A CRITICAL ANALYSIS OF THE EVOLUTION OF PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING IN THE SOUTH AFRICAN MINING SECTOR

by

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SUMMARY

In this dissertation I explore how the international law principle of free, prior and informed consent (FPIC) can enhance public participation, to promote environmental justice for communities affected by environmental decision-making in the mining sector in South Africa. Public participation required in terms of the mining sector environmental regulatory framework in South Africa is underscored by a requirement to 'consult'. In chapter one, I describe how the requirement to consult differs from a requirement to secure consent in terms of FPIC. I describe public participation (i.e. consultation) requirements related to applications for rights, permits, licences and authorisations that must be in place prior to commencement of mining operations. I argue that where the level of public participation requires mere consultation, it can easily amount to a regulatory tick-box exercise given that the views of mining-affected communities can be manipulated or overlooked, with mining developments proceeding despite devastating effects on communities. In chapter two I describe how FPIC has become part of the regulatory framework governing mining activities through the court's purposive interpretation of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) in *Baleni and Others v Minister of Mineral Resources and Others* and *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*. In chapter three, I engage with scholarly literature on FPIC to analyse why and how environmental justice should and can be enhanced by embedding FPIC into legislative public participation requirements. I argue that FPIC, which now forms part of South Africa's law through the IPILRA, should be a prominent feature in public participation processes for mining-affected communities generally, and not only for informal land right holders.

DECLARATION OF ORIGINALITY

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Declaration

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2. I declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.

3. I have not used work previously produced by another student or any other person to hand in as my own.

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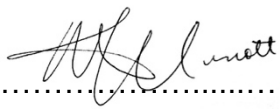

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Lastly, I thank my Heavenly Father, who is and will always be the Alpha and Omega of all that I am and all that I do.

… and what does the Lord require of you, but to do justice, and to love kindness, and to walk humbly with your God. Micah 6:8

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INTRODUCTION

This study explores how the international law principle of free, prior and informed consent (FPIC) can enhance public participation to promote environmental justice for communities affected by environmental decision-making in the mining sector.[1] Environmental justice connotes the equitable distribution of environmental benefits and burdens, the recognition of the equal moral worth of all people impacted by environmental decision-making, and equitable procedural mechanisms to secure the equitable distribution of environmental benefits and burdens given that a lack of recognition and adequate procedural mechanisms give rise to inequitable distribution.[2] Environmental justice thus incorporates substantive (distributional) and procedural elements. FPIC is defined as:[3]

> the principle that indigenous peoples and local communities must be adequately informed about projects in a timely manner and given the opportunity to approve (or reject) a project before operations begin.

In 2020 the South African legal framework for environmental decision-making in the mining sector was amended to make provision for 'meaningful consultation' when undertaking public participation processes.[4] Meaningful consultation between applicants for rights under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and interested and affected persons is intended to ensure that those that are likely to be affected by mining activities, including local communities, are provided with all relevant information, in a timely manner, to afford them the opportunity to contribute comments following consultation.[5] This study argues that 'meaningful consultation' as outlined in the amended Mineral and Petroleum Resources Development Regulations (MPRD Regulations) is to some extent an oxymoron, given the potentially devastating impacts of mining activities on mining-affected communities and the fact that regulatory public participation processes are still largely underscored by the notion of 'consultation' as opposed to 'consent'.[6] While the Interim

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1 International law instruments that deal with FPIC are noted in chapter two.

2 M Murcott *Towards a social justice-oriented environmental law jurisprudence in South Africa* (LLD thesis North-West University 2020) ('Murcott LLD thesis') 12 – 13.

3 E Greenspan 'Free, prior and informed consent in Africa: An emerging standard for extractive industry projects, Oxfam America Research Backgrounder Series' (2014) 5; United Nations Permanent Forum on Indigenous Issues, Indigenous Peoples, Indigenous Voice Fact Sheet https://www.un.org/esa/socdev/unpfii/documents/5session_ factsheet1.pdf (accessed 28 September 2020). Indigenous in the context of Greenspan's definition refers to the United Nations Permanent Forum on Indigenous Issues 'modern understanding' of the concept which is based on self-identification as indigenous peoples at the individual level and accepted by the community as their member; historical continuity with pre-colonial and/or pre-settler societies; strong links to territories and surrounding natural resources; distinct social, economic or political systems; distinct language, culture and beliefs; form non-dominant groups of society; resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

4 Amendment Regulations to the Mineral and Petroleum Resources Development Regulations, 2020 GN R420 published in *GG* 43172 of 27 March 2020 (MPRD Amendment Regulations) Regulation 1. Meaningful consultation is described in greater detail in chapter one.

5 Mineral and Petroleum Resources Development Regulations GN R527 published in *GG* 26275 of 23 April 2004 (as amended) (MPRD Regulations) Regulation 1 provides a detailed definition of interested and affected persons which includes mine communities. The concept of 'meaningful consultation' is described in chapter two.

6 Parliament of the Republic of South Africa 'High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' (2017) (HLP) 265. The report provides the following two direct quotes by community members during public hearings that formed part of the study by an independent high-level panel commissioned to assess the 'content and implementation' of post-1994 legislation:

> We live in great hardship in South Africa. We are dispossessed of our land by development, by the mines, and we get no compensation or benefits out of the so-called development on our ancestral land. We are not consulted.

Protection of Informal Land Rights Act 31 of 1996 (IPILRA), found to be of application in decisions about mining,[7] requires that consent be obtained from the holders of informal land rights prior to granting of a mineral right, this consent requirement applies to a narrowly circumscribed group of people under IPIRLA that is, as its name suggests, not permanent.[8] Before engaging with the need for FPIC to be embedded into the regulatory framework applicable to mining in South Africa, next I give a brief overview of the framework as it is.

Notwithstanding the criticisms levelled in this dissertation, South Africa's post-1994 environmental decision-making framework applicable to the mining sector has been described as 'comprehensive' and 'impressive'.[9] This regulatory framework is underscored by the Constitution of the Republic of South Africa, 1996 which, among other things, entrenches a substantive environmental right;[10] a procedural right of access to information;[11] and a procedural right to just administrative action.[12] These interrelated constitutional rights find expression in various statutes that regulate mining, such as the National Environmental Management Act 107 of 1998 (NEMA); the Promotion of Administrative Justice Act 3 of 2000 (PAJA); the Promotion of Access to Information Act 2 of 2000 (PAIA); the MPRDA; and specific environmental management acts (SEMAs).[13] Within this regulatory framework,

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> We have turned into non-entities with nothing, and yet we are the rightful owners of the land. We don't have certainty as to what is going to happen to us and our land.

Another speaker at a public hearing in KwaZulu-Natal noted that:

> Investment deals are concluded by the traditional leader without consulting with, or even informing, the community, who simply see bulldozers and trucks on the job. Dynamiting operations crack the walls of houses; coal dust covers roofs so that it becomes impossible to harvest rainwater; the same soot covers grass and renders it unfit for grazing. The traditional leader does not want to account, refuses to attend meetings.

Contrasting levels of public participation as depicted in the IAP2 Spectrum of Public Participation (Figure 1) are described in chapter one.

7 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) (*Maledu*) para 106.

8 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) (*Baleni*) paras 83 & 84.

9 M Kidd *Environmental law* (2nd ed 2011) 14 and 221. The term 'regulatory framework' refers to acts of Parliament and regulations that have been enacted to manage natural resource extraction; land-use; and environmental pollution control. Specific aspects of this regulatory framework are described in chapter one; T Murombo 'Beyond public participation: The disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development' (2008) 3 *Potchefstroom Electronic Law Journal* 1 1.

10 Constitution of the Republic of South Africa, 1996 s 24 provides that:

> Everyone has the right
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

11 Constitution (note 10 above) s 32 (1) provides that:

> Everyone has the right of access to
> (a) any information held by the State; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.

12 Constitution (note 10 above) s 33(1) provides that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'.

13 The National Environmental Management Act 107 of 1998 (NEMA) s 1 lists various SEMAs which include: the National Water Act 36 of 1998 (NWA); the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA); the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA); the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA); and the National Environmental Management: Waste Act 59 of 2008 (NEMWA). The definition of SEMAs

public participation is an important safeguard against environmental injustice, and a means to promote environmental justice.[14]

The notion of environmental justice in South Africa is underscored by the express inclusion of a substantive environmental right in s 24 of the Constitution.[15] McDonald notes that the s 24 environmental right is central to 'social, economic, political, and environmental relationships', and that it aims to address environmental injustices that are sometimes associated with these relationships.[16] Kidd notes that from an environmental justice perspective, the s 24 environmental right could be invoked to call a halt to state actions or decisions that threaten any person's health or wellbeing.[17] Environmental justice,[18] in a substantive or distributional sense,[19] has received recognition in NEMA as a relevant factor to be considered in environmental decision-making in pursuit of sustainable development and the fulfilment of the environmental right.[20] NEMA also recognises the importance of

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includes any regulation or other subordinate legislation made in terms of these Acts. Public participation provisions related to these SEMAs are described in chapter one.

14 Kidd (note 9 above) 257, 298 & 304. T Humby 'Environmental justice and human rights on the mining wastelands of the Witwatersrand gold fields' (2013) 43 *Revue générale de droit* 67 71 – 72 at fn 5, 6 & 7 cites various authors who have chronicled environmental injustices perpetrated against communities and mining employees in the pre-1994 era. These injustices included forced removal of communities from ancestral lands; hazardous work environments for black workers at mines; hazardous living conditions because of air and water pollution; and siting of mine communities close to mine waste facilities.

15 M Murcott 'The role of environmental justice in socio-economic rights litigation' (2015) 132 *South African Law Journal* 875 877 ('Environmental justice'). See also s 24 of the Constitution (note 10 above).

16 D McDonald (ed) *Environmental justice in South Africa* (2002) 4 citing the quarterly newsletter of the South African Environmental Justice Networking Forum (EJNF 1997) 3.

17 Kidd (note 9 above) 303.

18 McDonald (note 16 above) defines environmental justice as:

> [S]ocial transformation directed towards meeting basic human needs and enhancing our quality of life - economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others … In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making.

19 D Scott 'What is environmental justice?' (2014) in M Brydon-Miller & D Coghlan (eds) *The SAGE encyclopedia of action research. Forthcoming* articulates the distributive/substantive elements of environmental justice as 'fairness in the distribution of environmental benefits and burdens' as opposed to procedural manifestations which include 'processes that determine those distributions'.

20 Murcott LLD thesis (note 2 above) 82; World Commission on Environment and Development 'Our Common Future: Report of the World Commission on Environment and Development' (Brundtland Report) (1987). In this report, sustainable development is described as:

> a process of change in which the exploitation of resources; the direction of investments; the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.

NEMA (note 13 above) s 2(4)(c) provides that '[e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons'.

public participation in giving practical expression to the principles of sustainable development,[21] thereby pursuing environmental justice in a procedural sense.[22]

This study argues that notwithstanding express recognition of a substantive environmental right;[23] supporting procedural rights;[24] recognition of procedural and substantive requirements of environmental justice;[25] and an 'array of impressive environmental legislation',[26] mining-affected communities still carry a disproportionate share of environmental burdens and lamentable exclusion from environmental decision-making processes.[27] These intended beneficiaries of socio-economic benefits (in terms of applicable legislation concerning social and labour plans, for instance)[28] are instead frequently 'worse off as a result of the negative social, economic and environmental impacts' associated with mining operations, and experience environmental injustice.[29] This study argues further that public participation undertaken as part of the current regulatory framework frequently amounts to a mere tick-box exercise that ignores the needs of vulnerable individuals and communities.[30]

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21 NEMA (note 13 above) details the following relevant sustainable development principles that underscore the importance of public participation:

> Participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured (s 2(4)(f)). Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge (s 2(4)(g)). Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law (s 2(4)(k)). The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted (s 2(4)(q)).

22 Murcott 'Environmental justice' (note 15 above) 905 notes that environmental justice in a procedural sense involves engaging with people who are most affected by environmental decision-making on an equal footing as 'active participants whose environment is at stake' rather than mere 'passive recipients of goods and services'.

23 Constitution (note 10 above) s 24.

24 Constitution (note 10 above) s 32 & 33.

25 NEMA (note 13 above) s 2(4)(f).

26 Murombo (note 9 above) 1.

27 L Verdonck 'Human rights in an age of economic globalisation - the case of the Mogalakwena Mine, South Africa' (2015) 9 *Human Rights & International Legal Discourse* 34 37 – 38 records 'forced resettlement; lack of effective participation; water shortages and contamination; general environmental degradation - in particular mine blasting, dust nuisance and waste dumping; and suppression of protest'.

28 Mineral and Petroleum Resources Development Act 28 of 2002 preamble recognised the 'need to promote local and rural development and the social upliftment of communities affected by mining; s 25(2)(f) provides that a mining right holder must 'comply with the requirements of the prescribed social and labour plan'. MPRD Regulations (note 5 above) Regulation 41(c) provides that social and labour plans are a means to ensure that mining rights holders contribute towards socio-economic development.

29 South African Human Rights Commission 'National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa' (2016) 79 (SAHRC); C Soyapi & L Kotzé 'Environmental justice and slow violence: Marikana and the post-apartheid South African mining industry in context' (2016) 49 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 393 406 detail ongoing environmental injustices perpetrated against mining-affected communities; and T Humby 'Facilitating dereliction? How South African legal regulatory framework enables mining companies to circumvent closure duties' (2014) in *I Weiersby, A Fourie & M Tibbet (eds), Proceedings of the Ninth International Conference on Mine Closure, Sandton, South Africa*. Humby provides insight into the plight of a mining-affected community near Blyvooruitzicht Mine, Carletonville.

30 ActionAid South Africa 'Mining in South Africa 2018, whose benefit and whose burden? Social audit baseline report' (2019) (AASA) at 12 – 14, 32 – 33 & 84 highlights the mere rhetorical nature of public participation along with the continued and pervasive structural violence that is perpetuated against mining-affected communities through an unequal distribution of power concentrated in state and corporate interests.

Huizenga notes mounting calls by mining-affected communities to be afforded the right to say 'no' to proposed mining developments.[31] This study argues that such a right could find expression through the express inclusion of FPIC in South Africa's environmental decision-making regulatory framework for the mining sector. FPIC stands in contrast to the level of engagement outlined in NEMA, the SEMAs and the MPRDA, all of which require mere 'consultation'.[32] 'Consultation' does not rise to the level of 'consent' that forms an integral part of FPIC.[33] NEMA defines public participation as 'a process by which potential interested and affected parties are given an opportunity to comment on, or raise issues relevant to an application for environmental authorisation'.[34] The MPRD Regulations require 'meaningful consultation'.[35] Similarly, public participation processes regulated under the SEMAs contain no express FPIC requirement prior to the granting of various licences and permits.[36] However, when mining is proposed on land that is regulated under the IPILRA, consent must be obtained from the holders of informal land rights prior to granting of a mineral right.[37] In these instances, an applicant seeking to engage in mining activities not only has to follow the public participation procedures provided for in the MPRDA and NEMA,[38] but also has to obtain the consent of affected communities in terms of the IPILRA.[39]

In this study, the term 'mining-affected community' falls within the definition of 'communities' provided for in the MPRDA and the IPILRA. The MPRDA defines 'community' as:[40]

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31 D Huizenga 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' (2019) 6 *Extractive Industries and Society* 711 716. This aspect will be elaborated on further in chapters two and three.

32 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 67 notes that this level of consultation requires an applicant to:
> provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review.

33 *Baleni* (note 8 above) paras 26, 33, 47 & 71 Basson J noted that consultation cannot be equated with consent.

34 NEMA (note 13 above) s 1. In this study, the MPRD Regulations definition of interested and affected person described in chapter two is preferred over the NEMA (note 13 above) s 1 definition which includes:
> (a) any person, group of persons or organisation interested in or affected by such operation or activity; and
> (b) any organ of state that may have jurisdiction over any aspect of the operation or activity.

35 MPRD Regulations (note 5 above). This aspect is described in greater detail in chapter two.

36 These statutes and regulations merely require consultation. This aspect is described in greater detail in chapter one.

37 Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) s 1; *Baleni* (note 8 above) paras 83 & 84.

38 MPRDA (note 28 above) s 5A(a), 16(1) & 22(1) provides that an environmental authorisation is required prior to undertaking prospecting or mining activities. NEMA (note 13 above) s 24(1) & 1A requires environmental authorisation to undertake listed activities. Listed activities are detailed in Environmental Impact Assessment Regulations Listing Notice 1 of 2014, GN R983 published in *GG* 38282 of 4 December 2014 (as amended by GN 327 published in *GG* 40772 of 7 April 2017; GN 706 published in *GG* 41766 of 13 July 2018) (EIA Regulations Listing Notice 1); Environmental Impact Assessment Regulations Listing Notice 2 of 2014, GN R984 published in *GG* 38282 of 4 December 2014 (as amended by GN 325 published in *GG* 40772 of 7 April 2017; GN 706 published in *GG* 41766 of 13 July 2018) (EIA Regulations Listing Notice 2); and Environmental Impact Assessment Regulations Listing Notice 3 of 2014, GN R985 published in *GG* 38282 of 4 December 2014 (as amended by GN 324 published in *GG* 40772 of 7 April 2017 (EIA Regulations Listing Notice 3). Public participation requirements related to the current regulatory framework are described in chapter one.

39 *Baleni* (note 8 above) paras 83 & 84.

40 MPRDA (note 28 above) s 1.

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

The IPILRA defines community as 'any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group'.[41] The amended MPRD Regulations now includes mine-affected communities in the definition of interested and affected persons. Regulation 1 provides that '[i]nterested and affected persons' means:[42]

> a natural or juristic persons or an association of persons with a direct interest in the proposed or existing prospecting or mining operation or who may be affected by the proposed or existing prospecting or mining operation.

