/news/markets/Bengwenyama-challenged-on-land-claims.htm (05-04-2011).
[145] http://www.miningweekly.com/article/bengwenyama-misled-constitutional-court-in-rights-case-nkwe-2010-12-07 (05-04-2011).
[146] http://www.gemecs.co.za/Articles/Documents/Platinum/Inside%20Nkwe%20Platinum.pdf (05-04-2011).
[147] http://www.citizen.co.za/citizen/content/en/citizen/business-news?oid=157133&sn=Detail&pid=40&Chaos-on-platinum-farms- (05-04-2011).
[148] http://www.miningmx.com/news/markets/Bengwenyama-challenged-on-land-claims.htm (05-04-2011).
[149] http://www.citizen.co.za/citizen/content/en/citizen/business-news?oid=157133&sn=Detail&pid=40&Chaos-on-platinum-farms- (05-04-2011).

to be affected.[150] Within this context, the state as registered owner of the vast majority of traditional community-occupied areas in South Africa will also have to be consulted in those cases where such land is not held in private ownership by the community concerned. In addition to competing claims by various communities to the occupation of a specific (mineral-rich) area (as is now allegedly the case with respect to the Eerstegeluk farm), the incidence of intra-community disputes and conflicts will probably also increase.[151]

An allegedly haphazard allocation of prospecting rights by officials without due regard to the department's duties and responsibilities has resulted in a moratorium being placed on the granting of prospecting rights to enable the state to audit and examine alleged malpractices. On 30 August 2011, a moratorium[152] on prospecting licences was imposed by means of a notice in the *Government Gazette* in order to "iron out irregularities in the way rights are awarded and audit existing exploration and drilling contracts after a series of scandals over and disputes over rights".[153] A new electronic "online mining licence administration system"[154] "that aims to ensure transparency and end administrative blunders"[155] was launched on 18 April 2011. A recent audit of mining companies and other mineral rights holders has provided evidence of extensive violations ("over 400 notices were issued for prospecting violations [and] [o]ver 700 notices were issued for environmental violations").[156]

The department issued the guideline for consultation with communities and interested and affected parties as required in terms of section 10(1)(*b*), 16(4)(*b*), 22(4)(*b*), 27(5)(*b*) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002). In terms of the guideline, all applicants for prospecting or mining rights or mining permits are required to submit a consultation report in accordance with the guideline within a period of 30 days after having received a notification by the regional manager of the acceptance of such application. Consultation forms an integral part of the fairness process, and the guideline aims to provide clarity on the

[150] The department would also have to take cognisance of the principles relating to public consultation as set out by the constitutional court in *Matatiele Municipality v President of the RSA* 2006 5 SA 47 (CC), *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) and *Matatiele Municipality v President of the RSA (No 2)* 2007 6 SA 477 (CC); although these constitutional court judgments dealt with the role of public participation in the formulation of draft legislation, it is submitted that the underlying principles apply also to administrative decisions that may affect a particular community or communities.

[151] See *eg* the case of the Bakubung-Ba-Rathaeo community where two factions have been alleging that they are the legitimate representatives of the community (http://www.miningmx.com/opinion/columnists/ConCourt-ruling-adds-layer-of-red-tape.htm (05-04-2011)) and the question of which faction is entitled to the community's shareholding in Wesizwe Platinum (http://www.miningweekly.com/article/bengwenyama-roko-phasha-bagatla-bakubung-will-new-enforced-community-colloquy-help-or-hinder-mining-2011-01-14 (05-04-2011)).

[152] from 1-09-2010 until 28-02-2011 (GN 768 in *GG* 33511 of 31-08-2010). The moratorium was subsequently extended in the Mpumalanga region until 30-09-2011, while in all other regions it was extended until 31-03-2011: GN 160 in *GG* 34057 of 28-02-2011. In respect of the moratorium in all regions except the Mpumalanga region, the date was later extended to 15-04-2011: GN 287 in *GG* 34171 of 31-03-2011.

[153] http://af.reuters.com/article/investingNews/idAFJOE73H04G20110418?feedType=RSS&feedName= investingNews&pageNumber=2&virtualBrandChannel=0&sp=true (18-04-2011).

[154] Marais "Deadline-missing department set for a new start" *Sunday Times Business Times* (17-04-2011) 3.

