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AN ANALYSIS OF THE LEGAL IMPLICATIONS OF CONSULTATION VS CONSENT IN SOUTH AFRICA'S MINERAL RIGHTS REGIME

By

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Prepared under the supervision of

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ABSTRACT

On 22 November 2018, the High Court in Pretoria handed down a ground-breaking judgement in the *Baleni and Others v Minister of Mineral Resources and Others* (Baleni case). *In casu* the court held that, the Minister of Mineral Resources must obtain full and informed consent of the Baleni community prior to granting a mining right in terms of the Mineral and Petroleum Resources Development Act of 2002. It further held that consultation does not suffice; rather the community must be given an opportunity to consent before being deprived of their land. This case highlighted a dilemma within the extractive industry in South Africa which affects landowners**.** In most cases, like in the case of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* (Maleducase), affected rights holder is only requested to make inputs on the environmental authorisation process, and at worst, only finds out about the mining authorisation once the deal has been done, during the eviction process (when they are requested to relocate).

This study submits that there is a need within the mineral sectors to craft a fair balance between national interests, corporate interests and those of affected communities. In doing so, the affected communities must be given great stake. This is because, with the extractive industry projects taking place, people who suffer the most is the community/landowner whose land is affected or eroded directly as a result of such projects and whose resource rights is questionable. Therefore landowners' voices must be heard and taken into cognisance before the granting of a mining right and prior commencement of the projects. A right to veto over mining projects will result in landowners being informed of the mining projects in a timely manner and be given an opportunity to approve the projects before commencement of the operations.

LIST OF ACRONYMS

FPIC	Free Prior Informed Consent
IPILRA	Interim Protection of Informal Rights Land Act
MPRDA	Minerals and Petroleum Resources Development Act
TEM	Transworld Energy and Minerals (Pty) Limited
DMR	Department of Mineral Resources
DME	Department of Minerals and Energy

KEYWORDS

Mining right; Veto right; Consultation, Consent, Landowner,

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CHAPTER 1: INTRODUCTION

1.1. Background to the research

Historically, the Roman Dutch Law allowed private ownership of mines and minerals to a limited extent and subject to severe restrictions.[1] In other words, the land owner had the right to extract any minerals on his/her land and could dispose of those minerals for his/her own account. Roman-Dutch law accepted the principle *cuius est solum eius est usque ad coelum et ad inferos*, which confirmed the landowner's rights and entitlements to the subsurface.[2] This principle implied that by ownership of the land, the landowner is the owner of all beneath the surface; as a result minerals underground belonged to the landowner.[3] Where the mineral rights were not reserved for the state, they formed part of the landowners' rights who owns everything above and below the surface.[4]

Under the Roman Dutch Law principle of property law, the right to mine was one of the entitlements comprised by the mineral right, and the landowners' could not be divested of their interests on the land when the state granted prospecting or mining rights.[5] Thus, the ownership of land by the landowner was the basis upon which the regulatory framework was established. Despite the permission by the state to conduct mining projects, a miner thus needed to act on the authority of the landowner or mineral right holder.[6]

With the introduction of the Mineral and Petroleum Resources Development Act ('MPRDA'), [7]in 2004, the State became the custodian of natural resources. The State, as a custodian, has the ultimate power to grant, issue, control, administer and manage all minerals resources in South Africa.[8] The MPRDA is a major departure from the Roman Dutch law principles in terms of which the property laws entitled the common law owner of land to own everything above and below the land - including minerals.[9] The current mineral resources abolished the privileged position that was implied by landownership to mineral rights. It now allows equal access to natural resources with the state being the custodian. Landowner's right to deal with the minerals imbedded in the soil of his property has completely been annihilated.[10] In the case of *Agri SA v Minister for Minerals and Energy*[11], Mogoeng CJ held that custodianship does not make the state the owner of mineral and petroleum

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1 H Mostert & H van den Berg, 'Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences', in D N Zillman, A McHarg, A Bradbrook, & L Barrera-Hernandez (eds.), *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, (Oxford University Press, 2014) at 2.

2 *Ibid.*

3 H Mostert, *Mineral Law: Principles & Policies in Perspective*, (Juta and Company Ltd, 2012) at 5.

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 Mineral and Petroleum Resources Development Act, No 28 of 2002.

8 E van der Schyff, 'South African mineral law: A historical overview of the state's regulatory power regarding the exploitation of minerals', 64 *New Contree* (2012) at p131.

9 *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) [hereinafter '*Baleni and Others']* at para 41.

10 *Ibid.*

11 *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC).

resources.[12] The state holds the minerals on behalf of and for the benefit of its citizens. As such the control to exploit these resources has now been given to the state.[13]

In terms of the MPRDA the state may not grant the mining right without prior consultation with the landowners and/or obtain consent of traditional landowner before commencing with an extractive project. However, as argued in the *Baleni case*, the MPRDA fails to offer protection to traditional communities who suffered much racial discrimination under the apartheid regime.[14] This has given rise to insecure tenure of these communities. The MPRDA's primary object is the transformation of the minerals sector and the empowerment of those of those who were previously excluded from participating in the exploitation of the country's mineral and petroleum resources.[15] To protect these communities various pieces of legislation were adopted to address the historical inequalities and in particular the insecure tenure that these communities had, the Interim Protection of Informal Land Right Act protects these communities against mining activities which deprive them of their land by placing an obligation on the Minister to obtain their full and informed consent before granting mining right.[16]

1.2. Problem statement

One of the main impediments that landowners face is that their voice, let alone their consent, does not often matter when the Minister grants mining right over their land. Notwithstanding that the law requires that landowner be consulted, reality shows that landowner's voice has been failed to be recognised or rather being heard. South Africa, like most African States, permits development activities, such as mining, on the ground of public interest despite the impact of such activities on landowners.[17] This, as a result, undermines the interests of the landowners on the land upon which such mining activity is permitted.

The need to consent to the mining projects does not require that the landowners' interest overtrumps the national interest. Rather, landowner should be given an opportunity to veto mining activities that affect his/her land. In most cases, like in *Maledu case*, affected rights holder is only requested to make inputs on the environmental authorisation process, and at worst, only finds out about the mining authorisation once the deal has been done, during the eviction process (when they are requested to relocate).[18] The granting of mining rights is clearly a deprivation of the rights of the person who owns or held rights over the land to which the mining right relates. Section 5 of the MPRDA makes it clear that the holder of a mining right - which is a limited real right may engage in

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12 *Idem* at para 68.

13 See *Baleni and Others supra* n 9 at para 42.

14 *Idem* at para 49.

15 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 [hereinafter '*Maledu and Others*'].

16 See Van der Schyff (2012) *supra* n 8 at 153.

17 A K Abebe, 'The power of indigenous peoples to veto development activities: The right to Free, Prior and Informed Consent (FPIC) with specific reference to Ethiopia', Unpublished LLM dissertation (university of Pretoria, 2009) at p2.

18 *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) [hereinafter '*Bengwenyama Minerals & Others*'] at para 20.

far reaching activities in furthering its mining activities all of which have the potential of interfering with the use or enjoyment of land.[19]

1.3. Aims and objectives

1.3.1. Aim:

This research is aimed at examining the laws regulating mining rights system in South Africa, in particular the right to veto potential development activities by the landowner.

1.3.2. Objectives:

In order to achieve the main aim of the study, this study's objectives are to:

- To ascertain the meaning and implications of consent and consultation by communities within the mining sectors to the state.
- To examine and analyse recent case laws on the right of communities to consultation and consent in South Africa's extractive sectors
- To analyse the implications of the recent cases in mining law regime

1.4. Research question

1.4.1. Primary research question

The primary question of this research is, under which circumstances, if any, does the South African law afford a veto right in the context of statutorily required consultation?

1.4.2. Secondary research questions

The primary question is supported by a series of secondary questions, *viz*:

- What is the meaning of the concepts "consent" and "consultation" within the extractive industry, and what do they entail in the application of mining rights?
- What is the current standard requirement of consultation and/or consent that the mining companies must adhere to in application of a mining right as laid down by the courts?
- What are the implications of the recent cases on mining operations, state, communities and traditional communities?

1.5. Research methodology

Methodology

This research has adopted an analysis of the mining right in South Africa, which will be done through research of the legal literature and rely on journals, textbooks, articles, legislations, case laws, regulations and other scholarly research papers on the mining right in South Africa and the

[19] See *Baleni and Others supra* n 9 at par 58.

international conventions on the requirement of consent. This study will also focus on the analysis of *Baleni* and *Bangwenyama* cases.

1.5.1. Parameters of the research

The researcher is aware that some of the cases discussed in this study are high court decisions and that there might be possible appeals to such decisions. As a result, this study is restricted to decisions handed down until 30 November 2018.

1.5.2. Limitations of the study

The research topic has received little attention in South Africa, with the recent case being decided on this matter and therefore, renders this to be a new topic in the extractive industry. Therefore the literature in this topic is limited.

1.6. Relevance of the study

This study will benefit landowners to realise their right to participation in mining projects that affect their land. It will also assist other scholars who might have an interest on the similar topic to understand the underlying question rose on this research.

