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**An investigation into the role of law in managing community engagements
between mining companies, government and community: *Community
Consensus versus Community Consultation***

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Submitted as per requirements for the module

MND 800

LLM Extractive Industry Law in Africa

At the Faculty of Law, University of Pretoria

October, 2018

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ACKNOWLEDGEMENTS

I would like to extend my sincere gratitude to my supervisor Advocate Leon Gerber, who was very supportive throughout the research, as he was always availed himself for consultation and provided guidance throughout the drafting of dissertation. I also extend my gratitude to Doctor S, Bara who gave me guidelines of how to structure the dissertation accordingly. Lastly to my family, the Chagwinya family who offered emotional and spiritual support throughout the research and provided the resources to do so.

ABSTRACT

There is an on-going debate in Xolobeni, Eastern Cape, South Africa over the application of an exploration and mining right by Transworld Energy and Minerals (Pty) Limited (hereafter TEM). Community members and other interested parties lodged an application to the court to stop the Department of Mineral Resources from awarding TEM mining-related rights. The applicants against the granting of mining-related rights, argue that mere consultation with affected parties is not an adequate legal prerequisite to permit mining activity and have therefore submitted that community consent be adopted as an appropriate legal prerequisite. However, the respondents that constitute of the Department of Mineral Resources and TEM have argued that consultation is sufficient to permit mining activity, as gaining communities' consent may disrupt the country's effort to transform the economy which has an empowerment agenda for all its citizens based on constitutional values such as equality and dignity. Therefore, this court application constitutes a debate whether community consent is necessary to be obtained prior to the commencement of a mining project or if consultation with the community suffices. The current South African mineral law regime states that consultation is adequate to grant a mineral right, therefore if the court adopts community consensus as legal prerequisite this could set a precedence for future mining applicants and influence legislators to incorporate consent as a legal requirement. These preceding events have prompted the researcher to engage in the discourse of whether the South African mineral law regime must adopt community consensus or community consultation as a legal requirement before granting a mining right. This research unpacks the different approaches that mining companies use to engage with communities and the consequences of using such an approach. The researcher identifies and evaluates legal provisions that directly and indirectly affect communities and their expected involvement or participation before a mining life-cycle project commences. After evaluating the law, the researcher makes a comparative analysis between the adoption of community consent and community consultation as a legal requirement, therefore the benefits and challenges of each concept is evaluated. Lastly, the researcher suggests recommendations that future legislators and policy makers can embrace to bring about successful stakeholder relationships that benefit both government, mining companies and communities in a fair and equitable manner.

LIST OF ACRONYMS

ACC	Amadiba Crisis Committee
FPIC	Free Prior Informed Consent
IPILRA	Interim Protection of Informal Rights Land Act
MPRDA	Minerals and Petroleum Resources Development Act
MRC	Minerals Commodities (Ltd)
RBH	Royal Bafokeng Holdings
SAHRC	South African Human Rights Commission
TEM	Transworld Energy and Minerals (Pty) Limited
Xolco	Xolobeni Local Communities

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CHAPTER 1: Introduction, Relevance and Background

1.1 Introduction

There is increasing opposition from communities affected by the extractive industry. This is instigated by the growing desire of communities to share in natural resource wealth and heightened by the gross human rights abuses displayed by mining companies.¹ Communities are becoming more vocal and organized with the assistance of civil society and media press which is used as a platform to voice out their dissatisfaction.² A common feature of extractive industry is that it calls for the community to give up their land which results in community opposition.³ Communities view their land as non-saleable, and therefore the state has to intervene by exercising their administrative powers or through ultra vires acts to evict people from their traditional lands to make a way for an extractive industry project.⁴ The enormous negative physical and economic effects of extractive industry supersede those of other traditional forms of production hence this provokes community's disapproval.⁵ Furthermore, communities resist mining operations because they are ignored during decision making processes and are also often recipients of environmental destruction which pose a threat to their livelihood resources.⁶

Another explanation for the breakdown of the relationship between mining companies, government and communities is caused by the inability of stakeholders to follow consultation processes with due diligence. Gqada affirms that mineral development and community consultation are issues that are difficult to navigate.⁷ Government has a duty to consider the country's national economic development as a whole, whilst at the same time considering the opinions of the community as parties who are to be directly affected by mining operations. Therefore, balancing national interests and community interests can be challenging especially if their interests are conflicting.

¹ LJ Laplante *et al* "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" (2014) 11 *Yale Human Rights and Development Journal* 46.

² Laplante (n1 above) 46.

³ H Smith *et al* 'Complex commons under threat of mining: the process for and content of community consent' (2011) *Indiana University* 2.

⁴ Smith (n3 above) 3.

⁵ G Hilson *et al* 'The Environmental and Socioeconomic Performance of Multinational Mining Companies in the Developing World Economy' (2004) 19 *Minerals & Energy* 30.

⁶ I Gqada 'Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project (2011) 99 *SAIIA* 11.

⁷ Gqada (n6 above) 19.

Mining companies still have the duty to consult communities prior to the granting of mining-related rights, even though the government holds the prerogative to grant mining-related rights.⁷ The government also has usurping powers over communities even if they hold conflicting views against a mining project. The Department of Mineral Resources has the capacity to push their own interests even against the wishes of affected parties.⁹ The role and opinion of communities is “negligible” when making a final decision to grant a mining right, Gqada suggests to curb this problem consultation processes must be fully explained within the legal framework.⁸ Details of consultation processes must be outlined stating the participants, their rights and obligations, limitations of power and engagement rules.

Social conflict explained above has resulted in proponents of consent processes advocating for the implementation of consent processes as a risk mitigation strategy as a means to reduce social conflict costs.⁹ The incorporation of community consent in the awarding of mineral rights will result in binding stakeholder agreements.¹⁰ Community consent gives community members the right to decide what sort of development will be beneficial to them.¹¹ However, community consent practices are attacked on the basis of threatening government sovereignty over minerals which includes national economic development.¹² It is argued that state sovereignty is maintained through executive powers whilst community consent processes allow for communities to decide what happens on their land.¹³

It is certain that the relationship between governments, mining companies and communities is conflicted. The role of government is to award rights and for mining companies to run mining projects whilst communities are expected to sacrifice their resources to make way for a mining project which results in conflict. A debate emerges whether community consultation processes must be preferred over consent processes for national socio-economic development or whether communities must be protected to prevent degeneration of their socio-economic status. Therefore, this

⁷ Gqada (n6 above) 18.

⁹ Gqada (n6 above) 19.

⁸ Gqada (n6 above) 19.

⁹ Laplante (n1 above) 48.

¹⁰ Laplante (n1 above) 1.

¹¹ Gqada (n6 above) 20.

¹² Gqada (n6 above) 19.

¹³ Gqada (n6 above) 19-20.

research identifies the role of government by taking into consideration their powers and common *bona fide* and *mala fide* acts. The role of mining companies is also determined within the legal framework on how to conduct stakeholder engagements. Lastly, the legal rights and obligations of communities are deliberated upon. The power relations between the three entities are defined using practical examples, therefore recommendations are suggested in order to limit such powers and create a balance for all stakeholders.

1.2 Aim & objectives of the research

1.2.1 Aim of the research

To establish to what extent the law must consider community's consent versus consultation as a legal requirement before granting extractive industry-related rights to an applicant.

1.2.2 Objectives of the research

The objectives of this research is to:

- (a) To assess the functionality of different approaches adopted by mining companies in community engagements and its effect on stakeholder relationships.
- (b) Establish the current legal position of community consensus versus community consultation in granting mining and exploration rights within the South African legal framework.
- (c) Evaluate the advantages and disadvantages of adopting community consensus as opposed to consultation when considering whether to grant an exploration and mineral right.
- (d) Recommend whether to adopt community consultation versus community consensus or both systems as adequate, in order to grant an exploration and mining license.

1.3 Research Question

1.3.1 Primary Question

To what extent must the South African law consider community consensus versus community consultation in granting extractive industry-related rights?

1.3.2 Secondary Questions

- 1.) What is the nature and role of community engagement in the extractive industry, and the implications thereof on stakeholder relationships?

- 2.) What are the current legal *requirements*, in terms of community engagement, that mining companies must *adhere* to in order to be able to obtain a license/permit?
- 3.) What are the *advantages* and *disadvantages* of adopting community consensus versus community consultation in granting exploration and mining rights within the legal framework?
- 4.) *Is there an argument to be made for the adoption of community consensus, as opposed to consultation*, to ensure successful stakeholder engagements in granting exploration and mining rights?

1.4 Research Methodology

1.4.1 Methodology

This research is a critical legal analysis that examines the current legal position of South African law in connection to the granting of mineral and exploration rights. The researcher also adopts a comparative analysis investigating whether the law must adopt community consensus or community consultation in granting a license to an applicant. The researcher conducts a literature study about community engagements through the use of books and journals from a social science perspective. The researcher investigates the nature of community engagements and its effect on stakeholder relationships. To understand the various forms of community engagements, the researcher adopts a research strategy through the use of case studies. The researcher extracts the typology of community participation by Pretty to illustrate the various forms of community engagement available. The case studies practically show the approach adopted by a mining company during community engagements and the consequences thereof on adopting such an approach.

