THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 344/19

In the matter between:

SAMANCOR CHROME LIMITED	**APPELLANT**
and	
VDH HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
ABSOLUTE GROUP MANAGEMENT (PTY) LTD	**SECOND RESPONDENT**
MINISTER OF MINERAL RESOURCES	**THIRD RESPONDENT**
DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES	**FOURTH RESPONDENT**
DEPUTY DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES	**FIFTH RESPONDENT**
REGIONAL MANAGER, LIMPOPO REGION: DEPARTMENT OF MINERAL RESOURCES	**SIXTH RESPONDENT**
MINISTER OF ENVIRONMENTAL AFFAIRS	**SEVENTH RESPONDENT**
KOPANONG SHOPPING CENTRE (PTY) LTD	**EIGHTH RESPONDENT**
MINISTER OF PUBLIC WORKS	**NINTH RESPONDENT**
LIMPOPO HEADMEN'S ASSOCIATION	**TENTH RESPONDENT**

Neutral Citation: *Samancor Chrome Ltd v VDH Holdings (Pty) Ltd and Others* (Case no 344/19) [2020] ZASCA 96 (27 August 2020)

Coram: Cachalia, Saldulker, Mbha and Van der Merwe JJA and Matojane AJA

Heard: 19 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 27 August 2020

Summary: Section 22(4)*(b)* of the Mineral and Petroleum Resources Development Act 28 of 2002 – whether the appellant satisfied the requirement to notify and consult with interested and affected persons – High Court's order reviewing and setting aside the decision of the Minister of Mining Resources to grant a mining right to the appellant set aside – appeal upheld – applications to lead further evidence and to intervene dismissed.

ORDER

On appeal from: The Gauteng Division, Pretoria (De Vos J, sitting as court of first instance):

(a) The appeal is upheld with costs, such costs to be paid by the respondents jointly and severally, the one paying the other to be absolved, including the costs attendant upon the employment of two counsel.

(b) The order of the high court dated 16 November 2018 is set aside and substituted with the following:

'The first and second respondents' application to review and set aside the decision of the Minister of Mineral Resources dated 31 October 2016 is dismissed with costs, such costs to include the costs of two counsel.'

(c) The cross-appeal by the first and second respondents is dismissed with costs, such costs to include costs attendant upon the employment of two counsel.

(d) The application to lead further evidence by the appellant is dismissed with costs, such costs to include the costs attendant upon employing two counsel.

(e) The application to intervene is dismissed with costs in favour of the first and second respondents, such costs to include the costs attendant upon the employment of two counsel.

(f) The fifth respondent (the Minister) shall bear his own costs.

JUDGMENT

Mbha JA (Cachalia, Saldulker and Van der Merwe JJA and Matojane AJA concurring):

[1] The central issue for determination in this appeal is whether the appellant, Samancor Chrome Limited (Samancor), in pursuance of its application to be granted a mining right in terms of the Mineral and Petroleum Resources Development Act No 28 of 2002 ('the MPRDA', or simply 'the Act'), satisfied the requirements set out in s 22(4)(b) of the MPRDA to notify and consult with any interested and affected parties as defined.[1]

[2] The requirement to notify and consult with interested and affected parties accords with the specified objects of the Act, as set out in s 2 thereof. In particular, the Act aims to ensure that the nation's mineral and petroleum resources are exploited in an orderly and ecologically sustainable manner, while promoting social and economic development. Importantly, it seeks to ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they operate.

[3] VDH Holdings (Pty) Ltd and Absolute Group Management (Pty) Ltd (the first and second respondents, respectively) launched review proceedings to set aside the granting of a mining right to Samancor by the third respondent, the Minister of Mineral Resources (the Minister). The right was granted to Samancor in respect of the farms Wintersveld 417 KS, Jagdlust 418 KS (portion 1, as well as the remaining extent), and Zeekoegat 421 KS, all three of which are situated in the Limpopo Province. This, after Samancor

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[1] Section 22(4)*(b)* provides that if the Regional Manager (the RM) accepts the application, the RM must, within 14 days from the date of acceptance, notify the applicant in writing 'to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports'.

had appealed to the Minister, in terms of s 96 of the MPRDA,[2] against the refusal by the Director-General of the Department of Mineral Resources (the DG) to grant its application.

[4] On 16 November 2018, the Gauteng Division of the High Court, Pretoria (De Vos J) held that Samancor had failed to notify and consult with the communities that would be affected by its mining operations. It accordingly set aside the Minister's decision and referred the matter back to him for reconsideration. Samancor appeals against the order of the high court. The first and second respondents have also cross-appealed against the decision of the high court remitting the matter to the Minister. The cross-appeal further relates to the fate of the respondents' applications for prospecting rights submitted to the Regional Manager of the Limpopo Region for the Department of Mineral Resources (the RM). The appeal and the cross-appeal are with the leave of the high court. VDH Holdings (Pty) Ltd and Absolute Group Management (Pty) Ltd are the only respondents before us on appeal and are hereafter collectively referred to as 'the respondents'.