[155] http://af.reuters.com/article/investingNews/idAFJOE73H04G20110418?feedType=RSS&feedName= investingNews&pageNumber=2&virtualBrandChannel=0&sp=true (18-04-2011).

[156] http://af.reuters.com/article/investingNews/idAFJOE73H04G20110418?feedType=RSS&feedName= investingNews&pageNumber=2&virtualBrandChannel=0&sp=true (18-04-2011).

implementation of the relevant sections of Act 28 of 2002.[157] The guideline provides valuable definitions, including the following:

a Consultation: "'consultation' means a two way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to, and considering the latter's response, which allows openness in the decision making process".
b Community: "'community' means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: provided that, where as a consequence of the provisions of the act negotiations or consultations with the community are required, the community shall include the members or part of the community, directly affected by prospecting or mining, on land occupied by such members or part of the community".
c Interested and affected parties, which include, among others, host communities and traditional authorities.[158]

The guideline states that the purpose of consultation is to (a) provide landowners, affected parties and communities with the necessary information in order to enable them to make informed decisions, and to (b) engage in good faith with these parties in order to attempt to reach an accommodation. The regional manager[159] must make known by notice that an application has been accepted. Said notice must be placed on a notice board at his or her office. In addition, the regional manager must publicise the acceptance of the application by at least one of the following methods: (a) publication of such notice in the *Provincial Gazette* concerned, (b) placement of such notice in the relevant magistrates' court, or (c) advertisement of such notice in a relevant local or national newspaper. In doing this, communities and interested and affected parties are granted the opportunity to make comments and raise concerns before the application is further processed. The applicant is, in turn, obliged to:

a identify affected communities and interested parties (an "identification list" must include information on the identification of affected communities and interested parties, and state whether the community is the landowner and whether a land claim is involved);
b notify the landowner or lawful occupier, as well as other interested and affected parties (including the community) of the application; and
c consult with the landowner or lawful occupier, as well as other interested and affected parties (including the community). In this regard, the applicant must meet with the above-mentioned parties in order to inform them of what the prospecting operation will entail and to enable these parties to assess the impact the prospecting will have on them or on the use of their land. The mentioned parties must be consulted in order to attempt to reach an agreement with regard to the existing cultural, socio-economic, and/or biophysical

[157] *ie* s 10(1)(*b*), 16(4)(*b*), 22(4)(*b*), 27(5)(*b*), and 39.
[158] "Consultation" and "interested and affected parties" are not defined in Act 28 of 2002. The definition of a "community", as provided for in the guideline, is much wider than the definition contained in Act 28 of 2002. In addition, the guideline still refers to traditional authorities, notwithstanding the fact that s 28(4) of the Traditional Leadership and Governance Framework Act 41 of 2003 determines that from the date of its commencement (24-09-2004) all traditional authorities are to be known as traditional councils.
[159] in terms of s 10(1)(*a*).

environment. The applicant must ascertain whether a land claim is involved, and must take minutes to record the outcome of the meeting.

With regard to sections 16(4)(*b*) and 27(5)(*b*) of Act 28 of 2002, a consultation report must be submitted within 30 days of the date of the notice of acceptance of the application by the regional manager. This consultation report must contain the results of consultation, and include (a) the methodology applied, (b) a description of the existing status of the cultural, socio-economic and/or biophysical environment, as well as an identification of the anticipated impacts thereon, (c) a description of the proposed land use or development alternatives, (d) a description of the process of engagement,[160] and (e) a description of the most appropriate means to carry out the proposed operation, with due accommodation of all the issues that were raised during the consultation process.[161]

9 *Concluding remarks*

On the one hand, the judgment of the constitutional court is welcomed, as it is clear that the constitutional court concerned itself with the rights and interests of communities over their communal properties. Where Act 28 of 2002 does not *per se* provide such wide protection, the constitutional court made it very clear that the rights and interests of communities have to be protected by the state as custodian of the mineral resources of the people of South Africa. In addition, the department has a duty to assist these communities in protecting their assets, and to take their interests into account when considering and granting rights over community property. Community participation and consultation enjoys a much more definite focus as a result of this judgment.

