THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 783/2013

Reportable

In the matter between:

BENGWENYAMA-YA-MASWAZI COMMUNITY	**First Appellant**
BENGWENYAMA-YA-MASWAZI TRIBAL COUNCIL	**Second Appellant**
MIRACLE UPON MIRACLE INVESTMENTS (PTY) LTD	**Third Appellant**
and	
MINISTER FOR MINERAL RESOURCES	**First Respondent**
SIZANE NKOSI	**Second Respondent**
NKOTOLA SAM NKOSI	**Third Respondent**
GENORAH RESOURCES (PTY) LTD	**Fourth Respondent**

Neutral Citation: *Bengwenyama-ya-Maswazi Community v Minister for Mineral Resources* (783/2013) [2014] ZASCA 139 (26 September 2014).

Coram: Navsa ADP, Brand, Shongwe & Majiedt JJA and Schoeman AJA

Heard: 22 August 2014

Delivered: 26 September 2014

Summary: **Competing applications for preferent community prospecting rights in terms of s 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 – consideration of whether corporate vehicle can be used by community to apply for such right – control of company by community discussed – traditional leadership structures considered – provisions of Traditional Leadership and Governance Framework Act 41 of 2003 examined – held that the corporate vehicle could rightly be said to be the community for the purposes of the MPRDA – held that appellants satisfied the qualifying criteria set out in the MPRDA and that the Tribal Council had an existence in law and that in the circumstances of the case it was the authoritative voice of the community – held that a minimum threshold shareholding satisfied the requirements of the MPRDA in relation to community benefit and control – held that concerns expressed by Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) not heeded by the Department and the respondents – held that decision to grant mineral rights in part to respondents liable to be set aside – held that substituted order justified.**

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance).

The following order is made:

1. The appeal is upheld.
2. The conditional cross appeal is dismissed.
3. The order of the court a quo is substituted with an order in the following terms:

'(i) It is declared that the Traditional Council of the Bengwenyama-ya-Maswazi Community is the only authorised representative of the first applicant in its dealings with the first respondent.

(ii) The prospecting right purportedly issued by the first respondent to the first applicant on 31 March 2011 is set aside.

(iii) The first respondent is directed to issue to the third applicant a full and exclusive prospecting right in respect of the property Nooitverwacht 324 KT against proof by the third applicant that it has amended its shareholders agreement by substituting the words "74.1 % (seventy four point one per cent)" for the words "70 % (seventy per cent)" in clause 12.2 of that shareholders' agreement.

(iv) The second to fourth respondents are ordered jointly and severally to pay the applicants' costs on the attorney and client scale including the costs of two counsel.'

4. The second to fourth respondents are ordered to pay 90 per cent of the appellants' costs of appeal on the attorney and client scale, including the costs of two counsel.
5. The fourth respondent is ordered to pay 90 per cent of the appellants' costs of the cross appeal on the attorney and client scale, including the costs of two counsel.

JUDGMENT

Navsa ADP (Brand, Shongwe & Majiedt JJA, Schoeman AJA concurring):

[1] This is one of two related appeals involving contested claims for preferent prospecting rights to be afforded a community under section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). The community in question is the Bengwenyama-Ya-Maswazi Community (the BYMC or the community). This case concerns prospecting rights on the farm Nooitverwacht (Nooitverwacht) in Sekhukhuneland, Limpopo Province. The related appeal concerns prospecting rights on the farm Eerstegeluk (Eerstegeluk), Limpopo Province. The two appeals were heard together. There is a degree of overlap and what is stated in the one judgement will largely apply to the other. Where there is a distinction it will be explicitly stated and dealt with. The core question in both appeals is as follows: Who is entitled to represent the BYMC in applying for and holding the prospecting right in question? Put differently, and perhaps a little more accurately, in respect of the present dispute: Is it competent, in terms of s 104 of the MPRDA, for a company to apply for and be awarded a preferent community prospecting right? This involves a consideration of whether, for the purposes of the MPRDA, the third appellant, Miracle Upon Miracle (Pty) Ltd (MUM), can be considered to be a community. An allied question is whether the second appellant, the Bengwenyama-Ya-Maswazi Tribal Council (the Tribal Council), which was the driving force behind the application by MUM, has statutory underpinning. Put differently, the question is whether the Tribal Council exists in law and, if the answer is in the affirmative, whether it can be considered to be the authoritative voice of the BYMC. A further question, the answer of which depends on the answers to those aforementioned, is whether the BYMC exercises sufficient control over MUM to ensure that the prescripts of s 104 of the MPRDA are met. More particularly, whether the benefits contemplated in

affording the preferent prospecting right will result in real and tangible benefits for the BYMC.

[2] There was preceding litigation involving the Tribal Council and the first and fourth respondents, the Minister for Mineral Resources (the Minister) and Genorah Resources (Pty) Ltd (Genorah) respectively, which culminated in the judgment of the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC). In that case, a decision in 2006 by the Minister to grant Genorah prospecting rights on the two properties involved in the present appeals, namely Nooitverwacht and Eerstegeluk, was set aside. The basis for that order by the Constitutional Court was that there had been a lack of consultation with the BYMC and there had been a failure by the Minister to provide the appellant company in that case, which at the time purported to represent the BYMC's interests, with an opportunity to make an application for a preferent prospecting right. I shall say more about that case and the parties' respective contentions in relation thereto. The background to the present dispute is set out hereafter.

[3] During November 2010, in anticipation of a favourable outcome in the Constitutional Court case referred to in the preceding paragraph, applications for a preferent community prospecting rights in respect of both Nooitverwacht and Eerstegeluk were prepared at the instance of the Tribal Council, using a corporate vehicle, namely MUM. The applications were then submitted on the same day that the Constitutional Court handed down its judgment. The applications were in MUM's name and were purportedly brought in terms s 104(1) of the MPRDA, which reads as follows:

'Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.'