1.7. Chapter overview

This research comprises of five chapters, namely:

- **Chapter 1** – chapter one will serve as an introduction to the study.

- **Chapter 2** – This chapter explores the South African mining laws evolution from the Mineral Laws Act to the recent Mineral and Petroleum Resources Development Act (Act 28 of 2002). It illustrates the transition of the mining laws from the Roman Dutch law private ownership of minerals, to the current state custodianship of minerals for the interests of all South Africans. It will show how the private ownership of minerals was repealed to enable all South Africans an access to minerals within the borders of South Africa. It further defines and examines the concepts of ''consultation'' as provided for under the MPRDA and ''consent'' in terms of IPILRA in relation to the landowner in the context of mining right application. The unit concludes by briefly considering the implications of both consultation and consent in the extractive industry.

- **Chapter 3** – Chapter three is an examination and analysis of current legal status as laid down by the courts with regard to community consultation and consent. This chapter illustrates how the courts have previously resolved disputes between affected communities and mining right applicant and the Minister in terms of community consultation and/or consent.

- **Chapter 4** – Chapter four continues from chapter four discussions by discussing the implications of the cases on mining operations, state sovereignty, communities and implications of the cases on traditional landownership. The chapter concludes by briefly explaining the first step to the introduction of the veto right within the mining sectors introduced by the courts in the judgements of cases discussed in chapter four.

- **Chapter 5** – this chapter is the conclusion of the study, it provides the summary of the findings of study, conclusions and recommendations.

CHAPTER 2: CONSULTATION VS CONSENT

2.1. Introduction

The South African mining law requires that the applicant for a mining right must consult with the landowner before and after the granting of the right in terms of the MPRDA, and on the other hand, in terms of IPILRA, the holder of informal right to land may not be deprived of his/her land without his consent. In other words, the Minister of Mineral Resources (Minister) may not grant a mining right on a communal land on which the community holds informal rights without their full and informed consent. The notion of consultation and consent has stirred up a legal debate in South African law. This chapter discusses consultation in terms of the MPRDA and consent in terms of IPILRA, giving an overview of the implications of the two requirements and their application in our law.

2.1.1. Background

The South African history was characterised by racial discrimination, which affected the manner in which the policies and laws regulating natural resources were developed.[20] The Native Land Act[21] is one of the laws which was enacted and established by the white dominium over the greater part of South Africa.[22] This law made it illegal for people, classified as 'black', to own land outside reserves. Only 7% of the land was reserved for the black majority with the creation of the homelands.[23] The majority of black people were dispossessed of their land and resources.[24] Due to the segregation policies and laws under the apartheid regime, the majority of black people could not own land and consequently could not gain access to mineral resources.[25]

With that being said, during colonisation, land could be acquired through the doctrine of discovery. Under this doctrine, a discoverer of a territory could lawfully claim the land even when the land was inhabited by indigenous people.[26] The recognition of customary land rights was required, but these rights could be overridden on the ground that indigenous people were heathen and infidels.[27] The consent of these people was sometimes sought through the purchase and treaties; however these two methods of acquisition of land were exploitive in the sense that they

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20 See Mostert (2012) *supra* n 3 at 30.

21 Native Land Act 27 of 1913.

22 *Ibid.*

23 Legal Resources Centre, *Free, Prior and Informed Consent in the extractive industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia* (Oxfam, 2018). Available at https://africanlii.org/ebook/free-prior-and-informed-consent-extractive-industries-southern-africa (last accessed 08 August 2019) at p53.

24 *Ibid.*

25 E Van Der Schyff, *Property in Minerals and Petroleum*, (Juta and Company Ltd, 2016) at 8.

26 J A Gildenhuys, 'Indigenous peoples' rights to minerals and the mining industry: Current developments in South Africa from a national and international perspective' 23:4 *Journal of Energy & Natural Resources Law* (2005) at 466.

27 *Supra* J A Gildenhuys note 26 at p466.

were not properly understood by indigenous communities.[28] As a result, indigenous people lost the land to immigrant population.[29]

The claims of black people or indigenous communities to land and minerals was unceremoniously swept under the carpet and ignored.[30] The Roman Dutch laws did not leave any room for the recognition of communal ownership interests.[31] During the apartheid era, certain race groups were able to benefit from the country's minerals, however, black people and indigenous communities were excluded from benefiting directly and had to bear the brunt forced displacements to open up land for mineral exploitation.[32] This was because their customary claims to land and minerals were completely ignored. In cases where natural resources were discovered indigenous tribes who owned the lands were disposed of their land and their claims to the natural resources were ignored.[33]

The dominion of the white group over land came to an end during 1994 when the new government was introduced to rectify the racial discrimination of the past. The new democratic government aims to remedy the forced removals from the land and to institute land reform.[34] The government in addition to returning of the land to its dispossessed citizens also gave an opportunity for those who were never in a position to acquire land, and to institute tenure reform to provide security of tenure for individuals and communities.[35] In respect of mineral resources, Section 25 of the Constitution,[36] was set apart as the prime constitutional imperative that compels reform of the access to and the use of the country's mineral and petroleum resources.[37]

The introduction of the MPRDA in 2004 was a legislative conduit through which the legislature intended to archive equitable access to the country's natural resources. It constitutes a remedial measure upon which the previous racial injustices should be redressed with regard to mineral resources.[38] The MPRDA brought a regulatory regime which acknowledges that South Africa's mineral resources belong to the nation. It repealed the racial discriminatory policies and principles by allowing equitable access to the mineral resources by all South Africans with the state being the custodian thereof. The MPRDA has given the state, which acts through the Minister of Mineral Resources, control to determine if and where the country's mineral resources may be exploited.[39] It is noteworthy that the South African law was based on the Roman Dutch laws which allowed the principle private ownership of mineral resources. However, with the introduction of the MPRDA, this principle was replaced by the principle of "state custodianship", which emphasis that mineral resources belong to the citizen and no private ownership of minerals is permitted.

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28 *Ibid.*
29 *Ibid*.
30 *Supra* note 26 at p467.
31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 Constitution of the Republic of South Africa, 1996.
37 *Supra* note 25 at p15.
38 *Supra note* 25 at p8.
39 *Supra* note 26 at p427.

The MPRDA now gives opportunity to historically disadvantaged persons to participate in the mining and minerals industry and allow them to have an equal access and benefit from the exploitation of the mineral resources.[40] The Department for Mineral Resources and Energy ought to recognize that one of the means to benefit communities in the mining regions from the exploitation of mining and mineral resources is by encouraging greater participation by communities affected by mining operations.[41] The mining industry is growing rapidly in South Africa and it is noteworthy that the mining industry has also affected communities in the areas of its operation.[42] Some communities have to relocate to make way for the mining companies to proceed with the mining operations; as such greater participation by the host community will be in line with the objectives of the MPRDA.

The MPRDA requires that the mining companies must engage in public consultation with regard to exploration rights, mineral rights and environmental impact.[43] This is to promote participation of the communities in mining regions. However, because consultation in terms of the MPRDA does not require public consent of the host communities, this consultation process is merely formalistic.[44] Because of this, a room has been left for abuse of the process by mining companies who engages with the communities. The law should be clear and stipulate how consultation with the communities should occur on their lands, and ensure that during consultation, communities must receive prior information regarding the context of the project they are expected to express their opinion on.[45]

2.1.2. What is consultation?

The court in *Magoma v Sebe No and Another* held that;

> "*consultation in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate"*.[46]

Also, Oxford dictionary defines consultation as the act of discussing with someone or with a group of people before a making a decision about it.[47] The MPRDA does not define what consultation is, the Department of Mineral Resources and Energy guidelines, however defines consultation as a two way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to, and considering the latter's response, which allows openness in the decision making process.

2.1.3. Consultation before granting mining right in terms of the MPRDA

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40 K N Ramatji, "A legal analysis of the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 and its impact in the Limpopo Province", 2013, University of Limpopo, p27.

41 *Ibid*.

42 *Ibid*.

43 *Ibid*.

44 PJ Badenhorst and NJJ Olivier, "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002", vol 44, 2011.

45 *Supra* note 40 at p28.

46 *Magoma v Sebe NO and Another 1987 (3) All Sa 414 (CK).*

47 https://www.ocfordlearnesdictionaries.com/definition/american_english/consultation (last accessed 17 July 2019).

In summary, Sections 16, 22 and 27 of the MPRDA provide that, if the Regional Manager accepts the application it must notify the applicant for the right to consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports.[48] The obligation to consult is placed on the Minister on one hand and on the applicant on the other hand. The applicant before the actual granting of the mining right but after acceptance by the Regional Manager must notify and consult with landowners. Froneman J, in *Bengwenyama*[49], held that:

> *"One of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned.*[50] *Another more general purpose of the consultation is 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, so that they may decide whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review".*[51]

The MPRDA does not give landowners a prerogative of deciding whether mining should take place on their land or not. A duty to consult, as interpreted in many cases, is only placed on the applicant with the objective of finding an alternative accommodation and to inform the landowners of the project to take place.[52] However, no single section or case law provides that the parties during consultation, in terms of the MPRDA, must agree to the granting of the right or not. An agreement between the landowner and the applicant is not imposed as a requirement, by the MPRDA, to grant the applied right.[53] Therefore, consultation in terms of the MPRDA is a notification to the landowner because consent of the landowner is not needed by the applicant of the right.

