Mining and community engagement: the latest decision

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A recent decision of the Supreme Court of Appeal has clarified some issues relating to mining applications and consultation with affected communities.

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Tensions between mining companies and their neighbouring communities are historically high, given the nature of mining operations and the South African economy. This is illustrated in a recently-decided matter.

Samancor Chrome Limited v VDH Holdings (Pty) Ltd and 10 Others concerned the granting of a mining right in terms of Section 22 of the Mineral Petroleum Resources Development Act 28 of 2002 (MPRDA).

As a result of this ruling, any applicant applying for a mining right in terms of Section 22 of the MPRDA must show that it has taken reasonable steps to notify and consult with interested and affected parties. If consultations fail to take place because affected parties do not attend them, this cannot preclude an applicant from applying for and being granted a mining right in terms of the MPRDA. Effectively, interested and affected parties are unable to stop the grant of a mining right on the basis that they have elected not to consult with the applicant.

By way of background, Samancor Chrome applied to the regional manager for a mining right over land it owned as well as on additional farms which it did not own. The regional manager accepted the application and directed Samancor to,

amongst other things, notify and consult with interested and affected parties within 180 days.

Samancor's application was denied because it failed to provide adequate proof of consultation. It appealed the refusal in terms of Section 96 of the MPRDA. The minister of mineral resources and energy upheld the appeal and granted Samancor a mining right. This decision became the subject of a review before the High Court of South Africa, which set aside the grant of the mining right owing to a failure to notify and consult with interested and affected parties as contemplated by Section 22(4)(b) of the MPRDA.

Supreme Court of Appeal decision

The High Court decision was subsequently appealed to the Supreme Court of Appeal (SCA), which accepted that if persons were invited to engage and chose not to, it did not equate to a denial of the right to be consulted, and also said that Section 22 of the MPRDA did not place a duty on the applicant to ensure that affected persons exercised that right. The SCA also took judicial notice of the content of the consultations and held that the topics covered a wide variety of environmental issues, beyond oral presentation and disseminated slides.

More importantly, the SCA found that the High Court erred in its judgement by unilaterally ordering application of the Interim Protection of Informal Land Rights Act 31 of 1996, although its application was not addressed at all in the proceedings, either in the papers or the hearing. None of the owners or occupiers of the properties over which the mining right was granted contended that they were unlawfully deprived of their rights under IPILRA when the mining right was granted. The SCA distinguished the matter from the Baleni and Others v Minister of Mineral Resources and Others (Baleni) case. This may have been because the respondents before the SCA did not include any community members or organisations but were mining companies in competition with Samancor. The Samancor case goes to great lengths to provide guidance in respect of the application of IPILRA and the Baleni case in the granting of mining rights. However, this position could change if this matter or a similar one is brought before the Constitutional Court.

The SCA also found that:

- the Kgoshi Kgolo of the Bapedi did not fall within the definition of interested and affected parties, so Samancor had no obligation to consult with them; and
- the decision whether there had been adequate consultation with interested and affected parties in terms of the MPRDA lay with the administrator and not the High Court.

For these reasons, Samancor's appeal succeeded. Further to the above and as a result of the Samancor case, application of IPILRA is limited to members of communities neighbouring mining operations and does not apply to corporate entities.