[5] This court has also been asked to entertain two additional applications: First, Samancor has applied to lead further evidence on appeal. In essence, it avers that the respondents had misled the court a quo by introducing false evidence comprising 781 supplementary affidavits deposed to by members of the community to show that Samancor had not consulted with them. This application is opposed by the respondents.

[6] The allegations and counter-allegations in this application are the subject of a pending rescission application brought by Samancor in the high court. However, in his judgment, De Vos J made it clear that the contents of

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[2] In terms of s 96(1)*(b)* of the MPRDA, one of the provisions on the internal appeal process and access to courts:
'(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal within 30 days [of] becoming aware of such administrative decision in the prescribed manner to—
…
(b) the Minister, if it is an administrative decision that was taken by the Director-General or the designated agency …'

those affidavits played no role whatsoever in his decision. It is trite that new evidence will be admitted on appeal only in exceptional circumstances. One of the general requirements for such an application is that the new evidence must be weighty and material to the outcome of the appeal. The evidence that Samancor wishes to introduce does not meet this requirement and accordingly falls to be dismissed.

[7] Secondly, there is a voluminous application by three parties, namely the Baroka Ba Nkwana Royal Family, the Baroka Ba Nkwana Community and the Jagdlust Engagement and Stakeholders Engagement Forum, for leave to intervene as parties in the proceedings which form the appeal and the cross-appeal. This application was only filed on 5 May 2020, shortly before this appeal was heard, and was opposed by the respondents. There is no specific prayer in the notice of motion requesting any relief with reference to either the appeal or the cross-appeal, but it is clear from the contents of the founding affidavit that all the applicants support Samancor's stance in the appeal.

[8] They averred that they have a direct and substantial interest in Samancor retaining its rights to commence mining on the farms. Reliance was placed on a Memorandum of Agreement dated 25 January 2019, entered into between the Bapedi Kingdom and the Baroka Ba Nkwana community, on the one hand, and Samancor on the other. In terms of this agreement, the parties agreed to work together for purposes of expediting the commencement of mining and associated operations by Samancor on the mining area. Clearly, a partnership or working relationship of some sort has been established between the parties for their mutual benefit.

[9] On the facts it is beyond any question that these applicants have a purely financial interest in the proceedings. Therefore they do not comply with the applicable test to establish a legal interest to intervene in these proceedings. In *Bowring NO v Vrededorp Properties CC and Another*,[3] Brand

[3] *Bowring NO v Vrededorp Properties CC and Another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.

JA restated the well-known test for joinder of necessity, which also applies to an application for intervention, as follows:

'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned ...'.

The application for leave to intervene must accordingly suffer the same fate as the one brought by Samancor for the leading of further evidence.

[10] I deem it expedient to mention at this point that, although the Minister's decision to grant Samancor a mining right is at the heart of this litigation, the Minister elected not to file any papers in either the court below or on appeal to justify his decision. That election was extraordinary. Considering that the Minister represents the State in its role as the custodian of the nation's mineral and petroleum resources,[4] he had a constitutional duty to assist the court by explaining the reasoning behind his decision to overturn the DG's decision to refuse Samancor's application for a mining right. Moreover, in the cross-appeal the respondents specifically seek an order that the matter not be remitted to the Minister for reconsideration on the basis of, inter alia, his perceived bias in favour of Samancor. This court, of its own accord, therefore invited submissions from the Minister, to assist the court. The court is thankful for the subsequent submissions by Advocate M P van der Merwe SC, made on the Minister's behalf, which were of great assistance and benefit in deciding this matter.[5]

[11] I now turn to consider the appeal and cross-appeal before this court. I will start with the factual matrix against which the dispute between the parties arose. The appellant and the respondents are rival mining firms seeking to exploit the same substantial chrome resources on four properties in the Limpopo Province, namely, Wintersveld 417 KS, portions 1 and the remaining

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[4] See ss 2(b) and 3(1)-(2) of the MPRDA.

[5] The Minister who made the impugned decision on 31 October 2016 was Mr Mosenbenzi Zwane. And he was the Minister when the respondents launched their review application in January 2017. The current Minister is Mr Gwede Mantashe, who was appointed in February 2018. The high court set aside Minister Zwane's decision on 16 November 2018.

extent of the farm Jagdlust 418 KS (two separate properties) and the farm Zeekoegat 421 KS (together referred to as 'the properties').

[12] Samancor has a long history of involvement with the properties. It is the registered owner of two portions of the properties, namely Wintersveld 417 KS and portion 1 of the farm Jagdlust 418 KS. From about 2003 Samancor held prospecting rights under the now repealed Minerals Act 50 of 1991 in respect of an area in excess of 6 000 hectares situated over the properties (the mining area). These prospecting rights were subsequently recognised under the provisions of the MPRDA.