Approach and methodology

This study is a critical analysis of the regulatory framework as it pertains to public participation in environmental decision-making in the South African mining sector, conducted by way of a qualitative desktop review of relevant literature.

Research questions

This study raises, and seeks to respond to, the questions:

1) How does South Africa's environmental law regulatory framework currently provide for public participation and how does this differ from FPIC?
2) To what extent does FPIC form part of South Africa's regulatory framework in the governance of mining, and how did FPIC become part of the framework?
3) How can environmental justice be enhanced through public participation in the form of securing FPIC?

Assumptions and hypothesis

This study is based on the assumptions that:

1) South Africa is a participatory democracy founded on values of social justice, dignity and equality for everyone in the country.[43]

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41 IPILRA (note 37 above) s 1.

42 MPRD Regulations (note 5 above) Regulation 1 includes the following specific stakeholder groups in its definition of interested and affected persons: mine communities; landowners and traditional councils; land claimants; lawful land occupier; holders of informal rights to land; all applicable state departments; any other person whose socio-economic conditions may be directly affected by the proposed or existing prospecting or mining operation; local municipality; civil society; and government departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.

43 Constitution (note 10 above) preamble.

2) Environmental justice is interconnected with social justice, dignity and equality,[44] since the environment creates the conditions in which social justice, dignity and equality can occur.[45]
3) South Africa is a mineral rich country, but access to the country's minerals is required to be equitable, and to be provided in a manner consistent with the values and rights provided for in the Constitution.[46]
4) Mining-affected communities have rights to administrative justice and an environment not harmful to health or wellbeing, which rights incorporate environmental justice.[47]
5) Mining companies seeking to exploit the country's mineral resources are required to do so in accordance with the values and rights provided for in the Constitution.[48]
6) FPIC is an established concept in international law, that has found expression in South African law through the IPILRA.[49]

The study aims to prove that the Constitution and regulatory framework governing mining activities ought to be construed to require a level of consent-based participation and active involvement in decision-making that acknowledges that mining-affected communities are entitled to a greater say in the decisions that affect the environment in which they live. Anything short of this level of public involvement falls short of the standards outlined in the Constitution, which require a public participation process to be equitable, effective, open and transparent. While public participation provisions in South African environmental law are detailed and comprehensive, they fall short of the level of public involvement that mining-

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44 In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (*Grootboom*) para 83 Yacoob J emphasised the interrelatedness of rights provided for in the Bill of Rights.

45 NEMA (note 13 above) s 1 defines environment as follows:
the surroundings within which humans exist and that are made up of-
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.
In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 102 the importance of protecting the environment as a means to safeguard other rights in the Bill of Rights was underscored; D Schlosberg 'Theorising Environmental Justice: The Expanding Sphere of a Discourse' (2013) 22 (1) *Environmental Politics* 37 38 in his analysis of climate change and environmental justice observes the trend to extend environmental justice into a realm where 'environment and nature are understood to create the conditions for social justice'; Murcott 'Environmental justice' (note 15 above) 876 notes that environmental justice, as an 'inherently transformative and redistributive concept' can be utilised to respond to 'unjust living conditions and the unjust distribution of environmental benefits and burdens'.

46 Minerals Council of South Africa 'Mining in SA' https://www.mineralscouncil.org.za/sa-mining (accessed 29 September 2020) records how mining has been the 'mainstay of the South African economy' since 1887; MPRDA (note 28 above) preamble and s 2(c), (d), (e), (f), (h) & (i) detail fundamental principles with which development of mineral resources must comply.

47 Constitution (note 10 above) s 24 & s33; Promotion of Administrative Justice Act 3 of 2000 (PAJA) preamble; MPRDA (note 28 above) s 6; NEMA (note 13 above) s 2(4)(c).

48 Constitution (note 10 above) s 2, 24, 32 & 33. MPRDA (note 28 above) s 100 read with Broad-based socio-economic empowerment carter for the mining and minerals industry, 2018 GN 1002 published in *GG* 41934 of 27 September 2018 (as amended by GN 1398 published in *GG* 42118 of 19 December 2018) (Mining Charter, 2018) preamble.

49 The court in both *Baleni* (note 8 above) paras 83 & 84 and *Maledu* (note 7 below) para 97 accepted that the FPIC principle, as expressed in international law, is applicable when interpreting the IPILRA (note 37 above) in the context of mineral rights applications. As such, FPIC comes into play in mineral rights applications relating to communities whose rights are protected under the IPILRA.

affected communities ought to be afforded, to fully advance environmental justice. While the inclusion of 'meaningful consultation' as part of public participation requirements in mining right applications is a step in the right direction, it falls short of consent-based public involvement which will afford mining-affected communities a greater say during the critical initial stages prior to commencement of a proposed development project. Adherence to the level of public participation in governance which is mandated by the Constitution can be achieved by incorporating FPIC into the regulatory framework beyond the IPILRA.

Chapter overview

Chapter one

In chapter one, I contextualise the levels of public participation applied in practice in environmental law decision-making. I describe how the requirement to consult differs from the requirement to secure consent in terms of FPIC. I describe public participation requirements related to applications for rights, permits, licences and authorisations that must be in place prior to commencement of mining operations. Such applications include environmental authorisations in terms of NEMA; mineral rights under the MPRDA; and water, waste, atmospheric emission, and other licencing and authority authorisation requirements under the various SEMAs. I demonstrate in chapter one that the level of public participation required is no more than consultation.[50]

The purpose of this descriptive chapter is to explore the extent to which these public participation requirements pursue procedural and distributive environmental justice. I argue that where the level of public participation requires mere consultation, it could amount to a regulatory tick-box exercise given that the views of mining-affected communities could be manipulated or overlooked, with mining developments proceeding despite devastating effects on communities.[51]

Chapter two

In chapter two I describe how FPIC became part of the regulatory framework governing mining activities through the court's purposive interpretation of the IPILRA in *Baleni*. Fearing that a proposed opencast titanium mine would result in environmental and social harms,[52] the Amadiba Crisis Committee (ACC) asked the court to grant a declaratory order confirming that consent, in accordance with the living customary law of the Umgungundlovu Community and of the amaMpondo People, be obtained prior to granting a mineral right under the MPRDA.[53] The ACC relied on the IPILRA which requires consent prior to deprivation of informal land rights.[54] Placing reliance on the Constitutional Court's decision in *Maledu* and international law that underpins FPIC, Basson J confirmed that the IPILRA and the MPRDA

50 IAP2 Spectrum of Public Participation (Figure 1).

51 See AASA (note 30 above); Huizenga (note 31 above) 713 cites observations by the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA) that consultation during mining right applications is no more than a 'box-ticking exercises' that largely ignores any 'substantive issues raised by communities'. HLP (note 6 above) 60 records that:

> … mining has led to land dispossession and loss of livelihoods, while there are no real benefits for mine-hosting communities. Hundreds of millions of Rands paid over to traditional councils by mining houses have not been accounted for.

52 *Baleni* (note 8 above) para 19.

53 *Baleni* (note 8 above) para 28.

54 IPILRA (note 37 above) s 2(1).

must be read together.[55] In circumstances where the IPILRA is applicable, the level of public participation must therefore extend beyond consultation to include consent in accordance with the customs and practices of the community in question. However, the IPILRA only affords holders of informal land rights temporary protection of such rights.[56] Shortcomings of this Act as a permanent safeguard to ensure FPIC of informal land right holders are discussed in chapter two.

The purpose of this chapter is to illustrate the current legal basis for applying FPIC in applications for mineral rights in South Africa in circumstances when it is applicable.

Chapter three

In chapter three I discuss why inclusion of FPIC in South Africa's environmental decision-making framework for mining developments would be an advance in terms of pursuing environmental justice as opposed to the level of consultation required in terms of NEMA, the MPRDA and the various SEMAs described in chapter one.

I analyse how environmental justice can be enhanced through public participation that includes a requirement to secure FPIC. I engage with scholarly literature on FPIC to analyse how environmental justice can be enhanced by embedding this principle in public participation process requirements. I argue that FPIC, which now forms part of South Africa's law through the IPILRA, should be a prominent feature in public participation processes in general for mining-affected communities and not only for informal land right holders.

55 *Baleni* (note 8 above) paras 37 & 77 – 83.

56 IPILRA (note 37 above) has been extended annually for a further 12 months since July 1997. See respectively the first and most recent Extension of the application of the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 1996) GN1008 published in *GG* 18152 of 25 July 1997 and GN1323 published in *GG* 43981 of 11 December 2020. The IPILRA is discussed in further detail in chapter two.

1 CHAPTER ONE – PUBLIC PARTICIPATION IN SOUTH AFRICA'S ENVIRONMENTAL REGULATORY FRAMEWORK FOR MINING

1.1 INTRODUCTION

In this chapter, I demonstrate that public participation requirements in terms of South Africa's environmental law in mining-related applications are underscored by an overarching 'public participation goal' merely to 'consult', an approach that arguably undermines both the procedural and substantive dimensions of environmental justice. I do so with reference to the approach set out by the International Association for Public Participation (IAP2) (Figure 1). Practical considerations relating to the level of public participation required in a decision-making process are conceptualised by the IAP2 in a 'Spectrum of Public Participation'.[57] The IAP2 Spectrum of Public Participation is recognised by various local decision-making agencies (including the South African Parliament and the public service and administration more generally);[58] international organisations;[59] and international lender organisations as a useful instrument to ascertain the level of engagement required when undertaking public participation processes.[60] The IAP2 Spectrum of Public Participation specifies five levels of engagement that include informing; consulting; involving; collaborating with; and empowering those who participate in public participation processes.[61] Each of the five levels signify a progressive increase in the degree of influence and decision-making discretion afforded to participants.[62] Aligned with the IAP2 approach, the goal of consultation is underscored by a 'promise to the public' to '… keep [participants] informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision' (Figure 1). By contrast, where FPIC is required, the public participation goals of 'collaborate' and 'empower' find expression (Figure 1). Wilson outlines several key elements of a FPIC process as follows:[63]

i. People are not coerced, pressured or intimidated in their choices of development;
ii. Their consent is sought and freely given prior to authorisation of development activities;

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57 IAP2 Spectrum of Public Participation (Figure 1).

58 Parliament of the Republic of South Africa (August 2019) 'Public Participation Model' https://www.parliament.gov.za/storage/app/media/Pages/2019/ august/19-08-2019_ncop_planning_session/docs/Parliament_Public_Participation_Model.pdf (accessed 3 December 2020); and Department: Public Service and Administration, Republic of South Africa (2014) 'Guide on Public Participation in the Public Service' http://www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf (accessed 3 December 2020).

59 See for example United Nations Department of Economic and Social Affairs 'Multi-stakeholder engagement in 2030 Agenda implementation: A review of Voluntary National Review Reports (2016 – 2019)' https://sustainabledevelopment.un.org/content/documents/26012VNRStakeholdersResearch.pdf; and United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) 'Creating a seat at the table: stakeholder engagement for the 2030 Agenda' (2018) https://www.unescap.org/sites/default/files/Stakeholder%20Engagement%20Indicator%20Framework%20Brochure_180518_0.pdf (accessed 3 December 2020).

60 A Manroth *et al* 'Strategic Framework For Mainstreaming Citizen Engagement in World Bank Group Operations' 8 http://documents1.worldbank.org/curated/en/266371468124780089/pdf/929570WP0Box380ategicFrameworkforCE.pdf (accessed 9 December 2020).

61 IAP2 Spectrum of Public Participation (Figure 1).

62 As above.

63 E Wilson 'What is Free, Prior and Informed Consent?' Indigenous Peoples and Resource Extraction in the Arctic: Evaluating Ethical Guidelines at the Árran Lule Sami Centre Project (2016), 4 citing the UN Permanent Forum on Indigenous Issues (2015).

iii. They have full information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing; and
iv. Their choice to give or withhold consent over developments affecting them is respected and upheld.

Similarly, Goodland notes that FPIC must be '(1) freely given; (2) fully informed; (3) obtained before permission is granted to a proponent to proceed with the project; and (4) is consensual'.[64] In his analysis of the World Bank Group's approach to 'meaningful stakeholder participation', Goodland notes that '[c]onsultation and participation ring hollow if the potentially affected communities can say anything except "no"'.[65]

IAP2 Spectrum of Public Participation

IAP2's Spectrum of Public Participation was designed to assist with the selection of the level of participation that defines the public's role in any public participation process. The Spectrum is used internationally, and it is found in public participation plans around the world.

INCREASING IMPACT ON THE DECISION

	INFORM	CONSULT	INVOLVE	COLLABORATE	EMPOWER
PUBLIC PARTICIPATION GOAL	To provide the public with balanced and objective information to assist them in understanding the problem, alternatives, opportunities and/or solutions.	To obtain public feedback on analysis, alternatives and/or decisions.	To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.	To partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution.	To place final decision making in the hands of the public.
PROMISE TO THE PUBLIC	We will keep you informed.	We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.	We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.	We will look to you for advice and innovation in formulating solutions and incorporate your advice and recommendations into the decisions to the maximum extent possible.	We will implement what you decide.

Figure 1: IAP2 Spectrum of Public Participation
(Source: © International Association for Public Participation www.iap2.org).

In the sections that follow, I describe key legislation, policy and regulations that deal with public participation in applications for mining and related rights, permits, licences and permissions in South Africa. The purpose of this section is to highlight that the level of public participation mandated under South Africa's environmental law regulatory framework, is underscored by a public participation goal to 'inform' and 'consult'. This public participation goal corresponds with a low level of participant influence and impact on the decision that is made by the competent authority. I demonstrate that the requirement to consult does not accord with environmental management principles that relate specifically to public participation as outlined in NEMA, the MPRDA and the SEMAs, and arguably undermines environmental justice in a substantive and procedural sense. Public participation that is not underscored by a goal to 'empower' through a consent-based mechanism such as FPIC is not an appropriate level of engagement in instances where proposed development activities

64 R Goodland 'Free, prior and informed consent and the World Bank Group' (2004) 4(2) *Sustainable Development Law & Policy* 66 67. See also Wilson (note 63 above).

65 Goodland (note 64 above) 66. In chapter two I discuss practical considerations of FPIC; how FPIC became part of the South African regulatory framework; and the extent to which IPILRA safeguards FPIC for informal land right holders.

could impact the lives and livelihoods of mining-affected communities.[66] I reveal that FPIC requirements, as articulated by Wilson and Goodland, are triggered only when the IPILRA is applicable and not in terms of NEMA, the MPRDA or the SEMAs.

1.2 NEMA

NEMA is South Africa's framework environmental legislation.[67] NEMA outlines environmental management principles that seek to pursue and give content to the principle of sustainable development to which South Africa has 'unambiguously subscribed'.[68] The NEMA environmental management principles are applicable to public participation processes that occur in the context of mining activities in terms of NEMA, the MPRDA and the SEMAs. These principles underscore the importance of environmental justice, including through effective public participation, and could imply a need for participation that goes beyond mere consultation, though they have not yet been construed in this manner.

1.2.1 NEMA environmental management principles

The importance of effective and equitable participation of all interested and affected parties in environmental governance is emphasised in the following principle:[69]

> Participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

NEMA provides furthermore that '[d]ecisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge'.[70] In addition, NEMA provides that '[d]ecisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law'.[71] Lastly, NEMA provides that '[t]he vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.[72] The importance of these principles is underscored in NEMA by a requirement that the 'Minister responsible for environmental matters' report annually on South Africa's commitments under Agenda 21.[73] Agenda 21 provides for extensive 'broad-based public participation' with various groups in environmental decision-making.[74]

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66 International Association for Public Participation (IAP2) Foundations in Effective Public Participation, Planning for Effective Public Participation (2014) 58.

67 NEMA (note 13 above) preamble.

68 NEMA (note 13 above) s 2; T Field 'Public participation in environmental decision-making: Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism' (2005) 122 *South African Law Journal* 748 755.

69 NEMA (note 13 above) s 2(4)(f).

70 NEMA (note 13 above) s 2(4)(g).

71 NEMA (note 13 above) s 2(4)(k).

72 NEMA (note 13 above) s 2(4)(q).

73 NEMA (note 13 above) s 1 & 26.

74 Field (note 68 above) 761 citing para 23.2 of Agenda 21. Chapters 24 – 32 of Agenda 21 deal with specific involvement of various groups in environmental decision-making. These groups include women, youth and children, indigenous people, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific community and farmers.

Field argues that since s 2 of NEMA requires that the principles must be adhered to in all significant environmental decision-making, including mining developments, they require 'rigorous respect for public participation and democratic choice in decision-making affecting the environment'.[75] Field however concludes that compliance with the NEMA consultation process can nonetheless fall short of demonstrating actual democratic choice in environmental decision-making.[76] She notes that more is required to enhance 'procedural and substantive criteria' linked to NEMA public participation processes, and by extension, compliance with environmental management principles.[77]

While the environmental management principles in NEMA imply the need for a level of public participation that extends beyond mere consultation, NEMA subsequently contains no express requirement to do so as will be demonstrated in the sections that follow.

1.2.2 NEMA environmental authorisation

Prior to undertaking any listed activity outlined in the EIA Regulations Listing Notices, it is incumbent upon a prospective developer to submit an application for environmental authorisation in terms of NEMA.[78] As noted in the minority judgment of Schippers JA in *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Tendele)*, a requirement to secure environmental authorisation prior to undertaking a listed activity existed even before commencement of NEMA.[79] In terms of the current NEMA requirements, mining-related activities trigger various listed activities, and as such, require environmental authorisation.[80] All applicants who submit applications for environmental authorisation must comply with all 'procedures relating to public consultation and information gathering', which ought to be conducted in a manner consistent with the NEMA principles.[81] Procedures for investigation, assessment and communication of potential consequences or impacts of activities on the environment, including procedures associated with an application for an environmental authorisation, must include public information and procedures which provide all interested and affected parties with a reasonable opportunity to participate.[82] Interested and affected parties in terms of the NEMA definition include:[83]

a) any person, group of persons or organisation interested in or affected by such operation or activity; and
(b) any organ of state that may have jurisdiction over any aspect of the operation or activity.