[4] Despite MUM's application for an exclusive preferent community prospecting right the Minister chose, in respect of Nooitverwacht, to award 'the Community' a 50 per cent share in the prospecting right alongside MUM. The Minister's Department, on the other hand, issued a prospecting right to 'the Bengwenyama-Ya-Maswazi Community' and made it subject to an agreement in terms of which Genorah would play a major role. The second and third appellants are adamant that the Minister and her Department acted in this manner because Dr Sizane Nkosi, a medical practitioner, and Mr Nkotola Sam Nkosi, the second and third respondents respectively, with the full knowledge of Genorah, fraudulently procured the prospecting right by holding out that they represented the Bengwenyama-Ya-Maswazi Royal Council as well as the Tribal Council. In addition, the second and third appellants claimed that there was an improper relationship between Genorah and the Minister's Department. The relevant part of the document in terms of which the preferent prospecting right was granted by the Department reads as follows:

'In the furthering of the objects of this Act, the Holder is bound by, where applicable, the provisions of an agreement or arrangement dated 20th December 2011 entered into between the Holder/empowering partner and Bengwenyama-Ye-Maswati (70%) and Genorah Resources (Pty) Ltd (30%) (the empowerment partner) which agreement or arrangement was taken into consideration for purposes of compliance with the requirements of the Act and or Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right.'

[5] Significantly, it is unchallenged that the Minister communicated the decision to award the preferent community prospecting right in respect of Nooitverwacht, in the terms referred to in the preceding paragraph, inter alia to MUM, which in its application made no reference to, nor in fact wanted to be involved in any relationship with Genorah in relation to the prospecting right, or indeed in respect of anything else. This is particularly so because of the preceding litigation culminating in the Constitutional Court judgment referred to above, which had a long, troubled and antagonistic history. As can be seen from what is set out above, Genorah's application that was set aside by the

Constitutional Court was made several years before the application presently in contention.

[6] Following on the grant by the Department of the prospecting right in the terms set out in paragraph 4, representations were made to the Minister by the Tribal Council and MUM to have the prospecting right granted to MUM exclusively. The Department refused to accede to a request by the Tribal Council and MUM for the latter to be afforded the exclusive preferential prospecting right. It is that refusal that led to applications by the three appellants in the North Gauteng High Court for an order:

(i) declaring the Tribal Council to be the only authorised representative of the Community in its dealings with the Minister and the Department;

(ii) preventing Dr Nkosi and Mr Nkosi from continuing fraudulently to pass themselves off as proper representatives of the Community; and

(iii) providing the Department with a clear directive that it should deal with the first applicant and its chosen representatives in relation to the prospecting rights of the Community over Nooitverwacht.

[7] Furthermore, the appellants sought an order that an exclusive and undivided prospecting right over Nooitverwacht be awarded to MUM, which they assert is the vehicle through which the Tribal Council had elected to exercise the prospecting rights. In addition, an order was sought setting aside the prospecting right purportedly issued by the Department to 'the Community' in the disputed terms set out above. In essence, what was sought was an order reviewing and setting aside the decision of the Minister to award the Nooitverwacht prospecting rights jointly to the BYMC and MUM or to 'the Community' and substituting that decision with a decision to award the sole prospecting rights over Nooitverwacht to MUM.

[8] The following can be distilled from the affidavits filed on behalf of the appellants. First, an application for an exclusive prospecting right in terms s 104 of the MPRDA was made by MUM, in which the Community is the majority shareholder. The applications for preferent prospecting rights on both Nooitverwacht and Eerstegeluk were brought in MUM's name, subsequent to the favourable judgment by the Constitutional Court in the case referred to earlier. As will become apparent, the extent of the community's shareholding in MUM is material, and will be dealt with later in this judgment.

[9] Second, the application was brought with the full support of the Community and its leadership structures. In substantiation, it was pointed out that the Community's Royal Council passed a resolution in favour of the application using MUM as a vehicle, as did the Tribal Council. It is common cause that the Royal Council is a community structure which has an advisory role. Twenty nine of the 30 members of the Tribal Council supplied confirmatory affidavits in relation to the resolution referred to above.

[10] Third, there was extensive community consultation by the Tribal Council in relation to the application for a preferent prospecting right on behalf of the Community. In this regard, a great deal of detail is supplied by the Tribal Council and MUM, the essence of which was not seriously challenged by the second, third or fourth respondents.

[11] Fourth, in order to procure a preferent community prospecting right, Dr Nkosi and Mr Nkosi, whom the appellants referred to as impostors, together with Genorah, supplied a number of documents to the Department in which the impression was created that *their* application was sanctioned by legitimate and representative community structures. So, for example, they fraudulently furnished a shareholders' agreement in support of their application which purported to be one by an entity interchangeably described as the Tribal Council or Traditional Council. In support of that

application, which purported to be one by the Community, a 'Subscription and Shareholders' Agreement' was provided which claimed to be one involving 'the Bengwenayama-Ye-Maswati Tribal Council', 'Genorah Resources (Pty) Ltd' and 'Nkosi Platinum (Pty) Ltd'. Clause 2.2 of that agreement provided that Nkosi Platinum would 'become the corporate entity by means of which, the Bengwenyama-Ye-Maswati Traditional Community shall exercise all its rights under the provisions of section 104 of the MPRDA'. Clause 5.1 of the agreement contained two suspensive conditions:

'5.1.1 Bengwenyama-Ye-Maswati Traditional Community obtains a preferent right to prospect under the provisions of section 104 of the MPRDA.

5.1.2 Genorah Resources (Pty) Ltd becomes the technical and financial partner in relation to the preferent right referred to in 5.1.1.'

On the last page of what the Tribal Council and MUM describe as the fraudulent agreement, it was signed by Dr Nkosi on behalf of 'Bengwenyama-Ye-Maswati Traditional Council'.

[12] Furthermore, the 'impostors' attached a document in support of their application, entitled 'Genorah Resources (Pty) Ltd', purporting to provide information about Genorah and in which the following statements are made:

'Genorah Resources is a Black owned South African company with a broad base of South African shareholders which include Local Tribal Authorities in the Limpopo province and the Women's Agricultural Association.

. . .