[13] Under the prospecting rights Samancor, over an extended protracted period of time, prospected for chrome on the properties. This also involved consultation with the various communities residing within the mining area, from around 2008. The positive results of the prospecting activities prompted Samancor to apply, on 18 November 2011, in terms of s 22 of the MPRDA, for an underground and opencast mining operation, which it referred to as 'the Jagdlust operation'. Samancor applied for the maximum period of 30 years to allow for a 22-year mining period commencing in 2018.

[14] The Regional Manager (the RM) accepted Samancor's mining right application on 22 June 2012. Simultaneously, the RM instructed Samancor to submit a scoping report, within 30 days; to conduct an environmental impact assessment (EIA) and submit an environmental management programme (EMPR); and to notify and consult with interested and affected parties within 180 days (ie by 18 December 2013).[6] On 16 December 2012, within the specified timeframe, Samancor lodged its combined EIA report and EMPR with the office of the RM.

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[6] See s 22(4)*(b)* (op cit fn 1); and see reg 50(*f)* of the Mineral and Petroleum Resource Development Regulations, GN R527 in *GG* 26275 of 23-04-2004 (the Regulations). Although regs 48-55 have subsequently been repealed, with effect from 27 March 2020, reg 50*(f)* was still operative at the relevant time. See the amendments published under GN R420 in *GG* 43172 of 27-03-2020.

[15] On 4 January 2014 the RM sent a letter to Samancor, purportedly in terms of regulation 49(3) of the Mineral and Petroleum Resources Development Regulations (the Regulations).[7] The letter is poorly drafted, unclear and confusing. It read as follows:

'Samancor Chrome Limited the EMP submitted on the 23 February 2014:

- Attachment on EMP. No confirmation that the description of the environment has been compiled with the participation of the community, the landowner and interested and affected parties. (Note: consultation report, as you have indicated on the EMP is not attached.) Newspaper advert, roll call, site notices and minutes and comments from the interested and affected parties.
- You are also instructed to consult the surrounding communities and bring back the results. You must also consult Kgoshi Kgolo[8] of Bapedi.

The raised issues should be addressed on or before 24 March 2014 ...'.

[16] Samancor understood the RM's aforesaid letter to mean that he was not aware of the consultation it had undertaken with the communities, because a consultation report was not attached to Samancor's EMPR. Accordingly, on 20 March 2014 Samancor's legal manager, Mr Laubscher, re-submitted a public participation report to the RM. He specifically highlighted the fact that the public participation process had commenced in 2008 and continued in 2012. He also noted that '[the] process involved the Bapedi and surrounding communities and [that] the report specifically addressed the site notices, minutes and comments of the interested and affected parties'.

[17] Mr Laubscher also requested the RM to revert to him in the event of his having any further queries. It appears that the RM intended to send a further letter[9] by fax to Samancor, dated 27 March 2014, indicating that the information submitted was not sufficient. Samancor did not receive the letter.

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[7] Regulation 49 concerns the contents of the scoping report. Subregulation (3) provides that:
'The [RM] must evaluate the scoping report and request the relevant Government departments and organs of State, as the case may be, to submit written comments on the scoping report within 30 days from the days of the request.'

[8] 'Kgoshi' is Setswana for senior traditional leader, while 'kgoshi kgolo' refers to the highest ranking leader of a traditional community.

[9] This letter was in fact the same as the previous one, save for an additional bullet noting that the information submitted by Samancor was not sufficient.

A fax transmission slip shows that the attempt to fax this letter to Samancor had failed.

[18] On 14 June 2016 Samancor received the DG's decision, which was apparently made on 11 March 2016, to refuse its mining right application. The sole reason the DG gave for his decision was:

'Failure to comply with s 39(5) [of the MPRDA] read with regulation 50*(f)* of [the Regulations] … in that proof of consultation with interested and affected parties together with results of public participation were never submitted.'

[19] Samancor appealed to the Minister against the DG's decision in terms of s 96 of the MPRDA, read with reg 74 of the Regulations.[10] In its appeal

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[10] Prior to an amendment to the Regulations (See GN R420 in *GG* 43172 of 27-03-2020) reg 74 provided as follows, in relevant part:

'(1) Any person who appeals in terms of section 96 of the Act against an administrative decision, must within 30 days after he or she has become aware of the or should reasonably become aware of the administrative decision concerned, lodge a written notice of appeal with the Director-General or the Minister, as the case may be.

(2) The notice of appeal must state clearly—

(a) the actions appealed against; and

(b) the grounds on which the appeal is based.

(3) The appeal fee specified in regulation 76(1)*(f)* must accompany a notice of appeal.

(4) The Director-General or the Minister, as the case may be, may in his or her discretion and on such terms and conditions as he or she may decide, condone the late noting of an appeal.