1.4.2 Research Parameters

The researcher's investigation is limited to the legal requirement that an applicant for an extractive industry related right must fulfil with regards to the involvement of communities who are likely to be affected by any prospective mining activity. Therefore, the researcher identifies and studies the relevant legislation, international instruments, policies that are relevant to the research problem including appropriate case law limited to the South African legal framework. Furthermore, this research is limited to communities whose rights are protected under customary law such as indigenous communities and rural communities.

Other limitations are time constraints and lack of funding to conduct a community investigation, therefore there is heavy reliance on institutional reports, newspaper reports and documentary reports which may be biased according to the writer's perspective and conclusion. Furthermore, the judgment of the court case used as a case study to determine whether community consent or consultation is a legal prerequisite has been reserved, therefore the outcome of the case may be handed down after the handing in of the final dissertation.

1.5 Relevance of the Study

Titanium deposits were found along the wild coast area called Xolobeni situated in the Eastern Cape, South Africa. There is an ongoing debate as to whether mining the area will ultimately benefit the community. An application was submitted by an Australian mining company to mine the area, however such an application was faced with rejection and resentment by Xolobeni community members. The initial granting of the right led to community members being hostile to the mining company. This resulted in the Department of Mineral Resources withdrawing the mining right. The Department further attempted to grant the mining right again even after withdrawing at the first instance, this has led the community to approach the courts to deny the Minister of Mineral Resources from granting such a right. Amadiba Crisis Committee and Legal Resource Centre took the Department of Mineral Resources to court on the 23rd of April 2018 over attempts to grant Transworld Energy and Mineral Resources company exploration and mining rights over the land in Xolobeni.¹⁴ The applicants requested the court to rule that the DMR can only issue a license only if the community has consented to the mining project.¹⁵ The court is therefore faced with a critical question whether consultation with the community is adequate to grant a mining right as argued by the Minister of Mineral Resources or whether community consensus must be adopted as legal pre-requisite in granting a mining right as argued by the community.

This matter before the South African courts has prompted the researcher to investigate whether *adoption of community consensus, as opposed to consultation*, is important to ensure successful stakeholder relationships in granting exploration

¹⁴ K Seipato 'Historic Court Case on the Right to Say No to Mining' (2018) *Alternative Information Development Centre* <http://aidc.org.za/historic-court-case-right-say-no-mining/> (last accessed 18 July 2018).

¹⁵ Sepiatio (n16 above).

and mining rights. This study is relevant as there is widespread conflict arising between mining affected communities or prospective mining affected communities with mining companies. The nature of conflict, includes strikes, destruction of property, personal injuries and loss of life. The researcher investigates the scope and nature of community consultation versus consensus and the implications on all stakeholders. Stakeholder engagement is the channel in which mining companies can gain a community's consent to a mining project. Furthermore, it is through stakeholder engagements that a mining company can fulfil the consultation legal requirement envisaged in the Mineral and Petroleum Resources Development Act.¹⁶ Therefore, this research investigates the different ways in which applicants for mining licenses approach communities through stakeholder engagements. This research is significant as it will conclude which approach is most effective in strengthening stakeholder relationships necessary for social and economic development.

If the applicant is successful, this court case will set a precedence in South Africa and will influence the rest of the African continent that community's consent is a legal prerequisite for granting a mining or exploration license.¹⁷ This research is relevant to all stakeholders such as government, policy makers, activists, communities, mining companies and any other interested parties in the extractive industry to establish whether community consent must be preferred over community consultation.

1.6 Chapter Overview

Chapter 2

This chapter illustrates the types of community engagements used by stakeholders who seek to pursue a socio-economic project, however in this particular instance the typology will be analysed through the context of the extractive industry. Chapter 2 adopts seven types of community engagements introduced by Pretty and Cornwall namely interactive, passive, manipulative, consultation and functional and self-mobilisation. These types of community engagements are linked to the case studies and show the effect of such engagements on the community and other stakeholders. Chapter 2 reveals how community engagements are conducted and the ultimate consequences on stakeholder relationships. Chapter 2 concludes which form of

¹⁶ s10.

¹⁷ Sepiato (n16 above).

community engagement is the most effective and least effective in strengthening stakeholder relationships between mining companies, communities and government.

Chapter 3

Chapter 3 investigates the current legal status of the law with regards to community engagement. Therefore, this chapter identifies pieces of legislation that deal with community involvement such as the legal requirements that applicants to a mining right must fulfil before being granted the mining related rights. Furthermore, this chapter deals with how the courts have in the past resolved disputes between community members and applicants in the past, taking into consideration the manner in which the courts have interpreted certain provisions of the legislation. Lastly the research identifies international legal instruments that deal with a community's involvement. This chapter identifies whether South African law has adopted community consultation over community consensus and deliberates on how the law defines community consultation.

Chapter 4

Chapter 4 describes the pros and cons of adopting community consensus versus community consultation. Therefore, community consensus and consultation will be defined within the context of extractive industry. The socio-economic impacts of adopting either approaches will be investigated. Therefore, chapter 4 takes a comparative analysis of adopting either of the approaches.

Chapter 5

Chapter 5 ultimately answers the primary question of this research from a holistic view point. The researcher suggests recommendations with regards to which approach is suitable between community consensus and community consultation.

Chapter 2 Community Engagement and Effect on Stakeholder Relationships

2.1 Introduction

Chapter 2 discusses the concept of community engagement within the context of extractive industry. Chapter 2 unpacks the nature and role of community engagements in the extractive industry and how such engagements can affect stakeholder relationships. Chapter 2 adopts the typology of community engagement introduced by Pretty and Cornwall namely interactive, passive, manipulative, consultation and functional and self-mobilisation. Each form of community engagement is linked to a particular case study and shows the consequences of adopting such an approach on stakeholder relationships. This chapter shows examples of successful community engagement, as well as failed community engagements.

2.2 Definition of Key Terms

According to the MPRDA a **community** is defined as a coherent, social group of people who occupy a particular space of land in which the occupiers of the land have rights and interests.¹⁸ Community members are occupiers of that particular land by law, custom, or by agreement.¹⁹

Engagement is difficult to define according to Walker.²⁰ Walker attempts to define it as that the parties involved understand the purpose of the project, develop a title of ownership and therefore commit to be a part of processes to achieve the project goals and the outcome of the process.²³

The Chamber of Mines defines **stakeholders** groups, companies or persons affected by mining activities directly or indirectly affected by a decision with the purpose of creating sustainable conducive business environment and strong stakeholder relationships.²¹

¹⁸ Section 1 of the MPRDA.

¹⁹ MPRDA (n20 above).

²⁰ Centre for Disease Control and Prevention *Principles of community engagement* (2011) 7

²³ CDC (n22 above) 7.

²¹ T Chabana & Z Zama 'Stakeholder engagement and communication' (2016) *Chamber of Mines Integrated Annual Review 77*.

2.3 Different forms of Community Engagements

The researcher adopts the Pretty's typology of community participation to discuss the nature and characteristics of community engagements. This section therefore identifies the different forms of community engagements, and illustrates how each type is depicted practically through the use of examples. Lastly, this section suggests which community engagement is least effective and most effective in building sustainable stakeholder relationships.

2.3.1 Manipulative Participation

This form of community engagement is characterised by deception, pretence, coercion, force and concealment of essential details of the mining project.²² In other instances, those engaged in the negotiations have no legitimate power to represent the community.²³

To illustrate the characteristic of pretence and concealment of intricate details of a prospective mining project, events that ensued in Xolobeni are good example of how a mining company can pretend and disguise information from a community. With the intention of fulfilling the legal requirement of adequate consultation with prospective host communities according to the MPRDA, six meetings were conducted in Xolobeni, in which certain local community members and organisations were targeted to take part in the meeting.²⁴ However, the contractors who were mandated to engage with the community ensured that participation from local members was kept minimal, especially by those who were going to be directly affected by the mining activity.²⁵ Meetings were held in a strategic manner, whereby community members who were likely to be directly affected by the proposed mining activity were denied the opportunity to make substantial contributions.²⁶

To illustrate the characteristic of coercion, force and bribery under manipulated participation, Xolco a Black Economic Empowerment (BEE) mining company director admitted on video that the company had orchestrated a campaign to get "manipulated consent" from Xolobeni community and further refused to disclose

²² J Pretty 'Participatory learning for sustainable agriculture' (1995) 23 *World Development* 1252.

²³ Pretty (n25 above) 1252.

²⁴ A Bennie 'The relation between environmental protection and 'development': A case study of the social dynamics involved in the proposed mining at Xolobeni, Wild Coast' (2010) *Department of Sociology, University of the Witwatersrand, Johannesburg* 92.