Genorah Resources *supports the legitimate Tribal Structures* in the areas that they are prospecting and in favor of creating sustainable opportunities for equity participation by all its communities.' (My emphasis.)

This document is admitted and strikingly, neither the second, third or fourth respondents in their answering affidavits provide a more precise description or explanation of the

Tribal Authorities referred to, nor do they provide further details of the 'legitimate Tribal Structures' that they refer to.

[13] In yet another document attached to the application of the 'impostors' is a document entitled 'Strategy for Rural and Community Development and Upliftment' which, on its very first page, creates the impression that the application has the approval of the Royal Council. Genorah's response to the allegations that this document, like the others, is part of the fraudulent scheme by the 'impostors' is telling:

'As appears from paragraph 141 of the second and third respondents' answering affidavit, they allege that they do have the support of members of the royal council. I again point out that although references are made repeatedly in the founding affidavit to the "tribal council", the royal council and the traditional council, and although it is evident that there was a level of confusion regarding the legal status of these various bodies, it is evident that everything done by the second and third respondents was done by them for and on behalf of the Bengwenyama community and resulted in the award of prospecting rights, not to the second and third respondents, but to the Bengwenyama community as principal for whom they acted, as agent.'

[14] Dr Nkosi and Mr Nkosi for their part, in their answer to the appellant's allegations concerning their fraudulent behaviour and without providing the details and specifics that are supplied on behalf of the second and third appellants, say in general terms that they have the support of the Royal Council.

[15] In similar vein, so say the Tribal Council and MUM, the 'impostor' applicants made a presentation to the Department in support of their application for a preferent community prospecting right. The following appears on the second page in large font and in bold:

'**BENGWENYAMA – YE – MASWATI**

ROYAL COUNCIL

BENWENYAMA-YE-MASWATI TRIBAL COUONCIL

in partnership with

GENORAH RESOURCES (PTY) LTD

Application for a Preferent Right to Prospect in terms of Section 104 of the MPRDA, 2002

(Act 28 of 2002) on the Farms:

- **Eerste Geluk 327KT** (Portion 2 and Remaining Extent)
- **Nooitverwacht 324KT** (Portion 1 and 2);

Greater Tubatse Municipality, Sekhukhune Region, Limpopo Province'

[16] In his response to the first and second appellants' charge that this document was part of the fraudulent scheme, Dr Nkosi, once again without relying on any specifics or decisions by the Royal Council, reiterates that he has its support. Inter alia, he said the following about the reference in the document to the Tribal Council:

'144.6 . . . As far [as] a reference to Bengwenyama-Ye-Maswati Tribal Council is concerned this was an error which I would have rectified if I had seen it prior.

144.7 The application was at all times a community application.'

[17] Likewise, in an environmental management plan the 'impostors' submitted in support of their application, the applicant is indicated as follows:

'Bengwenyama-Ye-Maswati Royal Council and Traditional Council.'

Under the heading 'Biographic Details of the Applicant', the full name of the Applicant for the prospecting right was supplied as follows:

'Bengwenyama-Ye-Maswati Royal Council and Traditional Council.'

Importantly, under the heading 'UNDERTAKING' which appears in capital, large font and in bold the following is stated:

'I, Dr S. Nkosi, on behalf of the applicant (Bengwenyama-Ye-Maswati Royal Council) for a Preferent / prospecting Right hereby declare that the above information is true, complete and correct. I undertake to implement the measures as described in Sections F and G hereof. I understand that this undertaking is legally binding and that failure to give effect hereto will render me liable for prosecution in terms of Section 98 (b) and 99(1)(g) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002). I am also aware that the Regional Manager may, at any time but after consultation with me, make such changes to this plan as he/she may deem necessary.'

[18] Dr Nkosi's response to that document is the same as his earlier responses. I return to the other material assertions on behalf of the appellants.

[19] Fifth, the 'impostors' knew they had no authority to represent the Community or the Tribal Council and that Genorah must have been aware of the fact, particularly since the machinations resorted to by the 'impostors', in collusion with Genorah, occurred shortly after the decision by the Constitutional Court case referred to above, from which it is clear that it would be unlikely for the Community or the Tribal Council to be involved with Genorah. Put succinctly, the suggestion by the Tribal Council and MUM is that the application by the 'impostors' was opportunistic and was a blatant attempt to circumvent the Constitutional Court judgment.

[20] Sixth, the Department unquestioningly accepted the application of the 'impostors' and Genorah. The Tribal Council and MUM accused the Department of having an improper relationship with Dr Nkosi, Mr Nkosi and Genorah, which they say is evident from documentation produced, with the obvious assistance of Genorah for the Australian Securities Exchange, after the Constitutional Court case referred to above,

indicating clearly that they expected their impugned application to be fast-tracked by the Department and for it to be granted.

[21] Seventh, the 'impostors' failed to consult with the recognised leadership structures within the Community, and any consultations they assert they were involved in with the Community in general, were, in contradistinction to the consultation by the Tribal Council and MUM, at best, cursory and negligible. Such details as are provided by Dr Nkosi, Mr Nkosi and Genorah concerning a community consultation process pale into insignificance when compared to what was asserted by the Tribal Council and MUM regarding *their* consultative efforts.

[22] Eighth, despite trenchant criticism of the Minister and his department by the Constitutional Court in the earlier case concerning their treatment of the Bengwenyama-Ya-Maswazi Community and its then corporate vehicle, Bengwenyama Minerals (Pty) Ltd, the Department's behaviour continued unabated, to the detriment of the BYMC in the present case. In this regard, at para 73 of the Constitutional Court judgment the following appears:

'It seems to me that these provisions of the Act create a special category of right for these communities, in addition to their rights as owners of the land, namely to apply for a preferent right to prospect on their land. It is only where a prospecting right has already been granted on communal land that the preferent right may not be granted. It therefore appears to me that any application for a prospecting right under s 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under s 104 of the Act, materially and adversely affects that right of a community. Before a prospecting right in terms of s 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 s 104 prior to a decision being made on the s 16 application.'

