

[2] It is clear from the papers that the decision to refuse the prospecting right applied for by the applicant, was taken by the third respondent. In terms of section 17 of the Act the power to grant or refuse a prospecting right is given to the first respondent. Section 103 of the Act provides that the first respondent may, subject to a qualification not presently relevant, in writing delegate any power conferred on him or her by or under the Act. At the hearing before us it was argued on behalf of the applicant that it was not shown that the power in question was delegated by the first respondent to the third respondent. In the founding affidavit however, it was clearly accepted by the applicant that the power in terms of section 17 of the Act was delegated to the third respondent. In fact, the applicant relied on that delegation in the context of whether the applicant could or should have exhausted an internal remedy, to which aspect we will return shortly. In the answering affidavit the third respondent states under oath that the power in question was delegated to him in terms of a written delegation document attached to the papers. The delegation document provides that if any organisational changes occur which alter the names of existing designations, any power delegated in terms thereof

is deemed to have been delegated to equivalent ranks which arise from such changes. In the circumstances we regard the attempt on behalf of the applicant to rely on a minor difference in the description of the post of the third respondent contained in the written delegation document, opportunistic and without substance. We find on the totality of the evidence that the power in terms of section 17 of the Act was at all times relevant hereto in writing delegated by the first respondent to the third respondent.

- [3] On behalf of the respondents it was argued that the application should be dismissed without consideration of the merits thereof for failure by the applicant to exhaust internal remedies available to it. Relying in this regard in the first place on the provisions of section 96 of the Act, it was specifically argued that the remedy of appeal to the first respondent is available to the applicant.
- [4] According to its heading, section 96 of the Act deals with internal appeal process and access to courts. This section provides as follows:

“96 Internal appeal process and access to courts

- (1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to-
 - (a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or
 - (b) the Minister, if it is an administrative decision by the Director-General or the designated agency.
- (2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.
- (3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.
- (4) Sections 6, 7 (1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), apply to any court proceedings contemplated in this section.”

[5] The question then is whether the remedy of appeal to the first respondent in terms of section 96 of the Act is available to the applicant in the circumstances of this case. For the reasons that follow, we think that it is not.

[6] In his well-known work on administrative law, **Administratiefreg**, p. 52 – 57, Prof. Marinus Wiechers distinguishes in the field of delegation of public power *inter alia* between what he terms deconcentration and decentralisation. Delegation of power in the form of decentralisation takes place when powers are transferred to an independent organ or body which carries out these powers and functions entirely in its own name. As a rule the *delegans* (that is the delegating authority) has no authority to act on behalf of the delegate and has no control over the independent body other than appointment of the members thereof and/or some form of appeal against the decisions of that body. Deconcentration on the other hand, is applicable where the functions are performed by the delegate in the name or on behalf of the *delegans*, in other words the *delegans* acts by means of the delegate. An essential feature of the deconcentration of administrative power is that the *delegans* may withdraw the delegation at any time and perform the function himself or herself. Also, the *delegans* may exercise various forms of control over the delegate. These principles were expressly adopted in **NAIDOO AND OTHERS v JOHANNESBURG CITY COUNCIL AND**

OTHERS 1979 (4) SA 893 (W) at 896 E – 898 E and **SA FREIGHT CONSOLIDATORS (PTY) LTD v CHAIRMAN, NATIONAL TRANSPORT COMMISSION, AND ANOTHER** 1987 (4) SA 155 (W) at 164 F – 169 D. We respectfully believe that these decisions are correct. See also Baxter, **Administrative Law**, p. 436 footnote 317 and p. 441, 442 as well as **LAWSA**, 2nd Edition, Volume 1, para 101, p. 81 – 82. This principle is also illustrated in the judgment of **BARTLETT v MUNISIPALITEIT VAN KIMBERLEY** 1966 (2) SA 95 (GW) at 100 E – 102 F, where it was decided that where the exercise by a town clerk of a power delegated to him by the municipal council is attacked, the proper body to sue is the municipal council or municipality as the town clerk acted on its behalf under the delegated authority. The judgment in the case of **ADMINISTRATOR, CAPE v ASSOCIATED BUILDINGS LTD** 1957 (2) SA 317 (A) at 323 H, referred to on behalf of the respondents, does not support the respondents' argument, as it in fact provides an example of administrative deconcentration.

- [7] In this case section 103(4) and (5) of the Act specifically provides as follows:

- “(4) 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.
- (5) The Minister, Director-General, Regional Manager or officer is not divested of any power or exempted from any duty delegated or assigned by him or her.”