On the other hand, however, the increased protection offered to communities by this judgment will most likely hamper investor confidence in mining operations in South Africa, as there is now a material possibility that applications for prospecting rights by third parties on land owned by communities will be put on hold in order to give the community an opportunity to apply for a preferent right to prospect.

It is recommended that the department consider the expansion of the current guideline by the drafting of a detailed strategic framework on the manner and sequencing of proper and extensive consultation with all stakeholders (which include, as the case may be, land owners, communities, old order right holders and other interested parties who might be affected by the granting of a prospecting and/or mining right).[162] Cognisance should also be taken by the department of the legal reality that the state is the registered owner of the vast majority of traditional community areas, and, in this respect, the national government department concerned (the department of rural development and land reform) should also be consulted. In addition, full compliance with Act 3 of 2000 and Act 2 of 2000, as well as the constitutional and policy frameworks for public participation, should be central to this proposed detailed consultation framework. Furthermore, a strategic document that would set out the administrative steps to be taken for internal review

[160] *ie* a description of the information provided to the parties, a list of the parties that were consulted, a list of their views of the current environment and their views on the impact of the operations thereon, a list of other concerns raised, the minutes and the records.

[161] It is important to note that where s 22(4)(*b*) of Act 28 of 2002 is relevant, a scoping report is required.

[162] This is in addition to the department's guideline document (see 8 above), and will have to include a very detailed framework.

in the case of any entity that is aggrieved or potentially affected by a departmental action should also be developed. Both these documents, it is recommended, should be developed and finalised by means of a transparent and inclusive process, and the final versions thereof should be published as public documents that bind both the department and all affected parties.

SAMEVATTING

DIE LAASTE BESLISSING

Die dispuut tussen Bengwenyama Minerals (Pty) Ltd en Genorah Resources (Pty) Ltd ten opsigte van prospekteerregte op Bengwenyama tradisionele gemeenskapsgrond is finaal in 2010 deur die grondwetlike hof beslis, nadat appèl aangeteken is teen beide die uitsprake deur die hoë hof (2008) en die hoogste hof van appèl (2010).

Die outeurs sit die agtergrond, feite en geskiedenis van dié beslissing uiteen, asook die toepaslike gedeeltes van Wet 28 van 2002 en Wet 3 van 2000 (met besondere verwysing na die regsraamwerk vir die appèl) en bespreek die nienakoming van die konsultasie-, voorleggings- en omgewingsvereistes van die minerale wetgewing van 2002. Die grondwetlike hof se opmerkings oor (a) die ongelyke behandeling deur die departement van minerale hulpbronne en (b) diskresionêre remedies, word uitgelig, gevolg deur ’n bespreking van die hofbevel. Die artikel bevat ook ’n ontleding van die beslissing by wyse van ’n vergelyking tussen die drie uitsprake asook ’n bespreking van die wysigings vervat in Wet 49 van 2008 welke wysigingswet nog nie in werking getree het nie.

Die grondwetlike hof het dit duidelik gemaak dat, alhoewel die gemeenskap nie vir ’n preferente reg om te prospekteer aansoek gedoen het vóór die aansoek deur die betrokke derde party om ’n prospekteerreg nie, die gemeenskap nie benadeel mag word deur die aansoek nie. In die toekoms sal ’n gemeenskap in sekere gevalle ’n geleentheid gegun moet word om aansoek te doen vir ’n preferente reg om te prospekteer nádat ’n aansoek om ’n prospekteerreg deur ’n derde party by die departement ingedien is. So verseker die grondwetlike hof dat die regte van gemeenskappe beskerm word ten opsigte van (a) die gebruik van hul gemeenskapsgrond en (b) die statutêr omskrewe preferente reg wat aan die gemeenskap toegeken kan word om prospekteerregte te bekom. Hierdie direkte beskerming deur die grondwetlike hof kan egter ’n negatiewe impak hê op beleggersvertroue in Suid-Afrika, aangesien ’n belegger se aansoek om ’n prospekteerreg te bekom moontlik vir jare kan sloer indien die regte op gemeenskapsgrond van toepassing is en die gemeenskap nog nie om ’n preferente reg aansoek gedoen het nie.

Die outeurs sluit die opsomming van die uitspraak af met ’n kort bespreking van die reaksie op die grondwetlike hof se uitspraak en ’n aantal kort samevattende opmerkings en aanbevelings.