Mining-affected communities fall within the definition of interested and affected parties.

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75 Field (note 68 above) 755.
76 Field (note 68 above) 765.
77 As above.
78 NEMA (note 13 above) s 24 and EIA Regulations Listing Notices 1 – 3 (note 38 above).
79 *Global Environmental Trust and others v Tendele Coal Mining (Pty) Ltd and others (Centre for Environmental Rights as Amici Curiae)* 2021 JOL 49548 (SCA) para 16.
80 See for example EIA Regulations Listing Notice 1 (note 38 above) Activity 20 – 22; and EIA Regulations Listing Notice 2 (note 38 above) Activity 17 &19. See also *Tendele* paras 24 & 25.
81 NEMA (note 13 above) s 24(1A)(c). Aligned with the s 1 definition, 'applicant' refers to a person who has submitted an application for an environmental authorisation to a competent authority and has paid the prescribed fee. While no similar definition for applicant is provided in the MPRDA or its regulations, a number of obligations and mandatory requirements to be complied with by persons applying for prospecting and mining rights is spelled out throughout these instruments. When 'applicant' is used in the context of the MPRDA or its regulations, the term 'mineral rights applicant' will be used.
82 NEMA (note 13 above) s 24(4)(a)(v).
83 NEMA (note 13 above) s1.

As required under s 24(5) and s 44 of NEMA, the Minister responsible for environmental matters has promulgated regulations that set out procedures to be followed during environmental authorisations: the EIA Regulations.[84] The EIA Regulations detail the procedures that must be followed to ensure public participation in the process of applying for environmental authorisation, including applications relating to prospecting and mining activities, but do not require FPIC, as discussed next.

1.2.3 EIA Regulations

The EIA Regulations outline in some detail the minimum requirements with which public participation processes must comply, and procedural steps that must be followed before and after an environmental authorisation may be granted.[85] The EIA Regulations recognise the importance of securing prior consent from people directly affected by proposed listed activities. Regulation 39(1) of the EIA Regulations provides that a proponent must, prior to submitting an application for environmental authorisation, obtain written consent from the 'landowner or person in control of the land to undertake such activity on that land'. Remarkably, Regulation 39(2)(b) excludes consent where proposed activities relate to prospecting or mining.[86] Note: Regulation 39(2)(b) was amended after finalisation of this dissertation.[87]

As such, applications to authorise or amend environmental authorisations in the mining sector, are underscored by an overarching public participation goal to 'consult' as conceptualised in the IAP2 Spectrum of Public Participation (Figure 1).

The purpose and extent of the requirement to consult during applications for environmental authorisation; applications to amend environmental authorisations; environmental management programmes (EMPrs) and closure plans, are detailed in Regulations 40 – 44 of the EIA Regulations.[88] The purpose of public participation is to ensure that applicants make all relevant information available to interested and affected parties so that they can contribute comments.[89] Interested and affected parties are entitled to comment on draft

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84 NEMA (note 13 above) s 24(5)(vii); Environmental Impact Assessment (EIA) Regulations GN R982 published in *GG* 38282 of 4 December 2014 (as amended by GN 326 published in *GG* 40772 of 7 April 2017; GN 706 published in *GG* 41766 of 13 July 2018) (EIA Regulations); EIA Regulations Listing Notices 1 – 3 (note 38 above).

85 EIA Regulations (note 84 above) Regulations 3, 4, 13(1)(f) & 39 – 44 discussed below.

86 EIA Regulations (note 84 above) Regulations 39(2)(b) provides as follows:
> subregulation (1) does not apply in respect of … activities constituting, or activities directly related to prospecting or exploration of a mineral and petroleum resource or extraction and primary processing of a mineral or petroleum resource …

87 Regulation 39(2)(b) of the EIA Regulations (note 84 above) was deleted by Regulation 17(b) of the Amendments to the Environmental Impact Assessment Regulations, Listing Notice 1, Listing Notice 2 and Listing Notice 3 of the Environmental Impact Assessment Regulations, 2014 for activities identified in terms of Section 24(2) and 24O of the National Environmental Management Act, 1998 (Act No.107 of 1998) published in *GG* 44701 of 11 June 2021 (Amendments to the EIA Regulations, 2021). The result of this amendment is that the EIA Regulations, Regulation 39(1) consent requirement now applies to proposed activities that relate to mining.

88 EIA Regulations (note 84 above) Regulation 32(1)(a) (aa) & (bb) read with Regulations 40 – 44. An environmental management programme (EMPr) is a document prepared in accordance with s 24N of NEMA (note 13 above) and Regulations 19-23 read with Appendix 4 of the EIA Regulations, 2014 (note 84 above). An environmental management plan (EMP) is a document that must be prepared by national departments in terms of s 11(2) of NEMA. The definitions of EMPr and EMP were deleted from the MPRDA by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDAA).

89 EIA Regulations (note 84 above) Regulations 40(1) & 41(6).

reports during a 30-day comment period prior to final submission of relevant reports to a competent authority.[90] Aligned with the NEMA definition of the term, a competent authority refers to an organ of state charged under South African environmental law with 'evaluating the environmental impact of a proposed activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity'.[91] Interested and affected parties may be afforded an opportunity to comment on a proposed application before it is submitted, but they must be afforded an opportunity to comment once the application for environmental authorisation is submitted to the competent authority.[92]

Environmental assessment practitioners (EAPs) and specialists are required to undertake various reporting and monitoring functions in terms of NEMA and the EIA Regulations.[93] An EAP, aligned with the NEMA definition, is the individual responsible for the planning, management, coordination or review of EIAs, EMPrs, or any other appropriate environmental instruments introduced through regulations.[94] As it relates to public participation, an EAP or specialist must:[95]

> disclose to the proponent or applicant, registered interested and affected parties and the competent authority all material information in the possession of the EAP and, where applicable, the specialist, that reasonably has or may have the potential of influencing:
> (i) any decision to be taken with respect to the application by the competent authority in terms of these Regulations; or
> (ii) the objectivity of any report, plan or document to be prepared by the EAP or specialist, in terms of these Regulations for submission to the competent authority.

Depending on the specific activity or activities that a project proponent wishes to undertake, either a basic assessment or scoping and environmental impact reporting (S&EIR) process must be undertaken.[96] In a basic assessment process, interested and affected parties are provided an opportunity to comment on a draft basic assessment report, an EMPr, relevant specialist studies and a closure plan during a 30-day comment period.[97] In a S&EIR process interested and affected parties are provided an opportunity to comment on a scoping report during a 30-day comment period.[98] Comments and issues raised by interested and affected parties during the scoping phase must be included in the final scoping report submitted to the competent authority.[99] Upon acceptance of the scoping report by the competent authority, the applicant and EAP may proceed with preparing an EIA report, an EMPr and

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90 EIA Regulations (note 84 above) Regulations 40(1), (2) & 44(1). Regulation 3 provides guidance on how public participation timeframes are determined.
91 NEMA (note 13 above) s 1.
92 EIA Regulations (note 84 above) Regulation 40(3).
93 EIA Regulations (note 84 above) Regulations 12 & 14.
94 NEMA (note 13 above) s 1; An environmental management programme (EMPr) is a document prepared in accordance with s 24N and Regulations 19 – 23 read with Appendix 4 of the EIA Regulations (note 84 above). An environmental management plan (EMP) is a document that must be prepared by national departments in terms of s 11(2) of NEMA. The definitions of EMPr and EMP were deleted from the MPRDA by section 1(h) of the MPRDAA (note 88 above) with effect from 7 June 2013.
95 EIA Regulations (note 84 above) Regulation 13(1)(f). In *S v Frylinck and Another* 2011 Case number 14/1740/2010, Magistrate Patterson of the Regional Division of North Gauteng found an EAP criminally liable for supplying incomplete and misleading information during a basic assessment process.
96 EIA Regulations (note 84 above) Regulation 19 and 20 relate to a basic assessment process. Regulation 21 and 22 relate to a S&EIR process. EIA Regulations Listing Notices 1 & 3 (note 38 above) outline listed activities that require a basic assessment. EIA Regulations Listing Notice 2 (note 38 above) outlines listed activities that require a S&EIR.
97 EIA Regulations (note 84 above) Regulation 19 read with Appendix 1, 4, 5 and 6.
98 EIA Regulations (note 84 above) Regulation 21(1) read with Appendix 2.
99 EIA Regulations (note 84 above) Regulation 21(1) read with Appendix 2 s 2(1)(g)(iii).

relevant specialist studies.[100] The EIA, EMPr and specialist reports must be made available to interested and affected parties to consider during a 30-day comment period. The final basic assessment and S&EIR submissions to the competent authority must provide a record of the public participation process followed; comments and submissions received from interested and affected parties; how these comments and issues have been addressed and incorporated into the final submission; and where they have not been incorporated, reasons for not including them.[101]

To ensure that mining-affected communities, along with all other interested and affected parties, are informed of a proposed development, and promote environmental justice, the EIA Regulations detail minimum requirements that must be adhered to when notifying interested and affected parties of an application during either a basic assessment or S&EIR process. These minimum notification requirements include:

- Placing a notice on, or near the proposed project site and alternative sites.[102]
- Giving written notice via email; registered mail; ordinary mail; or hand delivered letter. Notice must be given in respect of the proposed activity as well as proposed alternatives to potential interested and affected parties which include: landowners; lawful occupiers; adjacent landowners; municipal ward councillors; ratepayers associations; community representatives; any person identified by the competent authority; and all organs of state with jurisdiction in respect of the proposed activity or alternatives.[103]
- Placing an advertisement in a local newspaper; official gazette; or in a provincial or national newspaper.[104]
- Alternative means of notification can be agreed with the competent authority taking into consideration literacy, disabilities or any other disadvantage that could adversely influence participation by any interested and affected party.[105]
- The proponent or applicant must open and maintain a register of interested and affected parties which must be submitted to the competent authority.[106]

During both basic assessment and S&EIR processes it is required of the applicant and EAP to assess 'geographical, physical, biological, social, economic, heritage and cultural' aspects and sensitivities related to the proposed mine.[107] Social aspects are typically assessed by way of a social impact assessment (SIA). The International Association for Impact Assessment (IAIA) defines SIA as:[108]

> … the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment.

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100 EIA Regulations (note 84 above) Regulation 22 read with Appendix 3, 4 and 6.
101 EIA Regulations (note 84 above) Appendix 1 s 3(1)(h)(ii) – (iii) & Appendix 3 s 3(1)(h)(ii) – (iii).
102 EIA Regulations (note 84 above) Regulation 41(2)(a) (i) & (ii) read with Regulation 41(3) & (4) which provides details of minimum content and size of the site notices.
103 EIA Regulations (note 84 above) Regulation 41(2)(b) read with s 47D of NEMA (note 13 above).
104 EIA Regulations (note 84 above) Regulation 41(2)(c) and (d) read with Regulation 41(3) which outlines minimum content required in an advertisement.
105 EIA Regulations (note 84 above) Regulations 41 (2)(e) & 44(2).
106 EIA Regulations (note 84 above) Regulation 42 & 43.
107 EIA Regulations (note 84 above) Appendix 1 s 2(d), 3(1)(h)(iv) & Appendix 2 s 1(d), 2(1)(g)((iv)&(vii), 2(c), 3 (1)(h)(iv)&(vii).
108 International Association for Impact Assessment (IAIA) (2009) 'Social Impact Assessment' https://www.iaia.org/wiki-details.php?ID=23 (accessed 2 January 2021).

Inclusion of a requirement to undertake a SIA could in theory be an opportunity to advance public participation beyond the IAP2 Spectrum goals of consultation (Figure 1), and pursue environmental justice.[109] However, in practice, SIAs undertaken in South Africa are frequently confused with the mandatory minimum public participation process requirements detailed in the EIA Regulations, which contributes to a 'weakening of both'.[110]

Undermining environmental justice in both a substantive and distributional sense, at no stage during either basic assessment or S&EIR process are mining-affected communities required to consent to proposed developments. Instead, communities are merely afforded an opportunity to review relevant information about the proposed development and contribute comments. Aligned with the requirement to merely consult, the EIA Regulations details minimum content that must be included in all environmental authorisations granted after 8 December 2014[111] and mandatory minimum requirements for making this information public. Regulation 26(h) provides that environmental authorisations must stipulate that:[112]

> approved EMPrs, any independent assessments of financial provision for rehabilitation and environmental liability, closure plans, certain audit reports and all compliance monitoring reports must be made available for inspection and copying:
> (i) at the site of the authorised activity;
> (ii) to anyone on request; and
> (iii) where the holder of the environmental authorisation has a website, on such publicly accessible website.

Furthermore, Regulation 4 provides for notification of all decisions made by a competent authority under the EIA Regulations and procedures that can be followed should interested and affected parties wish to take the decision on appeal.[113]

Once an environmental authorisation has been granted, the EIA Regulations provide for further opportunities for public participation to promote environmental justice, but none of these are consent-based. For example, Regulation 34 of the EIA Regulations requires the holder of an environmental authorisation; approved EMPr; and closure plan to undergo periodic independent audits to assess compliance with conditions specified in these legally binding documents.[114] If the findings of the audit indicate insufficient impact mitigation or levels of compliance, recommendations to amend the approved EMPr or closure plan to rectify identified shortcomings must be subjected to a public participation process agreed to between the holder and the competent authority.[115] The public participation process required in terms of Regulation 34 must be 'appropriate to bring the proposed amendment …… to the attention of potential and registered interested and affected parties'.[116] All relevant information, including comments received from interested and affected parties during the consultation process, must be submitted to the competent authority to assess if the

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109 L Kruger & L Sandham 'Social impact assessment: practitioner perspectives of the neglected status in South African SIA' (2018) South African Geographical Journal DOI: 10.1080/03736245.2018.1503090 6.

110 Kruger & Sandham (note 109 above) 14.

111 EIA Regulations (note 84 above) Regulation 26. 8 December 2014 is the commencement date of the EIA Regulations.

112 EIA Regulations (note 84 above) Regulation 26(h).

113 National Appeal Regulations, 2014 GN R993 published in *GG* 38303 of 8 December 2014 (as amended by GN 205 published in *GG* 38559 of 12 March 2015. NEMA (note 13 above) s 43(7) no listed activities may commence while an internal appeal process is underway.

114 EIA Regulations (note 84 above) Regulation 34(1) – (2).

115 EIA Regulations (note 84 above) Regulation 34(4) – (5).

116 EIA Regulations (note 84 above) Regulation 34(5).

proposed amendments provide sufficiently for 'avoidance, management and mitigation of environmental impacts' and that an 'appropriate public participation process' was undertaken.[117] As such, the competent authority must determine if the holder of an environmental authorisation, approved EMPr or closure plan can continue with mining activities. Mining-affected communities are merely entitled to be consulted; to contribute comments on proposed measures to rectify shortcomings identified during independent audits; and to verify that their comments have been submitted to the competent authority.[118] Public participation, even in the context of non-compliance with environmental conditions imposed on mineral rights holders, does therefore not rise above the level of consultation as outlined in the IAP2 Spectrum of Public Participation (Figure 1). Environmental justice is thus pursued in a procedural sense, but environmental justice in a substantive or distributional sense, is frequently undermined despite the public participation requirements embedded in the law.

1.2.4 Public Participation Guideline

To provide further guidance on public participation requirements outlined in NEMA and the EIA Regulations the Department of Environmental Affairs produced a Public Participation Guideline in 2017.[119] The guideline purports to provide guidance to applicants, EAPs and registered interested and affected parties 'on what is required of them and how to comprehensively undertake a [public participation process]'.[120] The Public Participation Guideline provides insights into methods and techniques that could be employed to ensure effective identification, notification and participation of potentially affected individuals and groups.[121] Measures outlined in the Public Participation Guideline, aligned with the EIA Regulations aim to support the competent authority in making 'better decisions as the views of all parties are considered'.[122] While the person responsible for conducting public participation is encouraged to 'incorporate extra steps' in the process, the guideline does not include measures that go beyond consultation, as conceptualised in the IAP2 Spectrum of Public Participation (Figure 1).[123] There is no indication that a local community's consent is required before an activity that impacts the environment in which they exist, can proceed. Again, the guideline does no more than facilitate procedural environmental justice, but does not seek meaningfully to advance substantive environmental justice.

1.2.5 Financial Provisioning Regulations

The Financial Provisioning Regulations detail requirements to manage, rehabilitate and remediate latent, residual or future environmental impacts associated with mining activities.[124] Aligned with the requirements detailed in the EIA Regulations, public

117 EIA Regulations (note 84 above) Regulation 35(1).
118 EIA Regulations (note 84 above) Regulation 34(4), (7) & Appendix 7(1)(g) – (h).
119 Department of Environmental Affairs 'Public Participation guideline in terms of NEMA EIA Regulations' (2017) (https://www.environment.gov.za/sites/default/files/docs/publicparticipationguideline_intermsofnemaEIAregulations.pdf (Public Participation Guideline) (accessed 13 December 2020).
120 Public Participation Guideline (note 119 above) 6.
121 Public Participation Guideline (note 119 above) 10 – 11.
122 Public Participation Guideline (note 119 above) 6.
123 Public Participation Guideline (note 119 above) 12.
124 Financial Provisioning Regulations, 2015 GN R1147 published in *GG* 39425 of 20 November 2015 (as amended by GN 326 published in *GG* 40772 of 7 April 2017; GN 706 published in *GG* 41766 of 13 July 2018) (Financial Provisioning Regulations).

participation in terms of the Financial Provisioning Regulations requires mere consultation, advancing only procedural environmental justice.[125]

1.3 MPRDA AND THE MPRD REGULATIONS

The MPRDA was enacted to:[126]

> … give effect to s 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.

