THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 784/2013

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	
GENORAH RESOURCES (PTY) LTD	**First Respondent**
ROKA PHASHA PHOKWANE TRADITIONAL COUNCIL	**Second Respondent**
ROKA PHASHA COMMUNITY	**Third Respondent**
MINISTER FOR MINERAL RESOURCES	**Fourth Respondent**

Neutral Citation: *Bengwenyama-ya-Maswazi Community v Genorah Resources (Pty) Ltd* (784/2013) [2014] ZASCA 140 (26 September 2014).

Coram: Navsa ADP, Brand, Shongwe and Majiedt JJA & 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 – lack of present registered title not an impediment – community instituted a claim for land restitution – overwhelming probability that it will be granted and that land would be registered in its name – 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 to respondents rightly 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 cross appeal is dismissed.
2. The appeal is upheld.
3. The order of the Court a quo is substituted with an order in the following terms:

   '1. The decision taken by the fourth respondent on or about 28 February 2011 not to award exclusive prospecting rights in terms of section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), to the applicants in respect of the farm Eerstegeluk 327 KT is reviewed and set aside.

   2. The decision taken by the fourth respondent, to award prospecting rights over Eerstegeluk 327 KT to the first, second and third respondents in joint venture, in terms of s 104 of the MPRDA is reviewed and set aside.

   2.1 The decisions of the fourth respondent referred to in paragraphs 1 and 2 above is substituted with a decision awarding the third applicant exclusive prospecting rights in respect of the farm Eerstegeluk 327 KT.

   2.2 The fourth respondent is directed to issue to the third applicant exclusive prospecting rights in respect of the farm Eerstegeluk 327 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.

   3. The first and second respondents are directed jointly and severally to pay the costs of the applicants, including the costs of two counsel.'

4. The first and second respondents are directed jointly and severally to pay 90 per cent of the appellants' costs of the appeal and cross appeal, including the costs of two counsel.

JUDGMENT

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

[1] This is the second 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 communities in contestation are the Bengwenyama-Ya-Maswazi Community (the BYMC) and the Roka Phasha Community. This case concerns prospecting rights on the farm Eerstegeluk (Eerstegeluk), in Sekhukhuneland, Limpopo Province. The related appeal concerns prospecting rights on the farm Nooitverwacht (Nooitverwacht), in Sekhukhuneland, Limpopo Province. The two appeals were heard together. As stated in the judgment in the first related matter[1], there is a degree of overlap between the two appeals. Much of what is stated in that judgment applies to the present case. For a fuller appreciation of the background and the issues, the reader is urged to read the judgments in tandem.

[2] In the present appeal the three appellants, the BYMC, Bengwenyama-Ya-Maswazi Tribal Council (the Tribal Council) and Miracle Upon Miracle Investments (Pty) Ltd (MUM) on the one hand, and the second and third respondents, Roka Phasha Phokwane Traditional Council and Roka Phasha Community respectively, and Genorah Resources (Pty) Ltd (Genorah) on the other, are the contesting parties. As in the other

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

appeal, the Minister for Mineral Resources (the Minister) took no part in the litigation in the high court and before us.

[3] The core questions common to the two appeals are set out in para 1 of the judgment in the first appeal. I repeat them here:

'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.'

[4] In the present case the issue that arises pertinently is whether the Minister ought to have accepted the representations on behalf of the respondents that they were entitled, to the exclusion of the BYMC and MUM, to a preferent community prospecting right in relation to Eerstegeluk. This encompasses the question whether the high court erred in setting aside the award of the preferent prospecting right to the Roka Phasha Community.

[5] The additional question posed in the present appeal, the context of which will become clearer later in this judgment, is as follows: Does the fact that the Eerstegeluk

land is not registered in the name of the Tribal Council or MUM militate against the grant to them of a preferent community prospecting right in terms of s 104 of the MPRDA?

[6] There was preceding litigation involving the Tribal Council and the first and fourth respondents, the Minister and 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.

