THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20069/14

In the matter between

MINISTER OF MINERAL RESOURCES	**FIRST APPELLANT**
DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES	**SECOND APPELLANT**
DEPUTY DIRECTOR-GENERAL: MINERAL DEVELOPMENT, DEPARTMENT OF MINERAL RESOURCES	**THIRD APPELLANT**
REGIONAL MANAGER: LIMPOPO REGION, DEPARTMENT OF MINERAL RESOURCES	**FOURTH APPELLANT**
DILOKONG CHROME MINE (PTY) LTD	**FIFTH APPELLANT**

and

MAWETSE (SA) MINING CORPORATION (PTY) LTD	**RESPONDENT**

Neutral citation: *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* (20069/14) [2015] ZASCA 82 (28 May 2015)

Coram: Navsa ADP, Leach, Majiedt, Zondi JJA and Meyer AJA

Heard: 7 MAY 2015

Delivered: 28 MAY 2015

Summary: Mining – prospecting right – when granted in law – whether BEE compliance can be attached as a condition of the right – lapsing of the right due to expiry.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Masipa J, sitting as court of first instance):

(1) The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Majiedt JA (Navsa ADP, Leach and Zondi JJA and Meyer AJA concurring):

Introduction

[1] The issues in this matter are whether a prospecting right had been lawfully granted to the fifth appellant, Dilokong Chrome Mine (Pty) Ltd (Dilokong), and, if so, whether Dilokong may lawfully exercise that right. Allied to that is the question whether that right had lapsed due to its expiry or abandonment. These questions were decided against Dilokong, and in favour of the respondent (qua applicant), Mawetse (SA) Mining Corporation (Pty) Ltd (Mawetse), in the Gauteng Division of the High Court, Pretoria, by Masipa J. Dilokong appeals with the leave of the court a quo. The first to fourth appellants, the Minister of Mineral Resources and senior officials in that Department, to whom I shall collectively refer as ‘the DMR’, did not participate in this appeal although they made common cause with Dilokong in the court below and to that end filed a comprehensive answering affidavit.

The order in the Gauteng Division

[2] The case was brought by Mawetse in the Gauteng Division as a review application. Masipa J held that:

(a) Dilokong had failed to comply with a suspensive condition attached to the grant of the prospecting right and had accordingly 'disabled' itself from implementing that right, and

(b) even if there had been a lawful award of a prospecting right to Dilokong, that right had been 'lost' due to the unreasonable delay in exercising it and, as a result, the right has lapsed as it has expired.

Masipa J consequently issued a declaratory order that Dilokong did not hold a valid prospecting right as it had lapsed and following on that conclusion that it no longer constituted a bar to the consideration of Mawetse's application for a prospecting right. She set aside the decision of the fourth appellant, the Regional Manager, Limpopo Region, Department of Mineral Resources (the Regional Manager) rejecting Mawetse's application for a prospecting right and remitted that application to the third appellant, the Deputy Director General: Mineral Development, Department of Mineral Resources (the DDG) for reconsideration within 30 days. Lastly, Masipa J dismissed Dilokong's counter-application in which it sought to compel the DMR to notarially execute the prospecting right that had been awarded to it.

Background

[3] On 24 November 2006 Dilokong applied, in terms of s 16 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), for a prospecting right for chrome ore (base metals) in respect of the farm Driekop 253 KT (Driekop). The application was lodged at the office of the Regional Manager who, in his letter of acceptance dated 6 December 2006, requested Dilokong to give effect to the objects of s 2(*d*) of the MPRDA by submitting, amongst others, a signed shareholder agreement to the Regional Manager's office by 4 February 2007. That request was made purportedly under the

provisions of s 17(4) of the MPRDA, an aspect which will be discussed in due course.

[4] On 21 June 2007 the DDG granted a power of attorney, ostensibly under s 103 of the MPRDA, to the Regional Manager to sign the prospecting right contemplated in s 17(1) in favour of Dilokong in respect of Driekop. On that same day the DDG signed an approval of a recommendation to grant a prospecting right to Dilokong for 4 years subject to Dilokong, where applicable, submitting, before notarial execution of the right, all other outstanding information or documentation, including a shareholder agreement with a Black Economic Empowerment (BEE) entity holding not less than 26% of the equity in the operation.[1] The DDG wrote to Dilokong on 18 July 2007 to confirm that it had been granted a prospecting right in respect of Driekop. The DDG purported to exercise the Minister's delegated powers in terms of s 103(1) and (2) of the MPRDA in respect of the grant and refusal of prospecting rights.