Furthermore, in the written delegation document, *inter alia* the following conditions of the delegation in question are stated:

- “(a) Any power must be exercised judiciously with the necessary discretion and with due regard to the applicable Regulations, as well as other instructions and control measures determined in terms of the Act.
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- (f) Should any doubt exist for any reason as to which decision should be taken regarding any matter, such matter should be referred to me for finality.

- (g) The aforesaid powers may nonetheless be exercised by myself notwithstanding the fact that it has been delegated.
- (h) I should be consulted should there be any reason to move away from or revise established policy guidelines.”

[8] It is clear therefore that the first respondent has both the power to revoke the delegation to the third respondent in question and to exercise the power delegated herself and the power to exercise control over the exercise of the delegated power. In our view the delegation to the third respondent in question took place in a scheme of deconcentration of public power. It follows that when the third respondent refused to grant a prospecting right to the applicant, the third respondent acted on behalf of the first respondent, that the first respondent acted through the third respondent and that the decision to refuse must be regarded as the decision of the first respondent. On this basis no appeal in terms of section 96 of the Act is available to the applicant.

[9] There is a further indication that this conclusion must be correct. In terms of the Act “Director-General” means the Director-General of the Department. “Department” means

the Department of Minerals and Energy. The Act also contains a definition of a designated agency referred to in section 96(1)(b) thereof, which is not relevant here. Importantly however, an officer as referred to in section 96(1)(a) of the Act, is defined as any officer of the Department appointed under the Public Service Act, 1994. It follows that the third respondent is an officer as defined. It also follows that if the decision in question must in law be regarded as the decision of the third respondent, then, in terms of section 96 of the Act, an appeal would lie not to the first respondent, but to the Director-General. It could not have been intended that the exercise of a power granted to the first respondent (the Minister) could be appealed against to a lower ranking official, to wit the Director-General. This anomaly does not arise if the decision in question is regarded as the decision of the first respondent, as we do.

- [10] Secondly it was argued, albeit with little enthusiasm, that section 103(4)(b) of the Act also provides an internal remedy to the applicant. We cannot agree. An internal remedy in this context is one that an aggrieved person may exercise as of right. To seek an indulgence, which at best is what the

request to act in terms of section 103(4)(b) would amount to, is not a remedy.

[11] In the light of this conclusion it is not necessary to deal with the prayer by the applicant for exemption in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA"). It is worthy of note in passing however, that it would appear that in terms of the Act an absolute duty to exhaust the remedies in terms of section 96 thereof is intended. That is the import of section 96(3) and in section 96(4) section 7(2) of PAJA is not made applicable to the proceedings contemplated in terms of section 96.

[12] In respect of the merits of the review, the applicant relied on a variety of grounds of review. Some of these grounds, such as the allegations of bias and bad faith, are completely without foundation. However, on the view that we take of the matter, it is in this regard only necessary to refer to what is stated below.

[13] Section 16(1) of the Act provides that any person who wishes to apply to the first respondent for a prospecting right

must lodge the application at the office of the Regional Manager in whose region the land is situated in the prescribed manner and with the prescribed application fee. Section 16(2) provides that the relevant Regional Manager must accept an application for a prospecting right if the requirements of section 16(1) are met and no other person holds a relevant right in the same mineral and land. In terms of section 16(3) the Regional Manager must notify the applicant in writing within 14 days of receipt of the application if the application does not comply with the requirements of section 16 and in terms of section 16(4) the Regional Manager must notify the applicant in writing if the application is accepted.

- [14] The applicant lodged the application for a prospecting right in question at the offices of the second respondent on 22 September 2005. By letter dated 16 October 2005 the second respondent informed the applicant that the application has been accepted. On 26 April 2006 the second respondent wrote to the applicant in respect of this application in the following terms:

“The relevant application has inter alia been evaluated by the Department’s Directorate: Mine Economics and the outcome of such an evaluation is that the relevant application does not comply with the provisions of section 17 (a) & (b) of abovementioned Act due to some outstanding information or documents. Your Company is therefore requested to submit the following, namely:-

- (i) Profiles of all personnel (contractors and consultants) that will be assigned to the proposed project, particularly the person that will take responsibility for the on site operation;
- (ii) A revised prospecting work programme that will lead to optimal prospecting of the area under application, in the same regard, it is suggested that the minerals to be prospected for should only be limited to diamonds (general and in kimberlite) as it is unlikely that prospecting for all minerals will be achieved due to different methods applicable to prospecting for all minerals;
- (iii) Justification as to why the proposed life of mine is two (2) years whilst the prospecting work programme suggests that the proposed project can be exhausted in just ten (10) months; and
- (iv) A revised cost schedule where the expenditure is broken down in terms of Regulation 7(1) (k) and all regulatory

costs applicable to the operation (prospecting fees, cost of rehabilitation, etc) should also be included on such a revised cost schedule.