[7] It is, for present purposes, not necessary to deal with the antagonistic history between Genorah and the Tribal Council leading up to the judgment of the Constitutional Court in the first *Bengwenyama* case, save to state that neither the Roka Phasha Community nor Roka Phasha Traditional Council participated in that litigation, even though it concerned prospecting rights in relation to Nooitverwacht *and* Eerstegeluk.

[8] During November 2010, in anticipation of a favourable outcome in the Constitutional Court case referred to in the preceding paragraph, an application for a preferent community prospecting right in respect of both Nooitverwacht and Eerstegeluk was made at the instance of the Tribal Council, using a corporate vehicle, namely MUM.

The application was in MUM's name and was purportedly brought in terms of 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.'

[9] Subsequently, the attorneys representing the Tribal Council and MUM wrote to the Department, drawing its attention to what was said by the Constitutional Court in the prior *Bengwenyama* case in relation to its treatment of the BYMC. That letter also recorded the BYMC's right to be informed of competing applications for prospecting rights in regard to both Nooitverwacht and Eerstegeluk. Furthermore, the attorneys referred to a letter written by Nkwe, a corporate associate of Genorah, to the Australian Securities Exchange, indicating that an application for prospecting rights in respect of Nooitverwacht and Eerstegeluk in which they were involved would be fast-tracked. This, according to the Tribal Council and MUM, suggested that there was an improper relationship between Genorah and the Department and raised the spectre of bias. No response was ever received to that letter. Later, however, MUM was invited at short notice to make a presentation on its application for preferent community prospecting rights. That was however changed to enable a presentation at a later date.

[10] Before the presentation the Tribal Council and MUM fortuitously became aware of competing applications for preferent community prospecting rights in relation to Nooitverwacht and Eerstegeluk. In respect of the present dispute the applicable notice was the one that referred to an application for such a prospecting right by the Roka Phasha Community, in joint venture with Genorah. In the other notice there was a reference to an application by the BYMC which, according to the Tribal Council and MUM, they subsequently discovered was submitted by persons they described as 'impostors', who were cited as respondents in the related appeal and are dealt with in the judgment in that case.

[11] After becoming aware of the competing applications, the attorneys representing the Tribal Council and MUM wrote to the Department, seeking confirmation that the application submitted in the name of the BYMC was in fact theirs. The attorneys placed the objection by the Tribal Council and MUM to the application by Roka Phasha and Genorah on record. They reminded the Department that the Constitutional Court in *Bengwenayama* had considered the BYMC and its corporate vehicle in that case, Bengwenyama Minerals (Pty) Ltd, as the authorised community representatives and had accepted that the BYMC, for the purposes of s 104 of the MPRDA, was the owner of both properties. The attorneys stated the BYMC's desire to work with the Department and invited the Department to raise such concerns as they had with the BYMC, to enable the community to be heard on any material issue. Once again, no response was received.

[12] During the meeting, when the Tribal Council and MUM made their presentation of their application for the prospecting rights, representatives of the department gave them the assurance that they would be given an opportunity to respond to Departmental concerns. Significantly, the Department undertook to provide them with an opportunity to object to the competing applications. At that meeting it was made clear to the Tribal Council and MUM that the application ostensibly submitted in the name of the BYMC, was not the one submitted by them.

[13] What then followed was an exchange of correspondence between the attorneys for the Tribal Council and MUM and the Department, in an attempt by the former to obtain copies of the competing applications. Only extracts of the full competing applications were finally received. At a time when there was correspondence between the Department and MUM concerning a revised Environmental Plan in relation to their application for a prospecting right, the Minister refused MUM's application in respect of Eerstegeluk on the following basis:

'Your respective applications on the farm Eerste Geluk 327KT have been refused on grounds that your community is neither the registered land owner nor the occupier of the farm.'

The decision appears to have been taken during February 2011, but was only communicated to MUM on 18 April 2011, at a time when MUM was in the process of furnishing its revised Environmental Plan to the Department. The Tribal Council and MUM found this puzzling as the Department did not, during the earlier *Bengwenyama* case, contest their ownership of Nooitverwacht and Eerstegeluk.