[5] On 14 November 2007, the date on which the prospecting right was about to be notarially executed (as it is a limited real right in terms of s 5(1) of the MPRDA), Dilokong's representatives were informed that this could not take place, due to Dilokong's failure to give effect to s 2(*d*) of the MPRDA in relation to the required BEE shareholding. Section 2(*d*) reads as follows:

'**2 Objects of Act**

The objects of this Act are to-

. . .

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.'

Dilokong's attempts to comply with this requirement proved futile. Dilokong is a wholly owned subsidiary of ASA Metals (Pty) Ltd (ASA Metals) which is in turn owned by East Asia Metal Investment Company Ltd and the Limpopo Development Corporation (Limdev), a Limpopo provincial government

[1] In accordance with the then applicable Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, GN 838, GG 33573, 20 September 2010 (the Mining Charter), developed in terms of s 100(2)(a) of the MPRDA.

enterprise. A national government moratorium on the disposal of all mining related state assets by all organs of state prohibited Limdev from disposing of its shares in ASA Metals to a BEE entity to meet the requirements imposed upon Dilokong. The environmental management plan submitted by Dilokong on 2 February 2007 in compliance with s 16(4)(*a*) was never approved due to Dilokong's failure to comply with the s 2(*d*) BEE compliance requirement.

[6] In the meantime Mawetse, completely oblivious of the facts set out above, applied in September 2009 for a prospecting right for various minerals (including chrome) in respect of various farms, including Driekop. Its application in respect of Driekop was rejected in terms of s 16(2)(*b*) of the MPRDA because that prospecting right had already been granted to Dilokong.[2] Upon investigation Mawetse discovered the facts set out above, in particular that Dilokong's prospecting right had not been executed, that its duration was for three years (ie contrary to the DDG's approval which was for a period of four years, an aspect to which I will revert shortly) and that according to Mawetse's calculation it would have lapsed on 13 November 2010. Mawetse challenged the award of the prospecting right to Dilokong in the North Gauteng High Court, Pretoria on 20 January 2012. That challenge was met with a preliminary point being taken by Dilokong, namely that the application was premature since Mawetse had not exhausted its internal remedy, ie an internal appeal to the Minister in terms of s 96 of the MPRDA. Mawetse's internal appeal was lodged on 28 October 2010 while its challenge in the North Gauteng High Court was held in abeyance by agreement. The Minister refused to consider Mawetse's internal appeal because the matter was considered to be '*sub judice*' due to Mawetse's pending application in the high court. In July 2011, Mawetse, faced with this impasse, approached the North Gauteng High Court again for an order to compel the Minister to decide the internal appeal and obtained such an order. On 16 August 2011 the Minister upheld the award of the prospecting right to Dilokong and dismissed Mawetse's appeal. On 20 January 2012 Mawetse launched the review

[2]Section 16(2)(b) of the MPRDA provides as follows:
'(2) The Regional Manager must accept an application for a prospecting right if –
no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land'.

application culminating in the present appeal. Counsel for Mawetse conceded in this court that at the time of Mawetse's application to the DMR, the time period in respect of the prospecting right (calculated as a four year period) had not yet lapsed but had lapsed at the time when Mawetse had launched its application in the court below. As stated earlier, Dilokong filed a counter-application which sought to compel the DMR to cause the execution of the prospecting right.

[7] It is against this factual backdrop that we must determine whether Masipa J was correct in her findings. A useful starting point is to examine the provisions of the MPRDA in respect of prospecting rights.

The statutory framework

[8] The MPRDA has been substantially amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008. Those amendments do not apply in this case, since they were promulgated subsequent to the events material to the central issues in this case. References to the MPRDA are therefore to the Act in its pre-amendment form. The statutory procedure in respect of an application for a prospecting right is set out comprehensively in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.[3] Sections 16 and 17 of the MPRDA regulate the application for and the granting and duration of prospecting rights. Section 16 sets out the mechanical bureaucratic procedure for the application. The Regional Manager's office plays a central role in this process but it fulfils a very limited, clearly circumscribed role. For present purposes, the following provisions are of importance –

Section 16(4) provides:

'(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 s 16(5) reads:

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[3] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113; [2010] ZACC 26 (CC) paras 32 – 38.