[23] The Tribal Council and MUM allege that the Department continued to treat them abysmally, despite numerous attempts by them to engage the Department in discussion. I interpose to state that the Department, notwithstanding the emphatic attack on its integrity and modus operandi by the Tribal Council and MUM, chose not to participate in the present litigation – an aspect to which I will revert in due course.

[24] At this stage, it is necessary to consider the bases of Dr Nkosi, Mr Nkosi and Genorah's opposition to the application by the Tribal Council and MUM for the orders set out in para 6 above. First, they denied that the first appellant, described as the Bengwenyama-Ya-Maswazi Community, has any existence or capacity in law. This probably flows from the amorphous nature of that description. It is necessary to record that before us, counsel on behalf of the Tribal Council and MUM accepted that the first appellant, as described, is an amorphous entity and that it could rightly be said that the description of the first appellant begs the question that falls for consideration and determination in the two appeals. Counsel conceded that we could discount considering the first appellant as a party to the litigation but insisted that this should in no way detract from the second and third appellants' case. Second, they denied that the Tribal Council has an existence as a legal person. This means that the Tribal Council's capacity to litigate was brought into question. Third, the nature and extent of the Tribal Council's authority to determine the affairs of the BYMC to the exclusion of others is implicated. Fourth, MUM's standing to be awarded a community preferent prospecting right in terms of s 104 of the MPRDA was challenged. The question arises whether the qualifying criteria set out in s 104(2) were met by MUM. Fifth, whether the substituted order sought was competent. Lastly, whether the Tribal Council and MUM provided a sustainable basis for setting aside the award of the prospecting right in the terms referred to in para 7 above.

[25] Not content merely to resist the relief sought by the Tribal Council and MUM, Genorah resorted to a counter application in terms of which it sought, inter alia the following orders:

'1. Declaring that –

1.1 The third applicant, Miracle Upon Miracle Investments (Pty) Ltd, is not a "community" as defined for purposes of section 1 and 104 of the Mineral and Petroleum Resources Development Act, 28 of 2002 ("the MPRDA");

1.2 The grant to the third applicant, of a preferent right to prospect under section 104 of the MPRDA, is *ultra vires* the provisions of section 104 of the MPRDA read with section 1 thereof;

2. To the extent necessary, reviewing and setting aside the decision of the first respondent, the Minister for Mineral Resources ("the Minister"), to grant to the third applicant a preferent right to prospect over the farm Nooitverwacht, which decision was taken by the first respondent on or about 28 February 2012;

3. In the event of the above honourable Court declining to grant the relief sought in prayers 1 and 2 above and upholding any of the applicants' claims to relief under the Notice of Motion dated 12 October 2011, reviewing and setting aside the decision of the Minister, taken on or about 28 February 2012, in which the Minister granted jointly to the third applicant and to the Bengwenyama Ye Maswati Community a preferent prospecting right, in accordance with section 104 of the MPRDA, for a period of five years in respect of the farm Nooitverwacht 324 KT; . . . .'

[26] The high court (Makgoka J) did not pause to consider the Tribal Council's status as a legal person. It was content to conclude that the BYMC does not necessarily speak with one voice and ultimately concluded that it could not come to the assistance of the Tribal Council and MUM, as they had failed to establish that the latter was the sole representative of the community in matters concerning the award of prospecting rights on the farm. The high court considered the provisions of ss 104(2)(*a*)-(*c*) of the MPRDA, which outline certain preliminary issues to be considered in the grant of a preferent right, and which read as follows:

'(*a*) the right shall be used to contribute towards the development and the social upliftment of the community;

(*b*) the community submits a development plan, indicating the manner in which such right is going to be exercised;

(*c*) the envisaged benefits of the prospecting or mining project will accrue to the community in question; . . . .'

[27] The high court then concluded that it could see nothing wrong in principle with the Minister's decision to award the prospecting right jointly to MUM and 'the community'. Makgoka J, at para 19 of his judgment, stated the following:

'If the applicants' position that the community controls MUM is sustainable, there should not be any difficulty in accepting the Minister's decision. It should be borne in mind that the Minister's decision is not dependent on anything else other than the considerations referred to [in] s 104(2), key among which, is clearly the benefit of the community from the exploitation of its natural resources. It is not about commercial enterprises like MUM or Genorah. In short, the fact that the community has decided to pursue its application for prospecting rights through a corporate vehicle, does not divest the Minister of her obligations to ensure that the objectives of the Act are realised when prospecting rights are awared.'

[28] In respect of the Tribal Council's allegations concerning the 'impostors', the court below readily accepted the *ipse dixit* of Dr Nkosi and Mr Nkosi that the agreement involving Genorah was authorised by the Community and it was satisfied that they had the mandate of at least a section of the community to pursue a s 104 application on their behalf. Makgoka J did, however, accept that on the face of it, Dr Nkosi did not have the mandate of the Traditional Council in whose name the agreement was signed, but concluded that it did not detract from the fact that a sizeable number of community members entrusted him with that mandate.

[29] Insofar as the Minister's lack of participation in the litigation was concerned, Makgoka J noted that it was regrettable that the Minister took no part, leaving some room for a measure of speculation. He stated that the court could have benefited from the Minister's participation, but concluded that it appears from the terms of the prospecting right that the interests of the community weighed heavily with the Minister and the Department in their decision. Notwithstanding the Minister's lack of participation, the court below held that the Minister was correct in awarding the prospecting rights to MUM *and* the Community, particularly because there were divisions within the latter.

[30] Makgoka J considered community shareholding in respect of the corporate entities, namely, MUM and Genorah, to be essential. He thought it worth mentioning that the shareholding agreement involving Genorah provided for 70 per cent of the shares to be held by the community whilst MUM afforded the community only 51 per cent. Makgoka J dismissed the application by the Tribal Council and, in respect of Genorah's counter application, concluded that there was 'simply no merit' to it. He took the view that the Constitutional Court, in the judgment referred to above, had recognised the right of the community to pursue its own application through the use of a corporate vehicle. He went on to reason that in an application for a preferent community prospecting right, the community has to show that it has the technical and financial resources to pursue the right to its conclusion. He consequently dismissed the counter application.