[14] As stated in the judgment in the related appeal, the Minister awarded joint ownership of the prospecting rights in respect of Nooitverwacht to MUM and 'the Community' subject to an agreement involving Genorah, notwithstanding that no such joint application had been made and against the background of the antagonistic relationship culminating in the Constitutional Court judgment in *Bengwenyama*.

[15] On 20 April 2011 a press release was issued by Nkwe and the first and second respondents and the persons referred to as 'impostors' in the related appeal. It purports to have been issued by the 'Bengwenyama Ya Maswati and Roka-Phasha communities who occupy the Eerstegeluk and Nooitverwacht farms respectively'. It appears to have been issued to publicise the award of the prospecting rights under s 104 of the MPRDA over Eerstegeluk and Nooitverwacht to the second and third respondents and 'the Community'. The record of decision in relation to Eerstegeluk indicates that on 16 March 2011 the Minister granted preferent community prospecting rights over Eerstegeluk, purportedly in terms of s 104 of the MPRDA, to the 'Roka-Phasha Phkowane Tribal Council in Joint Venture with Genorah Resources (Pty) Ltd'.

[16] The events set out above were followed by the application in the high court, described in the related appeal In the application in the present case by the Tribal Council and MUM, an order was sought, inter alia, in the following terms:

'1. Reviewing and setting aside the decision taken by the fourth respondent on or about 28 February 2011 not to award exclusive prospecting rights in terms of section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("the MPRDA"), to the applicants in respect of the farm Eerstegeluk 327 KT.

2. Reviewing and setting aside the decision taken on a date unknown to the applicants by the fourth respondent, alternatively an official employed by the Department of Mineral Resources acting under authority delegated by the fourth respondent, to award prospecting right over Eerstegeluk 327 KT to the first, second and third respondents in joint venture, in terms of s 104 of the MPRDA.'

[17] It is common cause that Nooitverwacht and Eerstegeluk are registered in the name of the state. Genorah and the second and third respondents in the present case adopt the position that the Minister was correct to refuse the application by MUM for prospecting rights on Eerstegeluk due to the lack of registered title to the land. This, of course, ignores the fact that the Roka Phasha Community itself does not have registered title.

[18] I interpose to state that, because the Minister did not take part in the present or related litigation, the statements on behalf of the Tribal Council and MUM about their communications with the Department and the manner in which they were treated are unchallenged.

[19] In relation to Eerstegeluk, it is important to note that the Tribal Council and MUM supplied an affidavit by a historian, Professor Pieter Delius, setting out the BYMC's historical connection to the land. The BYMC moved onto Eerstegeluk in the 19th century and by 1913 they had been living there for many years, apparently cultivating crops. By 1913 the Bengwenyama chief, Shopiane, and over 1 000 of his followers were removed from Eerstegeluk and moved to Nooitverwacht which was dry, rocky land on a mountain slope. Notwithstanding their removal, a number of members of the BYMC remained on

Eerstegeluk as labour tenants and others who had earlier departed moved back. Several unsuccessful attempts were made by the BYMC over time to purchase the land or to acquire it in some other manner with the co-operation of the then Department of Native Affairs. During that time a number of government departments seemed sympathetic to the plight of the BYMC. Conversely, there appears to be no link between the Roka Phasha and Eerstegeluk before the 1970's. They appear to have been moved onto Eerstegeluk because the government thought it politically expedient. It was officially recorded at some stage that the BYMC had a historical claim to the land. In 1976 the Lebowa Land Allocation Committee recommended that Eerstegeluk 322 KT be transferred to the Bengwenyama-ya-Maswazi tribal authority, and the farm De Goedeverwachting be allocated to the Roka Phasha Phokwane. On 20 October 1989 in Government Notice R22 a strip of the farm Eerstegeluk adjacent to De Goedeverwachting was included in the area of the Roka Phasha Tribal Authority by the Lebowa government. On 10 May 1990 in Government Notice R.9 this was extended to include the whole of Eerstegeluk other than *'the 186 ha of land on which the GaMapodilla town and commonage is situated'.*

The BYMC challenged this and the Magistrate of Sekhukhuneland wrote:

'The Kgosi's complaint is justified. The tribe has been trying to get Eerstegeluk from long ago . . . They further added that on 8 October 1983 . . . the then Chief Minister of Lebowa . . . told them that their request for Eerstegeluk had not been forgotten.'