(5) After receipt of the notice of appeal, the Director-General or the Minister, as the case may be, must-

(a) dispatch copies thereof to—

(i) the person responsible for the administrative decision concerned;

(ii) any other person, whose rights may, in the opinion of the Director-General or the Minister, as the case may be, be affected by the outcome of the appeal; and

(b) request the persons contemplated in paragraph *(a)* to respond as provided for in subregulations (6) and (7).

(6) A person contemplated in subregulation 5*(a)*(i) must, within 21 days from receipt of the notice of appeal, submit to the Director-General or the Minister, as the case may be, written reasons for the administrative decision appealed against.

(7) A person contemplated in subregulation 5*(b)*(ii) must within 21 days from receipt of the notice of appeal, submit to the Director-General or the Minister, as the case may be, a replying submission indicating-

(a) the extent and nature of his or her rights;

(b) how the outcome of the appeal may affect his or her rights; and

(c) any other information pertaining to the grounds as set out in the notice of appeal.

(8) The Director-General or Minister, as the case may be, must dispatch the documents contemplated in subregulations (6) and (7) to the appellant by registered post and request him or her to respond thereto in writing within 21 days from receipt thereof.

(9) The Director-General or the Minister, as the case may be, must, within 30 days from the date of receipt of the response contemplated in subregulation (8), either-

(a) confirm the administrative decision concerned;

(b) set aside the administrative decision concerned;

(c) amend the administrative decision concerned; or

(d) substitute any other administrative decision for the administrative decision concerned.'

Samancor explained firstly, that it had responded to the RM's letter of 4 January 2014, by furnishing him with a copy of its comprehensive public participation document that evidenced Samancor's compliance with the consultation and public participation requirements under the MPRDA and the Regulations; and, secondly, that if the DG was of the view that Samancor had not adequately complied with any obligation under these provisions of the MPRDA, he ought to have given Samancor notice thereof and an opportunity to comply.

[20] As provided for in the Regulations, the RM responded to Samancor's appeal. He pointed out that Samancor's consultative meetings held as far back as 2008 (when Samancor was in the process of prospecting for chrome) were not relevant to a mining right application lodged three years later in 2011; that Samancor had failed to follow the RM's directives as contained in his letters dated 4 January 2014 and 27 March 2014; that Samancor had failed to submit proof of consultation with the interested and affected parties, as well as the results of such public participations; and that Samancor had failed to submit the results of any consultation with the Kgoshi Kgolo of the Bapedi.

[21] The respondents also responded to Samancor's appeal by making submissions, on 5 July 2016, in which they criticised the consultation process Samancor had followed. It bears mention that, by then, the respondents had lodged multiple applications for prospecting rights for chrome on the properties. They first did so on 22 December 2014, which was even before the DG had refused Samancor's mining right application on 11 March 2016. The RM rightly rejected the applications on the basis that Samancor's mining right application was still pending.[11]

[11] Section 16(2) of the MPRDA sets out the requirements for accepting an application for a prospecting right. In terms of s 16(2)*(c)*, an application may only be accepted if 'no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused'. In such event, according to s 16(3), the RM must notify the applicant of that fact and return the application to the applicant.

[22] On 31 October 2016 the Minister upheld Samancor's appeal and set-aside the DG's decision to refuse Samancor's application for a mining right on the properties. In so doing he appears to have accepted the recommendation of the Deputy Director-General: Corporate Services that Samancor had provided adequate proof of the consultation process which it had forwarded to the RM, including its consultation with the Kgoshi Kgolo of the Bapedi Nation in accordance with the RM's request. The Minister also granted Samancor a mining right. Samancor's EMPR was approved by the RM in July 2017 and its mining right was then notarially executed.

[23] In January 2017 the respondents launched the review application mainly on the ground, as they had done in the internal appeal process, that the consultation process undertaken by Samancor was inadequate and did not meet the requirements of s 22(4)*(b)* of the MPRDA. They also contended that Samancor had failed to comply with the RM's letter of 4 January 2014, which the respondents considered to be a binding directive. The other grounds advanced for the review are not relevant for the purpose of this judgment.[12]

[24] In making its order, the high court made it clear that the only basis on which it set aside the Minister's appeal decision was because of Samancor's 'failure to notify and consult with interested and affected parties', as was required by s 22(4)*(b)* of the MPRDA.

[25] Section 22(4)*(b)* must be read together with the definition of 'community' in s 1 of the MPRDA, and the definition of 'interested and affected

[12] The respondents claimed that the measures adopted by Samancor in its EMPR to mitigate harm that might otherwise occur from mining are inadequate. This ground was not pursued in the court a quo. There was also an allegation that the Minister delayed unreasonably in processing Samancor's mining right application, and that this amounted to an 'unreasonable reservation, sterilization or banking of the rights to chrome in respect of the properties in favour of Samancor', which the respondents alleged Samancor had 'associated itself'. But there was no evidence to suggest that Samancor was complicit in the Departments' delays in processing its mining right application.

person'[13] in the Regulations.[14] For purposes of the MPRDA, 'community' means:

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

Secondly, the Regulations define an 'interested and affected person' as 'a natural or juristic person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation'.