The MPRDA is underscored by a transformative mandate which states that:[127]

> Mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans.

To give effect to this transformative mandate, the state is required to exercise custodianship of mineral resources through administrative processes outlined in various sections of the MPRDA.[128] A key feature of custodianship under the MPRDA is that the state makes the final decision on whether a mineral right should be granted or not.[129]

As it relates to public participation, the MPRDA provides that any person applying for a prospecting or mining right must simultaneously apply for an environmental authorisation.[130] A public participation process as outlined in the EIA Regulations for either a basic assessment or S&EIR process must therefore be undertaken when applying for a mineral right under the MPRDA. Applicants for mineral rights must consult with landowners, lawful occupiers and interested and affected parties 'in the prescribed manner' and include the consultation record with the environmental reports submitted to the Regional Manager.[131] In terms of the amended MPRD Regulations, the manner prescribed for consultation is now aligned with the NEMA public participation process as is evident from the following definition:[132]

> The meaningful consultation with landowners, lawful occupiers and interested and affected persons contemplated in sections 16(4)(b), 22(4)(b), 27(5)(a) of the Act shall be conducted in terms of the public participation process prescribed in the Environmental Impact Assessment Regulations promulgated in terms of section 24(5) of the National Environmental Management Act, 1998.

In *Baleni and Others v Regional Manager: Eastern Cape Department of Mineral Resources and Others (Centre for Applied Legal Studies as Amicus Curiae)* (*Baleni 2020*) Makhubele J reasoned that meaningful consultation entails 'discussion of ideas on an equal footing, considering the advantages and disadvantages of each course and making concessions

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125 Financial Provisioning Regulations (note 124 above) Regulation 13, Appendix 3(1), Appendix 4(1), 4(3)(b)(iii), 4(3)(c)(iv), 4(3)(d)(ii)&(vii), 4(3)(e)(i), 4(3)(l)(ii), Appendix 5(1), Appendix 6(1)(b)

126 MPRDA (note 28 above) s 2(h). *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) paras 5 & 8.

127 MPRDA (note 28 above) s 3(1).

128 MPRDA (note 28 above) Chapter 4 entitled Mineral and Environmental Regulation.

129 MPRDA (note 28 above) s 3(2).

130 MPRDA (note 28 above) s 16(1) & 22(1) and now expressly provided for in the recently introduced MPRD Regulations (note 5 above) Regulation 3A. Regulation 3A(2) provides that the office of the Regional Manager may participation in public participation processes to ensure that such processes are meaningful and conform with the MPRD Regulations. See also the discussion in chapter one at 1.2.2.

131 MPRDA (note 28 above) s 16(4)(b) & 22(4)(b).

132 MPRD Regulations (note 5 above) Regulation 3A(1).

where necessary'.[133] Thus, the court recognised that environmental justice in a procedural sense should be pursued, including by recognising mining affected communities as worthy and legitimate stakeholders in decision-making about mining.

While the amended MPRD Regulations now clarify the purpose; scope; and circumstances that necessitate public participation to a greater extent, 'meaningful consultation' does not include a requirement to secure consent.[134] As mentioned in chapter one, the EIA Regulations require no more than consultation in the context of proposed prospecting and mining right applications.[135] Similarly, meaningful consultation in terms of the MPRD Regulations does not rise above the level of consultation provided for in the EIA Regulations. Mining-affected communities are therefore, in terms of the MPRDA and MPRD Regulations, not required to consent to proposed prospecting or mining developments. Environmental justice in a substantive sense is arguably undermined by this approach, as mining applications are frequently granted, permitting harmful mining activities in a manner and in locations that disproportionately impact poor and marginalised communities.[136]

In addition to the NEMA linked public participation process provisions, specific consultation requirements are outlined in the MPRDA and MPRD Regulations. Section 10 of the MPRDA provides that the Regional Manager must 'make known' that an application for a prospecting or mining right has been accepted, within 14 days of such an application being lodged; and invite interested and affected parties to comment on the application within 30 days from the date of the notice.[137] Section 10, read with Regulation 3 of the amended MPRD Regulations, requires the Regional Manager or designated agency to place a notice at various publicly accessible places within the area or jurisdiction where the proposed project footprint is located.[138] The notices must be placed at the relevant 'office of the Regional Manager or designated agency'; the applicable Magistrate's Court; and 'local schools, public libraries, municipal offices, and Traditional Council offices' applicable to the proposed project footprint.[139] Mandatory minimum information to be detailed in the s 10 notice is outlined in Regulation 4.[140] Interested and affected parties are entitled, on request to the relevant Regional Manager of the DMRE, to a copy of a mining right application document with financially sensitive information redacted.[141] The importance of this requirement was underscored in *Bengwenyama* when the Constitutional Court determined that a failure to consult with landowners and lawful occupiers as per the requirements of s 10 and Regulation 3, could render the grant of a mineral right procedurally unfair.[142] This requirement advances environmental justice in a procedural sense, but where community objections are ignored, does not protect environmental justice in a substantive sense.

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133 *Baleni and Others v Regional Manager: Eastern Cape Department of Mineral Resources and Others (Centre for Applied Legal Studies as Amicus Curiae)* (2020) JOL 48540 (GP) (*Baleni 2020*) para 89.

134 This aspect is also described in the sections dealing with NEMA and the SEMAs.

135 See chapter one at 1.2.3.

136 International Human Rights Clinic, Harvard Law School 'The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand' (2016) 107, 110 & 111.

137 MPRDA (note 28 above) s 10(1) & (2).

138 MPRD Regulations (note 5 above) Regulation 3(2).

139 MPRD Regulations (note 5 above) Regulation 3(3)(b) & (d).

140 MPRD Regulations (note 5 above) Regulation 4 stipulates a minimum 30-day comment period and a requirement to include contact information where comments can be submitted.

141 *Baleni 2020 (note 133 above*) paras 95, 108 & 117.

142 *Bengwenyama* (note 32 above) paras 66, 70 & 80.

The MPRDA further provides that all mining right applications must include a social and labour plan (SLP).[143] In terms of the amended MPRD Regulations, public participation during a mining right application must now include 'meaningful consultation' on the content of a proposed SLP, conducted in accordance with the NEMA requirements as outlined in the EIA Regulations.[144] The NEMA public participation process requirements must also be followed when a periodic five-year review of an approved SLP is undertaken.[145] Inclusion of a requirement to be meaningfully consulted advances environmental justice in a procedural sense, but does not afford mining-affected communities a right to veto a proposed SLP or mine community development interventions that are included in this document to secure environmental justice in a substantive sense. Instead, people directly affected by mining activities are merely afforded the right to be provided with sufficient information in an understandable format and given an opportunity to contribute comment. The final decision on the content of an approved SLP is still determined by the mineral right holder; local municipal officials; and the DMRE.

The MPRDA also provides that where a prospecting or mining right application relates to land occupied by a community, the Minister may impose conditions 'to promote the rights and interests of the community, including conditions requiring the participation of the community'.[146] These conditions, when included in a mining right, become legally binding and enforceable obligations, and could advance environmental justice in a substantive sense.[147] Attempts by DMR to amend this section, by deleting the reference to community participation, suggests a level of discomfort with the extent to which it could potentially empower mining-affected communities in decision-making, but do not give rise to consent-based decision-making.[148]

Finally, the amended MPRD Regulations include requirements for meaningful consultation with interested and affected parties as well as employees and trade unions when the holder of a mineral right contemplates downscaling or cessation of mining operations as outlined in s 52(1) of the MPRDA.[149] Again, these provisions advance environmental justice in a procedural sense.

Should an application for a mineral right be successful, the applicant becomes the holder of a limited real right with entitlements outlined in s 5(3) of the MPRDA. Prior to commencing any authorised prospecting or mining operations, a mineral right holder is required to issue a notice to landowners and lawful occupiers.[150] While s 5A(c) merely details notice

143 MPRDA (note 28 above) s 23(1)(e).
144 MPRD Regulations (note 5 above) Regulation 42(4).
145 MPRD Regulations (note 5 above) Regulation 46B(b).
146 MPRDA (note 28 above) s 17(4A) & 23(2A).
147 For example, the MPRDA (note 28 above) s 47(1)(b) empowers the Minister responsible for mineral resources to 'suspend or cancel rights, permits or permissions' in the event of a breach of 'any material condition of such right, permit or permission'.
148 Draft Mineral and Petroleum Resources Development Bill, 2012 GN 1066 published in *GG* 36037 of 27 December 2012, Clause 18. The Bill lapsed in terms of the Parliament of the Republic of South Africa *Rules of the National Assembly* (9th ed 2016) Rule 333(2).
149 MPRD Regulations (note 5 above) Annexure II, Forms Y and Z read with MPRDA (note 28 above) s 52(1) relates to notice of profitability and curtailment of mining operations that may affect employment. The new Form Z provided in the amended MPRD Regulations (note 5 above) details requirements for meaningful consultation with interested and affected parties as well as employees and trade unions.
150 MPRDA (note 28 above) s 5A(c) read with s 97 and MPRD Regulations (note 5 above) 3B requires that the notice be delivered by hand or via registered post to landowners or lawful occupiers; 21 days before commencement of proposed mining or prospecting activities; and that it must include the date and time

requirements, it could ensure that landowners and lawful occupiers who might not have been consulted during the initial mineral right application process, are at least made aware that mining activities are about to commence. Further internal remedies which may be required if landowners and lawful occupiers prevent a mineral right holder from commencing mining activities are detailed in s 54 of the MPRDA.[151] Section 54 affords aggrieved landowners and lawful occupiers an opportunity to make representations to the Regional Mining Development and Environmental Committee and engage with the mineral right holder to reach agreement on compensation for loss or damage suffered.[152] Where these negotiations fail, the Minister responsible for mineral resources may expropriate the land for the purposes of prospecting or mining.[153]

Public participation under the MPRDA and the MPRD Regulations therefore does not rise above a requirement to consult as described in the IAP2 Spectrum of Public Participation (Figure 1) prior to granting a mining right, and their potential to advance environmental justice in a substantive sense is thus limited. As it relates to consent from those directly affected by proposed mining activities, both the MPRDA and MPRD Regulations are silent. Given that mining disproportionately impacts poor and vulnerable people, causing environmental injustice, the level of participation is arguably inadequate.[154]

1.4 SEMAS

1.4.1 National Environmental Management: Protected Areas Act 57 of 2003

In terms of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA):[155]

> … no person may conduct commercial prospecting, mining, exploration, production or related activities … in a protected environment without the written permission of the Minister and the Cabinet member responsible for minerals and energy affairs.

NEMPAA does not make express provision for a public participation process related specifically to the granting of such permission. In such instances, as was held in *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs (MEJCON)*, the public participation processes stipulated in s 3 and 4 of PAJA (as applicable) should be followed to ensure that administrative justice is pursued.[156] As it relates to consultation with communities when a decision is made to permit mining in a protected environment, s 4 of PAJA details public participation processes that could include

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of entry onto the land in question. A copy of the notice, as well as proof of service must be submitted to the Regional Manager within the 21-day notification period. The notice must contain the name and contact details of the person to whom objections may be sent.

151 In *Maledu* (note 7 below) at para 91 the court determined that no other remedies, such as an eviction or interdict, can be initiated before the s 54 process has been concluded.

152 MPRDA (note 28 above) s 54.

153 MPRDA (note 28 above) s 55.

154 Centre for Environmental Rights 'ZERO HOUR Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga' (2016) https://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf (accessed 27 February 2021) (CER Zero Hour) 74 recommends reforming the MPRDA to require FPIC where mining-affected communities could be impacted by proposed mining activities.

155 National Environmental Management: Protected Areas Act 57 of 2003 s 48(1)(b).

156 *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* 2019 (5) SA 231 (GP) (*MEJCON*) para 11.2.6.

public inquiries or notice-and-comment procedures. In deciding to grant permission for mining to be conducted in a protected environment, the Minister must 'take into account the interests of local communities and the environmental principles referred to in s 2 of NEMA'.[157] The Minister does however make the final decision given that the PAJA s 4 public participation process contains no requirement for community consent. Where the PAJA public participation processes are implicated and not followed, as was the case in the *MEJCON,* a decision to authorise mining in a protected environment could be ruled to be procedurally unfair and set aside on review.[158] However, the participation required by s 4 of PAJA is not consent-based, and does not include measures that go beyond consultation as conceptualised in the IAP2 Spectrum of Public Participation (Figure 1). The participation requirements under NEMPAA are thus arguably primarily aimed at environmental justice in a procedural sense, though the restrictions on permitting mining in protected areas could arguably serve to advance environmental justice in a substantive sense too.

1.4.2 National Water Act 36 of 1998

The National Water Act 36 of 1998 (NWA) was enacted 'to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled' to meet 'basic human needs of present and future generations;' promote 'equitable access to water;' and address 'the results of past racial and gender discrimination'.[159] These aims align with environmental justice in the substantive sense of the equitable distribution of water, an environmental benefit. Section 21 of the NWA outlines various water uses that require a license, a number of which could be required when undertaking mining operations. Section 21 provides that:[160]

> a water use must be licensed unless it is listed in Schedule I, is an existing lawful use, is permissible under a general authorisation, or if a responsible authority waives the need for a licence.

Public participation in water use licence applications (WULAs) are detailed in the NWA as well as the Water Use Licence Application and Appeals Regulations 2017 (WULAA Regulations).[161] Section 24 of the NWA provides that abstraction of groundwater on the property of another can only be undertaken with the prior consent of the owner or 'if there is good reason to do so'.[162] The responsible authority may also require a licensee to obtain 'written consent of any affected person before amending or substituting' a water use licence.[163] The WULAA Regulations also provide that written consent must be obtained from landowners on whose property a proposed water use will be undertaken prior to submitting a WULA.[164]

However, in *Endangered Wildlife Trust and Others v Director-General, Department of Water and Sanitation and Another (EWT),* the Water Tribunal clarified that the NWA consent

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157 *MEJCON* (note 156 above) para 10.7.
158 *MEJCON* (note 156 above) paras 11.2.6 & 14.1.
159 National Water Act 36 of 1998 (NWA) s 2(a) – (c).
160 NWA (note 159 above) s 21 read with Regulations on use of water for mining and related activities aimed at the protection of water resources GN 704 published in *GG* 20119 of 4 June 1999.
161 NWA (note 159 above) s 41 and the Water use licence application and appeals Regulations 2017 GN R267 published in *GG* 40713 of 24 March 2017 (WULAA Regulations) Regulations 17 – 19.
162 NWA (note 159 above) s 24.
163 NWA (note 159 above) s 50(2)(a).
164 WULAA Regulations (note 161 above) Appendix C and D.

requirement must be understood in the context of public participation requirements prescribed in the NWA.[165] As such, consent to a water use in terms of the NWA is not the same as consent to a land use, such as mining, in terms of the IPILRA.[166] In the context of a WULA, consent is 'only one of many factors that we must consider before we grant or refuse the WUL' which may be dispensed with if the responsible authority believes there are good reasons to do so.[167] According to *EWT*, a WUL can therefore be granted without landowner or lawful occupier consent; for water uses associated with a proposed underground mine; in a 'protected environment' as contemplated in the s 48 of the NEMPAA.[168]

Aside from the qualified consent provisions detailed in the NWA and WULAA Regulations, public participation in water use licence applications follows the NEMA consultation requirements to a large extent and is aligned with the IAP2 Spectrum of Public Participation (Figure 1) 'consult' goal. Mining-affected communities are therefore afforded no more than the right to be consulted and to comment on a proposed WULA. A limited degree of environmental justice in a procedural sense is thus pursued by the NWA in this context, as opposed to substantive environmental justice.

1.4.3 National Environmental Management: Air Quality Act 39 of 2004

The National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) was enacted to:[169]

> … give effect to s 24(b) of the Constitution in order to enhance the quality of ambient air for the sake of securing an environment that is not harmful to the health and well-being of people.

Section 21 of the NEMAQA empowers the Minister responsible for environmental matters or MEC to publish a list of activities that require an atmospheric emission licence.[170] Section 38(3) of the NEMAQA details similar consultation requirements to the basic assessment process requirements outlined in the EIA Regulations when an atmospheric emission licence (AEL) application is submitted to the relevant licensing authority.[171] As such, mining-affected communities are entitled to be provided with all relevant information regarding the proposed activities and potential impacts; in a timely manner; to afford them the opportunity to contribute comments which the competent authority must take into consideration in arriving at a decision to grant or refuse an atmospheric emission licence.

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165 *Endangered Wildlife Trust and Others v Director-General, Department of Water and Sanitation and Another* (WT 03/17/MP) [2019] ZAWT 3 (22 May 2019) http://www.saflii.org/za/cases/ZAWT/2019/3.html (accessed 7 May 2021) (*EWT*) para 163.5.

166 *EWT* (note 165 above) paras 163.6 & 163.6.

167 *EWT* (note 165 above) para163.7.

168 *EWT* (note 165 above) para 172.

169 National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) s 2(b).

170 NEMAQA (note 169 above) s 1 MEC is defined as the member of the Executive Council who is responsible for air quality management in the province; List of activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage GN 893 published in *GG* 37054 of 22 November 2013 (as amended by GN 551 published in *GG* 38863 of 12 June 2015) (NEMAQA listed activities).