‘(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.’

[9] Section 17 is of cardinal importance. It concerns the granting and duration of prospecting rights. Section 17(1) reads as follows:

’**17 Granting and duration of prospecting right**

(1) 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;

(b) The estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;

(c) The prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment;

(d) The applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996); and

(e) The applicant is not in contravention of any relevant provision of this Act.’

The key provision is s 17(1)(e).

Section 17(4) provides:

‘(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2(*d*).’

I have set out the provisions of s 2(*d*) above.

For present purposes ss 17(5) and (6) are significant:

‘(5) 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.

(6) 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.’ (emphasis added)

[10] Before turning to deal with the substantive issues outlined above, I pause to mention that prior to the hearing the following note was sent to the parties by the Registrar of this court:

‘The parties are directed to address the following question as a matter of urgency. Has the appeal not been rendered moot because the period for which the

prospecting right was purportedly granted to the Fifth Appellant [Dilokong] has passed?'

The parties filed supplementary heads of argument on this aspect with Mawetse answering the question in the affirmative and Dilokong contending that the appeal has not been rendered moot. Since the conclusion by Masipa J on whether the right has expired due to the necessary procedural steps not having been taken is contested, and since Dilokong contended that the question of the expiry of the period for which the right was granted is dependent on when the time starts to run (which also in dispute), it is necessary to deal with all these issues in the present appeal. These aspects are interwoven and are furthermore to be considered against the backdrop of the fact that the period for which the right endured had, on Mawetse's concession, not lapsed when Mawetse applied to the DMR, but had lapsed when Mawetse launched its court application.

Was the prospecting right lawfully granted and, if so, may Dilokong exercise that right?

[11] The primary dispute is whether Dilokong could lawfully have been required to be BEE compliant. Section 17(1), read with s 17(4), bears consideration. Dilokong contended that, once the requirements in s 17(1) had been met, the Minister was legally obliged to grant the right. According to Dilokong compliance with the BEE requirements in s 2(*d*) is not a precondition for the granting of a prospecting right, as opposed to a mining right, and it could not be lawfully imposed. These submissions are untenable on the law and on the facts. In the DDG's approval of the recommendation by the Regional Manager that Dilokong be granted the prospecting right in respect of Driekop, it was expressly recorded as follows:

'**5 Assessment of Charter Compliance**

5.1 Compliance with section 17(4)

The Shareholders Agreement and/or Share Certificates were not submitted.

6 Recommendation

6.1 In light of the fact that the applicant has complied with all the requirements of section 17(1) of the Act, as indicated in paragraph 4 above, it is recommended that you, please, consider to –

6.1.1 grant a prospecting right to Dilokong Chrome Mine in accordance with section 17(1) of the Act for a period of four (4) years, *subject to* –

(i) the applicant, where applicable, submitting (before execution) all other outstanding information and or documentation (including Shareholders Agreement with BEE entity not (sic) holding not less than 26% of equity in the operation and financial guarantee in the amount of R15 000.00); and

6.1.2 . . . .' (my emphasis)

[12] The DDG approved the recommendation in the terms set out in 6.1.1 above and affixed his signature to that effect. Thus the recommendation and its rationale became his decision. He also signed a power of attorney authorising the Regional Manager to sign the prospecting right in favour of Dilokong in respect of Driekop 'according to the approval signed by me [the DDG] today'. That decision of 21 June 2007 was conveyed to Dilokong by letter dated 18 July 2007. It was envisaged in the letter that the Regional Manager would approve the environmental management plan on the date of the signing of the right, ie the date of its notarial execution. As stated, this never happened since Dilokong was regarded as being non-BEE compliant. The DDG had thus plainly and unequivocally attached BEE compliance as a condition in granting the right. Moreover, the unsigned draft notarial deed in terms whereof the prospecting right was to be executed, envisaged in clause 16 that Dilokong had to be BEE compliant. It is necessary to record that in the affidavit filed on behalf of the DMR the BEE condition was accepted as having been communicated.