[26] Before us it was submitted on Samancor's behalf that it had followed all the necessary steps required to satisfy the requirements of s 22(4)*(b)*. Reliance was placed on Samancor's EMPR document headed 'Comprehensive Public Participation Document: Eastern Chrome Mines – Jagdlust Section', wherein Samancor explained that it took the following measures to notify and consult with communities occupying the mining area, as well as the surrounding communities and organisations, associations and businesses in the area:

26.1 In September 2012 Samancor notified certain institutions, traditional communities and individuals, not only on the properties where the mining operations are situated but also on adjacent properties and in affected municipalities, of its new mining right application. It provided them with copies of the Background Information Document (BID) relating to the application for a mining right and invited them to register as an interested and affected person. Samancor posted the BID to more than 50 such institutions, communities and individuals.

26.2 Samancor convened a public meeting on its mining right application on 5 December 2012. It gave notice of the public meeting to all the

[13] 'Interested and affected person' means a natural or juristic person or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the existing operation.'

[14] See chapter 1 of the Regulations.

communities located on Jagdlust, Wintersveld and Zeekoegat in the direct vicinity of the Samancor mining area. These are the communities of Tjibeng, Mmashikwe, Mohlahlaneng, Bogalatladi, Mogolaneng, Mmabulela, Machakaneng and Sefateng, which reside on the properties. It also directly sent over 200 SMS invitations, and emailed 107 such invitations to attend the meeting, including to some members of these communities and organisations working within them.

26.3 Samancor published notices of the meeting in two newspapers, namely the Daily Sun and the Steelburger, on 5 and 2 November 2012 respectively. It also gave notice of the meeting on posters, one of which was placed in the Potalake Nature Reserve, another at Zeekoegat and a third between Jagdlust and Zeekoegat, the latter two being along the R37. Samancor averred that the posters had been placed at well-trafficked locations on the properties, where most members of these communities would pass at one time or another.

26.4 According to the register of attendance of the meeting on 5 December 2012, attached to Samancor's EMPR, this meeting was attended by various members of the communities directly affected and by representatives of several surrounding communities and other interested organisations.

26.5 Samancor subsequently consulted directly with the Baroka Ba Nkwana Traditional Authority, which is recognised by statute[15] as one of the main and relevant traditional structures representing the communities living on the farms Jagdlust, Zeekoegat and Wintersveld. It is not disputed that the Baroka Ba Nkwana Traditional Authority has affirmed its support for Samancor's application, and has gone on record stating that it is anxious for the contemplated mining activities to commence because of the potential local economic projects entailed by Samancor's social and labour plan may begin to flow in an area that is in desperate need of such projects.

None of this evidence was disputed or seriously challenged.

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[15] See the Traditional Leadership and Governance Framework Act 41 of 2003, read together with the Limpopo Traditional Leadership and Institutions Act 6 of 2005.

[27] Before us the respondents rightly accepted that s 22(4)(b) did not provide the RM with the power to issue a 'binding directive'. They argued that on its own showing, Samancor failed to comply with its obligation in terms of s 22(4)(b) to notify and consult with interested and affected parties in two respects. These were; first, inadequate notification to and consultation with the interested and affected communities and second, the absence of consultation with the Kgoshi Kgolo of the Bapedi. I discuss these contentions in turn.

[28] A closer look at the respondents' complaints reveals that they were simply critical of certain aspects of the process followed by Samancor without, however, suggesting or showing that their criticisms are in any way material. For example, the respondents aver that the public meeting of 5 December 2012 was attended by only 43 people, mainly, if not exclusively, from the farm Jagdlust, out of thousands of people living in at least ten different communities on the three farms.

[29] In my view, this complaint is misconceived. The attendance register included in the record shows that representatives and residents from the communities living on all of the farms constituting the properties attended the meeting. In any event, the number of attendees at the meeting does not detract from the fact that many communities, associations and individuals were given due notice about the meeting. As Nugent JA put it in *Minister of Home Affairs and Others v Scalabrini Centre and Others*,[16] 'an obligation to consult demands only that the person who is entitled to be consulted be afforded an adequate opportunity to exercise that right'. And, importantly, it is '[o]nly if that right is denied [that] the obligation to consult [is] breached'. Accordingly, where persons have been invited to express a view and have elected not to do so, it does not follow that they have been denied the right to be consulted.[17] The respondents' contention in this regard is essentially a non sequitur. The right to be consulted that is conferred on interested and affected

[16] *Minister of Home Affairs and Others v Scalabrini Centre and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 43.
[17] Ibid paras 43-44.

individuals by the MPRDA does not imply a concomitant duty on Samancor to ensure that such persons exercise that right. There could be a variety of reasons, all of which are merely speculative, why community members, even though invited, chose not to attend the meeting. The critical point is that, provided the communities were given due notice of the proposed public participation, which I find to be the case here, it cannot be said that they were denied the right to participate and express a view.