171 NEMAQA (note 169 above) s 38(3)(b) public participation requirements correspond largely with the EIA Regulations (note 84 above) provisions, with an additional requirement to place an advertisement in two newspapers circulating in the area where the proposed activity will take place. The NEMAQA listed activities (note 170 above) Regulation 12 requires public participation prior to submission of an application to postpone compliance with minimum emission standard timeframes, as contemplated in Regulations 11.

Neither NEMAQA nor its regulations require consent from directly affected communities prior to authorisation of potentially polluting activities, such as those listed in Category 5 of the NEMAQA listed activities that relate to mining.[172] As such, mining-affected communities who suffer the most direct impacts associated with air pollution, and thus experience substantive environmental injustice to a significant degree, have little say in whether proposed activities should be authorised or not.[173] In these instances, mere consultation, as outlined in the IAP2 Spectrum of Public Participation (Figure 1) is required. Accordingly, limited procedural environmental justice is envisaged.

1.4.4 Air Quality Offsets Guideline

The Air Quality Offsets Guideline published in terms of s 24J (a) of NEMA provides for measures to 'counterbalance, counteract, or compensate for the adverse impacts of an activity on the environment'.[174] Air quality offsets are 'recommended' during applications to postpone compliance with minimum air emission standards as contemplated in s 21 of NEMAQA; where an application to vary the conditions in an AEL indicate that the variation will result in an increase in atmospheric emissions; and during AEL applications in areas where the National Ambient Air Quality Standards are already exceeded.[175] Air quality offsets could include working with communities to replace coal stoves with alternative cleaner cooking and household heating sources such as gas, electrical or hybrid stoves; ensuring safe and energy efficient electrical connections in households; and waste collection in areas where domestic waste is burnt due to a lack of municipal refuse collection facilities.[176]

The Air Quality Offsets Guideline contains recommendations that a project proponent consult with communities and, where necessary, provide proof that the community in question supports a proposed air quality offset strategy.[177] Public participation as part of an offset programme 'can be done as part of public participation undertaken in terms of the NEMA and/or a separate process'.[178] Once an air quality offset strategy is approved by the licencing authority, it becomes a legally enforceable condition in an AEL.[179] There is however no requirement under NEMA or NEMAQA to include air quality offsets in an AEL application. Public participation in these instances is therefore aligned with the IAP2 Spectrum of Public Participation (Figure 1) goal to 'consult'. Although the Air Quality Offsets Guideline has the potential to advance substantive environmental justice, it is not currently fulfilling this role in practice.

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172 NEMAQA listed activities (note 170 above).

173 Centre for Environmental Rights 'BROKEN PROMISES The failure of the Highveld Priority Area' (2017) 80 https://cer.org.za/wp-content/uploads/2017/09/Broken-Promises-full-report_final.pdf (accessed 27 April 2021).

174 Air Quality Offsets Guideline GN 333 published in *GG* 39833 of 18 March 2016 (Air Quality Offsets Guideline).

175 Air Quality Offsets Guideline (note 174 above) s 4(a) – (c).

176 Eskom Air Quality Offset Plans: Progress Report March2020 4 & 5 https://www.eskom.co.za/AirQuality/Pages/PlansReports.aspx (accessed 29 April 2021).

177 Air Quality Offsets Guideline (note 174 above) s 7.3.

178 Air Quality Offsets Guideline (note 174 above) s 6.

179 Air Quality Offsets Guideline (note 174 above) s 4.

1.4.5 National Environmental Management: Waste Act 59 of 2008

The National Environmental Management: Waste Act 59 of 2008 (NEMWA) was enacted with the objective of:[180]

> … 2(a)(v) preventing pollution and ecological degradation;
> 2(a)(vi) securing ecologically sustainable development while promoting justifiable economic and social development;
> 2(d) generally, to give effect to s 24 of the Constitution in order to secure an environment that is not harmful to health and well-being.

Prior to undertaking any activities listed in Schedule 1 of NEMWA or the List of waste management activities that have, or are likely to have, a detrimental effect on the environment,[181] a proponent must apply for a waste management licence and undertake either a basic assessment or S&EIR process as outlined in the EIA Regulations.[182] Waste management activities related to mining typically include excavation, removal, storage or disposal of soil or rock (overburden) to access the mineral or ore body; ore extraction and transportation; separating the ore from other non-metallic materials (beneficiation); and disposal of the residue (tailings) after the beneficiation process.[183] These activities could have far reaching and long-term adverse environmental, social and health impacts which include contaminants leaching into soil and water sources; acid mine drainage; soil erosion and sediment-loading to waterbodies; loss of topsoil; habitat fragmentation and loss; and air pollution to mention only a few.[184]

As it relates to public participation during waste management licence applications, no provision is made to secure consent from mining-affected communities prior to undertaking waste management activities, thus potentially exposing the communities to grave environmental injustice in a substantive sense. This is so despite NEMWA's preamble acknowledging that 'the impact of improper waste management practices are often borne disproportionately by the poor'.[185] Aligned with the EIA Regulations, a decision to authorise mining related waste management activities merely requires that mining-affected communities be provided with sufficient information and afforded the opportunity to comment. Public participation in these instances is therefore aligned with the IAP2 Spectrum of Public Participation (Figure 1) goal to 'consult', which advances procedural environmental justice, but does not necessarily advance environmental justice in a substantive sense.

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180 National Environmental Management: Waste Act 59 of 2008 (NEMWA) s 2.

181 List of waste management activities that have, or are likely to have, a detrimental effect on the environment GN 921 published in *GG* 37083 of 29 November 2013 (as amended by GN 332 published in *GG* 37604 of 2 May 2014; GN R633 published in *GG* 39020 of 24 July 2015; GN 1094 published in *GG* 41175 of 11 October 2017) (NEMWA listed activities).

182 NEMWA (note 180 above) Schedule 1, and the NEMWA listed activities (note 181 above) provide that Category A activities require a basic assessment process detailed in the EIA Regulations (note 84 above) Regulations 19 & 20. Category B activities require a S&EIR processes detailed in the EIA Regulations (note 84 above) Regulations 21 – 24.

183 ELAW Overview of Mining and its Impacts (ELAW) https://www.elaw.org/files/mining-eia-guidebook/Chapter1.pdf 5 & 6 (accessed 30 April 2021).

184 ELAW (note 183 above) 8 – 18.

185 NEMWA (note 180 above) preamble; *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 67; Murcott LLD thesis (note 2 above) 85.

1.5 ANALYSIS

While the regulatory framework as it relates to environmental decision-making in South Africa's mining sector has been enhanced to underscore the key role that public participation plays,[186] mining-affected communities have no right to consent to mining in terms of NEMA; the SEMAs; the MPRDA or any related regulations or guidelines. While the EIA Regulations recognise, in general, the importance of affording people who are directly affected by proposed development activities a right to consent prior to an application for environmental authorisation being submitted, the same regulations paradoxically exclude a prior consent requirement when the application relates to prospecting or mining.[187] This is an example of mining being treated as the 'special child' of South Africa's environmental governance regime.[188]

In addition, Leonard, in his assessment of the EIA regime in South Africa, speaks to the notion of 'pervasive exclusion' in that the regulatory framework contains no specific requirement to conduct meetings in pursuit of procedural environmental justice.[189] In this manner, mining-affected communities and other interested and affected persons who would benefit from participating in face-to-face interactions with the applicant and EAP could be denied the opportunity to do so, merely on the grounds that the law does not require such engagements. Leonard is also critical (and appropriately so) of the absence of an express requirement in the regulatory framework to make information available in the preferred language of mining-affected communities, leaving the choice of language and means of communication to the discretion of the competent authority and EAP.[190] The absence of such a requirement arguably undermines procedural environmental justice. The minimum 30-day comment period provided for in the NEMA, MPRDA and SEMA public participation processes has also been criticised for being too short,[191] such that it undermines environmental justice, particularly given the highly technical and voluminous nature of content that interested and affected parties are confronted with. Furthermore, communities are frequently 'rushed through consultation processes' with little regard for cultural practices and protocols that could afford community members sufficient time to form an understanding of how a proposed project might affect them so that they can respond appropriately.[192]

While the Public Participation Guideline encourages the use of 'extra steps' such as convening face-to-face meetings; radio advertisements; and making complex technical information available in an understandable summarised format in the language predominantly spoken in the region, such measures are left to the discretion of the person conducting the public participation process.[193] Where such 'extra steps' are not used,

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186 Huizenga (note 31 above) 711.

187 EIA Regulations (note 84 above) Regulation 39(2)(b). Note: Regulation 39(2)(b), which created the exclusion, was amended after finalisation of this dissertation. See Amendments to EIA Regulations, 2021 (note 87 above).

188 T Humby 'One environmental system: aligning the laws on the environmental management of mining in South Africa' (2015) 33(2) *Journal of Energy & Natural Resources Law* 110 112.

189 L Leonard 'Examining Environmental Impact Assessments and Participation: The Case of Mining Development in Dullstroom, Mpumalanga, South Africa' (2017) 19 *Journal of Environmental Assessment Policy and Management* 1750002 8.

190 As above.

191 South African Human Rights Commission 'Research Brief: The Status of Human Rights Defenders in South Africa' (2018) 24.

192 I Aucamp & A Lombard 'Can social impact assessment contribute to social development outcomes in an emerging economy?' (2018) 36 (2) *Impact Assessment and Project Appraisal* 173 175.

193 Public Participation Guideline (note 119 above) 10 & 12.

particularly in instances where they are warranted, vulnerable and marginalised individuals and mining-affected communities are effectively excluded from public participation processes given that all the mandatory regulatory public participation boxes have been ticked. Environmental justice in both a substantive and procedural sense is then materially undermined.

Practical examples of exclusion giving rise to environmental injustice are described by ActionAid South Africa (AASA) in its research into the socio-economic and political conditions of mining-affected communities in South Africa.[194] In a survey of eight mining-affected communities with more than 500 respondents, AASA concluded that 'community consultations were often not public knowledge and where consultations did take place they were often with traditionally dominant men or politically connected men in the community'.[195] The High Level Panel on the Assessment of Key Legislation in South Africa, through a series of public hearings conducted countrywide, notes a similar trend of exclusion of mining-affected communities from regulatory public participation processes prior to granting of mineral rights.[196] The panel highlights the proliferation of nefarious practices such as mining companies and government officials colluding with traditional leaders to conclude agreements contrary to the wishes of the broader community.[197]

In addition, internal appeal remedies against administrative decisions made by competent authorities in terms of NEMA, the MPRDA and the various SEMAs are frequently ineffective and prohibitively expensive.[198] Marginalised and under-resourced mining-affected communities thus suffer financial exclusion from the benefits of internal remedies intended to safeguard their rights and thus experience environmental injustice.

It is therefore not surprising that the current environmental law regulatory framework, in the context of mineral right applications, has been criticised for resembling a regulatory tick-box exercise.[199] The South African Human Rights Commission (SAHRC) highlights the need for 'meaningful consultation' that entails more than the mere 'tick-box exercise' that prevails under the current regime.[200] The SAHRC notes that, in the absence of an express requirement to secure FPIC, mining-affected communities have limited bargaining power or control over development activities that could adversely impact their lives and livelihoods.[201] I argue that consultation can meaningfully advance environmental justice only if it includes a requirement to secure consent from those directly affected by proposed mining activities. As it currently stands, linking all mining related public participation to the NEMA public participation requirements does not make consultation meaningful.

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194 AASA (note 30 above).

195 AASA (note 30 above) 18. See also HLP (note 6 above) 473.

196 HLP (note 6 above) 265 & 470.

197 HLP (note 6 above) 203.

198 HLP (note 6 above) 396 notes that courts in judicial review proceedings are 'loath to grant review relief in these circumstances, preferring to limit relief to an order compelling the appeal authority to make a decision'; CER Zero Hour (note 154 above) 44 note that internal appeal processes are time consuming, costly and frequently lead to no outcome at all which places mining-affected communities at a severe disadvantage.

199 Corruption Watch 'Mining for Sustainable Development Research Report' (2017) 31 https://www.corruptionwatch.org.za/wp-content/uploads/2017/10/Mining-for-Sustainable-Development-report-South-Africa-2017.pdf (accessed 30 September 2020) 4.

200 SAHRC (note 29 above) 6.

201 SAHRC (note 29 above) 66 & 71.

The SAHRC records ongoing environmental justice concerns of mining-affected communities relating to air pollution; blasting; relocation and compensation; mining in sensitive and protected areas; pollution and exploitive use of scarce water resources; inadequate planning and provision for housing; financial provision for post closure rehabilitation and land use; inadequate consultation; and a lack of access to information.[202] It is within this context of ongoing environmental injustices and systemic exclusion of mining-affected communities from public participation processes that I analyse the utility of FPIC as an instrument to enhance environmental justice in chapter three. In chapter two I describe how FPIC became part of the mining sector regulatory framework through the IPILRA and the extent to which this Act provides a permanent safeguard to protect informal land rights of mining-affected communities.

202 SAHRC (note 29 above) 3 – 4.

2 CHAPTER TWO – FPIC

2.1 INTRODUCTION

This chapter illustrates that FPIC forms part of South African law by virtue of its inclusion in the IPILRA and jurisprudence engaging with the IPILRA with reference to indigenous customary law and international law. The purpose of this chapter is to explain how FPIC became part of the regulatory framework governing mining activities in South Africa in a manner that advances environmental justice for mining-affected communities. Shortcomings of the IPILRA as a permanent safeguard to ensure ongoing inclusion of mining-affected communities in decision-making processes are also discussed in this chapter.

2.2 IPILRA

The IPILRA was enacted in 1996 as a 'holding measure or safety net'[203] until Parliament enacted legislation to protect the tenure of people in communal areas as envisaged in s 25(6) and (9) of the Constitution.[204] Section 25(6) of the Constitution affords security of tenure or comparable redress to people or communities previously subjected to racially discriminatory laws and practices,[205] with the IPILRA having been enacted to provide such redress.[206]

The IPILRA provides that no person entitled to informal land rights may be deprived of such rights without their consent;[207] that consent relating to activities on communal land must be secured in accordance with prevailing customs and usage of the community;[208] and persons affected by a deprivation are entitled to compensation.[209] In instances where IPILRA is applicable, the full IAP2 Spectrum of Public Participation (Figure 1) is implicated given that informal land right holders must be informed; consulted; involved; collaborated with and ultimately empowered by consenting to a proposed land use. The IPILRA provides that an 'informal right to land' arises in the following circumstances:[210]

> (a) the use of, occupation of, or access to land in terms of—
> (i) any tribal, customary or indigenous law or practice of a tribe;
> (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in—
> (aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);
> (bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or
> (cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;
> (b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;

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203 HLP (note 6 above) 258.
204 Constitution (note 10 above) s 25(6) and (9).
205 *Baleni* (note 8 above) 49 – 50.
206 *Baleni* (note 8 above) para 51.
207 IPILRA (note 37 above) s 2(1).
208 IPILRA (note 37 above) s 2(2) and (4).
209 IPILRA (note 37 above) s 2(3).
210 IPILRA (note 37 above) s 1.

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or
(d) the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question.

but does not include—

(e) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and
(f) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.

Informal land rights in terms of the IPILRA are elevated to the 'status of property rights'.[211] The treatment of informal rights to land as holding the same status as property rights is a significant departure from the discriminatory laws and practices that prevailed under the apartheid era where, through the imposition of colonial conceptions of ownership, black people were denied legal protection for their property rights and arbitrarily dispossessed of their land causing grave environmental injustice.[212] Claxton argues that land dispossession 'more than any other human rights abuse ... will directly affect the lives of disadvantaged and oppressed communities for generations to come'.[213] This statement rings true particularly in the context of mineral right applications where the MPRDA has been implemented in a manner that undermines informal land rights leading to 'land dispossession and loss of livelihoods'.[214] Alarmingly, certain mining-affected communities complain that they are now 'more vulnerable to dispossession than they were before 1994'.[215] It is therefore not surprising that two such communities approached the courts to protect their informal land rights under the IPILRA. Both matters concerned mining-affected communities who faced environmental injustice due to proposed mining activities in or adjacent to their communities. *Maledu* concerned the Lesetlheng Community, and Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR) and Pilanesberg Platinum Mines (Pty) Limited (PPM). *Baleni* concerned the Umgungundlovu Community and Trans World Energy and Mineral Resources (SA) (Pty) Ltd. If these mining companies were merely required to consult in accordance with public participation obligations described in chapter one, past land dispossession perpetrated during the apartheid era would arguably have been entrenched, furthering environmental injustice for these communities.[216]

2.3 RELEVANT JURISPRUDENCE

2.3.1 ***Maledu***

In *Maledu*, the Lesetlheng Community, holders of informal land rights as outlined in s 2(1) of the IPILRA, approached the Constitutional Court to overturn an eviction order and interdict

211 HLP (note 6 above) 260.
212 H Kloppers & G Pienaar 'The historical context of land Reform in South Africa and Early Policies' (2014) 17 (2) *Potchefstroom Electronic Law Journal* 677 679 & 680.
213 H Claxton 'Land and liberation: lessons for the creation of effective land reform policy in South Africa' (2003) 8 *Michigan Journal of Race and Law* 529 552.
214 HLP (note 6 above) 60.
215 HLP (note 6 above) 203, 264 – 267 highlight the 'inaccurate interpretations of post-apartheid laws such as the ... MPRDA' which deny community members their land rights.
216 HLP (note 6 above) 259.

granted to two mining companies, IBMR and PPM.[217] The Lesetlheng Community asserted that they had purchased the farm Wilgespruit 2 JQ in the North West Province in 1919,[218] but due to the racially discriminatory laws prevailing at the time, they were unable to register the property in the name of the Community.[219] At the time of the judgment, the property in question was registered 'in trust for the Bakgatla-Ba-Kgafela Community' given that the Lesetlheng Community was not recognised as an autonomous entity.[220]