[13] Dilokong contended that no request had in fact been made in terms of s 17(4) as far as s 2(*d*) BEE compliance was concerned and, if it could be said to have been made, it was never a condition as contemplated by the Act. Furthermore, so it was submitted, it was in any event not conveyed to Dilokong in the DDG's letter of 18 July 2007. Counsel emphasized that s 17(4) speaks of a 'request' not a 'requirement' or a 'condition'. He

juxtaposed s 17(4) with s 23(1)(*h*) where, in respect to mining rights as opposed to prospecting rights, BEE compliance is a prerequisite:

'**23 Granting and duration of mining right**

(1) Subject to subsection 4, the Minister must grant a mining right if –

(h) the granting of such right will further the objects referred to in section 2(*d*) and (*f*) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.'

[14] A submission was made in the written heads of argument on behalf of Dilokong that an applicant for a prospecting right could not in law be compelled to be BEE compliant and that the Mining Charter does not apply to prospecting rights. The submission is devoid of merit. Section 100(2)(*a*) of the MPRDA provides for the development of the Mining Charter in order to 'ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution.' The charter must 'set the framework for targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources'. It must also set out, amongst others, how the objects referred to in s 2(*d*) above can be achieved. Section 1 of the MPRDA expressly includes prospecting in the definition of 'broad-based economic empowerment':

'. . . [a] social or economic strategy, plan, principle, approach or act which is aimed at –

. . .

(b) transforming such industries so as to assist in, provide for, initiate or facilitate –

(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations; . . .'

Paragraph 2 of the charter repeats this definition verbatim and thus expressly includes prospecting.

[15] Section 17(4) unequivocally empowers the Minister to make the grant of a prospecting right conditional upon compliance with the s 2(*d*) BEE requirement as occurred in this case. In this regard Dilokong's approach on the papers is instructive. The DMR's answering affidavit was deposed to by

Ms Motlatso Constance Kobe, the Chief Director: Mineral Regulation Branch in the Minister's office. She commences her affidavit by setting out the process in the issuing of a prospecting right and states that:

'3.5 It is apparent from paragraph 3 to "PMW3" that the Fifth Respondent was called upon to comply with the object of Section 2(d) of the Act by submitting not later than the 4th February 2007 the following documents:-

(3.5.1) duly signed shareholders agreement;

(3.5.2) share certificates and shareholders register;

(3.5.3) articles and memorandum of association of the company;

(3.5.5) any other agreement or documents relating to the agreement.'

In Dilokong's answering affidavit the deponent expressly concurs with, amongst others, paragraph 3.5 above of Ms Kobe's affidavit. It is clear that all concerned, and Dilokong in particular, had treated the grant as one requiring, amongst others, compliance with the s 2(d) BEE requirement. And Dilokong was required to demonstrate its compliance by submitting a shareholder agreement evidencing the required 26% BEE entity shareholding. The papers also show, and Dilokong says so unequivocally in its answering affidavit, that it had made attempts to meet this requirement, to no avail, due to the impact of the moratorium placed by government on Limdev's disposal of its shareholding in ASA Metals. It is clear that before this litigation commenced, the DMR accepted this to be the position. On the evidence therefore the Minister, as she was in law entitled to do, issued a request through her lawful delegate, the DDG, to Dilokong to give effect to the object of black economic empowerment in s 2(d). The Minister (or her delegate) is expressly empowered to make the request since the section provides that she 'may request'.[4] The emphasis during argument by Dilokong on the use of the word 'request' in s 17(4) is misplaced. 'To request' means 'to politely or formally ask (someone) to do something'.[5] It is not contrary to a demand or a requirement, as it was contended. And it hardly lies in Dilokong's mouth to argue along these lines when it had not only concurred with the DMR that such a request had been made, but had also on the common cause facts actively set out to heed this request, albeit without any success. In this context a request is a

[4]Compare: *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO & others* 1993 (4) SA 621 (A) at 640 A.

[5]*The Concise Oxford English Dictionary*, 12 ed, (2011).

necessary preliminary step in ensuring compliance with the MPRDA's BEE imperative.