²⁵ Bennie (n27 above) 98.

²⁶ Bennie (n27 above) 93.

exact details of how the community was to benefit from the mining project.²⁷ This example exhibits the characteristics mentioned above. Furthermore, interviewees of Checkpoint allege that R14million was released to the local chieftaincy by TEM for community development projects but no project was launched and they suspect it was used for their personal use.²⁸

The characteristic of lack of legitimate structures can be explained by the manner in which two groups were formed, each claiming legitimacy which is a characteristic of manipulated consultation. Two groups were formed in which both groups alleged to be legitimate representatives of the local community. One of the group named itself the Amadiba Community Crisis (hereafter ACC) and the other as Xolco which is a BEE partner of TEM which was to receive 26% of the proceeds. During protests against mining in Xolobeni, it was discovered that ACC was acknowledged as the legitimate representatives of the Xolobeni Community because it pro-active with dealing with the grievances set out by the community members.²⁹ Whereas, Xolco a BEE partner of TEM was alleged to be biased towards mining because they would benefit financially and therefore ignored the opinions and concerns of the Xolobeni community. It is purported that Xolco submitted a petition to the Department of Mineral Resources claiming that they got signatures from Xolobeni local community members who were in support of the mining project. However, it was later discovered that some of the signatures presented were from community members that were already deceased and other local community members denied ever signing such a petition.³⁰ Conflict arose between ACC and Xolco because each group claimed to be legitimate representative of Xolobeni local community. ACC was against the mining project because it claimed that there was lack of consultation with community, therefore there was no community participation. Whereas Xolco was in support of mining project, because they claimed it would realise economic development for the community through the establishment of hospitals, clinics and schools.³¹

²⁷ Video, 'Wild Coast mining controversy: Mr Msabane spills the beans'.

²⁸ Checkpoint "Mining Murder" (2016) eNCA <https://www.youtube.com/watch?v=vEHwDuNVjec> (last accessed 29 October 2018).

²⁹ Msabane (n30 above).

³⁰ Checkpoint (n31 above) 22.

³¹ Sunday Tribune *Residents on warpath over mining* 24 June 2007.

ACC sent a petition to Xolco to submit documents to prove that they were legitimate representatives of the Xolobeni community, however Xolco failed to present such documents.³² Community members and the ACC challenged the legitimacy of Xolco and claimed that Xolco is a representative of just a few community members who had an interest because were likely to individually benefit financially from the for themselves, therefore they did not consider the community's interests as a whole. Therefore, the absence of legitimate representatives frustrates community members which leads to communities disliking mining projects because they feel they are not involved in decision making processes.

Lack of legitimate structures to represent the community and an attempt to gain manipulated consent, bribery, coercion results in weak stakeholder relationships. Communities become disgruntled and lodge protests against mining companies and government as their opinions and views are not consider. Manipulated participation results in less effective community engagements that hinder mining projects.

2.3.2 Passive Participation

This typology is characterised by “unilateral announcements”, whereby there is no dialogue or opportunities created for the community to contribute and participate in negotiations.³⁶ Therefore, mining companies or governments make unilateral directives to host communities, leaving host communities out of decision making processes. Information shared often belongs to external professionals of the mining companies.³⁷

Events that occurred at Xolobeni exhibit characteristics of passive participation, whereby no opportunities were availed to the community for engagement. In Xolobeni, no meetings were held in the tenement area where the proposed mining activity would take place.³⁸ However, the contractors opted to hold meetings in the inland zone, where the participants of the mining activity would only be indirectly affected. Amadiba Crisis Committee activists allege this was done deliberately to exclude community members who would be directly affected by the proposed mining activity, as they were likely to be in opposition of the mining activity.³⁹ The activists

³² Checkpoint (n31 above)

22. ³⁶ Pretty (n25 above)

1252. ³⁷ Pretty (n25 above)

1252 ³⁸ Bennie (n27 above)

91. ³⁹ Bennie (n27 above) 92.

further alleged that the contractors favoured people from the inland zone because they supported mining activity over those in the catchment area.³³ Zamile Qunya a pro-mining activist influenced people of the inland zone and therefore contractor's targeted people who lived in the inland locations to hold their meetings. The Xolobeni community holds the view that the development initiative was suggested without any form of involvement of the community and consultation which is equal to imposing the will of government or private business on communities.³⁴

Passive participation typology results in weak stakeholder relationships between community and mining companies because communities feel as if the will of government and communities is imposed upon them and which results in resentment towards any project proposed.

2.3.3 Participation by Consultation

This typology is characterised by people's involvement in community engagement. External agents identify the problem and determine how information is gathered and controlled.³⁵ Mining companies simply inform the community of their prospective mining project with regards to issues of relocation, compensation, employment and community development. The community shares its views and opinions on the proposed mining project.³⁶ However the "external professionals" (government or mining companies) are not mandated to adopt and accept the views of the community when making final decisions.³⁷ Consequently, the opinions of the community maybe futile if the mining community does not incorporate them in their mining projects. This typology reflects certain aspects of the current legal position of South African law in that the Minister retains the right to grant or deny a mining-related right even if it against the wishes of the community.³⁸

2.3.4 Functional Participation

This typology demonstrates how community participation is viewed as a means to achieve the project goals by a mining company.³⁹ A community will organise itself by

³³ Bennie (n27 above) 91.

³⁴ Gqada (n6 above) 13.

³⁵ Pretty (n25 above) 1252.

³⁶ Pretty (n 25 above) 1252.

³⁷ Pretty (n 25 above) 1252.

³⁸ Section 16 & 22 of the MPRDA.

³⁹ Pretty (n25 above) 1252.

forming functional groups to meet pre-determined objectives.⁴⁰ This typology is characterised by shared-decision making, however such an opportunity only arises after mining companies has already made major decisions.⁴¹ Therefore, the role of the community is an after-thought in a mining project and their involvement is not incorporated right from the beginning of a prospective mining project.

This form of typology results in strong stakeholder relationships before the mining project commences, however to retain the social license to operate on-going decision- making processes must incorporate all stakeholders. Therefore, weak stakeholder relationships will form after mining operations commence, communities often realise that a major decision has been made that is conflict with their current interests.

2.3.5 Interactive Participation

The community's involvement is not viewed as a means to achieve project goals but rather as a right. Therefore the community participates in a joint analysis which involves defining the problem and controlling processes with the mining companies.⁴² The community participates in the development of project goals including in the introduction, formation and strengthening of institutions.⁴³ The community has the privilege of making decisions and determining how resources will be shared and used.⁵¹ Lastly, the community has a stake in maintaining and controlling structures established. In the Philippines, Shell an oil and gas company initiated community engagement to gain community consent. Shell approached the affected community and other stakeholders to hold interviews and meetings. There was "information dissemination", educative sessions and community workshops.⁴⁴ Furthermore, perception surveys and participatory workshops that included formulation of environmental management were held to introduce the project and determine the survey results.⁵³ A memorandum of understanding was drafted when conflict arose and negotiated agreements were concluded between aggrieved parties, government

⁴⁰ Pretty (n 25 above) 1252.

⁴¹ Pretty (n 25 above) 1252.

⁴² Pretty (n 25 above) 1252.

⁴³ Pretty (n 25 above) 1252.

⁵¹ Pretty (n 25 above) 1252.

⁴⁴ J Carpio & P Molina 'Gaining Social Acceptability of a Project' (2003) *University of Philippines* 10.

⁵³ Carpio (n52 above) 10.

and legitimate stakeholders which entailed resettlement and social development programs.⁴⁵

The relationship between the community, mining company and other stakeholders in Philippines exhibits interactive participation typology. All participants who were to be directly or indirectly affected by the extractive industry project were incorporated into stakeholder engagements including the community who participated in suggesting, drafting and concluding agreements. This sort of engagement results in strong stakeholder relationships, as conflict is minimised or reduced as it arises throughout the project life cycle.

2.3.6 Self mobilisation

Self-mobilisation does not involve mining companies as external agents but the community works independently, whereby the community takes initiatives without the contribution of mining companies.⁴⁶ Mining companies are only involved to the extent that they provide advice to the community however they do not control how resources are used or shared.⁴⁷

This typology demonstrates how people can organise themselves through contributing resources in return for further material incentives.⁵⁷ The Royal Bafokeng community established a company called Royal Bafokeng Holdings (Hereafter RBH) that regulates and manages community's overall investment portfolios and strategy.⁴⁸ The RBH is directed by the community is to invest through the communal purse to achieve maximum possible profit and sustainability.⁵⁹ The RBH is not owned by a few individuals but has over 150 000 shareholders who are community members benefiting from the dividends of the company.⁴⁹ RBH enjoys tax exemption therefore resources are directed for community benefit and therefore dividends are not first run through national treasury.⁵⁰

⁴⁵ S Herz *et al* Development without Conflict: The Business Case for Community Consent (2007) *World Resource Institute* 22.