IBMR had successfully applied for a prospecting right, which was granted in 2004. A mining right was subsequently granted on 19 May 2008.[221] This was followed by approval of an environmental management programme on 20 June 2008 and conclusion of a surface lease agreement between IBMR and the Bakgatla-Ba-Kgafela Tribal Authority on 28 June 2008.[222] In 2015, after commencement of mining operations, the Lesetlheng Community successfully obtained a spoliation order against IBMR and PPM. IBMR and PPM swiftly applied to the High Court for an order to evict the Lesetlheng Community from the farm in question and an interdict to prevent community members from entering the surface lease area.[223] The High Court agreed with IBMR and PPM's assertion that the Lesetlheng Community's informal rights had been lawfully terminated, and granted both an eviction order and an interdict.[224] Both the High Court and Supreme Court of Appeal refused to grant the Lesetlheng Community leave to appeal.[225] However, Petse AJ on behalf of a unanimous Constitutional Court bench overturned these rulings.[226]

Proceeding from the constitutional imperative to protect individuals or communities whose land tenure is insecure due to past racially discriminatory laws or practices;[227] and to interpret the IPILRA in a manner that does the least amount of harm to those it seeks to protect, Petse AJ provided guidance on how to interpret both the MPRDA and IPILRA harmoniously in the face of apparently conflicting requirements.[228] The effect of such an interpretation was to protect the informal land rights of a community, as defined in the IPILRA, through their right to provide prior, informed consent.[229] This approach advanced environmental justice in a procedural and substantive sense by giving the community a seat at the decision-making table and recognising their substantive land rights. The court rejected IBMR and PPM's position that the granting of a mining right had the effect of making the Lesetlheng Community's occupation of the land unlawful.[230]

Furthermore, the court reasoned that remedies available to mineral right holders in conflict with common law owners did not apply in the instance of informal land right holders as

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217 *Maledu* (note 7 below) para 6.
218 *Maledu* (note 7 below) para 3 & 12. At 83 & 84 Petse AJ noted that the Lesetlheng Community have lodged and application to rectify the title deed in terms of the Land Titles Adjustment Act 111 of 1993.
219 *Maledu* (note 7 below) para 12.
220 *Maledu* (note 7 below) paras 6 & 12.
221 *Maledu* (note 7 below) para 14.
222 As above.
223 *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others* 2017 ZANWHC 86 para 1.
224 *Maledu* (note 7 below) para 23.
225 *Maledu* (note 7 below) para 25.
226 *Maledu* (note 7 below) para 113.
227 *Maledu* (note 7 below) para 5 read with s 25(6) of the Constitution (note 10 above).
228 *Maledu* (note 7 below) para 63.
229 *Maledu* (note 7 below) para 105.
230 *Maledu* (note 7 below) para 103.

defined in the IPILRA.[231] This is so given that granting of a mineral right is a 'deprivation' as contemplated in s 2 of the IPILRA.[232] It is not an 'expropriation' as contemplated in s 55 of the MPRDA.[233] Consequently, the consent requirement as contemplated in s 2 of the IPILRA was triggered.[234]

In addition, advancing environmental justice in a substantive sense, the court ruled that informal land right holders could consent to granting of a mining right, but this did not automatically divest them of their right to occupy the land.[235] Any underlying conflict had to be resolved by having regard to the purpose of the IPILRA, which is to provide security of tenure to previously disadvantaged individuals.[236] The court referred to a similar approach adopted in *Maccsand* where the MPRDA was read in a manner that did not override other applicable statutory provisions.[237] As such, requirements of both the MPRDA and IPILRA could, and had to be complied with before the mine could lawfully claim the right to evict the Lesetlheng Community.

In view of the findings in *Maledu*, consent as outlined in s 2(1) of the IPILRA had to be obtained from the Lesetlheng Community over and above the MPRDA consultation requirements.[238] IBMR and PPM therefore had to secure consent in accordance with the requirements outlined in s 2(2) and (4) of the IPILRA which provide that:

> (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

Notwithstanding a resolution concluded in 2008 between an IBMR partner and the Bakgatla-Ba-Kgafela Community, Petse AJ held that the requirements of s 2(2) and (4) of the IPILRA had not been complied with.[239] As such, Petse AJ overturned the eviction order and interdict granted against the Lesetlheng Community.[240]

*2.3.2 **Baleni***

The *Maledu* judgment was handed down on 25 October 2018. At around the same time Basson J of the North Gauteng High Court delivered her judgment in *Baleni*. In *Baleni* the court was asked to provide clarity on the principles that govern a decision to authorise mining activities on land that is subject to the living customary law of the Umgungundlovu Community and the IPILRA. The Umgungundlovu Community reside in the Xolobeni area which is located along the east coast of South Africa.

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231 *Maledu* (note 7 below) para 104, 106 & 110.
232 *Maledu* (note 7 below) para 97 – 99.
233 *Maledu* (note 7 below) para 100 – 103.
234 *Maledu* (note 7 below) para 103 & 108.
235 *Maledu* (note 7 below) para 105.
236 As above.
237 *Maledu* (note 7 below) para 106.
238 *Maledu* (note 7 below) para 108.
239 *Maledu* (note 7 below) fn 95.
240 *Maledu* (note 7 below) para 111.

The *Baleni* judgment was the culmination of a struggle by the Umgungundlovu Community that commenced in 2008 when they became aware that a mining right had been awarded to Trans World Energy and Mineral Resources (SA) (Pty) Ltd (TEM) by the then Department of Mineral Resources (DMR).[241] Prior to the award of the mining right, the Umgungundlovu Community was not consulted.[242] The mining right was subsequently revoked by the DMR in 2011 due to 'environmental concerns which were raised by interested and affected persons'.[243] TEM re-applied for a prospecting right within the timeframe stipulated by the DMR.[244] The local community near Xolobeni responded by forming the ACC to mobilise against 'mining and imposed developmental initiatives within their communities'.[245] While awaiting the outcome of its prospecting right application on the Kwanyana block of the proposed Xolobeni Sands Project footprint, TEM submitted an application to convert a prospecting right that extended over the remaining blocks within the tenement into a mining right.[246] All the while, conflict and tensions between TEM and the Umgungundlovu Community escalated.[247] So intense was the conflict and violence that the applicants launched an urgent application in the Eastern Cape High Court in 2015 to interdict certain directors of XolCo, TEM's black economic empowerment partner, from 'intimidating, victimising, threatening and assaulting' community members opposed to mining.[248] Notwithstanding discharge of the interdict, conflict within the community intensified. On 22 March 2016 Sikhosiphi 'Bazooka' Rhadebe, chairperson of the ACC was gunned down in his home in the presence of his 15-year-old son.[249]

It is within this context of violence, intimidation and conflict that the Umgungundlovu Community (the applicants) approached the North Gauteng High Court for declaratory relief towards the end of 2016. The applicants, who are the undisputed holders of informal rights to land in terms of the IPILRA, asked the court to declare that a mining right could only be granted if prior and informed consent, freely granted in accordance with the living customary law of the Umgungundlovu Community and the amaMpondo People, had been secured.[250] The applicants feared the 'disastrous social, economic and ecological consequences of mining'.[251] In other words, they wanted to prevent environmental injustice. Their

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241 A Bennie 'Questions for labour on land, livelihoods and jobs: a case study of the proposed mining at Xolobeni, Wild Coast' (2011) 42 (3) *South African Review of Sociology* 41 46 notes that the public and affected community only became aware that a mining right had been granted to TEM after an announcement was published on the Australia Stock Exchange website.

242 As above.

243 P Mwape *et al* 'South Africa's Mineral Industry 2012/2013' *Department of Mineral Resources, Republic of South Africa* (2014) 118.

244 Bennie (note 241 above) 46 and Mwape *et al* (note 243 above) 118.

245 Africans in the diaspora 'Amadiba Crisis Committee' https://www.africansinthediaspora.org/amadiba-crisis-committee#:~:text=Amadiba%20Crisis%20Committee%20(ACC)%20was,other%20families%20in%20neighbouring%20areas (accessed 6 January 2021).

246 Mineral Commodities Limited 'March 2015 Quarterly Activities Report for the period ended 30 March 2015' https://mineralcommodities.com/wp-content/uploads/2018/12/2015-03-March-QuarterlyActivities-Report.pdf 1 (accessed 7 January 2021) details timelines of the various applications submitted to the DMR by TEM; A Carlisle writing for Daily Despatch 'Xolobeni mining standoff goes to court' (2015) https://www.dispatchlive.co.za/news/2015-05-19-xolobeni-mining-standoff-goes-to-court/ (accessed 6 January 2021) provides further background regarding the TEM mineral rights applications.

247 *Baleni* (note 8 above) para 22.

248 Mineral Commodities Limited (note 246 above); *Baleni* (note 8 above) para 22.

249 T Carnie, Daily Maverick 'Wild Coast: Bazooka Rhadebe's murder probe 'sabotaged' by police' (2018) https://www.dailymaverick.co.za/article/2018-03-23-wild-coast-bazooka-rhadebes-murder-probe-sabotaged-by-police/ (accessed 6 January 2021).

250 *Baleni* (note 8 above) paras 3, 10 & 27.

251 *Baleni* (note 8 above) para 14.

environmental justice agenda is also exemplified by their concern about the complete absence of engagement with the community on how mining related impacts would be mitigated and how individual families would be compensated for their loss.[252] In finding in the applicants' favour, Basson J noted the well-documented trend that mining-affected communities frequently suffer 'grievous harm' that outweighs promised benefits such as employment and socio-economic upliftment.[253] Basson J noted further that:[254]

> … customary communities such as the applicants, tend to suffer disproportionately from the impacts of mining activities as they are directly affected by the environmental pollution, air borne diseases, loss of their farmland and grazing land, forced displacement and the loss of community amongst other things.

The application was opposed by TEM and state party respondents who refused to acknowledge the Umgungundlovu Community's right to consent to mining on their land.[255] The respondents insisted that the MPRDA trumps the IPILRA with the result that no right to prior consent exists.[256] The 'conundrum' that the court had to resolve was whether consent as outlined in the IPILRA was required or whether consultation as per the MPRDA requirement would suffice in a customary law setting.[257] Basson J acknowledged the importance of interpreting the apparently conflicting provisions of the MPRDA and the IPILRA in a manner that 'promote[s] the spirit, purport and objects of the Bill of Rights';[258] and having regard to the overarching purpose and historical context of the IPILRA and the MPRDA. Basson J reasoned that both statutes share a common goal of righting historical economic and territorial wrongs perpetrated against black people in South Africa.[259] Both statutes, according to Basson J, 'seek to restore land and resources to black people who were victims of historical discrimination'.[260] In other words, they ought to be implemented in a manner that advances environmental justice. The IPILRA seeks to protect the holders of informal land rights whose tenure is legally insecure due to past racially discriminatory practices.[261] The MPRDA preamble contains a transformative mandate which recognises the need to eradicate discriminatory practices in the mining sector and promote economic development of mining-affected communities.[262]

To give effect to its transformative mandate, the MPRDA provides for state custodianship of mineral resources.[263] A core feature of the respondent's case was the assertion that state custodianship of mineral resources implied that no landowner, either under common law or the IPILRA, has the right to veto the granting of a mineral right.[264] In addressing this argument Basson J held that while equal in status to the common law, customary law is not made subject to the MPRDA in the same way as the common law.[265] Section 211(3) of the Constitution furthermore provides that 'courts must apply customary law when that law is

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252 *Baleni* (note 8 above) para 18.
253 *Baleni* (note 8 above) para 20.
254 *Baleni* (note 8 above) para 19.
255 *Baleni* (note 8 above) para 26.
256 As above.
257 *Baleni* (note 8 above) para 43.
258 *Baleni* (note 8 above) para 34 citing Constitution (note 10 above) s 39 (2).
259 *Baleni* (note 8 above) para 40.
260 *Baleni* (note 8 above) 40.
261 *Baleni* (note 8 above) 52.
262 *Baleni* (note 8 above) 43.
263 MPRDA (note 28 above) preamble, s 2 (b) & s 3.
264 *Baleni* (note 8 above) para 26.
265 *Baleni* (note 8 above) para 66 & 72. See also MPRDA (note 28 above) s 4(2) which provides '[i]n so far as the common law is inconsistent with this Act, this Act prevails'.

applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Basson J held that the MPRDA does not fall in this category of 'any legislation' and does not purport to regulate or supersede customary law in any way.[266] The IPILRA, on the other hand, protects 'informal land rights' which include 'the use of, occupation of, or access to land in terms of … any tribal, customary or indigenous law or practice of a tribe'.[267] As such, the court found that the IPILRA applies in the event of a deprivation of informal land rights.[268]

Basson J accepted that granting a mineral right for the proposed Xolobeni mine would result in a deprivation which triggers the consent requirement outlined in s 2 of the IPILRA.[269] This consent requirement is made subject to 'the customs and usage of a community';[270] 'provisions of the Expropriation Act';[271] and 'any other law which provides for the expropriation of land or rights in land'.[272] Section 55 of the MPRDA provides that where a mineral right holder is unable to reach agreement with a landowner or lawful occupier regarding compensation for loss or damage, as determined by the Minister responsible for mineral resources, the Minister may expropriate the land for the purposes of prospecting or mining.[273] As such, s 55 could be interpreted to be 'any other law' as contemplated in s 2(1) of the IPILRA. If this interpretation is accepted, Basson J reasoned that it could place the rights of the affected community on an equal footing with common law owners, thus jeopardising their right to consent under s 2 of the IPILRA.[274] Basson J rejected this interpretation noting that it runs contrary to the purpose for which the IPILRA was enacted and prior precedent dealing with the status of customary law in South Africa's constitutional framework.[275]

Basson J also underscored the importance of international law as an interpretative tool given that the relief sought by the applicants was analogous to the international law FPIC principle.[276] Basson J highlighted the constitutional imperative to consider international law and to prefer an interpretation that is consistent with international law.[277] Basson J cited various international law instruments including General Recommendation No. 23 on Indigenous People issued in terms of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) which recognises past and present injustices, including loss of land and resources, perpetrated against indigenous peoples in the interest of commercial development.[278] To remedy this situation, Basson J noted the CERD recommendation that states must ensure that decisions that could affect the rights or

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266 *Baleni* (note 8 above) para 74.
267 *Baleni* (note 8 above) para 71 and IPILRA (note 37 above) s 1.
268 *Baleni* (note 8 above) paras 28, 58 & 59.
269 *Baleni* (note 8 above) para 61.
270 IPILRA (note 37 above) s 2(4).
271 IPILRA (note 37 above) s 2(1) referring to the Expropriation Act 63 of 1975.
272 IPILRA (note 37 above) s 2(1).
273 MPRDA (note 28 above) s 54(3) & s 55(1).
274 In *Baleni* (note 8 above) para 68 the respondents argue that the 'IPILRA intends to give informal land rights an equal status to formal land rights i.e. it requires them to be treated as if they were formal rights'.
275 *Baleni* (note 8 above) paras 63, 69, 71, 72 & 73.
276 *Baleni* (note 8 above) para 78.
277 *Baleni* (note 8 above) para 37 citing Constitution (note 10 above) s 39(1)(b) which requires 'a court, tribunal or forum –' to 'consider international law' when it is interpreting the Bill of Rights' and s 233 which requires that '… every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.
278 *Baleni* (note 8 above) para 78.

interests of indigenous people be secured in accordance with FPIC principles.[279] Basson J further cited General Comment 21 of the International Covenant on Economic Social and Cultural Rights (CESCR) which requires state parties to protect indigenous people's rights to 'own, develop, control and use their communal lands, territories and resources' and to ensure return of lands or territories 'inhabited or used' without FPIC.[280] As it relates to consent prior to depriving an indigenous community of their access to water, Basson J noted the Human Rights Committee determination in the *Angela Poma v Peru* matter that effective participation in a decision-making process requires 'not mere consultation but the free, prior and informed consent of the members of the community'.[281] Lastly, Basson J noted the African Commission on Human and People's Rights interpretations of the African Charter on Human and People's Rights (ACHPR) in the *Endorois* and *Republic of Kenya* matters where it was held that 'no decisions may be made about people's land without their free, prior and informed consent'.[282]

Basson J therefore concluded that a harmonious reading of the MPRDA and IPILRA consonant with the Constitution and the stated objectives of both Acts along with relevant case law and international law, mandated that communities, as defined in the IPILRA, must provide informed consent prior to any deprivation of their informal land rights.[283] Basson J held that in addition to the well-established minimum consultation requirements outlined in the MPRDA, the Minister is required under the IPILRA to 'seek consent of the community who hold land in terms of customary law'.[284]

2.4 ANALYSIS

The *Maledu* and *Baleni* judgments reaffirmed several interrelated constitutional imperatives regarding property rights on land owned by communities under the IPILRA and, by extension, the existence of FPIC in South Africa's mining sector decision-making regulatory framework. Petse AJ in *Maledu* confirmed that customary law must be applied when it is applicable and that it is subject only to the Constitution and any legislation that specifically deals with customary law, as provided for in s 211(3) of the Constitution.[285] Petse AJ also confirmed that s 25(6) of the Constitution seeks to redress inequalities associated with past racially discriminatory laws and practices that denied black people 'equal access to land and security of tenure'.[286] In *Baleni* Basson J reasoned that the IPILRA was enacted to protect people whose legal tenure was insecure, as envisaged in s 25(6) of the Constitution.[287] As such, both *Maledu* and *Baleni* adopted an environmental justice-oriented approach.