[30] Of particular significance and what, in my view, should have weighed heavily with the court a quo, is that although the respondents' complaint related to the adequacy of the consultative efforts employed by Samancor, no person with a right to be notified and consulted, ie one who is likely to be directly affected by the proposed mining operations, has come forward in support of the respondents' application by complaining that he or she has not been afforded that right. This is in stark contrast to previous cases relating to the obligation to consult, both in this court as well as the Constitutional Court, such as *Bengwenyama*[18] and *Maledu*.[19]

[31] As to the content of the consultation, I have perused the agenda items presented and discussed at the consultative meeting held on 5 December 2012 and the minutes thereof. The topics covered a wide variety of environment related issues such as the anticipated effects of the mining operations on air quality, the noise and dust impact, groundwater, rehabilitation and building of additional boreholes, vibration and so forth. Over and above oral presentation, projected slides were also used to disseminate all relevant information.

[32] In my view, the respondents have failed to identify any issue that ought to have been dealt with in the consultation process but was not. The high-water mark of their claim was that some potential, though as yet unidentified harm, might have been identified in a more extensive consultative process.

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[18] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC), especially para 62 *et seq*.
[19] *Maledu* op cit fn 8, coincidentally also from para 62.

This was pure speculation. It also has to be kept in mind, as the Constitutional Court has confirmed in *Maledu*,[20] that after the grant of a mining right under the MPRDA, the affected communities would be protected from harm in that Samancor, even as a rights-holder, will be obliged to engage with them as lawful occupiers in terms of s 54 of the MPRDA.[21]

[33] I now deal specifically with the high court's reasons for its finding that Samancor had not notified and consulted adequately with interested and affected parties, as required by s 22(4)*(b)* of the MPRDA.

[34] The court a quo was critical of the following aspects relating to the public participation meeting convened on 5 December 2012:

34.1 The meeting was held on a Wednesday, when most of the lawful occupiers and affected parties were at work. While it is correct that the meeting was indeed convened on a weekday, Samancor's environmental consultants, M2 Environmental Connections (Pty) Ltd (MENCO), took positive steps to confirm the attendance of registered interested and affected persons before the meeting. This is evidenced by MENCO's records of confirmation of interested and affected persons' attendance that were obtained prior to the meeting and included in the EMPR. Importantly, none of the occupiers or other interested and affected persons complained that they were prejudiced by the fact that the meeting was held on a Wednesday, or that they were precluded from consulting with Samancor or its application as a result. Whilst it may have been preferable to have convened a further meeting in addition to the one held on 5 December 2012, this was not

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[20] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* [2018] ZACC 41; 2019 (2) SA 1 (CC) paras 85-93.

[21] Section 54(6) and (7) of the MPRDA provides that:

'(6) If the Regional Manager determines that the failure of the parties to reach an agreement or to resolve the dispute is due to the fault of the holder of the ... prospecting right [or] mining right ... the Regional Manager may in writing prohibit such holder from commencing *or continuing* with prospecting or mining operations ... until such time as the dispute has been resolved by arbitration or by a competent court;

(7) The owner or lawful occupier of land on which ... prospecting or mining operations will be conducted must notify the relevant Regional Manager if that owner or occupier has suffered or is likely to suffer any loss or damage as a result of the prospecting or mining operation ...' (Emphasis supplied.)

sufficient reason for finding that the meeting fell short of compliance with s 22 (4)(b) of the MPRDA.

34.2 Consultation was required with the owners of the 46 boreholes on or adjacent to the mining site and the people who depended on borehole water. In this regard the court a quo assumed that Samancor did not consult on the issue of the impact of its mining operations on borehole water supply. However, this issue was specifically raised in the meeting of 5 December 2012 and was addressed by Samancor in its EMPR. The minutes of the meeting reflect that Samancor's response was that 'Underground mining will not affect boreholes as this will only impact the lower aquifer and not the top aquifer in which boreholes are sunk'. In any event, Samancor's EMPR set out the extensive measures it will take to protect borehole water supply. The subject matter of the information session at the meeting, to explain and discuss the impacts of the proposed mining operation with those who would be directly affected, is evidenced in the Power-Point presentation included in the EMPR. The finding that the information provided was superficial and lacked detail is therefore incorrect.

34.3 Several important issues were raised at the meeting but were never responded to and that these were merely noted in the EMPR. However, in saying so the high court appears to have relied on an incomplete version of the EMPR that was attached to the respondents' founding affidavit marked annexure FA19. Samancor indicated in its answering affidavit that this was an incorrect document, that the correct document was annexure FA4, which contained the minutes of the meeting of 5 December 2012 and which included a table of the questions raised at the meeting and the responses given.