[16] The affirmative action provisions in the MPRDA must be understood for what they are – a focused intervention to redress past inequalities in the mining industry. The Constitutional Court has emphasized that its objects are to address in a direct and forthright manner the historical exclusion of black South Africans and to facilitate equitable access to opportunities in the mining industry. One of the ways of achieving this in the MPRDA is to abolish the entitlement to sterilise mineral rights.[6] And in *Bengwenyama* that court said:

'There is no denying that past mining legislation and the general history of racial discrimination in this country prevented black people from acquiring access to mineral resources. Dispossession of land aggravated the situation. The Act [ie the MPRDA] seeks to redress these past wrongs'.[7] (footnotes omitted)

[17] In summary on this first issue: the Minister's delegate, the DDG, had lawfully requested Dilokong to comply with the s 2(*d*) BEE requirement. Dilokong acknowledged the request and had sought to comply with it, without any success. The objects set out in s 2(*d*) are of cardinal importance when the purpose of the MPRDA and the Mining Charter is borne in mind and, as our courts have stressed, are essential to redress the historical inequalities in the mining industry. Compliance with the request is not merely optional and the grant of the prospecting right was expressly made subject to such compliance. Absent compliance, the DMR was lawfully entitled to refuse to execute the right. Dilokong was non-compliant with s 17(4), read with s 2(*d*) of the MPRDA. The right was conditionally granted in terms of s 17(2)(*a*), read with s 17(1), namely on condition that Dilokong complies with the request. Section 17(6) makes a prospecting right subject to the MPRDA, any other applicable law and the terms and conditions stipulated in the right. As demonstrated above, compliance with s 2(*d*) was unequivocally imposed as a condition of the grant in the DDG's approval of the recommendation. On the

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[6] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1; [2013] ZACC 9 (CC) paras 1–3.
[7] *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others,* supra, para 28. See also: *Minister of Mineral Resources & others v Sishen Iron Ore Co (Pty) Ltd & another* 2014 (2) SA 603; [2013] ZACC 45 (CC) paras 3-10.

common cause facts Dilokong had accepted that such a request had been made as a condition of the grant and had unsuccessfully sought to comply with it. The unsigned draft notarial deed is consonant with this factual and legal matrix inasmuch as it also envisaged BEE compliance on Dilokong's part. In the premises, the court below correctly concluded that the Dilokong's failure to meet this condition had the effect of barring Dilokong from implementing its right to prospect.

Has the right lapsed?

[18] Any right issued in terms of the MPRDA lapses, amongst others, whenever it expires (s 56(*a*)) or is abandoned (s 56(*f*)). Expiry of the right would occur upon the effluxion of the time period for which the right has been granted. That determination requires a consideration of when exactly the right was granted. I interpose to reiterate that the unsigned draft notarial deed in terms whereof the right was to be executed is at variance with the DDG's approval insofar as the duration of the right is concerned. The draft deed stipulated a period of three years, whereas the DDG's approval was for four years. As I will presently demonstrate, the discrepancy is immaterial, since the right would have lapsed even taking into account the longer period of four years.

[19] There are three distinct legal processes which must be distinguished from each other, namely the granting of, execution of, and coming into effect of the right. A prospecting right is granted in terms of s 17(1) on the date that the DDG approves the recommendation (a contrary finding was made in two Northern Cape High Court decisions to which I shall in due course refer). In the present instance that occurred on 21 June 2007. For practical purposes communication of that decision will enable challenges by the grantee to conditions which it might consider objectionable and furthermore will alert not only the grantee but also competitors who might have an interest. The period for which the right endures has to be computed from the time that an applicant is informed of the grant, in this instance 18 July 2007. From the date of the grant Dilokong became the holder of a valid prospecting right as defined in the

MPRDA. But in terms of s 19(2)(*a*) of the MPRDA that right had to be registered in the Minerals and Petroleum Titles Office.[8] That Office has been established in terms of s 2(1) of the Mining Titles Registration Act 16 of 1967 (the MTR Act). While s 5(1) of the MPRDA provides that a prospecting right is a limited real right in respect of the mineral to which it relates, s 2(4) of the MTR Act provides that '[t]he registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties'. These provisions appear at face value to be contradictory with regard to the nature of the right and its legal consequences. But that is not an aspect which need concern us now – for present purposes I accept that the right becomes a limited real right only upon registration. The purpose and effect of registration is not only that the right becomes binding on third parties, but it also serves as notice to the general public, akin to registration of immovable property in the Deeds Office. The granting of a prospecting right becomes effective on the date on which the environmental management plan lodged by the applicant in terms of s 16(4)(*a*) is approved in terms of s 39.[9] That is the date from which a successful applicant can actively start prospecting.