Unfortunately, in doing so neither judgments recognised the relevance or significance of the NEMA principle of environmental justice, nor did they treat the issue as interrelated with the community's desire to protect their right to an environment not harmful to health or wellbeing as provided for in s 24 of the Constitution. This is a notable gap in the reasoning of the

279 *Baleni* (note 8 above) para 79.
280 *Baleni* (note 8 above) para 80.
281 *Baleni* (note 8 above) para 81.
282 *Baleni* (note 8 above) para 82.
283 *Baleni* (note 8 above) para 84(2) read with paras 76 – 78.
284 *Baleni* (note 8 above) para 76.
285 *Maledu* (note 7 below) para 94. Petse AJ cited with approval the judgment of Langa DJC in *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 41.
286 *Maledu* (note 7 below) para 47, 49 & 95.
287 *Baleni* (note 8 above) para 49 & 52.

courts, consistent with the tendency to compartmentalise mining and environmental issues.[288]

A further constitutional imperative highlighted in both *Baleni* and *Maledu* relates to the importance of international law in South Africa's new constitutional dispensation. In *Maledu,* Petse AJ highlighted the importance of s 233 of the Constitution, which enjoins every court to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'; and s 39(1)(b) that mandates every court to 'consider international law when interpreting the Bill of Rights'.[289] This approach was also followed by Yacoob J in *Grootboom* when he clarified the role of international law as follows: [290]

> … relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

While South Africa has signed and ratified the CERD;[291] the CESCR;[292] and the ACHPR;[293] it has not concluded any binding instrument that makes express provision for FPIC.[294] However, the courts in both *Baleni* and *Maledu* accepted that FPIC, as expressed in international law, is applicable when interpreting the IPILRA in the context of applications for mineral rights.[295] As such, FPIC comes into play in mineral rights applications relating to communities whose rights are protected under the IPILRA, thus advancing environmental justice in a substantive and procedural sense. By requiring consent as opposed to mere consultation, the IPILRA has enhanced protection afforded to mining-affected communities as it strengthens their position in negotiating with mining companies.[296] It could even afford them the right to veto a mining development.[297] This approach is echoed in the ACHPR Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance which links FPIC to extractive sector activities rather than the indigenous character of a potentially affected community. Article 4 of Resolution 224 provides that state parties must:[298]

> Ensure independent social and human rights impact assessments that guarantee free prior informed consent; effective remedies; fair compensation; women, indigenous and customary people's rights; environmental impact assessments; impact on community existence including

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288 Murcott 'Environmental justice' (note 15 above) 892.
289 *Maledu* (note 7 below) para 46.
290 *Grootboom* (note 44 above) para 26.
291 United Nations Treaty Collection 'International Convention on the Elimination of All Forms of Racial Discrimination' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV2&chapter=4&lang=en (accessed 4 February 2021).
292 International Network for Economic, Social and Cultural Rights 'The Government of South Africa ratifies the ICESCR' https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr (accessed 4 February 2021).
293 African Union 'List of countries which have signed, ratified/acceded to the African charter on human and people's rights' https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 4 February 2021).
294 No binding instruments regarding FPIC have been approved by resolution in accordance with s 231(2) of the Constitution (note 10 above).
295 *Baleni* (note 8 above) para 84; *Maledu* (note 7 below) para 97.
296 Huizenga (note 31 above) 719.
297 Huizenga (note 31 above) 716.
298 African Commission on Human and Peoples' Rights '224 Resolution on a Human Rights-Based Approach to Natural Resources Governance - ACHPR/Res.224(LI)2012' https://www.achpr.org/sessions/resolutions?id=243 (accessed 4 February 2021).

livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights.

The *Maledu* judgment has been criticised for an unnecessary reliance on international law, given that the IPILRA already provides for consent, and as such adds 'nothing new' to the mining sector regulatory framework.[299] This criticism loses sight of the fact that the Constitution requires a court to consider international law when interpreting the Bill of Rights and to prefer an interpretation consistent with international law when interpreting any legislation.[300] It also loses sight of the fact that, prior to *Maledu,* consent in terms of the IPILRA in the context of mineral rights applications was equated with consultation; and that it was apparently permissible to secure consent only after granting a mining right, or not at all as demonstrated in the facts of the *Baleni* matter.[301] Clarification on the manner in which consent must be secured was therefore critical. Unfortunately, Petse AJ refrained from elaborating in detail on the link between the international law FPIC principle and the IPILRA consent requirement. The *Maledu* judgment did however provide a useful starting point from which Basson J could proceed in the *Baleni* matter.[302] In *Baleni,* Basson J held that that consent as per the IPILRA requirements accords with international law as provided for in various international instruments.[303] As such, consent in terms of the IPILRA must be 'full and informed' and obtained 'prior to granting of a mining right'.[304]

Unsurprisingly, the *Baleni* judgment has been criticised for ostensibly going 'against the grain of section 23(1) of the MPRDA' which provides that the Minister responsible of mineral resources must grant a mining right if all conditions detailed in this section have been met.[305] These conditions relate primarily to practical, technical, environmental and financial considerations.[306] The criticism disregards s 23(6) of the MPRDA which provides that a mining right is subject to 'any relevant law'. As held by the Constitutional Court in *Maccsand,* the phrase 'any relevant law' is not limited to law that applies to mining, such as the Mine Health and Safety Act.[307] It could also include law that regulates land use such as the Land Use Planning Ordinance, and by extension, land use in terms of customary law as provided for in the IPILRA.[308]

Elaborating further on the reasons why customary law is not made subject to the MPRDA, and advancing environmental justice, Basson J noted that the MPRDA recognises historical

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299 Minerals Council Quarterly Update December 2018 https://www.mineralscouncil.org.za/industry-news/publications/newsletters/send/13-newsletters/673-quarterly-update-december-2018 (accessed 19 July 2020).

300 Constitution (note 10 above) s 39(1)(b) & s 233.

301 *Maledu* (note 7 below) para 74 the respondents describe how the Lesetlheng Community was consulted prior to granting of the mining right in May 2008. On the fact of the case, the ostensible deprivation of their land rights took place after the granting of the mineral right at the *Kgotha Kgothe* held in June 2008. See also *Baleni* (note 8 above) paras 18 & 32.

302 *Baleni* (note 8 above) para 82.

303 *Baleni* (note 8 above) para 78. These international law instruments are described in chapter two at 2.3.

304 *Baleni* (note 8 above) para 84(2).

305 Minerals Council Quarterly Update December 2018 https://www.mineralscouncil.org.za/industry-news/publications/newsletters/send/13-newsletters/673-quarterly-update-december-2018 (accessed 19 July 2020).

306 MPRDA (note 28 above) s23(1)(a) – (h).

307 *Maccsand* (note 126 above) para 45 referring to the Mine Health and Safety Act 29 of 1996.

308 *Maccsand* (note 126 above) para 45 in reasoning that the Land Use Planning Ordinance 15 of 1985 could be included in the definition of 'any other law' as contemplated in s23(6) of the MPRDA. *Maledu* (note 7 below) para 106.

injustices perpetrated against black people in South Africa and the role that customary law plays in ensuring that these injustices are not repeated.[309] In particular, the more robust consent based mechanisms that are typical of customary law decision-making processes, could afford traditional communities protection against similar injustices being repeated in the future.[310] In *Maledu,* the right to prior consent in terms of customary law, was furthermore held to be a constitutional imperative that underscores the need to address the injustices of the past.[311] From a procedural environmental justice point of view, both *Maledu* and *Baleni* therefore link consent related to a proposed land use such as mining, to a constitutional imperative to redress injustices of the past and prevent similar injustices in the future.

While the judgments in *Maledu* and *Baleni* provide welcome clarity on procedural requirements to secure consent in terms of the IPILRA, the struggle to protect land rights of mining-affected communities in pursuit of environmental justice is by no means over. As noted in chapter one, nefarious practices that aim to circumvent the NEMA consultation provisions are also employed to sidestep the IPILRA consent requirements.[312] These practices involve mining companies, under the guidance of the DMRE, undermining traditional decision-making structures by negotiating exclusively with and offering inducements to traditional leaders in exchange for written consent. One need only look at the manner in which Chief Lunga Baleni was 'co-opted' to support the proposed Xolobeni mine; and the overt exclusion of the Lesetlheng Community from decision-making structures in *Maledu* to find examples of such practices.[313] Huizenga refers to such practices as 'state endorsed form of territorialization and subjectification' which has the effect of excluding actual consent from mining-affected communities that accords with living customary law and the IPILRA.[314]

Meyer highlights the continued marginalisation of indigenous communities through state sanctioned mechanisms.[315] Meyer is of the view that the IPILRA should be made a permanent statute to ensure protection of informal land rights.[316] Meyer furthermore supports a recommendation of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017 to include an express provision in the IPILRA that states 'holders of informal land rights are deemed to be the owners of the land in question for the purposes of any revenue from the land or any compensation for use of the land, which would otherwise flow to the registered owner'.[317] Given that the state or traditional authorities are frequently the registered owner of the land, inclusion of this provision could help eliminate uncertainty regarding the mining-affected community that must be approached for their consent prior to mining. Where consent is granted by a community in terms of the IPILRA, proceeds from such an agreement should then flow directly to the mining-affected community, rather than the state or traditional authorities. This recommendation relating to the benefits of mining activities is in keeping with the FPIC

309 *Baleni* (note 8 above) para 66.
310 *Baleni* (note 8 above) para 10.
311 *Maledu* (note 7 below) paras 95 & 96.
312 See chapter one at 1.5.
313 *Baleni* (note 8 above) para 22; *Maledu* (note 7 below) para 21.
314 Huizenga (note 31 above) 715.
315 Y Meyer 'Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the way for formal protection of informal land rights' (2020) 23 *Potchefstroom Electronic Law Journal* 1) 13 & 14.
316 Meyer (note 315 above) 14.
317 Meyer (note 315 above) 14; HLP (note 6 above) 270. In most instances is the registered owner is the state.

principle and key FPIC themes identified by Doyle and J Cariño during their interactions with indigenous peoples in Asia-Pacific, Latin America, Africa and North America.[318]

A piece of legislation that potentially undermines environmental justice and the consent-based approach provided for in IPILRA is the Traditional and Khoi-San Leadership Act, 2019. Meyer notes that in terms of s 24(2)(c) of this Act, traditional leaders are empowered to enter into partnerships and agreements with any 'person, body or institution'.[319] While Meyer highlights the fact that the Traditional and Khoi-San Leadership Act, 2019 contains safeguards to ensure that traditional leaders act in the community's best interest, she also notes that no express provision is made in the Act for community consent prior to conclusion of agreements or entering into partnerships.[320] As such, the Traditional and Khoi-San Leadership Act, 2019 could provide a means for traditional leaders and mining companies to side-step the IPILRA consent requirements and conclude agreements, contrary to wishes of a mining-affected community. In these circumstances, traditional leaders can assume unilateral powers that they are not entitled to under customary law.[321] FPIC could provide useful safeguards to protect the rights and interests of mining-affected communities against such nefarious practices by requiring that consent-based decision-making processes, that are typical of indigenous law systems practiced throughout South Africa, be respected.[322]

Building on *Maledu* and *Baleni*, calls to apply FPIC and expand its application to a broader base of mining-affected communities are underscored by the notion that FPIC is 'an aspect of environmental justice and a tool for poverty alleviation',[323] with all people being entitled to 'equally high levels of environmental protection'.[324] The potential expansion of FPIC in pursuit of environmental justice is explored further in chapter three.

3 CHAPTER THREE – ENVIRONMENTAL JUSTICE AND FPIC

3.1 INTRODUCTION

In this chapter I expand on why the inclusion of FPIC in South Africa's environmental decision-making framework related to mining developments is an advance in terms of pursuing environmental justice, in contrast with the public participation processes that do not adopt a consent-based approach described in chapter one. I discuss how environmental justice could be enhanced by further embedding the FPIC principle in public participation

318 C Doyle & J Cariño 'Making Free Prior & Informed Consent a Realty. Indigenous Peoples and the Extractive Sector' (2013) www.piplinks.org/makingfpicareality (accessed 4 February 2021) 17 – 25. See also Box 1 in chapter three for a summary of these observations.

319 Meyer (note 315 above) 12; Traditional and Khoi-San Leadership Act 3 of 2019 which commenced on 1 April 2021 in terms of Proclamation No. 38 of 2020 published in *GG* 43981 of 11 December 2020 entitled the Commencement of Traditional and Khoi-San Leadership Act, 2019 s 24(2)(c) provides for agreements which could include agreements or partnerships with mining companies.

320 Meyer (note 315 above) 12 outlines certain requirement for consultation and majority support. As in *Baleni* (note 8 above), failure to follow proper protocols could prove problematic, as it might conflict with living customary law practices that require a higher threshold prior to a decision being made.

321 HLP (note 6 above) 487 citing *Pilane and Another v Pilane and Another* 2013 2013 (4) BCLR 431 (CC).

322 Such FPIC processes would be aligned with the full 'inform'; 'consult'; 'involve'; 'collaborate'; and 'empower' goals outlined in the IAP2 Spectrum of Public Participation (Figure 1); IAP2 (note 66 above).

323 T Zvobgo 'Free, prior, and informed consent: implications for transnational enterprises' (2012) 13 (1) *Sustainable Development Law & Policy* 37 37.

324 Zvobgo (note 323 above) 37 citing The California Energy Commission 'Environmental Justice' http://www.energy.ca.gov/public_adviser/environmental_justice_faq.htm.

process requirements. I argue that FPIC, which now forms part of South Africa's law through the IPILRA, should be a requirement in public participation processes where large-scale adverse environmental or social impacts related to proposed mining developments are anticipated. In essence, I argue that FPIC should be extended to mining-affected communities in general and not only for informal land right holders in order to give expression to the goal of environmental justice in South Africa.

Environmental justice, as described by the South African Environmental Justice Networking Forum (EJNF), plays the following role:[325]

> Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life - economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others … In recognizing that environmental damage has the greatest impact upon poor people, EJNF seeks to ensure the right of those most affected to participate at all levels of environmental decision-making.

Muigua and Kariuki, writing on environmental justice in a Kenyan context, note that environmental justice aims to 'ensure no groups of persons bear disproportionate environmental burdens and … that all have an opportunity to participate democratically in decision-making processes'.[326]

Scott describes the distributive/substantive elements of environmental justice as 'fairness in the distribution of environmental benefits and burdens' as opposed to procedural manifestations which include 'processes that determine those distributions'.[327] Murcott argues that environmental justice 'seeks to respond to unjust living conditions and the unjust distribution of environmental benefits and burdens in society' through 'equal participation in environmental decision-making'.[328] By requiring public participation in the form of consultation, the law theoretically pursues environmental justice in a procedural sense, so as to facilitate environmental justice in a substantive (distributional) sense.[329] However, because public participation is often treated as no more than a tick-box exercise, and communities' needs are not taken seriously, environmental justice in both procedural and substantive sense is frequently undermined.[330] Instances of environmental injustices

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325 McDonald (note 16 above) citing the quarterly newsletter of the South African Environmental Justice Networking Forum (EJNF 1997).

326 K Muigua & F Kariuki 'Towards Environmental Justice in Kenya' (2017) 1 (1) *Journal of Conflict Management & Sustainable Development* 1 & 2 where they cite R Ako 'Resource Exploitation and Environmental Justice: the Nigerian Experience' (2011) in F Botchway (ed) *Natural Resource Investment and Africa's Development* 74 – 76.

327 Scott (note 19 above).

328 Murcott 'Environmental Justice' (note 15 above) 876, drawing on the definition outlined by Manuel Castells 'The Power of Identity: The Information Age Economy, Society and Culture (1997) 132 quoted in J Dugard & A Alcaro 'Let's work together: Environmental and socio-economic rights in the courts' (2013) 29 SAJHR 14 at 18.

329 M Murcott 'The procedural right of access to information as a means of implementing environmental constitutionalism in South Africa' (2018) in E Daly & J May (eds) *Implementing environmental constitutionalism: Current global challenges* 193 203.

330 This is unsurprising given that public participation in terms of South Africa's mining sector environmental law regulatory framework is fixated on the IAP2 Spectrum of Public Participation (Figure 1) goal to 'consult' as opposed to giving expression to the full spectrum which includes involving; collaborating with; and empowering those directly affected by mining; AASA (note 30 above) 84 describes instances of routine exclusion of mining-affected communities from public participation processes; S Foster

impacting on mining-affected communities in South Africa are not hard to find. For example, a survey of eight mining-affected communities with more than 500 respondents undertaken by ActionAid South Africa (AASA) describes severe impacts associated with mining that contribute to intolerable living conditions for directly affected communities.[331]

3.2 WHY FPIC WOULD ADVANCE ENVIRONMENTAL JUSTICE

A positive expression of environmental justice for mining-affected communities could entail a fair and equitable distribution of benefits and burdens arising from mineral extraction.[332] The distribution of such benefits and burdens ought to be agreed upon in a transparent and inclusive decision-making process that involves all interested and affected parties, but particularly vulnerable and marginalised individuals and groups.[333] Aucamp echoes this sentiment by noting the importance of participation in environmental decision-making and its relevance to securing social and environmental justice for vulnerable communities.[334]

To bring about much needed change, Cariño argues that FPIC, in contrast to 'consultation', could facilitate environmental justice in a procedural and substantive sense given that it is geared to safeguard 'material interests, cultures, and ecological values, and to minimize harm' through a process of engagement that is 'based on respect and equality, leading to negotiated outcomes …. which includes the 'right to reject developments that do not gain community acceptance, based on informed choice'.[335] Through FPIC, prospective developers are required to engage with mining-affected communities in a respectful manner; without coercion or intimidation from either the state or the developer; with sufficient information about potential impacts; to enable those who will be directly affected to decide if they will allow the development to proceed or not. Where an agreement is reached, terms of such an agreement become binding and enforceable advancing procedural environmental justice by recognising the legitimate interests of mining-affected communities and giving them a seat at the table. In this manner, cultural and natural diversity are prioritised during a decision-making process.[336] This in turn could lead to more favourable outcomes for mining-affected communities, thus giving effect to substantive environmental justice.