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48 S 16 (4) if the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the application in writing-

(a) To submit an environmental management plan; and

(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

S 22(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing—

(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39; and

(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

S27 (5) if the Regional Manager accepts the application, the Regional Manager must within 14 days of the receipt of the application, notify the application in writing, to

(a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports;

49 *Bengewenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2010 ZACC.

50 L. Gumbi & D Nokwe, "Comparative analysis of the South African duty to consult and accommodate interested and affected parties before awarding prospecting and mining rights: Prospecting and mining rights", 2012, p47.

51 *Ibid.*

52 Supra note 49 at par 65.

53 *Supra* note 23 at par 54.

Section 10 of the MPRDA provides that within 14 days after accepting an application lodged in terms of Section 16, 22 or 27, the Regional Manager must in the prescribed manner make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question; and call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.[54] It further states that if a person objects to the granting of a prospecting right, mining right or mining permit, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and to advise the Minister thereon.[55] This section allows the landowner to object to the Minister. In terms of this section, the landowner submits his/her reasons why he/she does not want the Minister to grant the right, and in many cases the reason is because the applicant had failed to consult with the landowner. Section 10, however, does not prescribe that there be a hearing after the objection. This section merely provides that in case of an objection the matter is to be referred to the Regional Mining Development and Environmental Committee. Thus the fact that the parties who objected had not been afforded a hearing does not indicate that there was no compliance with the provisions of this section.

2.1.4. Consultation after granting of a mining right in terms of the MPRDA

In terms of the repealed Section 5(4) (c) of the MPRDA, notification and consultation with the lawful occupier or land owner was a prerequisite before mining companies could commence with their operations.[56] The court in *Meepo v Kotze*[57] held that in its view the consultative process envisaged in sec. 5 (4)(c) of the Act is intended to afford a land owner the opportunity of softening the blow inevitably suffered as a consequence of the granting of a prospecting or other right under the act.[58] In the Case of *Joubert and Others v Maranda Mining Company (Pty) Ltd*,[59] the land owner denied access to the mining right holder to the land and also refused to negotiate with the right holder or the Regional Manager. The Supreme Court of Appeal held that, a holder of a mining right has a right to enter the land in respect of which the mining right has been granted for purposes of exploiting its rights once such holder complied with the provision relating to notification and consultation.[60]

Section 5(4) (c) was replaced by the new Section 5A, which removed the requirement of consultation within the provisions of the old Section 5(4) (c). Section 5A (c) of the MPRDA provides that no person may prospect for or remove, mine, conduct technical cooperation operations, reconnaissance operations, explore for and produce any mineral, without a proper written "notice" to the landowner or lawful occupier of the land. Although Section 5A is similar to Section 5(4) (c), in all respects, Section 5A differs with Section 5(4) (c) in that no provision thereof requires consultation with the land owner or the lawful occupier of land. Instead, Section 5A requires that the landowner or lawful occupier of the land must be given at least 21 days written "notice" of the commencement

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54 Section 10 of the Mineral and Petroleum Resources Development Act No. 28 of 2002(MPRDA).

55 *Ibid.*

56 A Kabeng, Duty to Consult and Exhausting Internal Remedies,2018, https://inlexso.co.za/duty-to-consult-and-exhausting-internal-remedies/ (last accessed 19 July 2019).

57 *Meepo v Kotze 2008 (1) SA 104 (NC).*

58 *Supra* note 57 at par 15.

59 *Joubert v Maranda Mining Company (296/2008) [2009] ZASCA 68 (29 May 2009)*.

60 *Ibid*.

of mining or mining related activities on his/her land.[61] The protection that was afforded the landowner in terms of the old Section 5(4) (c) has been taken away.

Before granting of the right, no consent or an agreement to the project is required on the part of the landowner, an obligation is only the applicant to consult with the landowner. The MPRDA continues to fail by only allowing the holder of the right to only notify the landowner before commencing with the mining activities. It has been held that if the holder of the mining right has complied with the consultation process, the landowner has no choice but to allow the holder of right access to the land.[62] Therefore it is apparent that in terms of the MPRDA, the holder of the mining right may gain access to the property of the landowner by giving the landowner a notice and neither consultation nor consent of the landowner is not necessary at this stage.

Section 54 provides for compensation to be negotiated in circumstances where a landowner try to prevent or deny access to a prospecting or mining right holder from entering the land, and the Minister decides that the landowner has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations.[63] However, if the parties cannot agree on compensation, the matter goes to arbitration under the Arbitration Act,[64] or to a competent court. This section does not provide for a landowner to apply to stop prospecting or mining operations while negotiations take place.[65] The deleted section 5(4) (c) was key in enhancing the rights of the landowner's ability to negotiate access agreements after the granting of the mining right. In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another,*[66] (Maledu case) the court found that the mining company cannot enforce its right to access the property before it exhausts the Section 54 dispute process. The court further stated that allowing the mining company to mine pending the finalisation of this process will undermine the purpose of section 54 and the MPRDA.[67]

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61 *Supra* note *23.*

62 *Supra* note 24.

63 T Jewett, Mining, land, and community in communal areas ii: Mineral rights and land rights, 2016,https://hsf.org.za/publications/hsf-briefs/mining-land-and-community-in-communal-areas-ii-mineral-rights-and-land-rights (last accessed 19 July 2019).

64 Arbitration Act, Act. 42 of 1965.

65 *Supra* note 13.

66 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Proprietary) Limited and Another [2018] ZACC 41.*

67 *Supra* note 49 at par 92.

2.1.5. Landowners rights vs Mining rights holder

The court in *Maledu case* summarised the obligations and rights of the landowner and the mining right holder as follows:

> **"***It bears emphasising that the provisions of section 5(3) of the MPRDA echo two fundamental principles of the common law. First, that the owner of the land to which a mining right relates is obliged to allow the holder access to his or her land to do whatever is reasonably necessary for the effective exercise of the mining holder's rights.*[68]
>
> *Second, the mining right holder is in turn obliged to exercise his rights civiliter modo (in a reasonable manner) so as to cause the least possible inconvenience to the rights of the owner. Accordingly, the common law requires of both the landowner and the mining right holder to exercise their respective rights alongside each other to the extent that it is reasonably possible to do so. It therefore fosters a situation where the right of the landowner and the mining right holder co-exist".*[69]

Mining projects bring an inevitable disruption to the landowner's right to use and enjoy his property. There will always be conflicts between the mining right holder and the rights of landowner, given the invasive nature of mining operations.[70] The granting of the mining right limit the landowner's rights to use the land because of the limited real right over the land granted to the holder of the right. On the other hand the holder of the right is granted right to use the surface and underground of the land. Consultation, therefore, is the only process that is left for the landowners to mitigate such disruptions by voicing its concerns and negotiating preventative or compensative measures.[71]

The MPRDA entitles the holder of a mining right to enter the land to which such right relate, with their employees and bring to the land any plant, machinery or equipment and build, construct or lay down surface or underground infrastructure to fulfil the purpose of the respective right.[72] On the other hand, it protects the landowner's interest on the land by stipulating that the holder of the right may not commence with these activities without notifying the landowner.[73] The old Section 5 (4) (c) offered more wider protection to landowner by giving him the right to be notified and consulted. However, the new Section 5A only requires of the mining right holder to notify the landowner. However, the MPRDA does not offer the landowner a right to stop the right holder from accessing the land even when the landowner feels impinged or that consultation was not properly done. It allows the right holder to notify the Regional Manager if the landowner prevents him from exercising his right.[74] Notwithstanding the dispute over access to the land, the Regional Manager and the subsequent arbitration focuses on compensation to the landowner. Section 54 2(b) provides

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68 *Supra* note 49 at par 57.

69 *Supra* note 49 at par 58.

70 T T Ratsheko, "A critical analysis of the extent to which SA law protects the surface rights of landowners over whose property mining rights have been granted", 2018, Unpublished LLM Dissertation, University of Pretoria, p39.

71 *Supra* note 15.

72 Section 5 (3) (a) of MPRDA.

73 Section 5A (c) of MPRDA.

74 Section 54 (1) of MPRDA.

that the Regional Manager must inform the landowner of the rights of the right holder, but it does not provide the rights of the landowner being of deprived of his land.