[31] It is against those orders that the present appeal by the Tribal Council and MUM and the cross-appeal by Genorah are directed.

Legitimacy/Standing of the Tribal Council

[32] Since the application by MUM was driven by the Tribal Council, I consider the question of its legitimacy the proper place to start answering the questions posed in the present appeal. Historically, by means of individual proclamations, 774 traditional authorities (previously referred to as tribal authorities) were established for traditional communities with the geographical jurisdiction of each being specifically defined. Traditional leaders were appointed by the apartheid government and subsequently by homeland governments. This was the position when the Black Authorities Act 68 of 1951 was made applicable to South Africa in its entirety. This appears to a large extent still to be the legislative context pertaining to traditional leadership and institutions in our country.[1] It appears to be generally accepted that this type of recognition of traditional leadership was an attempt by colonial and apartheid governments to manipulate and control the institutions of traditional leadership. The Traditional Leadership and Governance Framework Act 41 of 2003 (the TLGFA) provides for the recognition of traditional communities, traditional councils and leadership. It is in line with ss 211 and 212 of the Constitution. Section 211 provides:

'(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically dealt with customary law.'

Section 212 reads as follows:

'(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

[1] NJJ Olivier, J Church, RB Mqeke, JC Bekker, L Mwambene, C Rautenbach & W du Plessis 'Indigenous Law' in Joubert *LAWSA* vol 32 (2 ed, 2009) para 14.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –

(*a*) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(*b*) national legislation may establish a council of traditional leaders.'

[33] Section 2 of the TLGFA is of importance and stipulates:

'(1) A community may be recognised as a traditional community if it –

(*a*) is subject to a system of traditional leadership in terms of that community's customs; and

(*b*) observes a system of customary law.

(2)(*a*) The Premier of a province may, by notice in the *Provincial Gazette*, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, recognise a community envisaged in subsection (1) as a traditional community.

(*b*) Provincial legislation referred to in paragraph (*a*) must –

(i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and

(ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.

(3) A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by –

(*a*) preventing unfair discrimination;

(*b*) promoting equality; and

(*c*) seeking to progressively advance gender representation in the succession to traditional leadership positions.'

[34] Section 3 of the TLGFA reads as follows:

'(1) Once the Premier has recognised a traditional community, that traditional community must establish a traditional council in line with principles set out in provincial legislation.

(2)(*a*) A traditional council consists of the number of members determined by the Premier by formula published in the *Provincial Gazette*, after consultation with the provincial house, in accordance with the guidelines issued by the Minister by notice in the *Gazette.*

(*b*) At least a third of the members of a traditional council must be women.

(*c*) The members of a traditional council must comprise –

(i) traditional leaders and members of the traditional community selected by the senior traditional leader concerned who is an *ex officio* member and chairperson of the traditional council, for a term of five years aligned with the term of office of the National House of Traditional Leaders, in terms of that community's customs, taking into account the need for overall compliance with paragraph (*b*); and

(ii) other members of the traditional community who are democratically elected for a term of five years aligned with the term of office of the National House of Traditional Leaders and who must constitute 40% of the members of the traditional council.

(*d*) Where it has been proved that an insufficient number of women are available to participate in a traditional council, the Premier concerned may, in accordance with a procedure provided for in provincial legislation, determine a lower threshold for the particular traditional council than that required by paragraph (*b*).

(3) The Premier concerned must, by notice in the *Provincial Gazette* and in accordance with the relevant provincial legislation, recognise a traditional council for that traditional community within a defined area of jurisdiction.'

The Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act), in the case of the BYMC, is the envisaged provincial legislation. Section 3(1) of the

Limpopo Act contemplates that a community envisaged by s 2(1) of the TLGFA may apply to the Premier in writing for recognition as a Traditional Community.

[35] It was submitted on behalf of Genorah and Dr Nkosi and Mr Nkosi that within the TLGFA and the Limpopo Act there is no entity such as a Tribal Council, which is the description of the second appellant. The Tribal Council and MUM's response to this assertion is that it is merely a case of imprecise nomenclature. It was pointed out that, as recorded in the Constitutional Court's *Bengwenyama* judgment, the Community has lived on Nooitverwacht for more than a century. It asserted that it has always functioned as a 'Traditional Council' as contemplated by the TLGFA and the Limpopo Act and that it has at all material times operated with the recognition of the Limpopo Provincial Government as the BYMC's Traditional Council, and that it is chaired by the Regent. What is unchallenged is that the BYMC has maintained its status as a traditional community.

[36] The respondents asserted that in order for a traditional council as envisaged in the legislation to be established, the prescripts of s 2(2)(*a*) of the TLGFA set out above must be observed. More particularly there must be a notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial House of Traditional Leaders, the community concerned, and if applicable, the king or queen under whose authority the community would fall. None of this, they contend, has occurred. The submissions on behalf of the respondents failed to take into account s 28 of the TLGFA, which deals with transitional arrangements. Subsections 28(1)-(4) provide:

'(1) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.

(2) A person who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity or as a deputy, is deemed to have been recognised or appointed as such in terms of section 13, 14 or 15, as the case may be.

(3) Any "tribe" that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional community contemplated in section 2, subject to –

(*a*) the withdrawal of its recognition in accordance with the provisions of section 7; or

(*b*) a decision of the Commission in terms of section 26.

(4) A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.'

[37] In their replying affidavit, the Tribal Council and MUM stated that, within the BYMC, the authoritative body that spoke on behalf of the community was always known as the Tribal Council. In this regard, they refer to the manner in which the 'impostors' and Genorah themselves used the expressions 'Tribal Council' and 'Traditional Council' interchangeably. On behalf of the Tribal Council it was pointed out that it was established and recognised as the Bengwenyama-Ya-Maswazi-Elulu Tribal Authority (later re-named the Traditional Authority) on 26 June 1964, in terms of s 2 of the Black Authorities Act 68 of 1951 and that Chieftainess Alice Namawene Nkosi was recognised as the traditional leader of the community. In substantiation, reliance was placed on GNR 948 of 26 June 1964 in terms of which the Bengwenyama Tribal Authority was to comprise, in addition to the Chief of the tribe, not less than 15 and not more than 21 councillors.