⁴⁶ Herz (n54 above) 22.

⁴⁷ Pretty (n25 above) 1252.

⁵⁷ Pretty (n 25 above)1252.

⁴⁸ SE Cook 'Community Engagement of Mineral Resources: The Case of the Royal Bafokeng Nation' (2013) 113 *Journal of the Southern African Institute of Mining and Metallurgy* 62. ⁵⁹ Cook (n58 above) 63.

⁴⁹ Cook (n58 above) 64.

⁵⁰ Cook (n58 above) 63.

2.4 Conclusion

This chapter assess the functionality of different approaches adopted by mining companies when engaging with communities. Furthermore, the effect of each approach is identified and evaluated if such an approach reaps benefits to ensure successful stakeholder relationships. The researcher proposes the best typology for successful community engagements is interactive participation which involves the tripartite relationship between government, community and mining companies. Interactive participation gives an enabling environment for a community to consent to a mining project or not, whereas the other types of participation hinder the community from consenting to a mining project. Manipulative participation and passive participation result in weak stakeholder relationships that are based on resentment, hatred and conflict between stakeholders. This is as result of mining companies acting in bad faith, so as to solicit a mining right.

Chapter 3: The Current Legal Status of Community Consensus and Consultation in South Africa

3.1 Introduction

This chapter discusses the current legal requirements that an applicant who seeks any mining-related rights must comply with. This chapter identifies and analyses provisions within the Constitution of the Republic of South Africa that affect all stakeholders during community engagements. The Constitution is the highest law of the land and this study recognises it as so, when contextualising the preferred legal status of selecting community consent as opposed to community consultation. This research identifies the Mineral and Petroleum Resources Development Act (hereafter MPRDA) as the main source of law that deals with extractive industry requirements. Therefore the researcher extracts provision's that may affect the relationship between communities and mining companies. The researcher also identifies other legislations and international instruments that affect the legal position of communities and mining companies before a mining project and its status in South Africa. Lastly, the researcher discusses case law on community engagements dealing with mining-related issues and how the courts have interpreted South African legislation. Chapter 3 gives a holistic view of the legal position of communities and applicants in relation to mining- related rights and obligations.

3.2 The Constitution of the Republic South Africa

Section 25 popularly known as the “property clause” can affect directly or indirectly applicants of mining-related rights, those who possess mining-related rights and communities. Therefore, the Constitution has a bearing on the above mentioned groups, influencing how decision making processes must be carefully considered. Since mining projects result in deprivation of the landowner or lawful occupier, section 25 of the Constitution must be considered accordingly. Land can only be expropriated in terms of law of general application, however it may not be arbitrary.⁵¹ Therefore, the Mineral and Petroleum Resources Development Act qualifies as the law of general application. Furthermore such deprivation can only be done if it is for a

⁵¹ Section 25(1) of the Constitution.

public purpose or interest subject to compensation that is just and equitable decided by the parties affected or court.⁵²

Additionally, affected parties must consider the current use and market value of the property, the history behind its acquisition and the purpose of expropriation.⁶⁴ The state is given a mandate to ensure that there is commitment to land reform by redressing past injustices. In the event of a community being illegally dispossessed based on discriminatory laws or practices, there ought to be restitution or equitable redress.⁵³ The Constitution is silent as to whether community members who are threatened by dispossession as a result of potential economic development activities such as mining, have a right to refuse from such a project if they feel it will disrupt their livelihood negatively.

3.3 The Mineral and Petroleum Resources Development Act

3.3.1 Legal interpretation under this Act

In case of conflict between common law and the MPRDA, the MPRDA will prevail over common law.⁵⁴ When interpreting any provision of the MPRDA, any reasonable interpretation must be in accordance with the objects of the Act and must therefore be favoured over any interpretation that is inconsistent with the objects of the Act.⁶⁷ The applicants in the Xolobeni case argue that Section 4(2) of the MPRDA does not trump customary law which is awarded equal rights as common law according to the Constitution.⁵⁵ They further argue that the MPRDA does not mention that it prevails over any other legislation even in the event of conflict.⁵⁶

3.3.2 Provisions dealing with consultation with interested and affected parties

According to the MPRDA no person can prospect, mine, conduct technical or reconnaissance operations, explore or produce any mineral or petroleum without the owner or lawful occupier being notified and consulted in connection to the land in issue.⁵⁷

⁵² Section 25(3) of the Constitution.

⁶⁴ Constitution (n63 above).

⁵³ Section 25(6) of the Constitution.

⁵⁴ Section 4(2) of the MPRDA.

⁶⁷ Section 4(1) of the MPRDA.

⁵⁵ *Baleni & Others v Minister of Mineral Resources* (2016) Applicants Heads of Argument (HC) para 76.

⁵⁶ *Baleni* (n68 above) para 76.

⁵⁷ Section 5(4)(c) of the MPRDA.

Section 10 under the heading consultation with interested and affected parties provides for the Regional Manager to make it known to all interested parties that an application for an exploration or mining right has been submitted.⁵⁸ Furthermore, he must call on all interested or affected parties to submit their responses to the made application within 30days from such notification.⁵⁹ This is an opportunity for all parties to cite their concerns and grievances about the prospective project to be made. Lastly, if there is any form of objection by such parties the Regional manager must submit the objection to the Regional Mining Development and Environmental Committee to deliberate on the objects and lastly advise the Minister on what to decide.⁶⁰

3.3.3 Provisions dealing with the scope of state powers with regards to related-mining rights

The MPRDA reaffirms the Constitution by stating that the state is the custodian of all mineral and petroleum resources for the benefit of all South Africans. Since the state is the custodian of all mineral and petroleum resources, the state will exercise its duty under the Minister of Minerals and Energy.⁶¹ Therefore, the Minister has the wide powers from granting, issuing, refusing, controlling and managing prospecting rights, mining rights, mining permits, retention permits and exploration rights in consultation with the Minister of Finance to determine the payable fee or levy.⁶² The Minister must balance between sustainable development of mineral and petroleum resources under national environmental policy vis-à-vis economic and social development.⁶³

Section 16 provides the legal requirements that an applicant ought to comply with before applying for a prospective right. Any person that wants a prospective right must apply to the Minister. Firstly he must lodge an application to the Regional manager where the land is situated to exercise the prospective right is situated and pay the relevant fees.⁶⁴ The Regional Manager has two decisions at his disposal,

⁵⁸ Section 10 (1)(b) of the MPRDA.

⁵⁹ MPRDA (n71 above).

⁶⁰ Section 10 (2) of the MPRDA.

⁶¹ Section 3 (1) of the MPRDA.

⁶² Section 2 (a) of the MPRDA.

⁶³ Section 3 (3) of the MPRDA.

⁶⁴ Section 16 (1) of the MPRDA.

either to accept the application if it complies with all requirements of the Act or to deny the application if it does not comply with the legal provisions prescribed.⁶⁵ If the Regional manager accepts the application he or she must notify the applicant within 14 days to submit environmental management plan and to notify and consult the land owner or lawful occupier of the land within 30 days of notice.⁶⁶ The Regional Manager must then forward the application to the Minister who will then publish a notice in the gazette for invitations to apply for prospective rights.⁶⁷

Section 22 also has the same provisions as section 16 but deals with the granting of mining rights, however the time frame given to the applicant to notify the landowner or lawful land occupier is 180 days instead of 30 days. Furthermore, no other person must hold a mining right, prospective, mining permit or retention permit for the same land and mineral.

Therefore, the MPRDA requires minimal consultation to be conducted by the company that seeks to be granted mining-related rights under the Act. The consultation required under section 16 and 22 is limited to environmental issues and access to land.⁶⁸ The state is only involved only to the extent that it promotes the rights and interests of the community and the conditions set out for community participation.⁶⁹

3.4 Broad Based Socio- Economic Empowerment Charter for the Mining and Minerals Industry

According to the MPRDA, the Minister must draft a Broad Based socio-economic empowerment Charter (*hereafter the Mining Charter*) that will benefit previously disadvantaged persons by allowing such persons to benefit from proceeds of mining activity.⁷⁰ The mining charter has currently been drafted. According to the Mining charter, a mine community is defined as communities where mining activity will actually take place, the community expected to send major labour, adjacent communities within a particular local, metropolitan or district municipality.⁷¹

⁶⁵ Section (2) & (3) of the MPRDA.

⁶⁶ Section 16 (4) of the MPRDA.

⁶⁷ Section 16 (5) of the MPRDA.

⁶⁸ Smith (n3 above) 9.

⁶⁹ Section 23(A) of the MPRDA.

⁷⁰ Section 100 (2) (a) of the MPRDA.

⁷¹ Section 2.5.3 of the Mining Charter.