[20] The gravamen of Dilokong's contentions is that the period of four years in the DDG's approval had not started running since the prospecting right has never become effective and had not been executed. This is an untenable proposition. If correct, it would mean that the right is sterilised indefinitely in favour of Dilokong. No applications for that right, ie for chrome (base metals) in respect of the farm Driekop could then be considered while the right remains sterilised.[10] An indeterminate reservation of the right in this fashion is contrary to the letter and spirit of the MPRDA. Section 17(6) expressly provides that a prospecting right remains valid for a maximum period of five years. Such an interpretation offends one of the MPRDA's key objectives, namely that mineral rights must be exploited within stipulated timeframes for

[8]Section 19(2)(*a*) reads:
'(2) The holder of a prospecting right must –
lodge such right for registration at the Mineral and Petroleum Titles Registration Office within 60 days after the right has become effective.'
[9]Section 17(5) of the MPRDA.
[10]Section 16(2)(*b*).

the benefit of the public. In *Agri SA* it was held that one of the objects of the MPRDA is to abolish the entitlement to sterilise mineral rights.[11] The structure of the MPRDA in any event militates against Dilokong's contentions. Section 19(2)(*b*) provides that the holder of a prospecting right 'must commence with prospecting activities within 120 days from the date on which the prospecting right becomes effective in terms of section 17(5) or such an extended period as the Minister may authorise'. As stated, s 17(5) stipulates that the effective date is the date on which the environmental management plan is approved in terms of s 39. That plan must be submitted to the Regional Manager within a period of 60 days of notification to do so.[12] The Minister must within 120 days from the lodgement approve the same, provided certain requirements have been met.[13] It is plain from these provisions that a successful applicant for a prospecting right cannot sit back, with arms folded, and remain supine on the basis that the DDG has unlawfully imposed the BEE compliance condition and that the Regional Manager's refusal to execute the right by reason of that non-compliance was also unlawful. Those decisions remained valid until set aside by a court.[14] The appropriate course of action was for Dilokong to obtain a mandamus compelling DMR to execute the right, that is assuming that the right was lawfully granted.

[21] The period for which Dilokong's prospecting right endured must in my view be calculated from the date on which it was informed of the granting of the right, namely 18 July 2007. On that date Dilokong became the holder of a valid prospecting right, subject to compliance with the request to prove BEE compliance. It matters not, for purposes of computing the period of the duration of the right, that the right still had to be executed and that the right had not yet become effective. Thus construed, Dilokong's prospecting right had expired due to the effluxion of time on 17 July 2011, ie 4 years after the date on which Dilokong had been notified of the granting of the right. The high

[11] See fn 6 above.
[12] Section 39(2) of the MPRDA, read with Regulation 52(1) of the Mineral and Petroleum Resources Development Regulations GNR 527, GG 26275, 23 April 2004.
[13] Section 39(4)(*a*).
[14] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222, [2004] ZASCA 48 (SCA) para 26; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) paras 64, 65 and 88.

court thus correctly concluded that the right had lapsed due to its expiry. It found further that the right had been lost because of Dilokong's unreasonable delay in using it. In view of these findings the high court did not deem it necessary to determine whether the right had been abandoned. While it is not necessary to decide the point, there is substantial merit in the contentions advanced on behalf of Mawetse that the right had in any event been abandoned due to Dilokong's failure to take steps to enforce its right. It follows that the appeal has been rendered moot.

[22] There is one last aspect which bears consideration in respect of this second main issue. It was contended by Dilokong that we have to decide the correctness of the decision of the Full Bench of the Northern Cape Provincial Division in *Meepo v Kotze.*[15] Mawetse accepted that *Meepo* may have been wrongly decided but contended that we need not make a finding on that aspect. For the reasons that follow, I am of the view that the decision in *Meepo* has a direct bearing on the issue under discussion and that *Meepo* was wrongly decided.

[23] The main issue in *Meepo*, germane to the present matter, was the validity of a prospecting right. In order to decide the issue the court there had to determine when exactly and as a result of whose administrative conduct the prospecting right had been granted. It held that:

(a) No rights accrued to an applicant for a prospecting right at the time of an approval by the DDG of a recommendation before any terms or conditions in respect of the prospecting right, as well as the period of its validity, had been determined.[16]

(b) On the facts of that case the rights and conditions and the period of validity were only determined and communicated to the applicant at the time when the notarial deed in respect of the prospecting right was executed.[17]

(c) The legal nature of the granting of a prospecting right is contractual, inasmuch as the Minister, as the representative of the State as custodian of the mineral resources of the country, consensually agrees to grant to an

[15] *Meepo v Kotze* (869/2006) [2007] ZANCHC; 2008 (1) SA 104 (NC).
[16] *Meepo v Kotze,* supra at para 46.3.
[17] Ibid.

applicant a limited real right to prospect for a specified mineral on specified land for a specific period under specific conditions. Until such terms and conditions have been determined and consensually agreed upon or consented to by an applicant, it cannot be said that a prospecting right has 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. That occurs when the notarial deed is executed.[18]

The Full Bench cited this court's judgment in *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*[19] in support of the finding in (c) above. *Meepo* was followed in *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy*[20].