[38] According to the Tribal Council, councillors together with the Chieftainess continued to tend to the affairs of the community. In 1982 a new Kgosi was appointed and officially recognised. So, the Tribal Council stated, that when the TLGFA came into force on 24 September 2004, the BYMC, in terms of s 28 of that Act, continued to enjoy the recognition it had been afforded earlier. Section 3(2) of the TLGFA, set out in para 34 above, which seeks to ensure that governance of traditional communities is progressively in line with constitutional prescripts, dictates measures to ensure a degree of democratic elections to traditional councils as well as increasing gender representivity. Section 28(4) of the TLGFA, set out above, makes it mandatory for those measures to be implemented within seven years of the commencement of that Act. The Tribal Council and MUM insist that those measures have been taken within the stipulated timeframe. Unsurprisingly, no opportunity was sought by and on behalf of Genorah and Dr Nkosi and Mr Nkosi to counter any of these factual assertions.

[39] I agree with the submissions made on behalf of the Tribal Council and MUM that the former's description does not detract from the fact that it is a constitutional and statutorily established institution. Section 4 of the TLGFA sets out the functions of a traditional council, which principally is to administer the affairs of the traditional community in accordance with custom and tradition. In terms of s 4(1)(*g*) a traditional authority has the function of 'participating in development programmes of municipalities and of the provincial and national spheres of government'. In terms of s 4(1)(*h*) a traditional council is empowered to promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery. As pointed out in *Lawsa* above para 14, customary institutions such as the Royal Council and general meetings of the community have by and large remained intact within traditional societies, notwithstanding the absence of legislative sanction. Section 10 of the Limpopo Act renders a traditional council responsible for liaising with other organs of state in relation to a community's interests and affairs. That Act also makes clear that property vested in a traditional community is controlled by that community's traditional council, by stipulating that:

‘24. Funds of a traditional council consists of –

. . .

(*c*) all monies derived from any property in possession of the traditional community concerned; . . . .’

[40] Having regard to the legislative underpinning referred to above, and to the extensive community consultation process the appellants demonstrated that they had embarked upon, in relation to the circumstances of this case I can hardly think of a more authoritative voice for the community than the Tribal Council. In my view the Tribal Council and MUM have demonstrated the Tribal Council’s *de facto* existence for a century and have proven its legal existence for much of that time.

Legislative framework underpinning preferent prospecting rights

[41] I turn to a consideration of s 104 of the MPRDA as the background against which MUM’s competence to apply for a preferent community prospecting right is to be adjudicated. I reproduce s 104(1) here for ease of reference. It reads:

‘(1) Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.’

[42] Section 104(2) sets out the prerequisites for the grant of such a right. It reads as follows:

‘(2) The Minister must grant such preferent right if the provisions of section 17 or 23 have been complied with: Provided that –

(*a*) the right shall be used to contribute towards the development and the social upliftment of the community;

(*b*) the community submits a development plan, indicating the manner in which such right is going to be exercised;

(*c*) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and

. . .

(*e*) section 23(1)(*e*) and (*h*) is not applicable.'

[43] Section 17(1)(*a*) of the MPRDA, in turn, provides, inter alia:

'(1) The Minister must within 30 days of receipt of the application from the Regional Manager, 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; . . . . '

[44] Likewise, ss 23(1)(*b*) and (*c*) of the MPRDA, which are specifically referred to in s 104, provide:

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

. . .

(*b*) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(*c*) the financing plan is compatible with the intended mining operation and the duration thereof; . . . .'

Whether MUM is entitled to exercise preferent prospecting rights

[45] Resorting to modern language, it was submitted on behalf of the Tribal Council and MUM, that in the real world of commerce and high finance, it was naïve to imagine that a traditional community would, without more, be able to raise sufficient finance and gather the required technical expertise in order to properly utilize a prospecting right. In order for a viable commercial enterprise to materialise, collaboration with commercial institutions is inevitable. It was pointed out that even the Constitutional Court in the *Bengwenyama* matter recognised Bengwenyama Minerals (Pty) Ltd as a legitimate vehicle through which the community could exercise the rights afforded in terms of s 104 and be granted preferent prospecting rights.

[46] In the present case, that objective was sought to be met by a resolution by the Tribal Council that MUM be the vehicle through which the application for a preferent prospecting right should be made. Whether the prescripts of ss 104(2)(*a*) to (*c*) have been met does in some measure depend on the degree of shareholding by the community in MUM and whether it is adequate to meet the envisaged objectives.

[47] That leads us to the issue pertinently raised on behalf of the respondents, namely that the MUM shareholders' agreement proves that the BYMC does not control the company and furthermore that, properly explored, such interest as the community has, can effectively be diluted to the point where it can be outvoted and the financial benefit accruing to it will be negligible. As I understand the submissions, it means not only that the BYMC does not exercise control over MUM, but that the shareholders' agreement has the effect that the prescripts of s 104(2)(*a*) to (*c*) of the MPRDA are not met.

[48] The MUM shareholders' agreement indicates that Nurinox (Pty) Ltd (Nurinox) holds 51 per cent of the shares in MUM and Atlantic Nominees (Pty) Ltd (Atlantic) 49

per cent. The sole shareholder in Nurinox is the BYMC. Superficially at least, the BYMC appears to be the majority shareholder. However, in respect of control and voting rights the following must be noted: First, both Atlantic and Nurinox are each entitled to appoint a maximum of three directors to the Board. Each director has a single vote. Resolutions are passed by simple majority vote. In the event that a majority is not obtained, the resolution shall be deemed to have failed. That notwithstanding, there are deadlock breaking mechanisms, namely that a matter shall then be put to the shareholders. In the event of a deadlock ensuing at that level, mediation is provided for.