The Mining Charter is silent on whether the community has the “right to say no” to a prospective mining project. The Charter only obligates the mining right holder to make meaningful contribution to the mine community in line with the principles of social license to operate.⁷² In the context of extractive industry, Boutlier and Thomson define social license to operate as informal consent or agreement that a community may grant to an individual or mining company to pursue development projects that affect the communities’ livelihood.⁷³

3.5 Interim Protection of Informal Rights Land Act of 1996

This Act provides that no person may be deprived of his or her informal right to land without their consent.⁷⁴ Where land is owned on a communal basis, it can only be deprived of that land according to custom and usage of that particular community.⁷⁵ In the event of disposing a right that is granted by custom and usage of a community, to dispose such a right must be decided through a meeting arranged for such a purpose.⁷⁶ Furthermore, adequate notice must have been given to the attendees and must be given reasonable opportunity to participate in the meeting.⁷⁷ Dispossession will only be legally held if the majority of attendees agree to dispose of such a right.⁷⁸

The applicants for the Baleni case in their heads of argument argue that IPILRA is envisaged from the Constitution under section 211(3), the purpose of the Act is to protect the informal right to land in terms of access, use and occupation in term of indigenous or customary law.⁷⁹ However, the MPRDA does not purport to regulate customary law, whereas IPILRA does. They further argue that there is nothing in the MPRDA that is inconsistent with reading IPILRA act together with the MPRDA.⁸⁰ Therefore, customary right owners have the right to consent rights before a prospective mining project commences as s2(1) of IPILRA and ss10 and 22 of the MPRDA which require community consultation must both be applied.⁸¹ Smith argues

⁷² Mining Charter (n84 above).

⁷³ RG Boutlier Modelling and Measuring the Social License to Operate: Fruits of a Dialogue between Theory and Practice (2011) *Social License* 2.

⁷⁴ Section 2(1) of the IPILRA.

⁷⁵ Section 2(2) of the IPILRA.

⁷⁶ Section 2(4) of the IPILRA.

⁷⁷ IPILRA (n89 above).

⁷⁸ IPILRA (n89 above).

⁷⁹ Baleni (n69 above) para 101.

⁸⁰ Baleni (n69 above) para 112.

⁸¹ Baleni (n69 above) para 113.

⁹⁵ Smith (n3 above) 10.

that MPRDA trumps and overrides the IPILRA, hence consultation is the bare minimum requirement and not consent.⁹⁵

3.6 International Instruments

3.6.1 United Nations Declaration on the Rights of Indigenous Peoples

This Declaration was adopted by the United Nations General Assembly. The Declaration is not a treaty and is therefore not legally binding on states but is rather a soft law. The UNDRIP provides that states must consult in good faith with indigenous peoples so as to obtain free, prior and informed consent before applying legislative and administrative measures.⁸² The Chairman of UNDRIP states that the right to self-determination and right to pursue economic, cultural and social development can only be achieved through the FPIC principle.⁹⁷ Therefore each community will have the right to manage their own natural resources freely for their mutual benefit and sustenance.⁹⁸

3.6.2 The Convention on the Elimination of All Forms of Racial Discrimination (CERD)

This convention obligates states to ensure that indigenous people have equal rights in respect of effective public participation and that decisions taken that affect their rights and interests must be done with their informed consent.⁸³ If the indigenous people have been already been deprived of their land without informed consent, states must compensate them accordingly.⁸⁴ Therefore mere consulting with these communities prior to exploitation of their resources falls short of the requirements needed to fulfil Committee's general recommendation XXIII on the rights of indigenous peoples.⁸⁵

3.6.3 International Covenant on Economic Social and Cultural Rights (ICESCR);

The Committee acknowledges that indigenous people have the right to collective action in terms of maintaining, controlling and protecting their cultural heritage,

⁸² Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples of 2007 ⁹⁷ Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007 on the adoption of the UN Declaration on the Rights of Indigenous Peoples ⁹⁸ Malezer (n97 above).

⁸³ General Recommendation XXIII on the Rights of Indigenous Peoples (1997) at para 4(d).

⁸⁴ General Recommendation XXIII on the Rights of Indigenous Peoples (1997) at para 5.

⁸⁵ Articles 9 of the Convention on the Elimination of All Forms of Racial Discrimination, Consideration of Reports submitted by States Parties, Concluding Observations on Ecuador (Sixty Second Session, 2003), U.N. Doc. CERD/C/62/CO/2, 2nd June 2003, para 16.

therefore to give effect to this right states should respect the principles of free, prior and informed consent.⁸⁶

3.7 Case Law

3.7.1 *Bengwenyana v Genorah Resources*

In *Bengwenyana v Genorah Resources* the court deliberated on the meaning of consultation. The court stated that there is an obligation on a party that intends to prospect or mine, to consult with the community.⁸⁷ The court held that there is a serious concern for the rights of individuals whose rights may be infringed as a result of the mining activity.⁸⁸ The court held that the duty to consult entailed that the land owner must be informed about the prospect to mine on that area.⁸⁹ Therefore, the community must have knowledge of the application for the prospect to mine that area. Secondly, duty to consult also involves providing the community with enough information about the proposed mining activity,⁹⁰ for example where the drilling will take place, number of households to be displaced and whether the water sources used by the community will be contaminated. Therefore, not only should the information be adequate but be truthful and precise. Lastly, the court further held that the MPRDA does not impose the obligation on the applicant to obtain consent from a community to be granted a mining right however they have a duty to consult in good faith.⁹¹ The process of consultation must be taken seriously and must not be reduced to a mere fulfilment of a requirement.

3.7.2 *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community and Others*

The court held that the title held by the Richtersveld community was one of a right of communal ownership envisaged under indigenous law.⁹² This right included the right

⁸⁶ Covenant on Economic Social and Cultural Rights, General Comment No 21 E/C.12/GC/21 (21 December 2009) at para 36.

⁸⁷ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; 2011 (4) SA 113 (CC) para 62.

⁸⁸ *Bengwenyama* (n103 above) para 66.

⁸⁹ *Bengwenyama* (n103 above) para 66.

⁹⁰ *Bengwenyama* (n103 above) para 65.

⁹¹ *Bengwenyama* (n103 above) para 65.

⁹² *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community and Others*,

to exclusive and undisturbed use of the land and exploitation of natural resources.⁹³ One of the primary customary rule that applied to Richtersveld people is that the land belonged to the community as a whole, and there was to be common use of its resources by all.⁹⁴ Each community member had legitimate access to land with the exclusion of non-community members, therefore non-community members were expected to obtain consent to use their land with a fee to enjoy such usage.⁹⁵

3.8 Shortcomings of mineral law regime in South Africa

The researcher identified flaws within the current mineral law regime in South Africa on the following basis:

3.8.1 Time limits allocated to conduct community engagement

The time allocations prescribed for the applicant to approach the community to be affected by the prospective mining project is short to conduct a meaningful and successful community engagement, especially when the mining activity will substantially affect their livelihood. This will result in sloppy work from the applicant in order to fulfil the legal requirement.

3.8.2 Definition and scope of what constitutes community consultation is blurred

There are no legal provisions that suggest how community consultations must be conducted. This leaves room for abuse by the mining companies who can manipulate, coerce and bribe communities, therefore acting in bad faith. The mining company can therefore allege that consultation took place even though they acted in bad faith. In some instances, some companies who wish to act in good faith are not able to discern what approach is appropriate and suitable to engage with communities hence they face resentment from communities. In an effort to mitigate community resentment, mining companies can make promises they know they will fail to keep, so as to reduce tension temporarily.

3.8.3 The imbalance of rights and obligations between stakeholders

The landowner or lawful occupier (community) has no “right to say no” to a prospective mining project under the MPRDA or Constitution and can only apply for

(CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), para 6.

⁹³ Alexkor (n108 above) para 7.

⁹⁴ Alexkor (n108 above) para 58.

⁹⁵ Alexkor (n103 above) para 58.

compensation or legal redress in the event of dispossession. The Constitution only provides to the extent that a community or individual can have legal restitution or redress if his land is taken illegally. However, the Constitution and Mining Charter is silent whether a person or community has the power to refuse the deprivation of his or her land. It could have been expected for the Constitution to provide for citizens the opportunity to give consent before a mining operation commences.⁹⁶ The government has wide powers and is the only stakeholder that can grant a mining right.

3.8.4 Recognition, conflict and gaps within the law

The MPRDA is in conflict with the IPILRA with regards to communal land. IPILRA demands for community consent for land to be disposed of whereas the MPRDA prescribes to mere consultation before a mining right is granted. Smith argues that the MPRDA supersedes tenure of laws and grants administrative powers to the state to grant, refuse and control mining rights, therefore the MPRDA will trump IPILRA hence community consultation is recognised over community consent.⁹⁷ However, applicants in the *Baleni* case argue that the MPRDA and IPILRA must be read together.⁹⁸ Therefore the outcome of this case, in which judgement has been reserved up to date will bring finality and clarity as to the legal status of the MPRDA over the IPILRA, moreover that is if the judge makes a final decision on the matter. International instruments mostly cover indigenous people leaving out rural communities that do not meet the criteria of indigenous people. Furthermore, it is difficult to establish which community qualifies as indigenous peoples in a South African context. Although South Africa has ratified the abovementioned international instruments they are treated as soft law and are not binding, this implies that the applicant need not to necessarily gain consent.