[24] It should be evident from what has gone before that I respectfully disagree with these findings. As I see it, the granting of a prospecting right, as is the case with all other rights under the MPRDA, is not contractual in nature, but a unilateral administrative act by the Minister or her delegate in terms of their statutory powers under the MPRDA. It occurs outside the ambit of and regardless of the existence of a contract between the Minister and a successful applicant. Professor Baxter refers to such an act as an authoritative or unilateral administrative act which is performed without the concurrence of the affected party.[21] In the high court's decision in *Bengwenyama*[22], the Transvaal Provincial Divison had to consider, amongst others, this very question, namely who granted the prospecting right in question. Hartzenberg J held that the DDG, as the Minister's delegate, granted the right and that the Regional Manager, in subsequently signing the notarial deed of execution, merely acted on the authority of the power of attorney signed by the DDG in favour of the Regional Manager.[23] Similarly in *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the*

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[18]Ibid.
[19]*Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affiars* 1991 (4) SA 718 (A) at 724-725.
[20]*Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy* & others [2008] ZANCHC 3.
[21]L Baxter, *Administrative Law* 1984 at 351.
[22]*Bengwemnyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd formerly Tropical Paradise 427 (Pty) Ltd & others* [2008] ZAGPHC 384.
[23]Paras 19-25.

Republic of South Africa[24] which concerned the lodging of an application for the conversion of prospecting rights at a particular Regional Office of the DMR, this court also held that it is the DDG, and not the Regional Manager, who makes the decision regarding the conversion of a prospecting right. A submission was made in that case that since the Regional Manager had signed the notarial prospecting right, he should be regarded as the person who granted the conversion of an old order right to one in item 6 of Schedule 2 of the MPRDA, and not the DDG. In rejecting that submission, Navsa JA stated that:

'The sixth respondent [the DDG] took the decision to convert and left it to the Regional Manager Mpumalanga to implement. . .'[25]

In *Mustapha v Receiver of Revenue Lichtenburg and others*[26] Schreiner JA described the nature of a unilateral administrative act as follows:

'In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a state official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases. . . .'

[25] In England statutory licenses are regarded as 'public law instruments'. In *Norweb plc v Dixon*[27] the Queen's Bench had to consider whether the supply of public electricity by a supplier, who is under a statutory duty to do so, to a tariff customer was based on a contractual relationship between the parties. The court (Dyson J, McCowan LJ concurring) held that 'the legal compulsion both as to the creation of the relationship and the fixing of its terms is inconsistent with the existence of a contract'[28] Similar conclusions were reached in *Sovmots Investments Ltd v Secretary of State for the Environment*[29] and *Pfizer Corporation v Ministry of Health*.[30]

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[24] *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy of the Republic of South Africa and others* [2011] ZASCA 49.
[25] At para 59. See further the discussion in Dale et al, *South African Mineral and Petroleum*, Law (Service issue 12, September 2012) para 133.2.3.
[26] *Mustapha & another v Receiver of Revenue Lichtenburg & others* 1958 (3) SA 343 (A) at 347 E-F.
[27] *Norweb plc v Dixon* [1995] 3 All ER 952.
[28] At 959.
[29] *Sovmots Investments Ltd v Secretary of State for the Environment* [1976] 1 ALL ER 178 at 201.
[30] *Pfizer Corporation v Ministry of Health* [1965] 1 All ER 450 at 455.

[26] The granting of a prospecting right does not admit of a legal relationship where consensus between the parties is a legal requirement. I disagree with the dictum in *Meepo*[31] that an applicant for a prospecting right has to reach consensus with the Minister or has to consent to the terms and conditions of the right. The MPRDA sets out in no uncertain terms the respective parties' rights and obligations. It is plainly an authoritative, unilateral administrative act whereby rights are granted with or without conditions and in terms whereof rights accrue to and obligations are imposed upon the successful applicant.