2.2. Consent in terms of the Interim Protection of Informal Land Rights Act

Informal Protection of Informal Land Rights Act, hereinafter IPILRA, came into operation on 21 June 1996 to protect those who held insecure tenure because of the failure to recognise customary title. Informal rights to land held in terms of customary law was not protected in our law under the past racially discriminatory laws, IPILRA was enacted too give temporary protection to informal land rights holder until 31 December 1997, however, IPLIRA has been repeatedly extended in terms of section 5(2) of IPILRA and most recently until 31 December 2018.[75]

Under the MPRDA mining right applicant only has to consult with landowners and communities before a mining right is granted. In terms of this Act this is to inform them of the planned activities and the potential impacts. It was not a requirement to get their consent. However, the landowners could object, but they couldn't ultimately prevent the Minister from granting of a mining right or to prevent any mining operation. The only recourse to landowners was a claim for damages if there no agreement could be reached with the mining company.[76]

However, IPILRA offers more protection to customary law landowners and communities. Section 2(1) of IPILRA provides that subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No.63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.[77] Section 2(3) of IPLIRA further provides that where land is held on a communal basis, a person may, subject to subsection 2(4), be deprived of such land or right in land in accordance with the custom and usage of that community.[78] Furthermore, Section 2(4) of IPILRA provides that 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.[79] IPILRA gives protection to landowners not to be deprived of their land without their free, full and informed consent.

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75 Short Title of Interim Protection Informal Land Rights Act, Act No. 31 of 1996, (IPILRA) "*to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law; and to provide for matters concerned therewith.*"

76 C Pavlovic, "Protecting Ancestral Land from the Pursuit of Profit – Xolobeni Community Stops Grant of Mining Right", 2018, http://clintonpavlovic.co.za/protecting-ancestral-land-pursuit-profit/ (last accessed 25 July 2019).

77 Section 2(1) of IPILRA.

78 Section 2(3) of IPILRA.

79 Section 2(4) of IPILRA.

2.2.1. Does granting of mining right amounts to deprivation of land?

IPILRA does not define the word deprivation under its definitions. *De facto* deprivation of property means that the owner is not formally expropriated, but that his ability to exercise his rights on the property is limited in such a manner that he factually does not have ownership anymore.[80] In the judgement of *First National Bank t/a Wesbank vs Minister of Finance*,[81] the court held any interference with the use, enjoyment or exploitation of private property involves some deprivation in respectct of the person having title or right to or in the property concerned.[82] Granting and execution of a mining right represents an invasion of a landowner's right of use and enjoyment of the surface.[83] In the *Baleni case*, which will be discussed in detail in Chapter 3, the court found that the granting of mining right would constitute deprivation in terms of IPILRA and therefore the Minister will have to obtain full and informed consent of the community before grating the mining right. [84]

2.2.2. The right to Free Prior and Informed Consent and IPILRA

The principle of FPIC as a right is strongly supported by international law legal instruments, including the ILO Convention 169 and African Charter for Human and Peoples' Right (Article 6(1)(a) of the ILO Convention). The notion of FPIC is perceived as a standard to protect, ensure and promote right to access to information, public participation and consultation of local communities during any development activities.[85] The consent as required by IPLRA may be said to be a development or rather an establishment of the right to FPIC in South Africa. The FPIC principles ensure that mining companies do not coerce or intimidate local communities and that their consent is properly sought and given freely before the commencement of proposed extractive activities, further ensure that they are given full information concerning the scope and impacts of extractive activities.[86] This ensures that they have the choice to ultimately give or withhold their consent.

IPLRA affords the communal landowner a right to consent before being deprived of their land. Consent, as contemplated in section 2(1) of IPILRA to be effective must be free, granted prior to deprivation of the land and be informed.[87] This has been argued, is in line with South Africa's international law obligations, *inter alia*, one of the binding legal instruments is the African Charter

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80 Control of use and deprivation of property, http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/control-of-use-and-deprivation-of-property/ (last accessed 18 July 2019).

81 *First National Bank t/a Wesbank vs Minister of Finance, 2002 (4) SA 768 (CC).*

82 *Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP), par 57.*

83 I Mukhovha, "Informal land rights: What does this mean for holders of mining rights?" 2019, https://withoutprejudice.co.za/free/article/6351/view (accessed 18 July 2019).

84 *Supra* note 81 at par 84.

85 JCN Ashukem, "Included or excluded: An analysis of the Application of the Free, Prior and Informed Consent Principle in Land Grabbing Cases in Cameroon" PER/PELJ (2016), http://www.saflii.org/za/journals/PER/2016/28.html (last accessed 18 July 2019).

86 JCN Ashukem. "Included or excluded: an analysis of the application of the free, prior and informed consent principle in land grabbing cases in Cameroon." Vol 19, 2016, *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*.

87 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1.*

for Human and Peoples' Rights.[88] In *Maledu case* the *amici* in support of the applicants argued that the African Charter does not expressly provide for the concept of free, prior and informed consent, but it is generally understood that this concept is inherent in certain guarantees such as the right to self-determination in Article 20, right to development and the right to information in Article 9.[89] According to the *amici*, the fundamental principles of the concept of free, prior and informed consent seek to ensure that: (a) local communities are not coerced or intimidated; (b) consent is properly sought and freely given; (c) the person whose consent is required is provided with full and reliable information relating to the scope and impact of the subject matter regarding the consultation; and (d) they have the choice to give or withhold their consent.[90]

The meaning of consent under IPLRA is not well defined; an adoption of the principles as set out by *amici* above and of the international FPIC in interpreting such consent will be prudent. The court in *Baleni case*, as stated above, went broader on the notion of consent more than the wording of IPLRA. The court set as a pre-requisite, the full and informed consent of the community before granting mining right. "Full and informed" means that the community must be provided with all relevant information in relation to the project, and the information must be objective, accurate and presented in a manner and form understandable to the local communities.[91] "Consent" implies that after engaging the community has the right to agree or to withhold the consent. It is clear from the wording of IPILRA that it has given the community a right to withhold or give consent to the extractive industry to affect them.

2.3. MPRDA VS IPILIRA

The MPRDA and IPILRA serve to protect different purposes, the former regulates mining activities in South Africa whereas the latter provide for protection of the customary law landowners. The provisions of the MPRDA and IPILRA are not in conflict with each other and therefore ought to be interpreted and read harmoniously.[92] Both these Acts were enacted to redress the history of economic and territorial dispossession and marginalisation in the form of colonisation and apartheid. They seek to restore land and resources to the victims who were previously discriminated.[93] As I have already alluded to above, the MPRDA requires that the landowner be consulted with when applying for a mining right, on the other hand IPILRA requires the Minister to obtain full and informed consent of the community before granting a mining right.

The MPRDA does not regulate customary law, it only focuses on promotion of equal access to mineral resources and protection of common law landowners. It failed to afford protection to customary law landowners who suffered more racial discrimination and disposed of their land during the apartheid regime. IPILRA therefore came into play to afford customary law landowners a special protection to traditional communities. The MPRDA still applies where a mining right is granted over

88 *Ibid.*
89 *Ibid.*
90 *Supra* note 87 at par 73.
91 *Supra* note 31.
92 *Supra* note 49 at par 68.
93 *Supra* note 82 at par 40.

land owned by traditional communities. The applicant is still required, under the MPRDA, to consult with the traditional community. In addition, IPILRA imposes a further obligation to the Minister to seek consent of that community.[94] Thus, traditional community has a right to decide what should happen, and their consent is required before they could be deprived of their land.

2.4. Conditions from the *Bengwenyama Minerals (Pty) Ltd and Others* v *Genorah Resources (Pty) Ltd and Others*

In this case the representative of Genorah, when consulting with the community, left a prescribed consultation form which simply provided blocks to be ticked yes or no to indicate whether there are any objections to the prospecting applications by the community. If the community has objections (answer is yes), the form provided more further five lines to detail the full particulars of the objection. The form was never signed by anyone on behalf of the Community.[95]

The court had to decide whether there was proper consultation by Genorah with Bengwenyama Minerals and the Community in terms of the MPRDA. Froneman J held that granting and execution of a prospecting right represents a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen.[96] According to the court, consultation is related to two general purposes:

> *"The first purpose must be to find out whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. It noted that the Act does not impose as a requirement to granting the right an agreement between the applicant and the landowner, but that does not prevent that consultation must be done in good faith".* [97]
>
> "*The second purpose, according to the court, is to provide landowners or occupiers with the necessary information on everything to be done in respect of the prospecting operation, so that they could make an informed decision.[98] The court, in contrast of the court a quo, held that section 16(4) (b) requires that the applicant must: inform the landowner in writing that his application has been accepted by the Regional Manager, inform the landowner in full details what the prospecting right entails on the land, consult with the landowner with the view to reach an agreement on the impacts of the proposed project, and lastly submit the outcome of the consultation to the Regional manager"*.[99]

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94 *Supra* note 82 at par 76.
95 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Other 2011(3) BCLR 229 (CC), pat 68.*
96 *Supra* note 95 at par 68.
97 *Supra* note 95 at par 65.
98 *Supra* note 95 at par 66.
99 *Supra* note 95 at par 67.