3.9 Conclusion

This chapter deliberates on the current legal position that applicants must adhere to with regards to communities that are likely to be affected by a prospective mining project. The minimum requirement that an applicant ought to fulfil is to consult with the community that is likely to be affected by mining operations under the MPRDA. Therefore, the applicant does not necessarily need community consent to lodge an

⁹⁶ Smith (n3 above) 2.

⁹⁷ Smith (n3 above) 1.

⁹⁸ *Baleni* (n68 above) para 76.

application. The government has the power to grant a mining-related rights even against the community, but must consider the rights and interests of the community. However, the IPILRA provides that consent is needed for deprivation of communal land, unfortunately it is unclear whether such provision extends to mineral extraction activities and if it does extend, whether the MPRDA trumps IPILRA. In practice, the Minister has been applying the legal-prerequisites as per the MPRDA and not IPILRA. Additionally, the community has the right to approach the court by means of an interdict to revoke the mining-related right granted or threatening to be granted. The Mining Charter and Constitution are silent as to whether a community has the right to refuse a mining project and only provides for compensation and legal redress in the event of deprivation by the aggrieved parties. International instruments however explicitly imply that applicants to a mining project must obtain consent. However, the legal status of international law in South Africa is of persuasive nature. This research therefore submits that consultation is the minimum requirement that an applicant needs to fulfil to be granted an applicant. Nonetheless, the judgment of the *Baleni* case might change the current trajectory of South African mineral law regime demanding community consent.

Chapter 4: The Advantages and Disadvantages of Adopting Community Consensus versus Community Consultation

4.1 Introduction

This chapter takes on compares the adoption of community consensus and community consultation within the legal framework. This chapter looks at the benefits and challenges of adopting consensus as a legal pre-requisite to be granted mining-related rights. This chapter acknowledges that consultation of affected and interested parties is the current legal pre-requisite in South Africa to be granted any mining-related rights. However, it also recognises that community consent as a legal pre-requisite before deprivation of communal land as provided for in the Interim Protection of Informal Rights Land Act of 1996 only to the extent that the land meets the criteria of the Act. Therefore, this chapter looks at the challenges faced by various stakeholders' particularly affected and interested parties who are consulted by applicants of mining-related rights. As a starting point, the researcher briefly deliberates on what community consensus and community consultation entails. This is necessary to demarcate the parameters that the researcher is limited to when comparing community consent versus community consultation.

4.2 What does Community consultation versus Community Consensus entail?

In 2007 the United Nations passed the Declaration on the Rights of Indigenous which states that indigenous people must give free, prior and informed consent (hereafter FPIC) to any proposed activity that affects their land, resources such as water bodies, roads and infrastructure.⁹⁹ This research defines community consensus within the framework of FPIC. FPIC principle's intention is to ensure that local communities are informed about any development project prior to its commencement.¹⁰⁰ FPIC demands participation of affected stakeholders about the terms and conditions of social, economic and environmental impacts before, during all phases of mining operations and thereafter. FPIC is different from consultation because of the manner in which decision-making authorities are implemented and

⁹⁹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, 32(2), U.N. Doc. A/Res/61/295 (Oct. 2, 2007).

¹⁰⁰ UNDRIP (n115 above).

legitimatised.¹⁰¹ Consultation processes only requires extractive industry companies to make affected or interested parties aware of a prospective project by taking into consideration their views during decision making processes.¹⁰² Whereas consent processes require host communities to actually participate in decision making processes with the power to negotiate agreements that will mutually benefits all parties.¹⁰³ Consultation is when people's opinions are determined through a process in which interested parties sit down and draft proposals, however these opinions may be considered or disregarded throughout the mining development stages.¹⁰⁴ Whereas FPIC demands that decisions are made before a development project starts, in which an agreement is drafted and strictly adhered to.

4.3 The Advantages of Adopting Community Consent for Mining Projects

4.3.1 Reduced operational risk

A mining company that has gained consent to run a mining project by the community receives a social license to operate. Operational risks increase when a project is disrupted which results in insufficient quantity of the mineral output, with the effect of higher production costs and reduced access to inputs and markets.¹⁰⁵ Community opposition can cause mining companies to face difficulties in attracting skilled and non- skilled local workers necessary to run operations. Therefore, there is a greater need of security to expatriate workers outside the community which increases the expenditure of the mining company.¹⁰⁶

4.3.2 Reduced legal risk

Mining companies who have adopted FPIC principles reduce their future legal risk, even where the law does not prescribe to it.¹⁰⁷ Courts have made judgements in favour of community consent before a mining company embarks on a mining venture. South African courts have retroactively applied the principle of consent. The Richtersveld community submitted a claim against the government and mining

¹⁰¹ World Resources Institute 'Development without conflict: The business case for community consent' 45 (2007), available at <http://www.wri.org/publication/developmentwithout-conflict> (last accessed 24 October 2018) para 105.

¹⁰² World Resources Institute (n117 above) 7.

¹⁰³ World Resources Institute (n117 above) 7-8.

¹⁰⁴ DI Theron *Participatory Development in South Africa: A Development Management Perspective* (2005) 37.

¹⁰⁵ World Resources Institute (n117 above) 13.

¹⁰⁶ World Resources Institute (n117 above) 13.

¹⁰⁷ K Amy & AH Gare 'Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges' (2010) *Foley Hoag LLP* 58.

company called Alexkor for the restitution of their land, in which the state had awarded Alexkor mining rights to mine diamonds. The government had removed the community by force to start mining operations. The Constitutional court found that Richtersveld community had a right to communal ownership as purported by indigenous law and therefore awarded the community with 49% stake of the company and return of their land.¹⁰⁸ This court case illustrates how courts can interpret the law to pursue socio-economic justice and redress past discriminatory injustices by retroactively applying the consent principle. The implication of court judgments in favour of communities results in unplanned litigations costs, redress and restitution costs.¹⁰⁹ Not only are mining companies affected by litigation cost but also communities who apply for an interdict to stop mining projects. Furthermore, there is international pressure for states, mining companies and other stakeholders to adopt the FPIC principle as provided for by international statutes. Therefore, legislature must consider incorporating the consent principle due to international pressure and the adoption of economic and social justice principles adopted by courts who often judge in favour of communities especially where judiciary arm is independent.

4.3.3 Reduced reputational risk

Incorporating consent in policy is useful because mining companies are likely to gain credibility especially in areas where other mining companies have a bad reputation for causing social and environmental damage.¹¹⁰ Consent policy will restore the reputation of mining companies who are largely looked upon with contempt and resentment by communities due to the past damages that mining companies have caused. Consent policy will help restore the damaged relationship between mining companies and host communities, thereby changing the perceptions of host communities towards mining companies.¹¹¹

4.3.4 Increased market access

A company that respects and adopts the FPIC principle is likely to gain access to markets particularly in countries that have a strong inclination to supporting local

¹⁰⁸ Amy (n123 above) 64.

¹⁰⁹ Amy (n123 above) 63.

¹¹⁰ Laplante (n1 above) 5.

¹¹¹ Laplante (n1 above) 5.

communities.¹¹² A mining company with a strong record of negotiating effectively and in a respectable manner with communities, is likely to be favoured over those who have no such record.¹²⁹

4.3.5 Increased access to “responsible” investors

Stakeholders such as mining companies and governments that adhere to consent principles will not only attract ordinary investors but also responsible investors who have stringent rules with regards to obtaining consent before a mining projects.¹¹³ This is advantageous as they will not be faced with opposition by non-governmental organisations, community protests and worker’s boycotts.¹¹⁴

The benefits of consent policies and practices are on the rise because responsible investors are developing standards that give companies incentives that have incorporated FPIC policies and that can produce evidence that they have previously managed their relationship with indigenous people effectively¹¹⁵

4.3.6 Acceptance and support of by government and community

Mining companies with a past record of successful consent processes are likely to be favoured over those without especially when governments decide whether to grant a mining right or not. Governments prefer mining companies that have a knowledge of applying consent processes through community engagement.¹¹⁶ The Canadian provincial government preferred to work with a certain undisclosed mining company because its company policy demanded that community consent must be obtained before embarking on any mining project.¹¹⁷ Governments tend to endorse such mining companies because they are less likely to be internal conflicts that may be detrimental to the longevity of the mining project. Governments prefer to grant mining rights to those they feel will have a social license to operate throughout the mining project.

¹¹² Amy (n123 above) 61.

¹²⁹ Amy (n123 above) 61.

¹¹³ Amy (n123 above) 66.

¹¹⁴ Amy (n123 above) 66.

¹¹⁵ Amy (n123 above) 66.

¹¹⁶ Amy (n123 above) 61.

¹¹⁷ Amy (n123 above) 61.