[27] *Ondombo Beleggings* does not support the findings of the Full Bench set out in para 23(c) above. It is distinguishable. That case concerned the validity of a prospecting lease in terms of s 4(1)(*b*) of the (now repealed) Precious Stones Act 73 of 1964. The Minister had refused to determine the terms and conditions of the lease in terms of s 4(2) of the Act, despite the fact that the lease had been granted. Eksteen JA described the nature of such a prospecting lease as follows:

'The very wording of s 4 of the [Precious Stones] Act underlines the contractual and therefore consensual nature of the lease. The Minister in effect binds himself to let the leaseholder prospect on the land concerned for an agreed period of time, and the leaseholder in turn agrees to pay a certain amount as rent. . . The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not in my view, detract from the contractual nature of the lease.'[32]

That case must be understood on its own facts and the applicable law. Section 17 of the MPRDA differs *toto caelo* from s 4 of the Precious Stones Act. As set out above, a prospecting right must be granted once there has been compliance with s 17(1) – it is not dependent on the determination and conclusion of an agreement between the Minister and an applicant on the prospecting right's terms and conditions. Section 4 of the Precious Stones Act reads as follows:

'4. Prospecting leases in respect of State land

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[31] *Meepo v Kotze,* supra para 46.3.
[32] *Ondombo Beleggings v Minister of Mineral and Energy Affairs (Edms) Bpk,* supra, at 724D-G.

(1) The Minister may –

(a) by notice in the *Gazette* and in one or more newspapers circulating in the area in which any State land or portion of State land in respect of which the exclusive right of prospecting for precious stones has not accrued to any person is situated, call for tenders for a prospecting lease in respect of precious stones over that land or that portion of such land, and grant a prospecting lease to any person who has submitted a tender and who satisfies the Minister that the scheme according to which he proposes to prospect is satisfactory and either that his financial resources are adequate for proper prospecting under such a lease or that the arrangements by which he proposes to obtain capital for the said purpose are satisfactory; or

(b) without calling for such tenders grant a prospecting lease in respect of precious stones over any such land or portion thereof to any person applying therefor who to satisfies him.

(2) Any such lease shall be subject to such terms and conditions as the Minister may deem fit, and –

(a) shall provide for –

(i) the scale on which and the manner in which prospecting operations shall be carried on;

(ii) the furnishing by the holder of the lease to the Minister at such times as may be specified in the lease of full statements describing the nature of the prospecting operations carried out and containing such other information as the Minister may require;

(iii) the keeping by the holder of the lease of such records relating to the prospecting operation as the Minister may require;

(iv) the examination of such records and the inspection of the lease area by any person authorised thereto by the Minister;

(v) the payment by the holder of the lease to any person entitled to use the surface of the land, who suffer any surface damage or any damage to crops or improvements on the land caused by the exercise by the holder of the lease of his rights under the lease or by any act or omission incidental thereto, of compensation for such damage; and

(vi) the payment by the holder of the lease to the mining commissioner of a rent to be fixed by the Minister after consultation with the board, . . .

(b) may provide *inter alia* for the payment by the holder of the lease to the mining commissioner of such share of the proceeds of any precious

> stones found by him in the course of prospecting operations on the land in question, as the Minister may after consultation with the board determine.'

As can be seen, once the Minister had granted a lease in terms of s 4(1), the terms and conditions thereof had to be determined in terms of s 4(2). Section 17 of the MPRDA constitutes, as I have said, an administrative act. The provision in s 17(6) that a prospecting right is 'subject to the terms and conditions stipulated in the right' does not, without more, change that administrative act into one that is contractual in nature. The effect thereof is simply that, in accordance with the principle of legality, the Minister may only act within the parameters conferred upon her by the legislative provision. The distinction between s 4 of the Precious Stones Act and S 17 of the MPRDA is stark. For these reasons *Ondombo Beleggings* does not support the findings in *Meepo.*

Conclusion

[28] The high court was correct in its finding that Dilokong had failed to comply with a condition of the grant, namely BEE compliance, and that the right had lapsed due to its expiry. The period of the duration of the right must be computed from the date on which Dilokong had received confirmation of the grant. The decision in *Meepo* that the right is granted only at the stage of the registration of the right is wrong. It follows that the appeal must fail.

[29] The appeal is dismissed with costs, including those of two counsel.

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S A Majiedt
Judge of Appeal

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