Kindly note that your Company is requested to submit the relevant outstanding information on or before 10 May 2006."

[15] It is common cause that a written response to this letter was in fact received at the offices of the second respondent on 10 May 2006. This response emanated from Bonaparte Diamond Mines NL, an Australian company, which the applicants says would fund the initial exploration in terms of the prospecting right applied for. The exact legal relationship between the applicant and this company, if any, is not clear. What is clear though, is that the response, consisting together with annexures thereto of some 24 pages, should have been considered as the applicant's response to the second respondent's requests in terms of his letter of 26 April 2006.

[16] It is common cause further that as a result of misfiling, the aforesaid letter of Bonaparte Diamond Mines NL to the second respondent, was not considered by the second respondent when he made his written recommendation to

the third respondent to refuse the applicant's application for the prospecting right in question and was not referred to in his recommendation to the third respondent. Although the third respondent does not expressly say so, it is clear from the evidence that he had not considered this letter when he accepted the recommendation by the second respondent to refuse the application. The written recommendation of the second respondent was dated 22 May 2006 and was accepted by the third respondent on 19 June 2006. The Bonaparte Diamond Mines NL letter was however only rediscovered after the misfiling thereof on 24 July 2006 as appears from the affidavit of the second respondent's secretary.

- [17] It is not disputed by the respondents that the decision to refuse the prospecting right constitutes administrative action as defined in PAJA. In accordance with section 33 of the Constitution, section 3(1) of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. In terms of section 6(2)(c) of PAJA a court has the power to judicially review an administrative action if it

was procedurally unfair. The concept of procedural fairness is flexible (see **CHAIRMAN, BOARD ON TARIFFS AND TRADE, AND OTHERS v BRESCO INC AND OTHERS** 2001 (4) SA 511 (SCA) at 520 – 521 para 11 - 13) and depends on the circumstances of each case, as is provided in section 3(2) of PAJA.

- [18] In the present case it was implicit in the second respondent's letter of 26 April 2006 that if the response thereto is received on or before 10 May 2006, the applicant's application will not be refused without considering that response. However what happened is exactly what was said would not happen. That the second respondent may not legally have been obliged to call for the further information or that he may have misconceived his duties in terms of section 16 of the Act, is immaterial. So is the reason why the information actually received was not considered. As the question is whether the procedure employed was fair, it is not necessary to refer to the contents of the response of 10 May 2006, save to say that it was clearly relevant. The matter is analogous to a promise made by a public authority to follow a certain procedure. In such case it is in the interest of good

administration that the public authority should act fairly and implement its promise. See the as yet unreported judgment in the **CHAIRPERSONS' ASSOCIATION v MINISTER OF ARTS AND CULTURE** [2007] SCA 44 (RSA) p. 15 – 16 para 45 – 46. In summary, the respondents called for further information from the applicant and indicated that if such further information is received timeously, it will be considered when adjudicating upon the application by the relevant authority, but failed to consider relevant information timeously received. In our judgment this is manifestly procedurally unfair, as was properly conceded by counsel for the respondents. We conclude therefore that the decision to refuse the applicant's application for the prospecting right in question is fatally flawed by procedural unfairness. It follows that this decision must be set aside.

[19] In the papers the applicant asked for an order that the prospecting right applied for be granted by this Court. This claim was rightly not pressed by counsel for the applicant. This is certainly not an exceptional case within the meaning of section 8(1)(c)(ii) of PAJA. In our view the employment of

two counsel by the applicant was justified and the costs of 27 July 2006 should follow the result.

[20] In the result the following orders are made:

1. The decision to refuse the applicant's application for a prospecting right for diamonds and all minerals in respect of the remaining extent of the farm Bronkhorstfontein 438, situated in the magisterial district of Heilbron, is reviewed and set aside.
2. The application is referred to the first respondent or her delegate to be reconsidered in accordance with this judgment.
3. The respondents are ordered to pay the costs of the application, including the costs of 27 July 2006 and of two counsel.

A. KRUGER, J

C.H.G. VAN DER MERWE, J

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