Given that FPIC requires a full disclosure of relevant information prior to a decision being made, it can advance the procedural and substantive dimensions of environmental justice. Full disclosure should typically include a financial assessment of potential impacts and 'externalities' that are frequently absorbed by mining-affected communities or the

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'Justice from the ground up: Distributive inequities, grass-roots resistance, and the transformative politics of the environmental justice movement' (1998) 86 *California Law Review* 775 789-791 and fns 60 & 67, citing I Young *The politics of difference* (1990) 16, Foster supports the argument that social justice and distribution are not coextensive and that 'distributional patterns and decision-making processes are intricately intertwined'.

331 AASA (note 30 above) 55 observe a strong correlation between mining activities and severe environmental and social impacts that contribute to generally unsafe living conditions. The most troubling impacts include an increase in the levels of crime; impacts associated with blasting and use of heavy equipment; water and soil contamination; and atmospheric pollution. These impacts contribute to a 'visceral sense of damage expressed by communities living close to mines'.

332 Scott (note 19 above).

333 As above.

334 Aucamp & Lombard (note 192 above) 180.

335 J Cariño 'Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice' (2005) 22 (1) *Arizona Journal of International and Comparative Law* 20.

336 Cariño (note 335 above) 39.

environment.[337] From this perspective, public participation can be conceptualised as a 'conduit for achieving FPIC', which Muigua argues is vital to enhancing environmental justice.[338] FPIC has the potential to empower communities and provide a platform for the expression of their socio-economic, cultural, environmental and property rights in line with the idea of environmental justice as 'recognition'.[339]

Similarly, Schlosberg and Carruthers propose that 'indigenous' communities demands for environmental justice conform with a 'capabilities approach' which emphasises 'equal participation, self-determination, ethical and sustainable land use' amongst other ideals.[340] These ideals could find expression through a public participation process that includes FPIC given that people who will be directly impacted by a proposed development are afforded an opportunity to be apprised of potential impacts before they materialise. Furthermore, public participation that includes FPIC potentially places directly affected people and groups at the centre of a decision-making process. This could compel project proponents to plan and undertake public participation with greater care, diligence and respect for those who will be directly affected.

Given that FPIC could serve to advance environmental justice, it is not surprising that calls from those who seek to protect the rights of vulnerable and marginalised people to formalise FPIC for all mining-affected communities are mounting. For instance, the High-Level Panel on the Assessment of Key Legislation in South Africa recommends that consent be secured from 'vulnerable groups faced with external mining or other investment deals that will negatively impact on their land rights'.[341] The SAHRC has also called for FPIC to be incorporated in all decisions to grant mining rights.[342] Internationally, the trend towards 'broad-based community consent' or 'FPIC by extension' is noted by Owen and Kemp in their analysis of FPIC as a 'voluntary form of policy' as opposed to a 'legal and compliance driven concept'.[343] Owen and Kemp observe the trend to apply FPIC to a broader base of mining-affected communities beyond those identified as 'indigenous'.[344] Similarly, Goodland argues that a requirement to secure FPIC should be informed by the extent to which the livelihood and culture of a community stand to be impacted.[345] Embedding an FPIC requirement in mining sector regulatory public participation processes can enhance environmental justice, given that FPIC is geared, more tangibly, to give practical expression to environmental justice goals.

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337 Centre for Environmental Rights (note 173 above) 1 describes externalities related to coal mining in South Africa as costs associated with a development but which are typically borne by mining-affected communities, the environment or South African taxpayers. These costs should instead be borne by the companies themselves, given the polluter pays principle that underscores South Africa's environmental law regulatory framework. The disproportionate burden of pervasive health impacts associated with coal mining and power generation on the Highveld is an example of one such externality.

338 K Muigua 'Maximising the Right to Free, Prior, And Informed Consent for Enhanced Environmental Justice in Kenya (2019) 18 (http://kmco.co.ke/wp-content/uploads/2019/03/Maximising-the-Right-to-FPIC-in-Kenya-Kariuki-Muigua-29th-March-2019.pdf) (accessed 29 January 2021).

339 Muigua (note 338 above) 4; Zvobgo (note 323 above) 37 & 39.

340 D Schlosberg & D Carruthers 'Indigenous Struggles, Environmental Justice, and Community Capabilities' (2010) 10 (4) *Global Environmental Politics* 12 14 – 15.

341 HLP (note 6 above) 269.

342 SAHRC (note 29 above) 71.

343 J Owen & D Kemp 'Free prior and informed consent', social complexity and the mining industry: Establishing a knowledge base' (2014) 41 *Resources Policy* 91 92 – 93.

344 Owen & Kemp (note 343 above) 92.

345 Goodland (note 64 above) 69.

3.3 ADVANCING ENVIRONMENTAL JUSTICE BY RECOGNISING FPIC IN EIA PUBLIC PARTICIPATION PROCESSES

Greenspan proposes that FPIC is a 'necessary condition for good governance of African natural resources'.[346] She argues that when development decisions are driven by economic motives, and such decisions could have potentially far-reaching environmental and social implications for communities, development project should proceed only if FPIC has been secured.[347] As such, regulatory compliance with FPIC standards should ensure effective community participation which includes mechanisms to allow affected communities the right to withhold consent prior to implementing a project.[348]

Building on Muigua's argument that EIA public participation could serve as a conduit for achieving FPIC, the Minister responsible for environmental matters should consider reviewing Regulation 39 of the EIA Regulations. As it stands, Regulation 39 (2)(b) does not further the goal of environmental justice, given that it eliminates any need for consent by those directly affected by a proposed mining development. The Minister should review this Regulation and at the least, consider deleting sub-regulation (2)(b).[349] In this manner, consent prior to applications for environmental authorisation will be required from all who are directly affected by a proposed mining development. The meaning of 'consent' as contemplated in Regulation 39 should also be made clear. Such consent should not be on the level of mere consultation, as is evident from the WULAA Regulations consent requirement described in chapter one.[350] The EIA Regulations should incorporate a procedure that must be followed where consent in terms of Regulation 39 is waived, withheld or not secured for whatever reason. Where consent in terms of an amended Regulation 39 must be secured from holders of informal land rights in terms of the IPILRA; any other legislation that Parliament may enact as required in terms of s 25(6) and (9) of the Constitution; or any community that observes a system of indigenous law as contemplated in s 211 of the Constitution, such consent must be secured in accordance with the principles of FPIC.

While some, especially in the mining industry, might argue that affording mining-affected communities a 'veto right' to prevent mining 'is a bridge too far', proper application of FPIC is geared to bringing about outcomes that are acceptable to all, particularly marginalised and vulnerable people.[351] A hyper-focus on the veto aspect of FPIC is linked to the flawed notion that mining-affected communities are anti-development and that they will say no to any and all proposed mining developments, regardless of the scale of the potential impacts.[352] In addition, it is arguable that embedded in this hyper-focus is the fundamentally unjust idea that the voices and interests of mining-affected communities are not as worthy of recognition as the voices and interests of mining companies. Lawrence and Moritz,[353] in

346 Greenspan (note 3 above) 27 & 42.
347 Greenspan (note 3 above) 41.
348 As above.
349 Note: Regulation 39(2)(b) was deleted after finalisation of this dissertation. See Amendments to EIA Regulations, 2021 (note 87 above).
350 See chapter one at 1.4.2.
351 K Cameron 'To protect or empower? – another taken on informal land rights and mining' (2020) https://www.macrobert.co.za/insights/posts/informal-land-rights-mining. This article provides a critique of the *Baleni* judgment and the concept of informed consent in the context of mining developments.
352 R Lawrence & S Moritz 'Mining industry perspectives on indigenous rights: Corporate complacency and political uncertainty' The Extractive Industries and Society (2018)1 3.
353 Lawrence & Moritz (note 352 above) 6.

their assessment of mining practices on indigenous Sámi land in Sweden, characterise such an approach as 'maximalist' and argue that it is based on a 'straw-man argument' that distorts and exaggerates the actual rights claimed by mining-affected communities.[354] A maximalist approach distracts from the aim of FPIC which is to engage with mining-affected communities, in good faith so as to achieve negotiated outcomes when proposed developments or activities threaten the lives or livelihoods of mining-affected communities.[355] Lawrence and Moritz note that a 'maximalist' approach to FPIC ignores the fact that communities are concerned primarily with the preservation of their traditional livelihoods rather than obstructing broader development goals of nation states.[356] It ignores guidance on the implementation of FPIC which proposes that a requirement to secure consent 'is a function of the degree of impact of the proposed activity'.[357]

Where large-scale adverse environmental or social impacts are anticipated, it stands to reason that environmental injustices and human rights violations, particularly as a result of the unjust distribution of the pollution and environmental degradation caused by mining, could materialise. In these circumstances, public participation that includes an FPIC requirement could help to secure environmental justice for mining-affected communities. To help conceptualise FPIC in a South African context, Box 1 below provides a summary of Doyle and Cariño's observations during interviews conducted with indigenous peoples' representatives from various regions across Asia-Pacific, Latin America, Africa and North America.[358] The interviews were conducted to ascertain indigenous peoples' views on FPIC in the context of mining projects. I argue that the key themes and observations detailed in Box 1 could be used to guide efforts to incorporate FPIC in public participation processes linked to proposed mining developments in South Africa.

354 Lawrence & Moritz (note 352 above) 2 & 6.
355 Lawrence & Moritz (note 352 above) 3.
356 As above.
357 As above.
358 C Doyle & J Cariño 'Making Free Prior & Informed Consent a Realty. Indigenous Peoples and the Extractive Sector' (2013) www.piplinks.org/makingfpicareality (accessed 4 February 2021) 17 – 25.

Box 1: Indigenous peoples' perspectives on FPIC in the context of mining projects[359]

- Mining companies must respect traditional consultative consensus-seeking practices, processes, protocols and rituals.
- The FPIC process must be defined by the affected community. External corporate, State or lender FPIC requirements should be used as 'guidelines' and should not be imposed on a community.
- Participation of women and youth must be secured in accordance with protocols and procedures agreed with the community.
- Mineral right applicants must ascertain the nature, scope and extent of the community decision-making structures in consultation with the affected communities. National laws should not be used as the primary source to determine the extent of the engagement.
- FPIC discussions should commence at the earliest possible time.
- FPIC should be seen as an 'iterative process' with consent being secured at 'every major step of the mining development process' from feasibility to post-closure phase.
- FPIC is 'non-transferrable'. Once granted, FPIC does not follow a mineral right. Should a mining concession/operation change ownership, FPIC will need to be secured afresh.
- All communities who are directly and indirectly affected by a proposed mining development must be included and actively involved in the FPIC process.
- Communities must be 'empowered to effectively participate' in environmental, social and human rights impact assessments.
- An FPIC process must not be driven by timeframes. Instead, it should be driven by 'consensus after a full understanding of the information and issues'. Timeframes should however not be 'open-ended' but should instead afford 'a reasonable amount of time' to 'ensure consensus building and good faith negotiations'. Timeframes should therefore be agreed beforehand with the affected community.
- Full information about the applicant; the proposed project; the FPIC process; and the community's rights in relation to all relevant and related aspects of the application must be disclosed. Information must be shared in a language and format that will be clearly understood by community members and they must be equipped with the necessary tools and support to enable them to make informed decisions about the proposed development.
- The terms upon which benefit sharing agreements are negotiated must be agreed during the FPIC process. Benefit sharing negotiations must be conducted in the community's language of choice. Benefit sharing should extend beyond compensation and include elements such as a say in community development projects, employment, education, provision of infrastructure, guaranteed royalties, or equity shares in the company.
- Agreements concluded as part of an FPIC process must detail grievance procedures that are aligned with the laws and customs of the community and mechanisms to address any breach of the terms of the agreement.

359 Doyle & Cariño (note 358 above) 17 – 25.

CONCLUSION AND RECOMMENDATIONS

This study aimed to explore why and how FPIC can enhance public participation, to promote environmental justice for communities affected by environmental decision-making in the mining sector in South Africa.

In chapter one I described how South Africa's environmental law regulatory framework currently provides for public participation that is underscored by a requirement to 'consult' as conceptualised in the IAP2 Spectrum of Public Participation (Figure 1) and how this differs from FPIC which requires 'consent'. Notwithstanding a constitutional environmental right and environmental management principles that suggest the need for a higher level of engagement, South Africa's environmental law regulatory framework is still largely fixated on the notion of 'consultation'. While detailed in nature and scope, the current level of 'consultation' required in terms of South Africa's environmental law regulatory framework does not rise to the level of engagement that could give full expression to both procedural and substantive environmental justice. While engaging with mining-affected communities through a regulatory 'inform and consult' public participation process theoretically promotes environmental justice, in practice the needs and views of many are frequently overlooked, manipulated or ignored. Mining-affected communities that are not protected under the IPILRA are denied the right to say 'no' to mining, even in instances where mining could have potentially devastating effects on community health, safety and livelihoods. While provision is made for internal appeal and subsequent judicial review procedures, vulnerable and impoverished mining-affected communities seldom have the resources to pursue these remedies. In such instances, mining-affected communities are denied environmental justice in both substantive and procedural sense.

In chapter two I described how FPIC was explicitly recognised as forming part of the regulatory framework governing mining activities through the courts' purposive interpretation of the IPILRA in *Baleni* and *Maledu.* Both judgments reaffirmed several interrelated constitutional imperatives regarding property rights on land owned by communities under the IPILRA and, by extension, the existence of FPIC in South Africa's mining sector decision-making regulatory framework. Further, both judgments confirmed that the IPILRA gives effect to s 25(6) of the Constitution which affords security of tenure or comparable redress to people or communities previously subjected to racially discriminatory laws and practices.[360] Both judgments underscored the critical role that s 211(3) of the Constitution plays in requiring that customary law be applied when it is applicable.[361] Decisions regarding a proposed land use (such as mining) on land that is subject to a system of indigenous law would therefore make customary law decision-making protocols applicable. In addition, the MPRDA does not purport to regulate or supersede customary law in the same way that it supersedes the common law.[362]

A further important constitutional imperative that underscored the courts' reasoning in both judgments was the requirement to interpret legislation in a manner consistent with international law as provided for in s 39(1)(b) and s 233 of the Constitution. [363] In *Baleni* the

360 *Maledu* (note 7 below) paras 5, 47 & 95; *Baleni* (note 8 above) 49 – 50.
361 *Maledu* (note 7 below) para 94 citing *Bhe* (note 285 above) para 41; *Baleni* (note 8 above) para 69 – 74.
362 *Baleni* (note 8 above) para 74.
363 *Maledu* (note 7 below) para 46; *Baleni* (note 8 above) 78 – 84.

court elaborated on various applicable international law instruments that were instructive in determining how consent in terms of the IPILRA must be provided. Taken together, these interrelated constitutional imperatives require that the MPRDA and IPILRA be interpreted harmoniously to protect the informal land rights of communities, as defined in the IPILRA.[364] As such, communities protected under the IPILRA have a right to provide informed consent, prior to granting of a mining right.[365] Unfortunately, neither judgments recognised the relevance or significance of the NEMA principle of environmental justice, nor did they treat the issue as interrelated with the community's desire to protect their right to an environment not harmful to health or wellbeing.

In chapter three I explored why and how environmental justice should and could be enhanced by embedding a requirement to secure FPIC in mining-sector public participation processes in general, and not only for the holders of informal land rights under the IPILRA. This is particularly important where anticipated impacts of proposed mining activities can reasonably be expected to have severe adverse impacts on mining-affected communities. Including a requirement to secure FPIC could empower mining-affected communities to negotiate a fair and equitable distribution of benefits and burdens associated with mineral extraction.[366] Such benefits and burdens ought to be agreed between mineral right applicants and mining-affected communities in a transparent and inclusive decision-making process.[367] FPIC could accomplish the goal of securing environmental justice because it is geared to safeguard 'material interests, cultures, and ecological values, and to minimize harm' through a process of engagement that is 'based on respect and equality, leading to negotiated outcomes …. which includes the 'right to reject developments that do not gain community acceptance, based on informed choice'.[368] In instances where development decisions are driven by economic motives, and such decisions could have potentially far-reaching environmental and social implications for mining-affected communities, development projects should proceed only if FPIC has been secured.[369] Compliance with FPIC standards should be integrated into South Africa's current mining sector environmental law regulatory framework; firstly to ensure effective community participation of mining-affected communities; and secondly to empower such communities with a right to withhold consent prior to implementing a project, particularly where the benefits will be outweighed by the burdens of the project, and the community will experience environmental injustice as a result of the project.[370] Efforts to conceptualise FPIC in a South African context should take into consideration key themes and views of indigenous people affected by mining developments as outlined in Box 1.

Overall, I assert that in order to promote environmental justice in South Africa as provided for in the NEMA principles, and pursue the Constitution's transformative vision, which requires promoting environmental justice, public participation processes linked to proposed mining development projects that could result in environmental injustices ought to incorporate an FPIC requirement as part of engagement with all mining-affected communities. By empowering communities with a more decisive say in the outcome of a mineral right application through FPIC, a higher level of environmental protection for mining-

364 *Maledu* (note 7 below) para 106; *Baleni* (note 8 above) 83.
365 *Maledu* (note 7 below) para 105 – 106; *Baleni* (note 8 above) para 84(2).
366 Scott (note 19 above).
367 Scott (note 19 above).
368 Cariño (note 335 above) 20.
369 Greenspan (note 2 above) 41.
370 Greenspan (note 2 above) 41.

affected communities could be secured in pursuit of the environmental right and environmental justice.[371] FPIC, which now forms part of South Africa's law through the IPILRA, should therefore be a prominent feature in public participation processes in general for all mining-affected communities, not only for informal land right holders under the IPILRA.

371 Zvobgo (note 323 above) 39.

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