34.4 Samancor did not address the interests of the adjacent communities and that they were not contacted at all. This finding is similarly incorrect. The public participation report in the EMPR evidences that Samancor's MENCO published the notice of the public meeting of 5 December 2012 widely, including to the local and traditional authorities, associations and businesses in the surrounding areas. Samancor has shown that to this end, MENCO sent over 200 SMS invitations, emailed

another 107 such invitations and posted copies of Basic Information Document to more than 50 potential interested and affected persons, including local authorities and community representatives in surrounding areas.

34.5 In respect of the posters Samancor had displayed to advertise the public meeting of 5 December 2012, 'there is no indication where these posters appeared'. This finding is, with respect, not borne out by the evidence. The EMPR public participation report included a map showing where the posters were situated. It may well be that Samancor could have put up more posters given the extent of the properties, but a blanket finding that there was no indication where these were posted is clearly unjustified. As alluded to earlier, Samancor also published notices of the meeting in two local newspapers. These were also posted at Samancor's existing Jagdlust operations.

34.6 There was no indication that the traditional leaders who Samancor had consulted with, informed the lawful occupiers of the consequences of the proposed mining operation and how it will affect them. This criticism is also misconceived. The concern that Samancor did not satisfy itself that this had happened, was never raised as an issue in the court a quo. In any event, Samancor was entitled to assume that the traditional authorities it consulted would in turn, inform and engage with their constituencies on the consequences of the proposed mining operation. Furthermore, Samancor did not rely solely on communication with traditional leaders in the public participation process, but circulated its BID and issued public notices to the communities on the mining properties and surrounding areas as aforesaid.

34.7 Samancor never provided follow-up information to interested and affected persons after the public participation meeting on 5 December 2012, and neither did it explain the full extent of its further engagement with registered interested and affected persons. Once again, Samancor was never called upon to indicate whether it did provide follow-up information to interested and affected persons. Nevertheless, it is apparent from the record that Samancor did continue to engage with persons the Department considered to be interested and affected

persons after the meeting of 5 December 2012. Samancor indicated, for instance, that it met with the Bapedi Tribal Council and then-acting Kgoshi Kgolo, Mr Kgagudi Kenneth Sekhukhune, on two occasions on 6 June 2014 and 24 February 2016.

[35] The court a quo also found, wrongly in my view, that the Interim Protection of Informal Land Rights Act 31 of 1996 (the IPILRA) was applicable in this case and, as a result, that Samancor had to procure the consent of the communities protected under this Act. It further held that it was common cause that the IPILRA had not been complied with. The application of the IPILRA was not addressed at all in the proceedings in the court a quo – not in the papers, nor at the hearing. Importantly, none of the owners or occupiers of the properties contended that they were unlawfully deprived of their rights under the IPILRA in the grant of the mining right to Samancor. The high court thus erred in finding that IPILRA's application was common cause and that this Act had a bearing on any of the complaints made by the respondents in the review application.

[36] I now turn to the matter of the need to consult the Kgoshi Kgolo of the Bapedi. It could not properly be suggested that the Kgoshi fell within the definition of 'interested and affected parties'. There was no evidence that the Kgoshi had a direct interest in Samancor's proposed operation, nor that he might be affected thereby. The high court accepted the respondents' argument at the time that Samancor was obliged to consult with the Kgoshi Kgolo of Bapedi because the RM had directed Samancor to do so in his letter of 14 January 2014. The court a quo thus accepted that this letter was a binding directive in terms of s 39(5)[22] of the MPRDA, read with reg 50*(f)*, which had not been challenged on review by Samancor. In my view the court

[22] In the Department's response to Samancor's appeal, the RM sought tostyle the letter as being a directive under s 39, read with regulation 50. However, this *ex post facto* attempt to alter the basis on which he issued the letter is impermissible.
Section 39(5) of the MPRDA states as follows:
'The Minister may call for additional information from the person contemplated in subsection (1) or (2) and may direct that the environmental management programme or the environmental management plan in question be adjusted in such way as the Minister may require.'

below erred on the facts. The letter stated expressly in its heading that it was issued under reg 49(3) of the Regulations, not s 39(5) of the MPRDA.

[37] The reference to reg 49(3) makes sense in the context of the contents of the letter. Regulation 49(3)-(5)[23] set out the RM's functions upon the receipt of a scoping report. The RM's task is purely administrative and he or she must collate and forward comments on the scoping report to an applicant for incorporation into the applicant's EMPR. It goes without saying that, in doing so, the RM does not issue any 'directive', as the court a quo accepted, that could be subject to internal appeal or (judicial) review. The RM is required simply to afford the applicant notice of the comments. Accordingly, Samancor's duty under regulation 49(5) is to 'address and incorporate all such comments'. This is what Samancor was asked to do in the letter of 4 January 2014, namely, to address the issues and provide a written response.