4.3.7 Stronger stakeholder relationships

Laplante suggests that if FPIC is implemented properly, companies and communities will be taken out of their “defensive positions” to a more proactive position that allows for stronger stakeholder relationships to be formed.¹¹⁸ Communities tend to protect their livelihood and will therefore act in any manner to guarantee such protection, whereas mining companies seek to run their operations at any cost which results in conflict between the two parties. Companies must take the first step to approach communities and seek consent, this will give them a competitive advantage whilst communities are able to enforce their agreements drafted with the mining companies.¹¹⁹

4.3.8 Respect of community’s rights and freedom of expression

According to Malezer, FPIC is one of the concepts that protects the rights of communities such as right to self-determination, right to land and resources, right to cultural practices.¹²⁰ FPIC guarantees community driven consultations rather than mining company driven discourses. Therefore communities are not involved in mere “information sharing” but are involved in decision making processes.¹²¹

Anaya states that freedom of expression and community participation are also provided for in international human rights, whereby individuals have the right to oppose and express their opinions against or for any mining project.¹²² Consequently, incorporating the principle of consent upholds the “right to say no” to any mining project by any affected persons.

4.4 The Disadvantages of Adopting Community Consent for all Mining Projects

4.4.1 Difficulty in determining who must grant community consent

Before granting the mining right administrators must determine if consent was granted by the community. Administrators are often faced with the difficulty of determining who granted the consent. Furthermore, the administrators may struggle to identify the community that has the right to consent. They must establish whether

¹¹⁸ Laplante (n1 above) 3.

¹¹⁹ Laplante (n1 above) 48.

¹²⁰ Malezer (n96 above).

¹²¹ Malezer (n96 above).

¹²² J Anaya ‘Indigenous Peoples Participatory Rights in Relation to Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples have in Lands and Resource’ (2005)22. *Arizona Journal of International & Comparative Law* 7. ¹⁴⁰ Amy (n123 above) 28.

community consent was granted by their representatives or by the community as a whole.¹⁴⁰ If the representatives granted consent the administrator must determine if their representation is legitimate. A dispute can arise as to who must consent on behalf of the community, some may reject traditional leaders as their negotiators, hence the administrator must take it upon himself to verify if the community as a whole is in agreement of the proposed mining activity.

Furthermore, mining companies may struggle to meet time limits to lodge application as getting consent from a community is an expensive and cumbersome exercise.¹²³ With the intention of meeting deadlines mining companies may decide to use unethical or illegal means to gain consent.

4.4.2 Difficulty or Impossibility in obtaining consent from community

It is difficult to adopt consent because the legislator or the administrator must determine the scope of consent. It must be determined whether consent is granted in terms of a unanimous agreement of the community or by majority agreement. Practically, it is nearly unachievable to get a unanimous decision from a community as few individuals can have different opinions and perspectives from the rest of the group, yet consent processes are expected to be inclusive to avoid conflict.¹²⁴ Advocates for consent processes state that when decisions are made groups must not be marginalised such as women, disabled or those of lower socio-economic status.¹²⁵

4.4.3 Impairs Social and Economic Development

Investors are likely to be deterred from investing if consent is incorporated as a legal requirement. Consent requires a lot of time and resources to be obtained, therefore investors will shun countries that demand consent as a legal requirement to receive a mining right as it is a cost burden to the investor.¹²⁶

¹²³ M Darrow & A Tomas 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Humans Rights Quarterly* 505.

¹²⁴ Laplante (n1 above) 28.

¹²⁵ World Resources Institute (n117 above) 8.

¹²⁶ Amy (n123 above) 58.

According to the consent principle, communities possess the “right to say no”, therefore mining companies will often opt to walk away from such prospective mining projects.¹²⁷ For that reason, mineral resources are not exploited which is a huge contributor to economic growth directly in the form of revenue and indirectly in the form of employment and entrepreneurial opportunities.

4.4.4 Lack of capacity by communities to influence social and economic agendas during consent processes

For consent processes to be successful, communities need to be aware of their rights and obligations. Illiteracy can be a hinder to successful consent processes as they may have a far different perspective of property rights and use.¹²⁸ There is a need for training to ensure that communities’ can advocate for themselves by setting their goals and wishes out of a mining development project under Environmental Assessment Plans.¹²⁹ This is however costly and time consuming which can be deterrent for investors, with the result of protests by communities due to lack of institutions to express their grievances.

4.4.5 Difficulty in amending agreement provisions

Since consent process are formal in nature and are usually in writing, it may be difficult for any of the signing parties to change the terms of the agreement. The circumstances of each of the stakeholders can change. For example, the mining company can over commit to community development projects foresight of profit making, however in the event of losses mining companies may fail to meet community development goals. Additionally, community interests can change from the initial community development goals they had consented to.

4.5 The Advantages of Adopting Community Consultation opposed to Consent

4.5.1 Increased national economic development

Introducing consent principle as a legal pre-requisite is detrimental to national economic development. Companies have walked away from communities that opposed their operations as they feared that their operations will be hindered.¹³⁰

¹²⁷ G Bridge ‘Contested Terrain: Mining and the Environment’ (2004) *Annual Review Environmental Resources* 250.

¹²⁸ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya* at paras 277-282.

¹²⁹ Amy (n123 above) 38.

¹³⁰ Bridge (n145 above) 250.

Therefore no matter how lucrative the mining operations may be, the community is still regarded as having absolute powers to reject a mining proposal. Therefore, consultation processes are preferred as all stakeholder interests are recognised and considered throughout the project, yet operations may continue increasing national revenue.

4.5.2 State retains duty as custodian of mineral resources in line with the Constitution

According to section 3(1) the State has been granted the status of custodianship of the nation's mineral and petroleum resources.¹³¹ The state exercises its powers through the Minister who has the power to grant, refuse, and control any extractive-industry related right or permit.¹³² The Minister also has the duty to ensure sustainable development of South Africa's mineral resources.¹³³ In some instances, mining companies are concerned with incorporating the FPIC policy and process, as it seems to be undermining the government that has the power to grant a mining right or not. Therefore, the relationship between the mining company and government may be damaged as the government may feel the mining company usurped its power to approve of a mining project or not.¹³⁴ Even in the event of a community granting consent or setting it as a legal requirement, the state grants, maintains and controls the subsurface minerals for the good of a nation. Consent processes can be seen as undermining the national sovereignty especially from the government's perspective.¹³⁵ Companies are not able to conduct FPIC processes without permission of the state.¹⁵⁴ Agreements made between mining companies and communities can be deemed by state administrators as inconsistent with national development goals. This will become a good incubator for social conflict between government, mining companies and communities, therefore consultation processes are preferred over consent processes as it does not restrict any of the stakeholders to participate.

4.5.3 Consultation processes are easier to conduct over consent processes

Consultation processes are easier to conduct as opposed to consent process. Consent processes are more expensive as it is more difficult to obtain consent from

¹³¹ Section 3(1) of the MPRDA.

¹³² Section 3(2) of the MPRDA.

¹³³ Section 3(3) of the MPRDA.

¹³⁴ Amy (n123 above) 7.

¹³⁵ Amy (n123 above) 7.

¹⁵⁴ Amy (n123 above) 8.

a community, as companies need to set up funds in the event of conflict or disagreement to re-start the negotiation processes. Consultation requires fewer obligations on the applicant's part, such as considering social and environmental impact. Whereas, consent processes demand that all community interests are considered which are often diverging between community members themselves as it is difficult for all of them to have one opinion. Therefore, consultation processes can consider different views as no agreement needs to be made, whereas consent processes demand for the same or similar views as an agreement needs to be concluded.

4.6 The Disadvantages of Adopting Community Consultation over Consent

4.6.1 Possible Infringement of community's human rights

Communities fear companies that commit human rights violations or use private security forces that commit human rights violations.¹³⁶ Since the state retains the right to grant a mining right, a legal requirement of community consultation can result in infringement of the community's rights to land and self-determination unlike consent. MacInnes states that this is a form of discrimination, and the right to land is an inherent right recognised by customary law under international human rights which has revived community's rights to sovereignty over their land.¹⁵⁶ International human rights and jurisprudence supports the idea that communities are not subject to any State granted "rights" but rather their land rights are pre-existing and inherent.¹³⁷

4.6.2 Possible Infringement of community's socio-economic rights

Consultation as opposed to consent as a model of engagement does not address the root cause of socio-economic problems resulting in community opposition. This is because it does not provide for shared decision-making authority between mining companies and communities' but rather constitutes the sharing of information with one authority making the final decision.¹³⁸ Consultation model is not an empowering form of public engagement.¹⁵⁹ Practically, mining companies present their plans to

¹³⁶ A MacInnes 'Free, Prior and Informed Consent: How to rectify the devastating consequences of harmful mining for indigenous peoples' (2017) *Perspectives in ecology and conversation* 152.

¹⁵⁶ MacInnes (n155) 152.

¹³⁷ MacInnes (n155) 156.