[49] The respondents, in substantiation of their submissions referred to in para 47 above, point to clause 12.2 of the MUM shareholders' agreement, juxtaposed against clause 17.4. Clause 12.2 provides:

'12.2 Neither the Shareholders, nor the directors of the Company, as the case may be, shall be entitled to decide, resolve or act on any of the matter in Appendix 1 without the prior written consent of the Shareholders holding not less than 70 % (seventy percent) of the entire issued Share Capital of the Company.'

Clause 17.4 reads as follows:

'17.4 To the extent that the Issued Shares are at any time offered to the existing Shareholders of the Company. In accordance with clauses 17.3 and 17.4 above, the Parties undertake to ensure that HDSA's shall at all times hold:

17.4.1 at least 26% of the shares in the issued share capital of the Company, or;

17.4.2 the minimum percentage of shares in the issued share capital of the Company as stipulated in the Mining Charter and the MPRDA from time to time;

whichever percentage is the greater.'

[50] The Tribal Council and MUM contend that clause 12.2 ensures a veto right by the BYMC, which effectively means that it can block any resolution not in the BYMC's

interest. The respondents on the other hand contend that, since it is at least notionally possible in terms of clause 17.4 for the BYMC's shareholding to dilute to below 30 per cent, the safety measure in clause 12.2 contended for by the Tribal Council and MUM is effectively nullified.

[51] Recognising the submissions on behalf of the respondents set out in the preceding paragraph as presenting a legitimate concern, counsel on behalf of the Tribal Council and MUM suggested a substituted order in relation to clause 12.2 in the following terms:

'Directing the first respondent to issue to the third applicant a full and exclusive prospecting right in respect of the property Nooitverwacht 324KT against proof by the third applicant that it has amended its shareholders agreement by substituting the words "74.1% (seventy four point one percent)" for the words "70% (seventy percent)" in clause [12.2] of that shareholders' agreement.'

I believe this amendment adequately addressed the respondents' concerns, and safeguards the share-holding of the BYMC in MUM.

[52] It is now necessary to deal with one further submission on behalf of the respondents, namely that in adjudicating the question of MUM's entitlement to apply for a prospecting right in terms of s 104 of the MPRDA, this court should bear in mind an established principle, being that companies have an existence distinct from that of their shareholders. In this regard reliance was placed on *Goldberg NO v P J Joubert Ltd* 1960 (1) SA 521 (T), more particularly the following at 525C-D:

'It is therefore clear that in law neither the applicant as a shareholder in the respondent company, nor for that matter the respondent itself as the owner of all the shares in the subsidiary company which owns the manufacturing or producing business or undertaking, has any proprietary or legal interest in that business. If the business makes a profit, and if it is decided that the subsidiary should pay a dividend out of such profit to its shareholders, the

respondent company would become entitled to its due share of the dividend declared; of course in its case, it may be the whole dividend.'

[53] In my view the latter submission misses the point. The question must surely be whether, adopting a purposive approach, the BYMC can rightly be said to be applying for the preferent community prospecting right, in terms of s 104 of the MPRDA, through MUM? The Constitutional Court in *Bengwenyama*, after setting out the objects of the MPRDA, said the following in paras 30 and 31:

'When interpreting a provision of the Act any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is inconsistent with the object of the Act, and to the extent that the common law is inconsistent with the Act, the Act prevails.

In broad terms the Act seeks to attain its transformation and empowerment aims by making the State the custodian of the country's mineral and petroleum resources, and by placing control of the exploitation of these resources under the control of the State, acting through the minister. Various provisions in the Act then seek to give specific effect to the object of expanding opportunities in the industry to historically disadvantaged persons. Of particular relevance to this matter are the provisions giving preference in the consideration of applications for prospecting rights to historically disadvantaged persons and to communities who wish to prospect on communal land.'

[54] I agree that in the real world of high finance – in the present case billions of rands are required for a viable mining enterprise – one can hardly imagine a community such as the BYMC being able to engage in mining without the necessary technical and financial assistance that the MPRDA requires it to demonstrate. This fact was taken into consideration by the Minister and her Department. In my view, the Tribal Council and MUM have demonstrated that the BYMC has overwhelmingly endorsed an application for a prospecting right using MUM as a vehicle. That being so, and keeping in mind the context provided by the Constitutional Court as set out in the preceding paragraph, one is led to the compelling conclusion that the application in terms of s 104 by MUM is in

substance one by the BYMC. The Department was not averse to the use of MUM and at least engaged the Tribal Council concerning the extent of the community's shareholding.

[55] Of necessity, the acquisition by the BYMC of the necessary financial and technical assistance requires a certain quid pro quo, in the present case in the form of the shareholding by corporate entities as set out in the shareholders' agreement referred to earlier with concomitant participation rights.

[56] Insofar as control of MUM is concerned, it appears to me that the concerns about the BYMC being outvoted on major issues, or of share dilution to such an extent that it renders the community shareholding nugatory, are met by the proposed substituted order presented on behalf of the Tribal Council and MUM. This amended majority shareholding ensures that the prescripts of s 104(2) are met.

Conclusions

[57] To sum up, the Tribal Council has a legal existence and locus standi. On a conspectus of the evidence presented on behalf of the Tribal Council and MUM and detailed earlier in this judgment, and which remains largely unchallenged, it is clear that the Tribal Council should be considered to be the sole and authoritative voice of the BYMC. In my view, the opposing affidavits on behalf of Genorah and Dr Nkosi and Mr Nkosi are deliberately vague, even opaque and, to say the least, disingenuous. MUM, in the circumstances of the present case, was entitled to apply for and be granted a preferent community prospecting right. The BYMC interests are protected in the shareholders' agreement (in the suggested amended form) and the prescripts of s 104(2) of the MPRDA have been met.

[58] I am particularly concerned that dicta of the Constitutional Court in the prior *Bengwenyama* case were not heeded by Genorah and by the Minister and her Department in their conduct subsequent thereto. In that judgment, Froneman J was concerned, right at the outset, about the contemporary effects of past racially discriminatory laws. In para 3 of that judgment the following was stated:

'The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Mineral and Petroleum Resources Development Act (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land, and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral resources.'