It is important to note that in respect of Professor Delius, no contradictory evidence was presented by the respondents.

[20] It appears from the results of a land survey commissioned by the Tribal Council and MUM that the Roka Phasha Community are confined to a strip of land on Eerstegeluk and are a very small minority in percentage terms, and further that the overwhelming majority of inhabitants of Eerstegeluk are members of the BYMC and regard the Tribal Council as their Traditional Authority. The respondents' opposition to

this evidence is that it was procured by a party allied and sympathetic to the Tribal Council and MUM.

[21] It is necessary to record that before December 1998 the BYMC lodged a land claim in terms of the Restitution of Land Rights Act 22 of 1994. In a memorandum of acceptance of the land claim by the Regional Land Claims Commissioner, the following appears under the title recommendations:

'8.1 It is therefore recommended that the claim be accepted as meeting the requirements of Section 2 of the Restitution of Land Rights Act, Act No 22 of 1994 as amended.

8.2 It is therefore recommended that the claim be published in the Government Gazette in terms of section 11(6) of the Restitution of Land Rights Act 22 of 1994.'

[22] Importantly, no competing land claim in respect of Eerstegeluk was lodged by the Roka Phasha Community or indeed by any other community.

[23] In summary, the following was the case on behalf of the Tribal Council and MUM: The BYMC was entitled to have a peferent community prospecting right awarded to its corporate vehicle, MUM, on the basis that the BYMC was the rightful owner and occupier of Eerstegeluk. The Department had ignored the directive by the Constitutional Court to be of assistance. The Minister was wrongly taken in by the representations on behalf of the respondents that they were entitled to the prospecting right. There was an improper relationship between the Minister's Department and the respondents. The Tribal Council and MUM were not afforded an opportunity to deal with the Department's concerns and with the merits of the competing application and the representations concerning ownership and occupation of Eerstegeluk. In the totality of the circumstances, the Tribal Council and MUM were entitled to an order by the court granting MUM the prospecting rights.

[24] In opposing the application, Genorah and the second and third respondents, as was done by Genorah and the respondents in the other related appeal, right at the outset challenged the locus standi of the first appellant, which is described as the Bengwenyama-Ya-Maswazi community. Likewise, the authority of the Tribal Council and its existence as a legal person was disputed on the same basis as was described in the judgment in the related appeal. Similar to the position adopted in the related appeal, MUM's entitlement to a preferent prospecting right and community control over the commercial vehicle was also brought into dispute. In this regard, the MUM shareholders' agreement was implicated and it was submitted that there is no protection for community interest in the shareholding scheme.

[25] As indicated earlier in this judgment, the respondents supported the basis for the Minister's rejection of the application by MUM, namely, that they did not have registered title. This appears at odds with a statement on their behalf in the answering affidavits that both the Roka Phasha and the BYMC are owners for the purposes of the MPRDA. In relation to the historical position the respondents did not effectively counter the evidence of Professor Delius. They regarded the official recognition of the Roka Phasha Traditional Authority on Eerstegeluk as legitimising their claim to the preferent community prospecting right. In respect of the land claim lodged on behalf of the BYMC they adopted the attitude that the Land Claims Commission will probably look to compensate the BYMC by providing alternative land. They contend that there is no evidence that a successful claim would result in restitution of the land to the BYMC.

[26] Makgoka J, who decided the matter in the court below, held that the BYMC had the necessary locus standi. In respect of MUM, the high court held that it was consistent with the objectives of s 104(2) of the MPRDA for a company to be used by a community to pursue prospecting rights. In that regard Makgoka J thought it significant that the Minister and her Department were satisfied that MUM was an appropriate vehicle for the

community to pursue its application for a preferent community prospecting right. The high court accepted the evidence of Professor Delius about the BYMC's historical connection to Eerstegeluk and that it comprised the overwhelming majority of Eerstegeluk's residents. In the view of the high court the Roka Phasha Community had no prospects whatsoever of being the owners of Eerstegeluk. Makgoka J reasoned that it was 'almost guaranteed' that the BYMC would be successful in its land claim.