¹³⁸ Laplante (n1 above) 15.

¹⁵⁹ Laplante (n1 above) 15.

communities who they ask for their contributions, followed by a decision that only reflects the mining company's plans and a modified version of the community's opinions.¹³⁹ This approach of consultation is unable to mitigate risk factors in community projects and foster successful mining projects.¹⁴⁰ Community are often concerned with adverse effect of mining project citing environmental destruction, water contamination, deprivation of land, loss of crops and loss of educational facilities through relocation. Even if communities are not happy with a proposed mining project, the Minister can grant the mining company to commence the mining project which may result in the abovementioned effects.

4.6.3 International pressure for mining companies to adopt community consent over consultation

Financial institutions such as the World Bank oblige project sponsors to engage in "meaningful stakeholder participation".¹⁴¹ World Bank Legal Department has deduced this as the communities right to reject a proposed mining project.¹⁴² FPIC has been adopted as an international norm in which it results in benefit sharing, furthermore it is viewed as a mitigation process especially where projects are large-scale with substantial effects.¹⁶⁴

4.7 Conclusion

The aim of this chapter was to compare the advantages of adopting community consensus and community consultation in granting exploration and mining rights within the legal framework. This chapter outlined the advantages of adopting community consent as a legal pre-requisite such as reduced legal and operational risks, advancement of human rights and freedom of expression, increased market access and attraction of responsible investors. Lastly, strong stakeholder relationships will be formed reducing conflict that results in protest actions, loss of life and destruction of property. However, this research admits that consent processes are difficult to conduct and to determine who must grant consent and what may be perceived or defined as consent. Furthermore, FPIC is inflexible making it difficult to

¹³⁹ H Saleem *et al* 'The Ecology and Economy of Indigenous Resistance' (2006) *Contemporary Pacific* 387.

¹⁴⁰ Laplante (n1 above) 47.

¹⁴¹ R Goodland 'Free, Prior and Informed Consent and the World Bank Group' (2004) *Sustainable development and policy* 71.

¹⁴² Goodland (n162 above) 71.

¹⁶⁴ Smith (n6 above) 15.

amend the provisions in the agreement once concluded, however grievance mechanisms can be set up although it may not cover on all agreed contents. This research also established that consultation is easier to administer since stakeholders do not need to reach an agreement. Consultation processes will not threaten national sovereignty and state powers. This allows state administrators to grant mining rights even in the event of community disapproval which will realise more state revenue. However, the disadvantage of adopting consultation processes exclusively is that in the event of community disapproval, communities may be subjected to human rights abuses and infringement of socio-economic rights. Additionally, there is international pressure by international financial institution and world organisations to adopt FPIC principles. The researcher submits that advantages of adopting consent processes outweigh the advantages of adopting consultation processes, however it is difficult to obtain community consent.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Concluding Remarks

The primary goal of this research is to determine the extent South African law must adopt community consensus versus community consultation. This chapter therefore recommends adopting community consent based on its findings. To mitigate the disadvantages of adopting the consent model such as unjustified refusal by the community, the Minister will retain the right to grant a mining right whilst imposing a duty on the applicant to obtain community consensus. The researcher admits that model is not absolutely perfect in the event of corruption but submits that it is more effective than the current legal position. Furthermore, if the community consents to a mining venture but the Minister refuses to grant the mining right to the applicant, conflict may arise leading to a revolt by the community against the government. The current legal position in South African law is that the applicant must consult with the community and the government must consider the rights and interests of the community under the MPRDA. However, the Minister is not obliged to make a final decision based on the communities' views and perception. The Mining Charter and Constitution is silent as to whether the community has a right to reject a mining project and only provides for legal dress in the case of land deprivation. The researcher submits that the advantages of adopting community consent as opposed to mere consultation will result in more stable stakeholder relationships as discussed in Chapter 4, thereby reducing risk factors.

Chapter 3 concluded that the current legal position requires mining rights applicants to consult with communities. Therefore, this somewhat typifies the participation by consultation introduced by Pretty's model as described in Chapter 2. This is because the views and concerns of the community are heard and may be considered but the Minister has the power to override any decision they make. Chapter 2 also discusses manipulated participation as the worst form of community engagement as it characterised by deception, pretence, coercion and concealment of essential details. Therefore, this provides for a conducive environment for conflict to arise. Mining companies and government must avoid using such methods at all cost as it will result in an irreconcilable relationship with the community hence threatening any future national and community development. This research submits the best type of community engagement is that of interactive participation because it balances the

rights and obligations of government, community and mining companies. Community's participation is viewed as a "right" with equal participating status, which also includes the authority of the community to define problems and control processes like mining companies. A community can make decisions of how resources will be utilised and distributed. Such a model allows for community consent processes as discussed in Chapter 4 to be incorporated. FPIC principles can be applied resulting in strong stakeholder relationships.

5.2 Recommendations

The researcher proposes the adoption of consent in South African legislation as a legal requirement before an applicant can be granted a prospecting or mining right. The researcher therefore proposes the amendment of section 16 and 22 of the MPRDA from sub-section 4 (application for prospecting rights and mining rights respectively) under annexure A of this dissertation.

The recommended provisions above allow for the adoption of community consent, however the Minister will still have the prerogative to grant a mining right if it is in the interest of the nation and community that such a right is granted. The recommended provisions above places an obligation on the applicant for a prospective or mining right to obtain consent from a community which has many advantages for both the applicant and community as outlined in Chapter 4.¹⁴³ However, to mitigate the disadvantages of adopting community consent such as difficulty or impossibility of obtaining consent from community and impairment of social and economic development, the Minister will retain the prerogative to grant such a right. The Minister will consider the submissions made by the applicants with regards to the reasons why they failed to obtain community consent and the motivation for the Minister to grant their application even though they failed to obtain such consent. The Minister will weigh the benefits and challenges of granting such a right. Therefore, the Minister will be able to purport the objects of the MPRDA.

Placing a duty on the applicant to obtain consent but maintaining the Minister to exercise power over mining rights, balances the interests and rights of all stakeholders within a legal framework. However, such an arrangement will function effectively if there is no bribery or manipulation of the executive that have wide

¹⁴³ see section 4.5.1

powers to grant mining rights. Introducing a more demanding duty to obtain consent other than consultation, will encourage the applicants to take the rights and interests of interested parties such communities more seriously, by incorporating methods and institutions that ensure successful community engagements.¹⁴⁴ Consultation reduces community engagement to a mere formality whereas community consent demands a higher degree of compliance and applicant's earnestness. Even in the event that the mining company wishes to push their agenda or personal interests the minimum requirement of community consent will at least have been fulfilled before granting the mineral right.

According to the SAHRC the report states that communities affected by mining activities indicate that there is no clear or adequate interaction between themselves, government departments and mining companies.¹⁴⁵ SAHRC recommends that Anglo platinum must shift from a compliance based methodology during community consultations, but must seek to include the FPIC model as a key mitigation risk policy.¹⁴⁶ It is the best interest of South Africa to move towards consent model, so as to create strong stakeholder relationships thereby purporting the values of the Constitution such as dignity, equality and fairness.

¹⁴⁴ South African Human Rights Commission 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo' (2008).

¹⁴⁵ SAHRC (n166 above) vi.

¹⁴⁶ SAHRC (n166 above) vi.

ANNEXURE A

In light of the above findings, the following recommendations regarding legislative intervention/amendment is submitted:

The words underlined show words omitted from original versions and new words inserted:

16. (1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application (4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing— (a) to submit an environmental management plan; and (b) to notify in writing and obtain consent with the land owner or lawful occupier and any other affected party and submit the result of the negotiations within 60 days from the date of the notice. (c) submit *modus operandi* of obtaining consent and all relevant information provided for by interested and affected parties (d) submit proof of consent from interest and affected parties in writing (5) In the event of failure to obtain such consent within 90 days from the date of notification the applicant must (a) -notify the Regional Manager in writing of such failure (b) submit reasons for failure to obtain such consent (c) submit reasons for the Minister to grant the mining right even without such consent. (6) Upon receipt of the information referred to in subsection (4) and (5), the Regional Manager must consult with the interested and affected parties and compile a report and must forward the application to the Minister for consideration.

22. (1) Any person who wishes to apply to the Minister for a mining right must lodge the application— (a) at the office of the Regional Manager in whose region the land is situated;- (4) (b) to notify and obtain consent from any interested and affected parties within 180 days from the date of the notice. (c) submit *modus operandi* of obtaining consent and all relevant information provided for by interested and affected parties (d) submit proof of consent

from interested and affected parties in writing (5) In the event of failure to obtain such consent after 180 days from the date of notification the applicant must- (a) must notify the Regional Manager in writing (b) submit reasons for failure to obtain such consent (c) submit reasons for the Minister to grant the mining right even without such consent. (6) Upon receipt of the information referred to in subsection (4) and (5), the Regional Manager must consult with the interested and affected parties and compile a report and must forward the application to the Minister for consideration.

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