[59] In respect of the conduct of the Department in relation to the prior *Bengwenyama* case, the Constitutional Court at para 74 said the following:

'The department was at all times aware that the community wished to acquire prospecting rights on its own farms. It gave advice to the community over a long period of time in this regard, to the extent of requiring better protection for the community in the investment agreement. It continued dealing with the community and Bengwenyama Minerals in relation to their application brought on prescribed s 16 forms without informing them of the fact that approval of that application would end their hopes of a preferent prospecting right. There is no explanation from the department for this strange behaviour. The department had an obligation, founded upon s 3 of PAJA, to directly inform the community and Bengwenyama Minerals of Genorah's application, and its potentially adverse consequences for their own preferent rights under s 104 of the Act. This obligation entailed, in the circumstances of this case, that the community and Bengwenyama Minerals should have been given an opportunity to make an application in terms of s 104 of the Act for a preferent prospecting right, before Genorah's s 16 application was decided. None of this was done.'

[60] There may be some force in the contention on behalf of the respondents that the prior *Bengwenyama* case was not dispositive of all the issues presently in contention as they were not pertinently raised, debated and decided in that matter. However, the Constitutional Court's concerns about land dispossession and redress and that communities deserved to be assisted to claim what is rightfully theirs cannot be discounted.

[61] I have already alluded to the Department's conduct in failing to heed the concerns of the Constitutional Court. Inexplicably, it compounded its reprehensible conduct by not taking the high court into its confidence and providing a basis for what can only be described as a startling decision to lump together two applicants and Genorah in the award of the preferent prospecting right, knowing full well the bitter battle that had ensued leading up to the *Bengwenyama* decision in the Constitutional Court. It is clear that the decision to award the prospecting right jointly, and including Genorah, meant that the Constitutional Court's concerns were not heeded and that the relevant issues of community consultation and authorisation were not properly considered. In addition, one is ineluctably drawn to the conclusion that the inclusion of Genorah and the lumping together of antagonistic parties was capricious. It also appears that the qualifying provisions of the empowering statute, namely s 104(2) of the MPRDA were not properly considered. Lastly, by grouping MUM with Genorah without affording the former and the Tribal Council an opportunity to make representations thereon, the Department acted in a manner that was procedurally unfair.

[62] Counsel on behalf of the Tribal Council and MUM, in understated fashion, submitted that he had given careful thought to the repeated allegations made by and on behalf of his clients of fraud on the part of Genorah and Dr Nkosi and Mr Nkosi, and that he ultimately considered them to be justified. In my view, the evidence presented on behalf of the Tribal Council and MUM referred to earlier in this judgment, demonstrates opportunistic and reprehensible behaviour on the part of those three respondents

calculated, in my view, to circumvent the concerns expressed by the Constitutional Court in the earlier *Bengwenyama* case. I would, however, stop short of labelling it fraudulent, but I nevertheless impose an appropriate costs order to show this court's displeasure at the manner in which they behaved. The submission made by counsel on behalf of Dr Nkosi and Mr Nkosi that, although he could not show approval by statutorily sanctioned tribal or customary institutions for the application submitted by them in the record, nor point to a resolution properly taken to show substantial community support even approximating that shown by the Tribal Council and MUM, his clients should at least be considered to have acted in the interest of the BYMC and not have to suffer the same fate of a punitive costs order, is without factual foundation or legal basis. On the contrary, as demonstrated above, they were an integral part of a contrived application; ostensibly on behalf of the BYMC, but not actually so. The contention on their behalf that they ought not to have been parties to the present litigation can also rightly be rejected, because of what is set out earlier in this paragraph.

[63] For all these reasons the impugned decision falls to be set aside.

[64] One final aspect now requires consideration, namely whether the application by MUM ought to be referred back to the Minister and her Department for consideration or whether the substituted order sought by the Tribal Council and MUM ought to be granted. It was submitted on behalf of Genorah and Dr Nkosi and Mr Nkosi that a decision on an application for a preferent community prospecting right is within the domain of the Minister and her Department, and that it is not for the court to arrogate to itself the right to make that decision. It is however clear in our law that where the original decision maker has, as in this case, twice exhibited bias or incompetence, the reviewing court can correct that decision itself.[2] Thus the order that follows does award that right to MUM, as per the intention of the recognised and legitimate representative of the BYMC.

[2] C Hoexter *Administrative Law in South Africa* 2ed (2012) at 555 and the core decisions there cited.

[65] In line with the conclusions referred to above, the appeal must succeed and the conditional cross-appeal must fail. Finally there is the question of the record being more extensive that it ought to have been. To his credit, counsel on behalf of the Tribal Council and MUM accepted that there should be a small percentage taken off the costs his clients would be entitled to.

[66] The following order is made:

1. The appeal is upheld.

2. The conditional cross appeal is dismissed.

3. The order of the court a quo is substituted with an order in the following terms:

'(i) It is declared that the Traditional Council of the Bengwenyama-ya-Maswazi Community is the only authorised representative of the first applicant in its dealings with the first respondent.

(ii) The prospecting right purportedly issued by the first respondent to the first applicant on 31 March 2011 is set aside.

(iii) The first respondent is directed to issue to the third applicant a full and exclusive prospecting right in respect of the property Nooitverwacht 324 KT against proof by the third applicant that it has amended its shareholders agreement by substituting the words "74.1 % (seventy four point one per cent)" for the words "70 % (seventy per cent)" in clause 12.2 of that shareholders' agreement.

(iv) The second to fourth respondents are ordered jointly and severally to pay the applicants' costs on the attorney and client scale including the costs of two counsel.'

4. The second to fourth respondents are ordered to pay 90 per cent of the appellants' costs of appeal on the attorney and client scale, including the costs of two counsel.

5. The fourth respondent is ordered to pay 90 per cent of the appellants' costs of the cross appeal on the attorney and client scale, including the costs of two counsel.

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MS NAVSA

ACTING DEPUTY PRESIDENT

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