[27] The high court considered the complaint on behalf of the Tribal Council and MUM that the respondents misrepresented their entitlement to Eerstegeluk to be justified. The departmental recommendation that the respondents' application for a preferent community prospecting right be granted was evidence of this, so the high court reasoned. In the view of the high court the Minister's reason for rejecting MUM's application, set out in para 13 above, is based on the false assertions by the respondents.

[28] At para 40 of the judgment of the high court, the following appears:

'It is clear that the decisions of the Minister to award preferent prospecting rights to Genorah and the Roka Phasha community, and to refuse the applicants' application for those rights, were based on errors of fact, and fall to be reviewed and set aside under sections 6(2)(a)(i), 6(2)(e)(iii) and 6(2)(f)(i) of PAJA.'

[29] The high court's next finding is the propulsion for the present appeal by the Tribal Council and MUM. The high court considered whether to remit the matter to the Minister or to substitute the Minister's decision with a decision by the court granting the prospecting right. At paras 44 and 45 of the judgment the following appears:

'I am reluctant to grant the prospecting rights, mainly for the two reasons. First, it is clear from the decision dismissing the application, that the applicants' application was really not considered. It was simply dismissed summarily on the basis that the community does not

occupy the farm and that it does not have title to the farm. It follows that the Minister and the department should be afforded an opportunity to apply their minds to the applicants' application in terms of s 104 of the Act.

Second, I am [uneasy] with MUM's shareholding agreement and whether, in its present form, the prospecting will meet the objectives of the Act, in particular s 104(2)(c), which requires the envisaged benefits of the prospecting or mining to accrue to the community in question. That would by necessity require a significant portion of the benefits accruing to the community, as opposed to commercial entities such as MUM and Genorah. The applicants contend that MUM is a corporate vehicle for the Bengwenyama community and that the community exercises ultimate control over MUM.'

[30] At para 50 the high court reached the following conclusion:

'For all these considerations, I am disinclined to award the prospecting rights to the community, and accordingly, I made the order referred to in paragraph 1 of this judgment.'

[31] Thus, the order made by the high court is as follows:

'1. The decision of the fourth respondent (the Minister for Mineral Resources) made on 28 February 2011 not to award to the applicants the exclusive prospecting rights in terms of section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 in respect of the farm Eerstegeluk 327KT, is reviewed and set aside;

2. The decision taken on an unknown date by the Minister, or an official employed by the Department of Mineral Resources, acting under the delegated authority of the Minister, to award prospecting rights over the farm Eerstegeluk 327KT to the first, second and third respondents in a joint venture, in terms of section 104 of the Act, is reviewed and set aside.

3. The first, second and third respondents are ordered to pay the costs of the application, such costs to include those consequent upon employment of two counsel.'

[32] As stated above, the appellants essentially appeal the decision of the high court not to grant MUM the exclusive preferent community prospecting rights itself. The respondents cross-appeal against the order of the court a quo, reviewing and setting aside the decisions of the Minister.

[33] I now turn to deal with the questions contemplated in para 3 above, in the order that they were addressed in the associated appeal.

The legal status of the first appellant

[34] Insofar as the first appellant, the Bengwenyama-Ya-Maswazi Community, is concerned, the respondents' denial of its existence or capacity flows from the amorphous nature of that description. As with the associated appeal 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.

Legitimacy/Standing of the Tribal Council

[35] 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.[2] 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.

(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.'

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

[2] 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.

‘(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.’

[37] 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.

[38] It was submitted on behalf of the respondents 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 and was dispossessed of Eerstegeluk in 1913, and has lodged a land claim for restoration. 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.

[39] 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) to (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.'

[40] According to the Tribal Council and MUM the former was always the authoritative body that spoke on behalf of the BYMC and was always known as the Tribal Council. 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.