[38] Despite the fact that Samancor had no legal obligation to consult with the Kgoshi Kgolo of the Bapedi Kingdom, it did in fact consult with the acting Kgoshi Kgolo at the time, Mr Sekhukhune. Samancor met with Mr Sekhukhune on 6 June 2014 to discuss its proposed mining operation. He was also in attendance at the meeting on 24 February 2016 between Samancor and the Bapedi Kingdom Tribal Council, where further discussions on Samancor's proposed mining activities were held.

[39] Ultimately the judgment as to whether there had been proper consultation with interested and affected parties as required by s 22 (4) (b) is one that the decision-maker must make, not the court. A court will only interfere with the decision if it is one to which no reasonable decision maker

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[23] Regulations 49(3) to (5) provide that:

'(3) The Regional Manager must evaluate the scoping report and request the relevant Government departments and organs of State ... to submit written comments on the scoping report within 30 days from the date of the request.

(4) The Regional Manager may request the applicant to forward specific and additional information or to conduct further investigations regarding the scoping report ...

(5) The Regional Manager must collate and forward all comments contemplated in subregulation (3) to the applicant who must address and incorporate such comments in the environmental impact assessment report and environmental management programme.

could have arrived at.[24] The court a quo should therefore have considered whether a reasonable decision-maker in the position of the Minister, exercising an appeal power and on the information before him, could have reached the conclusion that there was adequate notification and consultation in respect of Samancor's application for the mining right, and having regard to the particular circumstances of the matter. These include the length of time the matter had already been proceeding; that Samancor had been involved with the communities since 2008, and had invested large amounts of money into the project; and, most importantly, that none of the involved communities, or any individual citizens therefrom, had advanced any complaints relating to Samancor's consultation. And as I have pointed out earlier the court a quo's acceptance of the respondents' criticisms of the adequacy of the consultation process were largely unfounded. In this regard sight must not be lost of the fact that the respondents were not interested and affected persons in terms of the MPRDA. They are merely business rivals to Samancor, in pursuit of furthering their own commercial interests through mining for chrome in the same area. The court a quo should have found that there was no ground for interference with the Minister's decision.

[40] For all these reasons Samancor's appeal must succeed. The upholding of the appeal leads ineluctably to the conclusion that the respondents' cross-appeal has to fail. Clearly it could only have succeeded if the main appeal had failed, in which event this Court would have to consider the appropriateness of issuing the mining right to the respondents and not remitting the matter to the Minister for reconsideration. Accordingly, I make the following order:

(a) The appeal is upheld with costs, such costs to be paid by the respondents jointly and severally, the one paying the other to be absolved, including the costs attendant upon the employment of two counsel.

(b) The order of the high court dated 16 November 2018 is set aside and substituted with the following:

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[24] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 44.

'The first and second respondents' application to review and set aside the decision of the Minister of Mineral Resources dated 31 October 2016 is dismissed with costs, such costs to include the costs of two counsel.'

(c) The cross-appeal by the first and second respondents is dismissed with costs, such costs to include the costs attendant upon the employment of two counsel.

(d) The application to lead further evidence by the appellant is dismissed with costs, such costs to include the costs attendant upon the employment of two counsel.

(e) The application to intervene is dismissed with costs in favour of the first and second respondents, such costs to include the costs attendant upon the employment of two counsel.

(f) The fifth respondent (the Minister) shall bear his own costs.

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B H Mbha
Judge of Appeal

APPEARANCES:

For Appellant:	Adv N Cassim SC, with Adv M Wesley, Adv J Bleazard and Adv I Phalane
Instructed by:	Malan Scholes Attorneys, Johannesburg Claude Reid Inc, Bloemfontein
For First and Second Respondents (cross-appellants):	Adv C M Eloff SC, with Adv J L Gildenhuys SC and Adv A Higgs
Instructed by:	Venter de Villiers Attorneys, Pretoria Bezuidenhouts Inc, Bloemfontein
For Third to Sixth Respondents:	Adv M P van der Merwe SC (Third respondent)
Instructed by:	The State Attorney, Pretoria Not participating in the appeal
For Seventh Respondent:	*
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein
For eighth respondent (seventh respondent in the cross-appeal):	*
Instructed by:	Kopanong Shopping Centre (Pty) Ltd, Polokwane Cited as an historical party that did not participate in the court a quo and is not participating in the appeal
For ninth respondent (eighth respondent in the cross-appeal):	*
Instructed by:	Minister of Public Works, Pretoria Cited as an historical party that did not participate in the court a quo and is not participating in the appeal
For Tenth Respondent:	*
Instructed by:	T P Moloto & Company Inc, Benoni Not participating in the appeal