According to Ramatji Kanuku Nicholas this case is an indicative of the insufficient protection of communities provided for by the MPRDA.[100] Another mining law specialist held the view that prospecting rights have been granted left, right and centre, all over the country, and the consultation with landowners by both the DMR and the prospecting right applicants is often fairly desultory.[101]

2.5. Conclusion

Fundamental implications of consultation as required by the MPRDA are that the Minister, provided that there was consultation, may grant a mining right against the will of the landowner. At best, such owner is only entitled to 21 days' notice before the commencement of operations.[102] Lack of agreement does not prevent the Minister from granting the right. Consultation only involves a process of engaging and informing. The MPRDA's official Guideline for Consultation with landowner requires consultation report, however it does not allow for a landowner to say no.[103] Thus, consultation is a two-way communication process between the mining company and the landowner wherein the former is listening and considering the latter's response,[104] but no consent is needed from the latter.

Under the MPRDA the state distances itself from protecting and promoting the rights and interest of landowners. The basis of the consultation which is required is not properly stipulated and nor are the conditions under which the opinion of the affected landowner is obtained.[105] Mostly the company that stands to benefit from mining rights is the one that facilitates the process of elections of community representatives and obtaining landowners approval for a resolution that allows the company to extract the minerals without a proper consultation with all affected landowners.[106]

On the other hand, IPILRA provides that landowners cannot be deprived of their land against their will. This means that the Minister does not have discretion to grant a mining right without first consulting with the landowner, and in addition to consultation must obtain their full and informed consent. One should bear in mind that there is no conflict between the MPRDA and IPILRA and each statute must be read in a manner that permits each to serve their underlying purpose. However, our law is still uncertain as to whether the landowner is afforded the veto right against the mining operations to take place on his/her land

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100 *Supra* note 95 at p29.

101 *Ibid.*

102 *Supra* note 35 at par 47.

103 Contradictions in legislation on mining and its community benefits, 2015, http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/MiningandCommunityBenefits_Factsheet_Final_Feb2015 (last accessed 19 July 2019).

104 *Supra* note 35.

105 Rural communities and mining on their communal land: The current legal regime http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100528lrcrural_0.rtf (last accessed 22 July 2019), p2.

106 *Ibid.*

In the next chapter, the study will examine decided cases in the South Africa's mining rights regime, specifically cases where the courts had to decide whether consent as opposed to consultation was sufficient. With the ambiguity in the South African mining laws, it has always been a struggle for the affected landowners whose rights on the land were always overlooked when granting mining rights. Chapter three will unpack the protection afforded to the landowners and/or communities by the South African courts as well as legislations.

CHAPTER 3: AN EXAMINATION OF RECENT CASE STUDIES

3.1. Introduction

Chapter two explored consultation and consent literature by showing the application and implications of the two requirements respectively. This chapter now focuses on examining recent case studies in South African mining law regime. This chapter tries to find out the standard requirements of consultation and consent that mining right applicant must comply with before the mining right is granted as laid down by the courts. There is ambiguity in the literal interpretation of consultation as required by the MPRDA and consent as required by IPILRA. Landowners run the risk of abuse by mining companies and the minister who usually grants the mining rights without adhering to the rights of landowners to be consulted and in certain circumstances, to give or withhold their consent.

3.2. *Maledu and Others* v *Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*

This case concerns an appeal against an eviction order granted by the High Court, Northwest Division, Mahikeng. The High Court granted an eviction and interdict against the Applicants and all persons occupying the farm through or under them.[107]

3.2.1. Facts

In *casu*, Applicants' forebears purchased the farm in question, but due to racial discriminatory laws, the farm was passed and registered in the name of the Minister of Rural Development and Land Reform, who holds it in trust on behalf of the community to which the applicants are a part of.[108] The farm was subsequently divided into 13 plots, and allocated to 13 families. These families conducted crop and stock farming operations on the farm. The families erected houses and shacks on the farm for their occupation or that of their employees.[109] The Applicants are informal land rights holder in terms of IPILRA.

In 2004, the DMR granted the Respondents a prospecting right over the farm. Consequent to that, on May 2008, the DMR awarded the Respondents a mining right over the same land. The commencement of the mining operations brought about an inevitable consequence negatively impacting upon the peaceful and undisturbed occupation and enjoyment of the farm by the Applicants. As a result of these operations, the Applicants obtained a spoliation order against the Respondents.[110]

The Respondents approached the High Court to seek an order evicting the Applicants, and all persons whose right of occupation derived from that of the Applicants, from the farm. They also sought an interdict restraining the Applicants from entering, remaining or conducting farming

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[107] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1, par 3.*

[108] *Supra* note 107 at par 12.

[109] *Supra* note 107 at par 13.

[110] *Supra* note 107 at par 14.

operations on the farm. The Respondents asserted that they consulted with relevant parties during their application for prospecting and a mining right as required by the MPRDA.[111]

The Applicants in opposing the application raised the following issues to be decided by the court, namely:

- That as the true owners of the farm they were never consulted in the manner contemplated by the MPRDA, therefore the mining right was invalid;
- They asserted that they were also not consulted by the Respondents as required by Section 2(1) of IPILRA, and they did not consent to being deprived of their informal rights to the farm. Therefore, their informal rights to the farm were not validly extinguished;
- Lastly, the Respondents were precluded from securing an interdict against them until and unless any dispute relating to their surface rights over the farm had been resolved in terms of section 54 of the MPRDA.[112]

3.2.2. High court decision

The High Court rejected all the defences raised by the Applicants and held as follows:

The Applicants were not the owners of the farm and therefore there was no obligation on the Respondents to consult with them.[113] Furthermore, in deciding whether there was a proper consultation, the court held that the Bakgatla-Ba-Kgafela Community was the owner of the farm to which the Applicants formed part of, and referred to a Kgotha Kgothe (meeting) held on 28 June 2008 where the Bakgatla Community agreed to enter into the Surface Lease Agreement with the Minister of Rural Development and Land Reform and the IBMR. According to the court the community resolution taken at the Kgotha Kgothe on 28 June 2018 to enter into the surface lease agreement with IBMR proves that the Respondents consulted with the affected parties.[114]

With regard to the provisions of section 2 of IPILRA, the court held that this provision does not require that each holder of informal rights to land must be consulted. Therefore, since the farm was held in a communal basis, the resolution adopted at the kgotha kgothe on 28 June 2008 suffices in terms of section 2(4) and therefore binding on the Applicants by virtue of them being members of the Bakgatla-Ba-Kgafela Community.[115] It concluded that in terms of Section 2(2) the informal rights of the Applicants were lawfully terminated when the kgotha kgothe resolved to enter into the surface lease agreement.[116]

The court, with reference to *Joubert v Maranda Mining Company (Pty) Ltd,*[117] rejected the Applicants' contention that the Respondents were precluded from commencing with the mining operations until the provisions of Section 54 of the MPRDA have been met. It held that since the

111 *Supra* note 107 at par 15.
112 *Supra* note 107 at par 16.
113 *Supra* note 107 at par 17.
114 *Supra* note 107 at par 21.
115 *Supra* note 107 at par 22.
116 *Ibid.*
117 *Joubert v Maranda Mining Company (Pty) Ltd [2009] ZASCA 68; 2010 (1) SA 198 (SCA).*

respondents had attempted in good faith to comply with the consultative requirement, the respondents were free to commence with their project notwithstanding that the process envisaged in Section 54 has not been finalised.[118] Therefore the applicants may still claim for compensation in terms of Section 54 of the MPRDA.

3.2.3. Constitutional Court decision

On appeal the Applicants asserted the same arguments as they did in the High Court. However, the CC rejected all arguments except for two. According to the court it was unnecessary and undesirable to deal with other issues, but rather the matter should be decided principally on the basis of Section 54 of the MPRDA and Section 2 of IPILRA. As such, they were two central issues to be dealt with. First, "*whether Section 54 was available to the respondents, and if it was, whether they are precluded from obtaining an interdict before exhausting the mechanisms for which Section 54 provide*. Second, *whether the applicants had consented to being deprived of their informal land rights to or interests in the farm"*.[119]

The court considered the condition in this case and stated that:

> "*There is a constitutional imperative that should not be lost from sight, which imposes an obligation on parliament to ensure that persons or communities whose tenure of land is legally insecure as a result past racially discriminatory laws or practices are entitled to tenure which is legally secure or comparable redress"*.[120]

The court held that Section 54 provides for a speedy dispute resolution based on the parties reaching some sort of an agreement, but if parties fail to reach an agreement they may bring the issue to court. According to the court, to allow the respondents to mine pending the finalisation of Section 54 process would undermine the purpose of the section to strike the balance of interests of the mining right holder and that of the landowner.[121] The need for proper consultation exists in order to alleviate the potential serious inroads that may be made on the rights of landowners. In terms of Section 54(5) the regional manager may recommend to the Minister that the land be expropriated in terms of Section 55 if the negotiations between the landowner and the mining right holder are deadlocked, and according to him/her further negotiations would frustrate the objects of the MPRDA.[122]

The applicants, in terms of the second issue, argued that they are protected by section 22(4) (b) of the MPRDA which places a duty on the respondents to consult in the prescribed manner with them. They further argued that they are the holders of informal rights to the farm as contemplated in IPILRA.[123] Therefore, they cannot be deprived of their informal rights to land without their consent in terms of IPILRA.[124] The *amici* argued that, the granting of a mining right affects and limit the landowner's bare dominium of land and constitutes deprivation of the land. As such the respondents

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118 *Supra* note 107 at par 23.
119 *Supra* note 107 at par 42.
120 *Supra* note 107 at par 5.
121 *Supra* note 107 at par 92.
122 *Supra* note 117.
123 *Supra* note 107 at par 67.
124 *Supra* note 117.

are obliged under IPILRA to seek the applicants' consent.[125] The consent in terms of section 2(1) must be free, granted prior to deprivation and be informed.