[41] It was asserted by the Tribal Council that 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 37 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. There is nothing to gainsay that assertion.

[42] 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; . . . .'

[43] 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

[44] 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.'

[45] 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.'

[46] 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; . . . . ’

[47] 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 apply for preferent prospecting rights

[48] 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.

[49] In the present case, that objective was sought to be met by a resolution of 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.

[50] That leads us to the issue pertinently raised on behalf of the respondents, and which was a concern noted by Makgoka J when he refused to issue a substituted order 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 ss 104(2)(*a*) to (*c*) of the MPRDA are not met.

[51] 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.

[52] The respondents, in substantiation of their submissions referred to in para 24 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.’

[53] 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.

[54] 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.

[55] 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.'

[56] 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.'

[57] 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.

[58] 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.

[59] 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.

Lack of registered title to Eerstegeluk on the part of the BYMC

[60] Does the lack of registered title militate against the grant of a preferent community prospecting right to MUM? In the circumstances of this case, the short answer is no. Section 104 of the MPRDA contemplates that a prospecting right can be granted to a community in respect of land that either *is* registered or *to be* registered in the name of the community. In the present case, there is no indication of any result other than a successful land claim by the BYMC, with the land ultimately being registered in the name of the BYMC. There is no question on the record of alternative land being granted. The high court cannot be faulted for its conclusion that a successful land claim is 'almost guaranteed' with restoration and registration being the ultimate result.

Conclusions

[61] 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. 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.

[62] 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.'

[63] 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.'

[64] 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 to be assisted in claiming what is rightfully theirs, cannot be discounted.

[65] 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 exclude the BYMC, the Tribal Council and MUM on a basis it had accepted in the prior *Bengwenyama* case, namely title to Nooitverwacht and Eerstegeluk. Furthermore, it once more denied the Tribal Council and MUM an opportunity to be heard on that issue and on the competing application by the respondents. The Department did so knowing full well the bitter battle that had ensued leading up to the *Bengwenyama* decision in the Constitutional Court involving Genorah. The high court cannot be faulted for reviewing and setting aside the decision of the Minister to award the prospecting right to the respondents.

[66] 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 have been granted. It was submitted on behalf of the respondents 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, exhibited bias or incompetence, the reviewing court can

correct that decision itself.[3] Thus the order that follows does award that right to MUM, as per the intention of the recognised and legitimate representative of the BYMC.

[67] In line with the conclusions referred to above, the appeal must succeed and the 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.

[68] The following order is made:

1. The cross appeal is dismissed.

2. The appeal is upheld.

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

'1. The decision taken by the fourth respondent on or about 28 February 2011 not to award exclusive prospecting rights in terms of section 104 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), to the applicants in respect of the farm Eerstegeluk 327 KT is reviewed and set aside.

2. The decision taken by the fourth respondent, to award prospecting rights over Eerstegeluk 327 KT to the first, second and third respondents in joint venture, in terms of s 104 of the MPRDA is reviewed and set aside.

2.1 The decisions of the fourth respondent referred to in paragraphs 1 and 2 above is substituted with a decision awarding the third applicant exclusive prospecting rights in respect of the farm Eerstegeluk 327 KT.

2.2 The fourth respondent is directed to issue to the third applicant exclusive prospecting rights in respect of the farm Eerstegeluk 327 KT against proof by the third

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

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.

3. The first and second respondents are directed jointly and severally to pay the costs of the applicants, including the costs of two counsel.’

4. The first and second respondents are directed jointly and severally to pay 90 per cent of the appellants’ costs of the appeal and cross appeal, including the costs of two counsel.

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANTS:	Adv M Chaskalson S.C. (with him I Goodman)
	Instructed by:
	Cheadle, Thompson & Haysom Inc., Johannesburg
	McIntyre & van der Post, Bloemfontein
FOR FIRST TO THIRD RESPONDENTS:	Adv. B E Leech S.C. (with him J Babamia)
	Instructed by:
	Werksmans Attorneys, Sandton
	Matsepes Inc., Bloemfontein