The respondents on the other hand relied on Section 2(4), which in nutshell, provides that "*the decision to dispose of any right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for such purpose"*. They referred to the meeting of Lesethleng Community which they contended that they explained the process and progress of the mining to the affected parties.[126] According to the respondents one of the attendees raised any objection to the proposed mining. As a result consultation was compatible with the commands of the MPRDA and was sufficient since the award of a mining right was not dependent upon them granting consent.[127] They further contented that the applicants as a result of the resolution adopted on the kgotha kgothe were deprived of their informal land rights in terms of section 2(2) and (4) of IPILRA[128]

The court held that the resolution adopted by the Bakgatla-Ba-Kgafela at the kgotha kgothe of 28 June 2008 does not substantiate that the applicants were deprived of their informal rights in terms of the provisions of Section 2(4).[129] It further held that the underlying purpose of IPILRA is to provide security of tenure for the historically disadvantaged and vulnerable and thus it was incumbent upon the respondents to comply with the prescripts of IPILRA.[130] As such proper consultation in terms of the MPRDA and the consent of the community, including that of the applicants must be obtained. High Court decision was overturned.

3.3. Baleni and Others v Minister of Mineral Resources and Others

The dispute in this case is centred on the competition between informal land rights held by the community in terms of IPILRA and the legal requirements to grant a mining right under the MPRDA.[131] Of noteworthy is that the High Court decision is currently being challenged and the Minister of Mineral Resources, Gwede Mantashe has pronounced his intention to appeal the decision, the subsequent discussion will be restricted to that of the High Court decision.

3.3.1. Facts

In *casu*, on 29 March 2007 an Australian company – Transworld Energy and Mineral Resources (SA) Pty Ltd "TEM" submitted a mining right application to the then Department of Minerals and Energy (DME) in respect of the Kwanyana Block of the Xolobeni tenement area (the community). On 14 July 2008 the Director-General of the DME granted the mining right to TEM. The community received a copy of the mining right application from TEM's attorneys and subsequently file an objection in

125 *Supra* note 107 at par 71.
126 *Supra* note 107 at par 74.
127 *Supra* note 104.
128 *Supra* note 107 at par 108.
129 *Supra* note 107 at par 108.
130 *Supra* note 107 at par 105.
131 N Mohlaba & G Masina "Community consent vs consultation – high court rules in favour of community", 2018, Cliffe Dekker Hofmeyr, https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Corporate/mining-and-minerals-alert-23-november-Community-Consent-vs-Consultation-High-Court-rules-in-favour-of-community.html (last accessed 29 July 2019).

terms of Section 10 of the MPRDA. The community was thereafter notified that drilling would commence on 22 February despite their objection and that if access was not allowed, force would be used. The consent of the community was never sought before the mining right application was made.

The community in this case holds land in informal tittle due to previous racial discrimination and have lived in the area for years. Most of the families in the community have family graves in the area and are considered to be important places for family and community rituals. The community is therefore made of the collection relationships between the living and the dead.[132] The community take pride in their long history of occupying, owning and using their land.[133]

The community fears the mining project and do not want TEM to mine in their ancestral land. Their main contention was that the land that comprises the proposed mining area is an important resource and central to the livelihoods and substance of the community.[134] They fear the disastrous social, economic and ecological consequences of mining. Lastly, they believe that the suggested mining activities will not only bring about a physical movement from their homes, but will lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life.[135]

According to the community, TEM did not make any effort to present a proposal to them and show how these catastrophic impacts will be mitigated. The community approached the court for a declaratory relief that the Minister lacks authority to grant mining right over land owned by them without their free and informed consent. The community argued that their free and informed consent in terms of Sec 2(1) of IPILRA is required before they may be deprived of their land. The respondents argued that the community's consent is not required as the MPRDA merely requires consultation. They based their argument on the view that the MPRDA trumps IPILRA and in terms of the MPRDA no owner can have a right to refuse consent to mining.[136]

3.3.2. High Court decision

The court had to decide whether consent as referred to in IPILRA is necessary for the granting of a mining right over the land held in terms of customary law or, will consultation in terms of the MPRDA suffice. The High Court had to decide whether consultation requirement, contained in the MPRDA, applies to the exclusive of the consent requirement contained in IPILRA.

In answering this question, the court reiterated what the Constitutional Court said in *Maledu case,* that there is a constitutional imperative that should not be lost form sight, which imposes an obligation on parliament to ensure that persons whose tenure of land is insecure because of past racial discriminatory laws are entitled to tenure which is legally protected.[137] The court held that the applicants must be afforded broader protection in terms of IPILRA than the protection afforded to

[132] *Supra* note 82 at par 7.
[133] *Supra* note 82 at par 9.
[134] *Supra* note 82 at par 11.
[135] *Supra* note 82 at par 18.
[136] *Supra* note 82 at par 26.
[137] *Supra* note 82 at par 43.

common law owners.[138]As such, in addition to consultation as envisaged in the MPRDA, the minister has an obligation in term of the provisions of IPILRA to seek the consent of the community who holds land in terms of customary law. The court held, in conclusion, as follows:

> *"In keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants in this matter therefore has the right to decide what happens with their land. As such they may not be deprived of the land without their consent. Where the land is held on a communal basis – as in this matter – the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent to or not to a proposal to dispose of their rights to their land. "*

3.4. Conclusion

It is clear as alluded to above, that the current mining law regime does not afford landowners the veto right. However, these judgements have laid down a foundation of the right to say no. These judgements have afforded traditional communities falling under the ambit of IPILRA a wide special protection to consent to mining projects which affect their land. The implication of these decisions is that the Minister lacks power to grant a mining right in terms of the MPRDA over a land owned by a community which has informal land rights without their prior, free and informed consent.[139] With these judgements, the mining right applicant must ensure that they fully comply with all the consultation provisions provided for in the MPRDA. This means that mining right applicant must put more effort in identifying the owners of the land. This will help them identify whether the landowner has an informal right to land, if so, the mining right applicant would be required to, in addition to consultation in terms of the MPRDA, obtain the consent of the landowner.[140]

These judgements affords people whose tenure is vulnerable more protection, and place the community in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to the land.[141] It is apparent from the judgement that holders of informal rights to land cannot be deprived of their rights to land without their consent as envisaged in section 2 of IPILRA. Mining companies and the DMR will no longer be able to ride rough shod over communities' wishes by simply getting the approval of tribal authorities in granting mining right.[142] Both the Minister and the companies are obliged in terms of IPILRA to consult with the informal land

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138 *Supra* note 82 at par 76.

139 *Ibid.*

140 B Cripps & A Reid, 2018, "Mining community consultation: Who is the community?", https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Corporate/mining-alert-30-october-mining-community-consultation-who-is-the-community.html (last accessed 16 August 2019).

141 Media statement by the Bench Marks Foundation, 2018, Judgement is game changer for communities.

142 *Ibid.*

rights holders before granting the mining right, with regard to the latter, and before commencing with the mining operations with regard to the former.[143]

In chapter 4, the study identifies and discusses both legal and non-legal implications that the above alluded cases have brought to the South African mining regime. The judgements of these cases brought about a new dawn within the context of mining regime. The courts have emphasised the need to consult with and/or obtain the consent of landowners. This has both current and future implications in our mining regime. Chapter 3, therefore, discusses current and future changes that the above cases will and/or have brought in the mining sector.

[143] Top court's ruling restores rights of landholders violated by mining giants. https://www.timeslive.co.za/sunday-times/business/2018-11-13-top-courts-ruling-restores-rights-of-landholders-violated-by-mining-giants/ (last accessed 16 August 2019).

CHAPTER 4: IMPLICATIONS FOR THE SOUTH AFRICAN MINING LEGAL REGIME

4.1. Introduction

The objectives of the MPRDA include promoting opportunities for historically disadvantaged persons to participate and benefit from the mining activities within their areas. It has been argued that consultation as provided for in the MPRDA is merely formalistic since public consent is not required. Under the MPRDA public consent is not a requirement for granting the mining right, therefore consultation under the provisions of this statute does not require the parties to reach an agreement.[144]

The MPRDA has left much work for the courts to interpret and determine whether a proper consultation was held with the landowner. There are no legal provisions within the MPRDA or other statutes which suggest how consultation with the community must be conducted.[145] This, has been argued, leaves room for abuse by the applicant for the mining right who can manipulate, coerce and bribe landowners.[146] Recently the courts have laid down the precedent in which consultation must be conducted with the community, and the courts in all cases have emphasised consultation in good faith and consent by the holder of informal right to land in terms of IPILA.

The reiteration of IPILRA and consent before being deprived of land rights by the courts in both *Maledu* and *Baleni cases* provide a foundation for the right to say no.[147] Communities are now empowered to consent or withhold their consent to mining operations when consulted with by the mining companies. Mining companies will be required to obtain consent directly from land right holders that will be directly affected by mining where it has not yet started.[148] Also, the Minister as custodian of the South African mineral wealth in terms of the MPRDA is prohibited, from granting any mining right to a new applicant in the mining industry without the consent from a community holding an informal right to land in terms of IPILRA.[149]

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144 *Supra* note 140.

145 N P Chagwinya, "An investigation into the role of law in managing community engagements between mining companies, government and community: *Community consensus versus community Consultation*",2018, University of Pretoria, p31.

146 *Ibid.*

147 S Luthango, "The end of decentralized despotism? The Implications of the Maledu Constitutional Court Judgement for the "Right to Say No" to Mining", 2018, online publication, https://www.rosalux.depublication/id/39617/the-end-of-decentralied-despotism/ (last accessed 21 September 2019).

148 *Supra* note 147.

149 https://lrgalbrief.co.za/diary/legalbrief-enviromental/story/mining-and-communities-the-consent-issue/print/ (last accessed 05 September 2019).

4.2. Implications of the cases on mining operations, state sovereignty and communities

4.2.1. State sovereignty

These judgements have stirred up a substantial legal debate on whether or not the Minister of Mineral Resources' discretion to grant rights in terms of the MPRDA has been removed, or at the very least, severely restricted by the these two judgements.[150] One of the main arguments is that these cases take away the power of the state as a custodian over our natural resources to deal with, and control, these resources. This is because the control to decide whether a mining project can proceed has now been given the community by allowing them to have the right to say no to proposed mining projects before the Minister grants the mining right.

The Minister of Mineral Resources and Energy, Gwede Mantashe, has adamantly opposed the decision to give the community the right to consent, on the ground that the *Baleni case* poses a risk of transferring the authority over licensing in the mining sector from the state to communities.[151] According to him the licensing power should be with the state as required by legislation and not the community.[152] However, his assertion is in contradiction with the international law of Free, Prior and Informed Consent provided for in the United Nations Declaration on the Rights of Indigenous Peoples and, by the World Bank's Environmental and Social Standards.[153]

Also, Mineral Resources director general Mokeoena opposes that the community must consent to mining projects. He said that the MPRDA only requires meaningful consultation with communities before a mining right is granted.[154] According to him, if the legislation is interpreted so that the consent of communities is required for mining to take place, there would be very little mining activity in South Africa.[155] Mining law experts also backed Mkoena's contention, arguing that the requirement of consent could severely damage investment and cripple the mining industry.[156]

It is true that the right to consent does have consequences to restrict the discretion of the Minister to deal with mineral resources. However, it should not be overlooked that in the exercise of its discretion, the state, must also promote the constitutional imperatives to ensure that communities whose land tenure is legally insecure because of racially discriminatory laws are entitled to land tenure which is legally secured.[157] Thus the state being the custodian and having eminent domain over mineral resources, it should respect human rights law and should not be

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150 Engaging with communities – has the Minister of Mineral Resources been tied up in knots, E:\Research Materials\Engaging with communities – has the Minister of Mineral- Publications - Eversheds Sutherland.html.

151 https://www.fin24.com/Special-Reports/Mining-Indaba/mantashe-government-appealing-xolobeni-ruling-to-prevent-chaos-in-mine-licensing-20190204 (last accessed 5 September 2019).

152 *Ibid.*

153 https://www.dailymaverick.co.za/article/2019-02-14-mantashe-needs-to-ask-what-kind-of-development-xolobeni-wants/ (last accessed 05 September 2019).

154 Community consent requirement will end mining, MPs told, https://www.businesslive.co.za/bd/national/2019-02-13-community-consent-requirement-will-end-mining-mps-td/ (last accessed 10 September 2019).

155 *Ibid.*

156 *Ibid.*

157 *Supra* note 107 above.

granted any special status or exemption to justify denial of the right of the community to consent.[158] Custodianship does not grant the state an absolute power over the South African mineral resources. It is noteworthy that consultation in terms of the MPRDA with communities by mining companies is often not genuine with the intent or an attempt to reach consensus between the parties. Therefore, there should be a stronger obligation on mining companies to reach an agreement with communities.[159]

State sovereignty over natural resources is not entirely affected by allowing the community to consent to the mining projects, hence Section 55 of the MPRDA which gives the Minister discretion to expropriate property for purpose of prospecting or mining.[160] IPILRA does not give informal land right holder an absolute right to prevent mining operations or any development from occurring on their land.[161] International laws as well as our Constitution generally recognise the power of the State to expropriate property in the national interest conditional upon adequate, prompt and effective compensation.[162] Thus the right to consent will not take away the state sovereignty over the natural resources, but it will promote the recognition of landowners' rights to land when mining deals on their land are concluded.

4.2.2. Mining operations (mining right no longer override surface right)

Formerly, in cases where mining operations were stopped by landowners, the mining company would obtain an interdict against the landowner on an urgent basis preventing the denial of access or interruption of operations.[163] This is because mining companies believed that they were not required to exhaust any internal dispute resolution as required by the MPRDA, but rather rush to court to obtain an interdict against anyone interfering with mining operations.[164] Mining right holders relied on the SCA judgement of *Joubert & others v Maranda Mining Company* which was interpreted to mean that a mining right holder was not required to exhaust the consultative and compensation process envisaged in section 54 of the MPRDA before approaching the court for an interdict against a landowner who prevented access to land or obstruct operations on his land.[165] The rights of a mining right holder overtrumped those of the landowner; as such any compensation payable to the landowner for the loss of the use of property could be determined at a later date. However, the Constitutional court has shifted the power from the mining company to the landowner.[166]

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158 A K Abebe,"The power of Indigenous peoples to veto development activities: The right to free, prior and informed consent (FPIC) with specific reference to Ethiopia", 2009, University of Mauritius.

159 *Supra* note 140.

160 Section 55 of MPRDA.

161 L Moalusi *et al*, "Holders of informal land rights have the right to say no to mining" https://withoutprejudice.co.za/images/publications/combined/Mining-Feature-Fabruary-2019.pdf

162 *Ibid.*

163 https://vanderwantattorneys.co.za/constitutional-court-judgement-stirs-things-up/ (last accessed 10 September 2019).

164 *Ibid.*

165 *Supra* note 161.

166 http://clintonpavlovic.co.za/access-denied-no-mining-without-consultation/feed/ (last accessed 10 September 2019).

Mining operations may no longer commence pending the finalisation of the processes contemplated in s54 of the MPRDA.[167] Mining operations used to continue while the mining company is still negotiating with the landowner, which undermined the negotiating position of the landowner. Currently consultative processes provided for by the MPRDA and possible disputes about access to land or compensation must be finalised prior to the commencement of operations unless the rightful communities negotiate in bad faith to subvert the aims of the MPRDA.[168] If the community negotiate in bad faith, the Minister has the discretion to expropriate the land. This section applies to owners and lawful occupiers and the court, in *Baleni case*, reiterated that informal land right holders are part of this category.[169]

4.3. Implications of the cases on traditional landownership

4.3.1. The end of decentralized despotism

Maledu and *Baleni* judgements have wide implications which, *inter alia*, shift the power to consent to proposed mining operations within the community from the traditional leaders to the community. Prior these judgements, traditional leaders had the power to consent on behalf of the community to mining projects without engaging with the community. Traditional authorities made decisions even when community members were not consulted with about decisions that affect their land. This, has been argued, refers to decentralized despotism.[170] Decentralized despotism refers to a situation where the power is centralised in chieftaincy, community representatives who were appointed by the state and were never democratically elected; and no term of office was specified.[171]

Traditional leaders are known of abusing their powers,[172] and they are considered to be unaccountable to communities. This has led to a rapid increase of corruption as traditional leaders made secret deals in exchange for bribes from mining companies.[173] Currently, traditional leaders cannot enter into mining ventures with mining companies without the consent of informal land right holders who will be directly affected by the mining.[174] Mining operation cannot commence without the majority vote of the community consenting to such operation. The affected groups are now entitled to challenge the common practise of traditional leaders making decisions in the name of community without consulting with them in courts.[175]

These judgments are important as they elucidate the roles and responsibilities of traditional leaders in relation to land administration and this will reduce their power over their persons which are undemocratic in nature.[176] The Constitutional Court has ruled in favour of the community against

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167 *Supra* note 140.
168 *Supra* note 140.
169 *Supra* note 161.
170 See S Luthango *Supra* note 147.
171 See *Supra* S Luthango note 147.
172 See *Supra* S Luthango note 147.
173 See *Supra* S Luthango note 147.
174 *Ibid*.
175 *Ibid*.
176 *Ibid*.

their chief, it held that the land belonged to the people and not the chief. This means that Traditional leaders will have to engage with its subjects before consenting to the mining project which affect them. The autocratic discretion that the traditional leaders have been curtailed and much weight will be carried by the voice of the majority of the community. In time, as asserted by Sikho Luthango, this will contribute to the decline of decentralized despotism.[177]

4.3.2. Minister lacks authority to grant mining right in terms of the MPRDA

Another profound implication by the above judgements is that the Minister of mineral resources lacks authority to grant mining right in terms of the MPRDA in cases where the community holds an informal right to land, unless if the minister has complied with the provisions of IPILRA. The Minister is obliged to obtain full and informed consent of the community prior to grating a mining right. Therefore, the power of the Minister to grant mining right without community's participation has been curtailed. The minister and the mining right applicant must engage with the community and get their full and informed consent before granting mining right and before the commencement of the project. The Minister does no longer have an absolute power to grant the mining right.

The courts in both *Maledu* and *Baleni cases* emphasized that communities who hold informal right to land cannot be deprived of their land without their consent as provided for in IPILRA. The reiteration of IPILRA by the courts and emphasis on the concept of consent by the community has laid down a foundation for the right to say no.[178] Mining companies must obtain the consent of landowners who will be directly affected by mining operations before any project commence. The notion of the right to say no is an important step towards the recognition of the community's right to self-determination highly recognised internationally. This is a fundamental right of the community not only to be informed of the proposed project and the impacts thereof, but to say no to the proposal.[179]

The Constitutional Court and the High Court have afforded traditional communities falling under the ambit of IPILRA a wide special protection to say no to mining projects which affect their land. The judgement has empowered communities to decide what to do with their land and to say yes or no to mining on their land. It is an important judgement which will encourage the mining companies to have a genuine consultation with the community with the aim of obtaining their informed consent. The mining companies and the DMR will no longer be able to ride rough shod over communities' wishes by simple getting the approval of tribal authorities in granting mining licences, [180]as discussed above.

It has been argued that the judgements introduces uncertainty as the state was generally understood to be the custodian of mineral resources, with the community getting compensation for

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177 See S Luthango *Supra* note 147.

178 *Ibid*.

179 http://www.yestolifenotomining.org/righttosayno-mining-campaign-takes-off-south-africa/ (last accessed 11 September 2019).

180 Media statement by the Bench Marks Foundation, "judgement is game changer for communities", 2018, p1.

the loss of their land but not being able to stop mining.[181] These judgements beg a question, whether only the consent of customary landowners is required and not that of the landowners under common law. Tucker stated that if community consent is required for mining then any landowner's consent is arguably necessary.[182] The Minister of Mineral Resources has confirmed that he will appeal the decision on the ground that it took away the power to award licences from the DMR and gave it to local communities. However, during the 2019 Mining Indaba he expressed his view on engagement with community by stating that community engagement is important, anarchy should not be allowed and everyone should be allowed to express their views.[183]

4.4. Conclusion

The main aim of this chapter was to outline the implications of recent cases on South Africa's mining law regime. The chapter has outlined the implications the cases have on the state, community, mining operations and the traditional communities. It has established that the requirement of consent has laid down the foundation to the right to veto mining in South Africa. The current mining law regime affords holders of informal rights to land power to consent before being deprived of their land. Thus these people have the right to say no to mining on their land, which limits the Ministers authority to grant mining right against the community's wishes. It is apparent as alluded to above that this right will also operate as deterrent against the power of traditional leaders who usually act as representatives of the community. This research admits that the right to say no to mining restrict the power of the state as custodian to deal with the national resources. However, the Minister still have power to expropriate the land for the purposes of mining if the community does not want to negotiate with the mining company.

181 Xolobeni ruling could hurt investment, says expert, https://www.businesslive.co.za/bd/national/2018-11-25-xolobeni-ruling-could-hurt-investment-say-experts/ (last accessed 31 July 2019).

182 *Ibid.*

183 https://www.fin24.com/Special-Reports/Mining-Indaba/mantashe-government-appealing-xolobeni-ruling-to-prevent-chaos-in-mine-licensing-20190204 (last accessed 31 July 2019). Mantashe government appealing Xolobeni ruling to prevent chaos in mine licensing.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The main aim of this study is to determine circumstances under which, if any, does the South African law affords a veto right to veto mining projects. The study has found that the South African law does not afford any veto right to affected communities in the mining sectors. Chapter 2 found that in terms of the MPRDA, the Minister may grant a mining right to an applicant provided the applicant has complied with the consultation requirement in terms of the MPRDA. However, whether or not consultation is done in good faith does not prevent the Minister from granting a mining right. In terms of the MPRDA, as discussed in chapter 2, consensus between the parties is not a requirement during consultation. The MPRDA does not afford communities affected by mining operations a right to have a say to mining operations to affect. The MPRDA's official Guideline for Consultation with landowner requires consultation report, however it does not allow for a landowner to say no. The study found that basis of the consultation which is required is not properly stipulated and/or are the conditions under which the opinion of the affected landowner is obtained.

However, in chapter 3, the study found that the courts afford community whose tenure is vulnerable more protection. They placed communities in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their customs on whether they consent or not to a proposal to dispose of their rights to the land. Although the courts have not granted a veto right, they have laid down a foundation of the right to say no to mining activities by affected landowners. The courts have afforded the traditional communities who fall under the ambit of IPILRA a special protection to consent to mining projects which affect their land. As such, the Minister now lacks authority to grant a mining right in terms of the MPRDA over land owned by community which has informal land rights without the prior, free and informed consent. This means that the Minister does not have discretion to grant a mining right without first consulting with the landowner, and in addition to consultation must obtain their full and informed consent

In chapter 4 the study found that empowering communities affected by mining activities to consent before the granting a mining right by the Minister has positive implications in the mining sectors. Despite the concern by the Minister that this approach will prevent further mining or development in the South Africa, the study submits that adopting the consent approach lays a good foundation for the veto right. Chapter 4 has established that the requirement of consent has laid down the foundation to the right to veto mining in South Africa. The mining law regime affords holders of informal rights to land power to consent before being deprived of their land. Thus these people have the right to say no to mining on their land, which limits the Ministers authority to grant mining right against the community's wishes. However, this position is still being challenged by the Minister as he has showed his intention to appeal the *Baleni* case.[184]

[184] Gwede Mantashe at the 2019 Mining Indaba in Cape Town sated that DMR will appeal a High Court decision that the department must get full approval from the Xolobeni community before granting any mining right. He started that this will transfer authority over licensing in the mining sector from the state to communities.

It has been argued that affording community a right to consent introduces uncertainty as the state was generally understood to be the custodian of mineral resources, with the community getting compensation for the loss of their land but not being able to stop mining. But it is noteworthy that the right to say no will operate as deterrent against the abuse of power of traditional leaders who usually act as representatives of the community. This research admits that the right to say no to mining restrict the power of the state as custodian to deal with the national resources. Communities are always exposed to risk to be abused by the Minister in its quest to grant a mining right. The Minister will grant a mining right to ensure as much development is gained from the mineral wealth notwithstanding the consequences such decision will have on the affected community.

5.2 Recommendations

The researcher proposes the insertion of consent as provided for by IPILRA into the MPRDA as a legal requirement. The MPRDA should provide that the mining right applicant must obtain the consent of a landowner before the mining right can be granted. Though this does not afford communities a veto right, it will extend community's protection. IPILRA does not provide for protection of land rights within mining activities. There is legal uncertainty within the two provisions of the MPRDA and IPILRA. The MPRDA is primarily concerned with the promotion equitable access of all South Africans.[185] There is a belief that the MPRDA is the only statute that regulates the South African mining industry and that IPILRA cannot over trump the MPRDA. Although the High Court has made it clear that the two legislations must be read together,[186] there is always a dispute between the mining right applicant and the landowner as to whether consultation is sufficient and not consent.

The above recommendation will bring about equality in the mining sectors considering that there is a lack of protection for communities affected by mining operations. The government does not support communities affected by mining operations and these communities had no chance of influencing the outcomes that would better their lives in negotiations with mining companies.[187] The MPRDA does not provide an effective mechanism to ensure community participation in the extractive industry. The inclusion of consent in the MPRDA will encourage an effective community participation mechanism. South African law should strike a proper balance between the affected community's interest and the national interest. As the study has shown in chapter four, empowering the community to have the right to say no to mining operations does not strip off the state of its power of sovereignty over natural resources. The Minister will still have the prerogative to grant the mining right and/or further expropriate the land if the consent by the community is being withheld unreasonably.

Regulations should be enacted to ease the implementation of the operation of consent. As such, guidelines should be enacted to give content to the right of the community to consent in terms of

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185 See *Baleni* case *supra* at par 64.

186 See *Baleni* case *supra* at par 79

187 Mining and Petroleum Resources Development Amendment Bill (MPRDA): public hearings, https://pmg.org.za/committee-meeting/24646/ (last accessed 20 October 2019).

IPILRA. There must be an amicable relationship between the DMR and Department of Rural Development and Land. The guidelines will ensure that both departments do not interfere with each other's functions. The Department of Rural and Land has not dealt with cases where the community oppose to the granting of rights to mine.[188]

[188] S Ngubeni, Xolobeni mining ruling compromises the state, 2019, https://mg.co.za/article/2019-ruling-compromises-the-state (last accessed 20 October 2019).

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